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Dynamics of EU Transport Safety Regulation in the European Policy Process: Differences and Similarities

Fleur Fragola

Abstract

The European Community (EC) and subsequently, the European Union (EU), have been central to an impressive development of regulation at the European level. In this 'regulatory age' (Majone 1994), product safety has become one of the first issues to be dealt with, in order to overcome barriers to trade, and should be regarded as a first step to be taken in order to integrate European markets. Transport industries have experienced distinct levels, forms and timing of EU safety regulation. While the automotive industry has undergone a standardisation process since the 1970s, such questions were only addressed in the context of railways in the 2000s. Thus, it is interesting to question and analyse the various interplays of actors and/or events which have characterised the European policy process in each transport sector. In addition, a trans-sectoral comparison will help in explaining such differences and their impact on the validity of traditional EU decision-making theories, such as that developed by Héritier in 1996.

Keywords

Automotive Industry; European Decision Making Process; Railway Safety; Transport.

THE EUROPEAN COMMUNITY (EC) AND SUBSEQUENTLY, THE EUROPEAN UNION (EU), have seen an impressive development of regulation since the European integration project began. This dynamic was accelerated during the 1980s with the development of the Single European Act (SEA)[1] and the progressive elaboration of a Single Market. In this 'regulatory age' (Majone 1994, 1996), product safety has become one of the first issues to be dealt with in order to overcome barriers to trade, and as a first step to be taken to integrate European markets. As Joerges (2001: 181) notes, "for the EC, [product safety] is of central importance because of the concept of bringing about a single European market". Thus, the level of product safety can be considered as an indicator of the level market integration in Europe.

Transport industries are cornerstones of the European market, as far as they are essential to the free movement of goods and people (Provensal 2007). The transport sector represents about 7% of European gross domestic product (GDP) (European Commission

[1] The Commission's White Paper on the completion of the internal market (1985) illustrates this regulatory inflation, in that it lists hundreds of regulatory measures to be taken in order to unite European markets.

A version of this article won the Gordon Smith Prize (2007), which is awarded by the London School of Economics (L.S.E.) for the best dissertation on the MSc Politics and Government in the European Union Programme. The opinions expressed by the persons interviewed during this research are personal and in no way may be taken as the official views of the relative institutions or companies. I am most grateful to Martin Lodge for his valuable suggestions and helpful comments.

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2006c: 3) and the demand for mobility will continue to increase. It is foreseen that passenger transport will grow by 35% between 2000 and 2020, while freight transport will achieve a 50% increase over this period (European Commission 2006c: 8).

These sectors are also regulated as a means to guarantee a maximum level of safety to European citizens/consumers. In order to achieve such goals, the EU has been given power to legislate on mandatory technical requirements called 'essential safety requirements'. This prerogative has been strengthened at a legal level, by the introduction of 'safety' as an objective of the European transport policy (Article 71), by the Maastricht Treaty. Yet, despite this common legal basis, each individual transport industry has had specific levels, forms and timing of EU safety regulation imposed on it.

The developments experienced in the road and railway sectors seem particularly interesting to investigate and compare, as they share some similarities (inland transport modes) but follow different intrinsic logics, as rail is a guided transport, contrary to road. In addition, they represent the two transport modes that are the most frequently used by European citizens.[2] Railway and road illustrate different safety regulation patterns at the EU level. On the one hand, the automotive industry has known a standardisation process since the 1970s, which has led to extensive technical specification of subsystems' requirements and to the European type-approval of (safe) passenger cars. On the other hand, safety concerns were only addressed in the 2000s for the railways. Thus, it is interesting to question and analyse the various interplays of actors and/or events which have characterised the European policy process in each transport sector. Comparing them will help in explaining the observed differences. The research in this article focuses on the topics of 'product' standardisation (i.e. vehicle safety) and mandatory EU regulation, leaving aside the developments in 'process' harmonisation (i.e. European driving licences) and voluntary European standardisation (i.e. norms elaborated by the European Committee for Standardisation (CEN) and the European Committee for Electrotechnical Standardisation (CENELEC).

Two branches of the relevant literature have been used in this research, which are centred on the transport policy and on European standardisation. Comparative analyses of the differential policy processes and policy outcomes concerning mandatory technical regulation have not been documented so far in the literature. Firstly, the comparison rail/road has more often focused mainly on the differential liberalisation process of both industries and their specific implementation throughout the EU (Stevens 2004; Héritier 2001). Secondly, considering the standardisation process, most of the literature focuses on voluntary norms and their effects on actors' behaviour (Austin and Milner 2001; Genschel 1997) or European (market) integration (Egan 1998). As a result, the lack of literature directly focusing on EU decision-making and (mandatory) transport safety regulation has been compensated by a series of fifteen semi-structured interviews, which have been conducted with actors involved in this policy process. These elite actors include officials from the European Commission and the European Railway Agency, European interests groups, national safety authorities and members of the European Parliament. These interviews were conducted in Brussels, Paris and Valenciennes between April and July 2007.

[2] Until 1995, road and rail were the two main transport modes, in terms of passenger kilometres (European Commission, 2009: 118). Since then, air transport has reached the second place in the performance rating concerning passenger transport, in particular due to the fact that distances covered by airplanes are longer.

The analytical framework will be based on Héritier's (1996) analysis of the European decision-making process as a 'patchwork' accommodating European diversity and as 'regulatory competition'. Then, two case studies will shed light on the validity and limits of this theoretical explanation, by considering the mandatory technical standardisation in the inland transport sectors.

The first part of this research will set the theoretical patterns of policy-making as developed by Héritier (1996) and emphasise the general assumptions that underlie her argumentation. The second and third part will offer analyses of EU safety regulation in the railway and road sectors, focusing on their particular policy processes. Finally, a comparison between the two transport modes will be drawn and will lead to concluding remarks on the validity of Héritier's (1996) theory to understand the mechanisms at stake in the transport industries.

Patterns of policy-making and expectations

Héritier (1996) explains the European decision-making in terms of a 'patchwork', insofar as she highlights the 'subterfuges' used to accommodate European diversity. It is important to underline that Héritier's argument refers to legislative processes following the 'traditional' Community method, on matters which involve a consultation of Committees.

As Héritier (1996: 149) notes, "European regulatory policy-making unfolds in the context of diverse interests and traditions of Member States, [which] clash in the European arena and have to be brought into balance". Thus, there is a competition to impose specific regulatory frameworks and outputs.[3] This regulatory race is motivated by the Member States' desire to boost their competitive position in the European market and to limit the adjustment costs. Therefore, Héritier (1996: 151) notices that it is generally "a State with a strong regulatory tradition that approaches the Commission with a policy proposal", in order to benefit from 'first mover' economic and regulatory advantages. The role of the European Commission consists mainly in acting as a 'gate-keeper', determining the 'most appropriate' policy alternatives. Once the Commission has offered its support to a proposal, this initiative will frame the problem definition, identify the European agenda, and, therefore, have effect on later negotiations.

Once the problem has been framed and the agenda has been set jointly by the first mover and the Commission, the consultation in comitology takes place. This debate involves 'regulatory national experts' under the coordination of the Commission. The work of these committees eases the policy-drafting phase of the decision. However, it is the strategies and 'subterfuges' (Héritier 1997: 171) amongst Member States in the Council and the European Parliament that determine the final outcomes and the formal decision-making.

Héritier makes three main assumptions in her analysis. Firstly, Héritier insists on the fact that Member states are the dominant actors in the European policy process at the agenda-setting and decision-taking levels. It is also interesting to underline that Héritier assembles under the notion of Member States' strategies, actions taken both in the Council and in the European Parliament. Secondly, Héritier grants an important role for the European Commission, emphasised by its legislative function, where it determines the framework of the alternative solutions. Finally, Héritier marginalises the role of any other actors or events in this process.

[3] Héritier (1996) underlines in particular the strategies of the Member States to shape the agenda ('first mover strategy') and the final decisions ('negative coordination, bargaining and compensation').

This article will attempt to identify how well Héritier's (1996) arguments explain the developments experienced by the railway and automotive industries. These two sectors will indeed provide differentiated empirical cases in terms of timing, content and extent of EU safety regulation. Thus, it will be interesting to see how well Héritier's (1996) argumentation explains their particular policy process and elucidates the puzzle of their great variation in policy outputs. In order to structure the demonstration, attention will be drawn to specificities of the industry and of their own EU safety regulation experience. On the one hand, the decisive role of actors as 'policy entrepreneurs' (Kingdon 1995: 178)[4] will be analysed. Three sets of 'actors' will be considered (1) the Member States, (2) the European Commission and (3) 'other' actors). However, similarly to Heritier's (1996) argumentation, the role played by individuals in these institutions will not be specifically assessed. On the other hand, the importance of events (i.e. accidents, evolution of the transport mode) as 'policy windows' (Héritier 1996: 166) will be studied. For the clarity of the demonstration, a differentiation will be made between the role of punctual events and of structural trends. This benchmark and method will be used systematically in the railway and road sector. Finally, a comparative analysis of the developments known in both sectors will lead to general conclusions on Héritier's (1996) arguments.

Railway transport

EU safety regulation in the railway sector

Dynamics of the railway sector

Railway safety regulations were issues kept national until the 2000s. Railway systems have indeed remained under close control of the States[5], because of their nature and their wide-reaching implications. Indeed the railway sector is characterised by numerous market failures, such as a natural monopoly, economies of density, safety and asymmetries of information (Di Pietrantonio and Pelkmans 2004: 1). In addition, railways have been decisive for national security, wealth and cohesion (both social and territorial). As a result, the development of railways in Europe has led to highly fragmented railway systems (Héritier 2001: 39). This diversity has limited competition between national railway companies, despite the applicability of EC competition rules to the transport sectors, as confirmed by the European Court of Justice Case (1986), 'Nouvelles Frontières'[6] (Di Pietrantonio and Pelkmans 2004: 24).

This organisational structure was no longer sustainable in the 1980s (Héritier 2001: 38). High costs engendered by the lack of competition, standardisation and interoperability as well as the lack of competitiveness of national operators weakened the position of railway in the intermodal competition. Di Pietrantonio and Pelkmans (2004: 2) report that "during the period 1970-2001, rail's [freight] market share collapsed from 21% to 7.8% [while rail passenger transport] decreased from 10% to 6%."

The European Commission began in the 1980s to campaign for a European-wide solution to the decline of the railways, underlining a strategy to 'revitalise' the railways (European

[4] John Kingdon (1995) develops an explanatory model of agenda-setting through randomness. He analyses this process of agenda setting as the coupling of three streams (problems, policy and political streams) by policy entrepreneurs in the time, during which a policy window is opened.
[5] The intervention of the state has taken many facets, including state-ownership of the infrastructure and the railway operator, planning strategies, funding (through subsidies) of railway services and railway industries.
[6] Judgment of the European Court of Justice of 30 April 1986, `Nouvelles Frontières' (Cases 209-213/84).

Commission 1996). In addition, institutional reforms of the Community like the Single European Act (SEA) and Maastricht Treaty pushed the strategy of integration of railways forward, in the frame of a single European market.

Dynamics of EU (safety) regulation in the railway sector

Since the 1990s, the strategy of the Commission has been based on a dual approach. On the one hand, a common model was adopted to enable future incremental opening of the market. "Unbundling was viewed by many as an inevitable step of reforms pursuing greater efficiency" (Di Pietrantonio and Pelkmans 2004: 16). Directive 91/440 required vertical separation of the accounting of services and management of infrastructure. Directive 2001/12 developed this common framework further with the obligation to create different organisational structures to bear these two distinct tasks. In addition, it required the independence (from railway operators) of certain essential functions, such as the allocation of capacity or infrastructure charging and licensing. An incremental introduction of competition emerged after long negotiations. Competition was opened for international freight transport services by the first railway package (Directive 2001/12)[7] and generalized to all freight services in 2007 with the second railway package (Directive 2004/51).[8]

On the other hand, interoperability Directives (Directives 96/48 and 2001/16, both amended by Directive 2004/50)[9] were set up under the treaty base relative to Trans-European Transport Network (Chapter 15, TEU). These Directives made it possible to establish mandatory European specifications, known as Technical Specifications for Interoperability (TSIs), which helped the technical integration of railway systems. TSIs define the technical specifications necessary for the implementation of essential requirements, including safety. TSIs will help the railway sector sidestep the lasting process of rolling stock certification. Sub-systems will have to match the requirements imposed by their related TSI, but once certified as conformed, the certification of this point will be valid all over Europe. These binding specifications are held by the Commission to be "essential to ensure that trains can run safely and seamlessly throughout the entire trans-European rail transport network" (European Commission 2006b: 2). Thus improving safety performance was not the primary objective of EU railway regulation, all the more that "rail is a safe mode of transport" (Lundström 2002: 1). Yet, with the progress toward interoperable Trans-European networks and the progressive opening up of the railway market, it was necessary to maintain at least equivalent levels of safety (ERA 2007).

Before 2004, safety issues were addressed principally through the conditions of attribution of licences or conditions for granting access to the network. It is the second railway package, which has created a harmonized European approach to railway safety. Directive 2004/49 aimed at creating a European approach to railway safety through the obligation for states to create national safety authorities, the establishment of common safety targets (CSTs) and methods (CSMs), as well as the elaboration of common rules for accident

[7] Directive 2001/12/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 91/440/EEC on the development of the Community's railways (OJ, 15.3.2001)
[8] Directive 2004/51/EC of the European Parliament and of the Council of 29 April 2004 amending Council Directive 91/440/EEC on the development of the Community's railways (OJ 164, 30.4.2004)
[9] Directive 2004/50/EC of the European Parliament and of the Council of 29 April 2004 amending Council Directive 96/48/EC on the interoperability of the trans-European high-speed rail system and Directive 2001/16/EC of the European Parliament and of the Council on the interoperability of the trans-European conventional rail system (OJ L 164, 30.4.2004)

investigation. A European Railway Agency (ERA) has been set up by Regulation 881/2004 to provide the Commission with an expertise body able to elaborate proposals of TSIs and the requirements for the Safety Directive. Thus a strategy of harmonisation of technical standards, safety management systems and methods, guaranteeing continuing high levels of safety has emerged.

Nevertheless, this strategy was not sufficient to ensure rapid outcomes (European Commission 2006c: 15) particularly in safety-related issues (Desfray 2007). The TSIs follow a long process of drafting and implementation before these binding norms become effective for the construction of any new lines, the investment in new rolling-stock or their 'significant' upgrade (Directives 96/48 and 2001/16). For instance, the TSIs that were requested by the Commission in 2006, which are expected for 2009, and will result in the production of the first interoperable locomotives by 2015 (interview European Commission 2007). Taking into account that the life-time of rolling-stock is about 25 to 30 years, the empirical effects of TSIs will be observed on a medium-term perspective. In the meantime, sets of national rules are likely to persist.

This lack of convergence in national safety requirements and certification processes of rolling-stock is directly hindering their operation on European tracks. In fact, "international operators have to go through repeated approval processes in each Member State where they intend to operate, often requiring the provision of evidence not mutually recognised by Member States" (European Commission 2006b: 3). For instance, the homologation process for a locomotive operating between Germany and France lasts on average 24 months and costs 3 million Euro (European Commission n.d.: 6). To avoid such additional delays and costs, the Commission has envisaged a complementary strategy of cross-acceptance and adopted proposals in December 2006 aiming at facilitating cross-border railway transport and simplifying the certification of railway vehicles. Thus, cross-acceptance of rolling-stock would be a useful and efficient instrument easing the interpenetration of national railway markets in Europe.

Decision-making dynamics and EU railway safety regulation

Decision-making procedures and safety norms

EU legislation relative to safety and interoperability is organized on the typology of a pyramid (see Figure 1, page 338). At the top, essential requirements, including safety, are part of the interoperability Directives which are adopted under the normal Community procedure of co-decision. These requirements are further developed in the TSIs. Elaborated by the European Association for Railway Interoperability (AEIF) until 2004, TSIs are now conceived by the ERA. In both cases, the proposals were made to the Commission, which could approve it by a Commission decision, after positive results in the Article 21 Committee.[10] Voluntary CEN and CENELEC standards are often used by legislators. The voluntary nature of the standards means that EU legal documents do not have to include extensive technical descriptions (European Commission 2007). If they were explicitly referred to in such documents, then the standards become mandatory and part of the *acquis*.

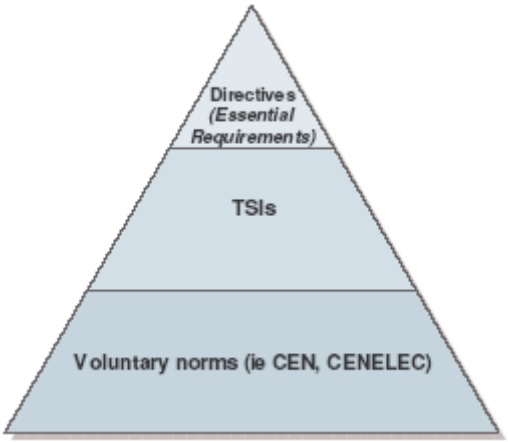
[10] This Committee was set up in art.21 of Directive 96/48 (OJ L 235, 17.9.1996) on interoperability of the European high-speed railway system and is referred to in Directive 2001/16 (OJ L 110, 20.4.2001).

Policy entrepreneurs

Until the mid-2000s

As underlined above, the strategy for the Community's railways seems to have been strongly influenced by the Commission's propositions. Its strategy was to boost interoperability and safety through the progressive liberalisation of the railways' undertakings. Yet, the timing of the reform was determined by the Member States, which had blocked European legislation on railways until the early 1990s (Knill and Lehmkuhl 2000: 68). Member States indeed refused at first to delegate the railway policy to the EU, making any progress on railway safety harmonisation at the EU level impossible. Thus, Member States can be held accountable for the delay and for the late formulation of a European safety approach to railways, through their individual lack of willingness to address any railway-related issues and their votes in the Council. Finally, the role of the rolling-stock industry is more arduous to define, even if there is strong probability that in the beginning of the 1990s its influence was marginal, in so far as the railway supply industry was reorganizing itself and that the European Association for Railway Supply Industries (UNIFE) was nascent.[11]

Figure 1 : *Legislation pyramid in the railway sector*



After the mid-2000s

The distribution of power between the actors did not remain static. After the shift of the regulatory paradigm and decision level of the railway policy, a sensible reallocation of power between the actors occurred. Member States suffered the loss of their monopoly of control and legitimacy over railway policy. Even though Member States remained crucial in the decision-making process, some institutional changes limited the Council's scope of action. The generalisation of Qualified Majority Voting (QMV) in the Council and the extension of the co-decision procedure in the transport arena by the Amsterdam Treaty slightly weakened (in relative terms) the Member States' position.

[11] UNIFE was created in 1991 and in 1992, its headquarters moved to Brussels. This reorganisation and relocation happened in reaction to the establishment of a Single Market (interview A. Loraillère 2007).

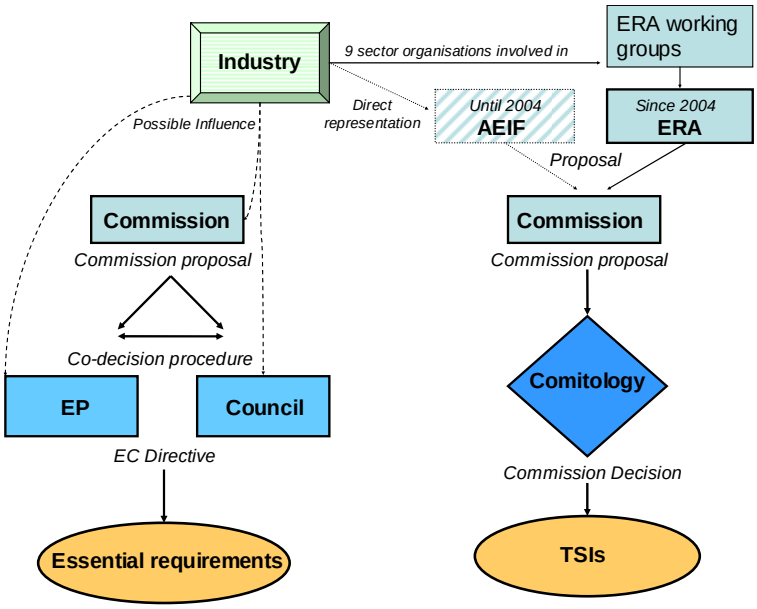
The European Parliament emerged in the arena as a balance to the Council's supremacy (European Commission 2007). Nevertheless, it has not undermined the divisions inherent to a Parliament (interview D. Sterckx 2007) and relative to the nationality of the MEPs (interview D. Naudet 2007). Yet, there is no causal or corollary relationship between the implications of the co-decision procedure and the role of the European Parliament on the extent, content or timing of the EU railway regulation, in so far as the legislative expansion in the field happened after 1990 (European Commission 2007). In addition, directives are being amended, to be in accordance with Decision 2006/512, to grant greater power of scrutiny over the 'Article 21' Committee to the European Parliament.

The role of the Commission increased slightly. The proposals made by the Commission led to a development of non-majoritarian institutions both at EU (ERA) and national level (national safety authorities, infrastructure managers). This evolution amplified the power of the Commission in two self-reinforcing ways. Firstly, the Commission successfully downloaded its own structure and functioning patterns to the newly created institutions. Secondly, it continued the transfer of railway policy from the political scene to the expertise arena, "insulat[ing] the resolution of technical regulatory issues from the day-to-day political changes" (Vos 2000: 1119).

Finally, the railway sector became more and more active and influential in the EU policy process, in particular through the involvement of representative organisations in the discussion and elaboration of TSIs (interview A. Loraillère 2007). Until 2005, representatives of the industry (through the AEIF), were directly responsible for the elaboration of TSIs. This participation of the industry has been institutionalised within the ERA, whose working groups can include representatives of the sector, even if it can happen that groups representing minority positions are not able to influence the final outcome (European Commission 2007).

The increased number and influence capacity of actors produced two effects that may appear paradoxical at first: a growing complexity in the relationships between the actors and a simplification of the entrepreneurial landscape, in so far as major actors could be easily identified (Desfray 2007).

Figure 2 : *Diverse decision-making modes according to the two types of mandatory norms and influences*



Policy windows

Stakeholders' actions and reactions have to be analysed in a particular context and in the light of specific events. According to Desfray (2007), the structural decline of the railways has been determinant in policy change and the evolution of national politicians' consciousness and strategy related to this policy. On the contrary, punctual events (such as accidents) have not played any significant role either in the policy shift or in the elaboration of EU safety regulation (ERA 2007). This can be explained by their low magnitude (Lundström 2002: 1-3). Despite the resounding criticisms relative to railway safety, in particular in Britain (after the 1993 Railway Act privatizing the sector and the 2000 Hatfield train crash) safety levels have remained very high in comparison with other transport modes and have steadily increased in Britain (Muir 2006).

Road transport

It is necessary to clarify two issues before discussing the case of safety regulation in the road sector. First, it is crucial to dissociate individual cars (category M1), on which the attention of this research is focused, from commercial vehicles, coaches and buses, which have known radically different legislative processes. Second, it is essential to bear in mind that road safety is by nature an integrated issue. Traditional holistic approaches consider road safety as being constructed on three pillars: the vehicle, the infrastructure and the drivers' behaviour (European Commission 2005a). Although this paper will essentially shed light on vehicles' technical requirements, it will succinctly consider the interactions and the evolutions experienced in the two other pillars.

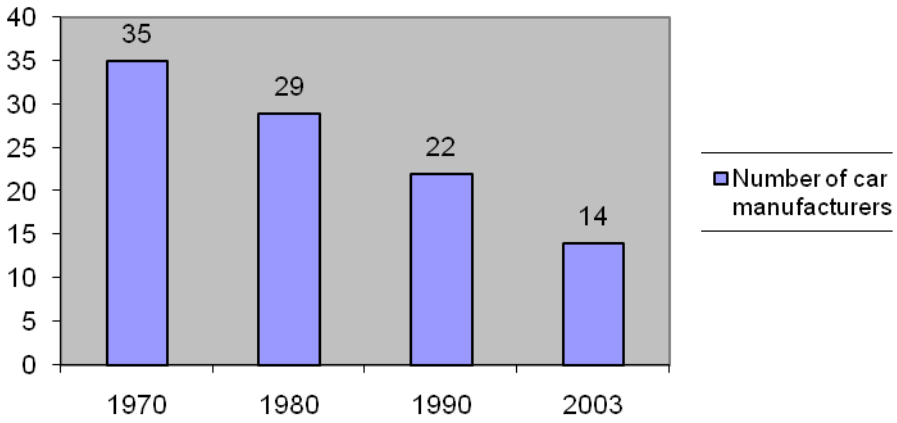
EU safety regulation in the road sector

Dynamics of the road sector

Europe has always been a leading region for the production of automobiles (see figure 3). In 2002, Europe represented 42% of world production (European Commission 2004: 160), making the automotive industry a pillar of European economy in terms of employment, investment and international trade (Rhys 2004: 877). Since the 1970s, two developments have had wide-reaching implications on the structures and dynamics of this industry in Europe. Firstly, the relationship between the states and 'their' national automotive industries changed dramatically. While most European industries benefited from considerable State aid,[12] EC competition law put an end to these practices. Secondly, since 1970s increasing international competition has led to extensive "consolidation and restructuring [that] have radically transformed the industry" (Rhys 2004: 163). The magnitude of the competitive threat posed particularly by Japanese imports has changed the nature of the European car market in the 1980s (Stephen 2000: 22) and the behaviour of car manufacturers that started cooperation arrangements (Weber and Hallerberg 2001: 188). The "opening to international competition of new increasingly important markets such as Eastern Europe, China and Russia" that has accelerated this evolution at the turn of the century (European Commission 2004: 163), as illustrated by the restructuring of car manufacturers.

[12] For instance, between 1977 and 1987 the main beneficiary of State aid (Renault) was attributed ECU 4500M (European Commission, 1990).

Figure 3 : *Restructuring of the European, American and Japanese car Industry*



Source: European Commission 2004:164

Dynamics of European (safety) regulation in the road sector

The various national safety regulations that existed in the automobile sectors after the Second World War could be considered as prohibiting sales of imported goods on safety grounds (Sykes 1995: 16). International and/or regional regulation was necessary to overcome these barriers and ease the free movement of goods, all the more so since the Treaty of Rome had established a custom union (Article 9).

In Europe, safety regulation has been elaborated in two different frameworks. The Working Party 29 (WP.29) was set up under the United Nations Economic Commission for Europe (UNECE) by the 1958-Agreement on international technical harmonisation in the motor vehicle sector. This agreement laid the ground for vehicle regulation, including technical requirements and reciprocal recognition of approved vehicles. In 1995, the 1958 Agreement was revised and opened to all members of the United Nations, independently from their certification procedure. Thus, the WP.29 became "the world forum for motor vehicle technical harmonisation" (Serre 2002: 3). Nevertheless, in reaction to some very integrated procedures (i.e. the majority-voting procedure, the concept of mutual recognition and the directive effect of UNECE Regulations), some countries were not in a position to join the 1958-Agreement. These countries proposed to create a parallel 'Global Agreement' (1998) also aimed towards enhancing the development of technical harmonisation through to the elaboration of Global Technical Regulations (GTRs).[13]

The second structure dealing with safety regulation of motor vehicles is the European Community, which started to regulate the automotive industry in the 1970s. This early process was mainly driven by commercial targets, even if safety has always been a part of the discussion (European Commission 2007). Indeed, as clearly indicated in the Directive 70/156[14] recitals, the observation is made that "in each Member State motor vehicles […] must comply with certain mandatory requirements, [which] differ from one Member State to the other and consequently hinder trade within the European Economic Community". Thus, Directive 70/156 proposed the 'type-approval' procedure as a means to overcome

[13] GTSs do not provide direct effect or mutual recognition of approval and are approved by consensus voting.
[14] Council directive of 6 February 1970 on the approximation of the laws of the Member States relating to the type-approval of motor vehicles and their trailers (OJ L 42, 23.2.1970)

such barriers, enabling cars (M1 vehicles only) to be registered and sold within the EC without restriction, once they have received a certificate of conformity. This framework directive was dependent on separate directives regulating individual parts of the vehicle, which were voted on in the 1970s and subsequent years and which have been regularly updated by the Committee for the Adaptation to Technical Progress (CATP). Yet, in order to provide a transition period, temporary measures were laid down to enable a phased change between EC and national requirements. It was the SEA that provided a powerful incentive to strengthen the type-approval method (Potvin 2007) and led to the adoption of Directive 92/53.[15] This directive, amending Directive 70/156, made the harmonisation total and mandatory by 1996 and the EC Whole Vehicle Type-Approval (WVTA) compulsory for passenger cars by 1998.

In both frameworks, safety issues were mainly addressed indirectly through the approval of safe vehicles. Yet, safety was also directly regulated though compulsory equipment of certain safety devices under EC law (i.e. seatbelts; on-going discussion on Electronic Stability Control or daytime running lights.). However, in the EU, vehicle safety has also been associated with a broader 'road safety action programme' as foreseen in the 2001 White Paper and defined in the Communication aiming at reducing by half the number of road deaths by 2010 (European Commission 2003), thanks to an integrated approach of road safety. These policy guidelines addressed, more specifically, 'behaviours' (Directive 2003/20[16] on the compulsory use of safety belts, Directive 2006/126[17] on driving licences) and infrastructure quality (Directive 2004/54[18] on tunnel safety).

In order to avoid regulatory duplication and to ensure coherence between the two levels of regulation, the Community decided in 1997 (Decision 97/836) to become a Contracting Party to the WP.29. Thus, when an agreement is reached between the 27 Member States in the CATP, the Commission has a block vote. An additional effect of this directive has been the provision of equivalence between UNECE Regulations and EC law. Even if a correspondence between UNECE regulations and EC law has existed for some time, there is often a delay between the amendments of the two legislations (European Commission 2007). Thus, the CAR 21 report of the European Commission (2005a) has addressed the question of the simplification of the regulatory framework surrounding automotive technical requirements. It has suggested that "in those areas where the Community has acceded to a UNECE regulation for which in parallel an EC Directive exists, and where the latter does not provide a higher level of safety or environmental protection, the UNECE regulation should replace the corresponding Directive" (European Commission 2005a: 20).

Since the 1970s, the most wide-reaching evolution relative to safety matters has been experienced in the regulation of the vehicles themselves. Attention has tended to focus first on passive safety, where the potential gains in innovation have been the most visible[19] (Potvin). Then, interest has been directed toward active safety, with constant improvement in innovative use of new technologies reducing the likelihood of crashes (i.e. Electronic Stability Control devices) and to encourage safe behaviours (i.e. seatbelt reminders).

[15] Council directive No 92/53/EEC of 18 June 1992 amending directive 70/156/EEC on the approximation of the laws of the Member States relating to the type-approval of motor vehicles and their trailers (OJ L 225, 10.8.92)
[16] Directive 2003/20 on the approximation of the laws of the Member States relating to compulsory use of safety belts in vehicles of less than 3,5 tonnes (OJ L 115/63, 9.5.2003)
[17] Directive 2006/126 on driving licences (OJ L 403/18, 30.12.2006)
[18] Directive 2004/54 on minimum safety requirements for tunnels in the Trans-European Road Network (OJ L 167, 30.4.2004)
[19] This visibility is particularly ensured by EuroNCAP, which provides transparent and independent safety assessment of the main cars sold in Europe.

Innovations are now foreseen in the last phases (post-crash), such as 'eCall'[20] (European Commission 2005b). The two other pillars of road safety have been more difficult to regulate, since the State is seen as the sovereign body to legislate on these issues, according to the subsidiarity principle (TEU, Article 3b). Nevertheless, a legal basis is provided by the treaty to allow EC regulation where cross-border traffic is concerned (i.e. safety of the TENs) or when the Single Market and the mobility of persons are at stake (i.e. driving licence). The move from technical harmonisation of vehicles to an integrated/holistic approach for road safety can be observed since the turn of the 21st century. This has been initiated by the combination of political will with existent economic targets (i.e. Single Market integration).

Decision-making dynamics and EU road safety regulation

Policy entrepreneurs

Until the 1980s

States were decisive actors in both the EC and the UNECE, in so far as they were the ultimate decision-makers. Yet, at the EC level, the 1970-1980 period can be characterised by a relatively low level of political decision-making. In the aftermath of Directive 70/156 most of the legislative work on the agenda was technical and consisted of an elaboration of the technical requirements for the vehicles' subsystems. Nevertheless, European states kept a watchful eye on these regulations, which went through Comitology procedures.

The Commission was at the epicentre of the technical harmonisation of motor vehicles. First of all, it embodied the strategy of the EC to achieve a common market and to guarantee the freedom of movement of goods and people. Secondly, the Commission was the initiator of the method and it remained at the heart of the coordination (through legislative proposal and to its role in the Comitology procedure) of the technical elaboration of the standards. Finally, this institution was until 1998 an observer in the WP.29 discussion before it became the EU representing body in this instance.

The process of vehicle standardisation in Europe cannot be fully understood without taking into account the very dynamic and influential role that the industry has played. The manufacturers had a determining impact in the launching, the extension and the success of the type-approval method, which allowed them to achieve economies of scale and made the European automotive industry more competitive. The industry also had an active role in the elaboration of the standards in the EC (through consultations or direct proposals to the Commission) and in the frame of the WP.29.

After 1990s

Legislative and institutional changes in the 1990s combined with a more active and integrated approach to road safety (European Commission 2001) have modified the balance of power between actors. States remained decisive actors and they even saw their role increase with the growth of political decision the Council took (concerning the WTVA, the adhesion to the Revised 1958 Agreement or relative to road safety). The shift to a

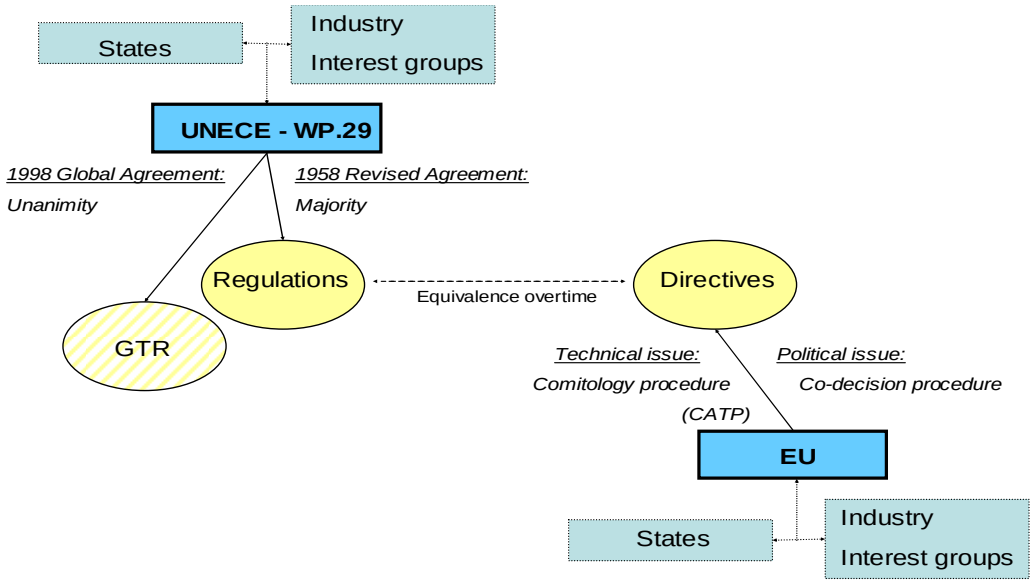
[20] The eSafety initiative is part of the Commission's strategy to encourage the development of information and communication technologies for road safety application. ECall is one of the innovations elaborated within this framework and consists of an 'emergency in-vehicle call system', which could reduce the time of emergency response after the car crash by 50%.

mandatory WTVA changed the character of negotiations in the Council. Despite the fact that Member States agreed on a 'reasonable' level of safety regulation being elaborated at the EU level, disputes arose around the definition of the 'reasonableness' of the EU norms. In addition, constitutional reforms led to balancing the power of the Council with the emergence of the EP as a co-legislator and soon as an oversight body of the CATP. The 'regulatory procedure under scrutiny' (Decision 2006/512)[21] is indeed on the way to becoming the Comitology procedure applied in this sector.

The Commission played an even wider role providing ambitious strategies as imagined in 2001 and included in the 2003 'road safety action programme'. Yet, the Commission had to anticipate decision-makers' preferences and adapt the scope of the reform proposals to them. In addition, even though the Commission did not take the side of the industry, it still had to take care that any action would not have irreversibly negative impacts on the European industry (European Commission 2007).

The industry continued to provide fruitful expertise to the EC/EU and the UNECE. Its involvement even increased, insofar as it also campaigned for a simplification of the legislation that was imposed on them. In addition the relationships between European states and the industry evolved considerably and moved from paternalistic relations to autonomy. The relationship between European industrials also evolved and shifted from competition to increased cooperation, as the creation in 1991 of a representative body at the EU level (the ACEA) illustrates. Finally, new interest groups were created during this last period and aimed at raising political awareness of road safety issues (i.e. ETSC created in 1993). Yet their role and influence in the decision-making process is still peripheral. A summary of the decision-making processes in vehicle safety regulation is provided below (figure 4).

Figure 4 : *Decision-making processes in vehicle safety regulation*



[21] Council Decision of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission (L 200/11, 22.7.2006)

Policy windows

Even though some major traffic accidents (i.e. the accident in the Mont Blanc tunnel) have had a powerful impact on very specific EU legislation, road crashes in general cannot be held as policy windows. The constant and continuous nature of road accidents has been trivialized in our society. As Achterberg (2007) notes, "people are so used to traffic accidents that they do not see it any more as a problem that can be tackled, all the more that the blame and the responsibility for the accident is directed toward the individual and not to the system as a whole". Therefore, despite the magnitude of traffic accidents, these dramatic events cannot explain the timing and extent of motor vehicle safety regulation.

The leading thread of automotive standardisation has been primarily economic. Yet, pan-European and international developments have potentially had some indirect influence in the framing and the timing of European standardisation. Firstly, the increase in cross-border traffic and with it, the growing interpenetration of vehicles not conforming to national requirements has accelerated the need for political action (Avenoso 2007). Then, vehicle safety in the USA has been contingent and corollary to European evolution in this matter. In 1965 and 1966, the USA was to frame car safety as a policy issue, thanks to the impact of Ralph Nader's book *Unsafe at any Speed* (1973) and the creation of National Highway Safety Authority. In a few years, major laws were passed and 'federal safety requirements for new vehicles' were established; for example, in 1966, seat belts were made mandatory in new cars. Nowadays, the developments in the USA are closely followed by Europeans because the car markets are so highly integrated and European manufacturers sell their vehicles in the USA. For instance, the progress toward a mandatory installation of ESC by 2011 in the USA is being scrutinized in Europe and may have a knock-on effect (European Commission 2007). Even if it is still hazardous to find a causal relationship between policy evolutions in America and Europe, the globalisation and integration of international markets has now created a far closer relationship between the policy development on both sides of the Atlantic.

Comparison between transport modes

As illustrated by the railway and road case studies, the two sectors have experienced different regulatory paths at the EU level. This section of the article provides a comparative analysis of safety regulation in both sectors, as well as explanations for such divergences. A comparative table (figure 5) provides a summary of these findings. The study will be led from an EC/EU point of view, thus considering other European developments such as the ones known inside the UNECE as external evolutions.

Explaining diversity through industry specificities

Although some similarities were shared by both industries (i.e. State subsidies, early fragmented markets), the differences between these two sectors have affected the way and the timing of EU safety regulation. Three main sets of differences are proposed to explain the variation in EU regulatory outcomes. Firstly, the technical, organisational and ideological components of the two inland transport industries have greatly affected the way safety issues have been tackled, as far as this structured the preferences of the decision-makers. The railway sector has been affected particularly by a high political sensitivity to the industry and complex technical barriers in terms of how these issues impact on matters of national interest, such as social cohesion and economic growth. These two factors have hindered integration of railway networks in Europe, making European regulation of railway safety meaningless for decades. By contrast, the automotive industry experienced fewer politico-ideological pressures and technical

difficulties, but this was countered by the potential commercial gains and regulatory demands resulting from the increase in cross-border road traffic between European states. The only similarity in the process is that the integration of transport networks and interpenetration of vehicles within Europe has been a prerequisite for direct and indirect regulation regarding safety.

Secondly, the interactions between the national, European and international levels have to be taken into account to understand the underlying logics of each sector. In the railway, states remained the frame of reference until 1990, at which point it was transferred to the supranational level. The automotive industry has known an earlier and wider shift at the end of the 1950s from the national to the international level (UNECE). The emergence of the EC level in the regulatory framework appeared in the 1970s and was facilitated by the pre-existence of the WP.29 framework, even though the majority of UNECE regulations have been elaborated after 1970 (European Commission 2007).

Finally, safety was not perceived similarly in the two sectors. While it was urgent to intervene in vehicle and road safety, involving profound and massive efforts, transport by rail was less preoccupied regarding safety. Consequently, the cost-benefit results of raising motor vehicle safety were comparatively far more rewarding in terms of lives being saved; all the more that it was easier to regulate this industry (Avenoso 2007).

Explaining diversity through differential European standardisation strategies and treaty bases.

The railway and road examples have illustrated two distinct logics in the elaboration of European transport safety regulation. The EC Directives on automotive regulation have been based on the 'old approach' of standardisation and relied on the principle of total or 'maximilistic' (Farr 1996: 4) harmonisation set out in the Treaty of Rome.[22] The strategy of the Community, between 1958 and 1985, was to promulgate extensive detailed technical regulations, product by product (Egan 2001: 61). Because the railway sector only later came onto the EU agenda, the logics of the process have been closer to the 'new approach' of standardisation, which encourages the mutual recognition of regulations and standards throughout Europe. This 'approach' also allows room for harmonisation of safety standards, where necessary. This strategy explains why 'cross-acceptance' (i.e. mutual recognition of rolling stock) is being encouraged as a temporary measure, before the application of TSIs makes it automatic.

In addition, different treaty bases have been used in the two sectors and have had profound effects on the nature and the power of EC/EU action. In the case of railways, the action of the EU has been grounded on various chapters of the Treaty of Maastricht relative to Transport (concerning the liberalisation process) and to Trans-European Networks (concerning the interoperability directives). The automotive standardisation has been based on the chapter regulating the common market of goods, thus benefiting from far-reaching policy instruments to achieve standardisation, all the more as these powers were strengthened by the SEA and the Maastricht treaty.

Explaining diversity through sector-specific network of actors and background events

<u>Policy entrepreneurs</u>

In both the case-studies reviewed, it appears that the Member States are decisive actors in the safety regulation of transport vehicles. Their actions as final decision-maker in the

[22] (Articles 3, 30-36 and 100)

Council and through Committees as stakeholders in the elaboration of technical specifications are illustrative in this matter. Yet, these prerogatives are now shared with the European Parliament that has become co-legislator and has fought for increased power over the Comitology process. Originally conceived as a control device over the Commission, these committees have grown more autonomous and consensual (Dehousse 2003: 809-810). The need for closer scrutiny of these committees, combined with the desire of the European Parliament to gain power in this field, have led to Council Decision 2006/512. This act introduces a new type of regulatory procedure 'under scrutiny', which improves the European Parliament information on the Committees' work and allows the legislators to oppose the adoption of the Commission's proposal in some precise cases (i.e. excess of Commission's powers, disrespect of subsidiarity principle, etc.). In the case of railway and automotive regulation, directives are being modified to include these changes.

The European Commission is at the centre of the policy process thanks to its 'formal agenda-setting powers' (Pollack 1997: 106), through its exclusive right of legislative initiative. The Commission also uses 'informal agenda setting power' and acts as a 'policy entrepreneur' (Pollack 1997: 125; Majone 1994: 205) pushing for issues to be put high on the agenda and elaborating proposals that can rally consensus. In particular circumstances, the Commission has been able to press for ambitious and challenging reforms, as has been the case in the railway policy where the railway crisis weakened the consensus for institutional status-quo. Most of the time, however, the Commission has to anticipate the preferences of the European Parliament and Council to increase the probability of its proposals to be accepted. The Commission is also a 'regulatory bureaucracy' (Pollack 1997: 106) and plays a crucial role in the elaboration of the technical regulation initiating proposals, coordinating Committee work and issuing Commission Decisions.

Other non-majoritarian stakeholders have a role in the policy process, particularly at the policy-shaping stage of the decision. "EU meso-level decision-making is more complex than in most national systems. It implicates more and more different types of actors with varying agendas" (Peterson 1995: 75). The dramatic increase of groups, and in particular private actors, seeking to influence the EU policy process has risen exponentially since the 1980s (Greenwood *et al.* 1992; cited in Hix 2005: 211). The participation of these actors is encouraged by the Commission's 'open and structured dialogue with special interest groups' (European Commission 1992). The Commission relies "heavily or wholly on *non-institutional* (especially private) actors for resources" (Peterson 1995: 78). Private actors are all the more interested in providing this expertise that economic and social regulation was more and more elaborated at the supranational level (Hix 2005: 213). Private actors tend to prefer European solutions when competitive threats are high (Weber and Halerberg 2001) and uniform sets of rules when markets are fragmented (Majone 1994: 203). In addition, "decision-making at the relatively early stages of the EU policy process is a critical determinant of eventual policy outputs" (Peterson 1995: 75). In fact, "control over knowledge and information is an important dimension of power" (Haas 1992: 2) and "technocratic does not necessarily means apolitical" (Peterson 1995: 74). As a result, because of the openness of the system and of the potential gains of participation, the number of actors involved at the EU meso-level is soaring.

Yet, the lack of 'internal' expertise of the Commission is being compensated by the creation of independent European agencies, as has been the case with the creation of the ERA. As many authors suggests, European agencies have in most cases been limited to the 'gathering and diffusion of information' (Héritier 1999: 10; Majone 1997: 262) and to networking (Dehousse 1997: 61). The ERA's prerogatives go far beyond this task, in particular thanks to its ability to elaborate and submit TSIs proposals to the Commission

(Silla 2002). The legitimacy and technical authority of this agency stem from the legal Regulation which establishes it, the work mandates which it receives from the Commission, but also from its own recruitment procedures and the involvement of sectoral representative organisations in its working groups (interviews ERA 2007). Thus, the authority acquired by the ERA and its proposals may reduce the margin of manoeuvre of the Commission and Committee 21 on the changes/amendments made to these specifications. Yet, in order to validate (or not) this hypothesis, one will have to analyse the level of divergence between the ERA's proposals[23] and the actual Commission decisions.

Roughly speaking, the decision-process, because of its technical content is quite largely depoliticised and 'denationalised' (Bach 1992 cited in Héritier 1996: 155). First of all, "the actors participating in the formulation of the policy specification are often 'non-political': the Commission's Directorate General, national civil servants and private actors" (Peterson 1995: 74). Secondly, the complexity and technical nature of the discussion (as is the case in transport safety issues) ease the insularisation from distributive questions (Héritier 1996: 155). Thirdly, it is possible to observe the growing autonomy of groups of experts, conceptualised under the terminology of 'issue networks' (Majone 1994: 204) or 'policy networks' (Peterson 1995: 76). These groups may transform themselves into 'epistemic communities' (Haas 1992) and move from the mediation of interests, to the creation of their own "sets of normative and principled beliefs, […]causal beliefs, […] notions of validity" aiming at "a common policy enterprise" (Haas 1991: 3). Further study needs to be conducted in order to determine whether issue-networks in the railway and road sector have experienced such transformations.

Two other actors are indirectly involved in the EU policy process, namely international organisations and the media. As underlined by the automotive example, the WP.29 has played a decisive role in the elaboration and in the level of current European standards, but also on their current level. The hundred regulations established under this organization have indeed largely influenced EC/EU regulation, and are regularly referred to in EU documentation. In addition, according to the CAR 21 report (2005a), the EU would tend to replace existing EC/EU norms by these international standards. Secondly, it is necessary to stress the importance of the media in the decision-making process, as they are potentially able to modify the actors' preferences. The dissimilar attention of European media coverage of accidents according to their nature is instructive. Roughly speaking attention varies according to the transport mode, the catastrophic nature of the accident and the eventual social or policy background in which this accident occurs. Thus, media are able to 'produce the event' (Champagne 1984: 18), and road crashes are often not conceptualized as an 'event' as such, in particular because of the individual nature of the accident and the large number of such crashes. Therefore, media coverage often occurs a few times a year, when the road deaths' figures are published.

Finally, it is important to bear in mind that the balance of power is not static and varies according to the subject (degree of technical complexity and political sensitivity), the status of the other actors' preferences but also the background environment.

Policy windows

Punctual events can have important effects and foster change. Thanks to the case-studies, three types of event have been identified, with various impacts on the EU safety regulatory process. The most powerful impact of such events has been experienced in the

[23] Four TSIs proposals are being elaborated by the ERA and will be proposed to the Commission by 2009.

constitutional framework. This is particularly the case of the adoption of the SEA, the introduction of 'transport safety' in the Maastricht treaty or the opening of transport policy making to co-decision by the Amsterdam treaty. Secondly, punctual accidents have not been decisive in the policy process, even if it is obvious that in some precise cases (i.e. rail crash in Hadfield in 2000 or the road tunnel accident in Mont Blanc in 1999), crashes have had powerful effects. Yet, these results were determined by very specific circumstances (i.e. railway privatisation in the UK, large series of tunnel accidents in Europe), highly publicised and led to very low level of systemic change at the European.[24] Finally, it is interesting to underline that the European policy-making has known some level of interaction and inspiration from extra-European countries and the USA in particular (i.e. road safety in the mid-1960s), although the nature and level of this influence is very difficult to qualify.

Structural trends have played various roles in the decision-making processes. The railway crisis has been a powerful trigger for reform. It changed the terms of the debate from national protectionism to sectoral revitalisation and meanwhile modified the preferences of the actors of the sector, and particularly those of the Member States. Concerning the road sector, the alarming numbers of road deaths since 1970 have not played a similar role. Pragmatic reasons have been the impulse for change.

Patterns of policy-making applied to EU transport safety regulation

Validity

A dual conclusion on Héritier's (1996) assumptions can be drawn from the two case-studies of EU transport safety regulation. On the one hand, the decisive role of the Member States is validated, even if some variation can be observed overtime. It is important to emphasise that the role of the Member States is determinant both in the framework of the Council and the European Parliament, which has become an autonomous co-legislator. As far as the underlying strategies of the Member States are concerned, generally the cost-benefit analysis prevails on an economic and commercial point of view, as Héritier (1996) suggested. Yet, it can happen, with media-related (i.e. accidents) and/or citizens' pressure (i.e. preference for dynamic intervention in transport safety) that national governments and the members of the European Parliament decide to go faster and further on some issues. Héritier (1997; 1999) later considers the existing 'diversity' of interests existing amongst Member States and the strategies or 'subterfuges' they are forced to elaborate to 'overcome deadlocks'.

Secondly, Héritier is right to emphasize the importance of the Commission in the determination of the trajectory and frame for the evaluation of the policy management. Even though the reviewed empirical cases suggest that the Commission has developed some informal additional powers, enabling it to modify the actors' preferences (in particular of the Member States), the scope of analysis is too restricted to generalise this observation.

Finally, Héritier's emphasis of the importance of 'denationalized' expertise at the early stage of the decision-making process is useful. This observation is even stronger in the case of technical issues such as the safety specification of transport vehicles. As a result, Héritier's argument is able to provide a broad understanding of the policy process and its

[24] The Hadfield accident led indirectly to a national railway reform in 1997, whereas the Mont Blanc tunnel accident has not led to EU regulation of road infrastructure but only of tunnels present on the TEN-T network.

two key actors. However, the European decision-making 'patchwork' seems to be a far bigger and evolving piece of art of a complex and dynamic nature.

Figure 5 : *Comparison Rail/Road*

Comparison rail/road		
	Rail	**Road**
Technical specificity	Complexity: technical, several stages of production, various possible combinations, complex interface with infrastructure	Simplicity: more concise and self contained piece of equipment (easily identifiable), one stage of production (or two), simple interface with the infrastructure
Organisational structure	Fragmented market, Few national champions	Fragmented market, Relatively high number of manufacturers
Ideological content	National defence, Nation building, Involvement in national companies	Involvement in national companies (through state-ownership or subsidies)
Levels of regulation	National	National - International - European
Safety target	Maintain existing levels of safety	Increase the level of safety
Safety method	Elaboration of essential requirements and TSIs	Whole vehicle type-approval: Standardisation of safe vehicles
Model of standardization	New approach'	Old approach'
EC/EU legal basis on which EU safety requirements rely	TEU - Transport and on TENs	TEC - SEA - TEU: Free movement of goods. Common market/Single Market
Member States' role	Decisive (final decision-maker in Council, representation in Committees)	Decisive (final decision-maker in Council, representation in Committees)
European Parliament's role	Decisive (co-legislator, oversight of Comitology procedures)	Decisive (co-legislator, oversight of Comitology procedures)
Commission's role	Central	Central
European agency	ERA (2004) - powerful	None
Industry	Increasing influence - European representative body (UNIFE) created in 1991	Central (elaboration of norms and influence of policy-making) - European representative body (ACEA) created in 1991
Lobby groups	Peripheral	Peripheral
Other actors	No other principal actors	Decisiveness of the WP.29
Media	Large coverage of accidents (more impressive)	Low coverage of accidents
Punctual events	Marginal role of precise accidents - Decisive role of institutional changes	Marginal role of precise accident - Decisive role of institutional changes - Some influence of other continents' policy evolution
Structural events	Decisiveness of the rail crisis for European intervention	Marginal role of road deaths. Impact of commercial issues and increase of cross-border traffic

Limits and actualisation of the argument

This comparison pleads for a dynamic analysis, taking into consideration in the long run the reallocation of power between the decision makers or the increase of actors taking part in the process. Héritier's (1996) analysis undermines the autonomous role of the European Parliament, as well as the function of 'peripheral' actors such as the industry or other non-majoritarian stakeholders at all stages of the policy process. Therefore, Member States are not the only actors pushing for legislation. The increasing institutionalisation of the participation of sectoral representative organisations in the legislative drafting phases (as in the ERA working groups) and the growing involvement of interest groups at all stages of the decision limit the scope of validity of Héritier's (1996) argument. In addition, Héritier overestimates Europe as a frame of reference and does not take enough into account the possible interactions that can emerge from extra-European countries and international organisations. Finally, Héritier does not assess strongly enough the role of windows of opportunity as triggers for change.

Conclusion

The case of EU safety regulation in the railway and road sectors sheds a particular light on the EU policy process. The Europeanisation of these industries and the regulation at the supranational level of their safety requirements have known highly differentiated timings, approaches and results. The sectoral specificities of the industry, their particular network of actors and their sensitivity to corollary events have been decisive in shaping differential EU safety regulation systems.

Héritier's (1996) description of the decision-making process has been useful to identify some heavy trends in particular key decisive actors (i.e. the Member States and the Commission) and logics (i.e. regulatory competition). Yet, Héritier's hypotheses have proved less effective to explain more subtle differences in the policy process and its dynamic evolutions (such as the reallocation of power between actors or the interaction of the legislative process with 'peripheral' actors and background events). Thus, Héritier's concepts of 'patchwork' and 'accommodation of diversity' are useful but they should not only refer to Member States' strategies and behaviours. They could also be applied to the whole policy process, the entire network of actors and to the sector concerned. Therefore, greater attention could be directed to the EU decision-making process itself, as a mechanism able to accommodate the diversity of the sector at stake in order to achieve the fittest legislative outcomes.

The comparison of policy processes relative to safety in two transport modes offers a new focus on the various interactions that exist between the industry characteristics, its actors and associated events, as well as their consequences in terms of EU safety regulation. Firstly, it illustrates the overlapping of political and technical choices, underlying the role of expertise as a source of influence and power. Safety regulation can be held as an arena "in which scientific and technological information battles are central to political outcomes" (Shapiro 1997 cited in Vos 2000: 1130). Secondly, comparison across transport sectors, despite their technical, organisational and ideological differences allows a very instructive illustration of the differentiated impacts of decision-making components. For instance, events have not always had the same impact in opening a policy window for action at the EU level. Finally, it offers an interesting approach to EU safety regulation. In some sectors such as food safety, "the complexity of regulation and the lack of transparency concerning their application may discourage potential exporters, and are often magnified by procedural delays and other administrative practices that may inhibit market access, the discriminatory effects are difficult to determine" (Egan 2001: 57). Contrary to this example,

safety regulation in the railway and automotive industries has been conducted to achieve a greater integration of these markets internationally and regionally, while allocating growing attention to the transparency of the policy process.

Further studies need to be pursued on this theme, extending the scope of research to other transport industries. Maritime and aviation transport have also experienced specific developments regarding safety regulation that would complete the present analysis. Safety regulation in both sectors came late on the European agenda. It is mainly major accidents affecting Europe (i.e. Erika and Prestige shipwrecks) or the impact of terrorist attacks (i.e. 9/11) that have provided not only windows of opportunity for EU safety/security regulations but also a demand from European citizens to react to these threats (European Commission 2007).

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Beyond the Eurosceptic/Europhile Divide: Towards a New Classification of EU News Coverage in the UK Press

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Abstract

Newspapers are typically categorised as being either Eurosceptic or Europhile. However, this classification is insufficient and misleading when applied to news reporting in the UK press. The term Euroscepticism has been usefully deconstructed into more nuanced and complex categories by researchers studying political parties and public opinion. A similar approach is now needed to better represent the complexities of EU news coverage. The current Eurosceptic / Europhile classification needs to be developed for two main reasons. First, it is misleading in that it fails to accurately map the landscape of EU news reporting across the press. Second, it is too simplistic in that it ignores important variations in EU news production – in particular, differences between tabloid and quality titles, and between Brussels based and national based journalists. This article will discuss these issues by drawing on new, empirical research into EU news production. It will conclude by proposing a new means of classifying EU news coverage in the UK press.

Keywords

Europhile; Eurosceptic; EU; news; press

STUDIES ADDRESSING MEDIA COVERAGE OFTEN FIND IT USEFUL TO CATEGORISE THE press along various fault-lines. For example, UK newspapers are often categorised in terms of market sector (see McNair 2007):

- **Elite:** i.e. *Independent, Financial Times, Guardian, Financial Times, Times*
- **Mid-market:** i.e. *Daily Express, Daily Mail*
- **Mass circulation:** i.e. *Daily Mirror, Daily Star, Sun*

Or in terms of their political stance (see Statham 2007):

- **Left broadsheet:** i.e. *Guardian, Independent*
- **Right broadsheet:** i.e. *Times, Daily Telegraph*

In terms of the European Union (EU), UK newspapers tend to adopt a strong editorial position which does not necessarily reflect their party political allegiances. For example, *The Sun* backed the Labour Party during the Blair government but took up a strongly anti-European stance throughout this period. Therefore, a categorisation which captures newspapers' particular stances on the EU is needed.

The most commonly used form of categorisation is to divide the UK press in to Eurosceptic and Europhile (or pro-European) camps. This is done by studies focusing on EU news coverage (for example Anderson and Weymouth 1999; Anderson 2004; Daddow 2006,

Price, J. (2009). 'Beyond the Eurosceptic/Europhile Divide: Towards a New Classification of EU News Coverage in the UK Press', *Journal of Contemporary European Research*. Volume 5, Issue 3. pp. 356-370. Available at: http://www.jcer.net/ojs/index.php/jcer/article/view/148/163

2007; Gavin 2001; McLeod 2003) and by wider political studies relating to European issues (see for example, Baker 2001; Carey and Burton 2004; Wallace 2005).

The categorisation is not only used by academics, but also by politicians, pressure groups and journalists themselves, as in the following example written by Steven Glover in the *Independent* (July 2, 2007):

> …Europe is nonetheless bound to be a bone of contention for the Mail unless Mr Brown calls a referendum, though so far it has been less worked-up than The Sun. Mr Brown might do himself a great favour if he did change his mind. The **Europhile** press will make much less of a din if he calls a referendum than the **Eurosceptic** press will if he did not. (emphasis not original)

Looking in more detail at this form of categorisation, the current distribution of UK national daily titles is as follows:

- **Eurosceptic press**: *The Daily Telegraph, The Times, Daily Express, Daily Mail, Daily Star, The Sun*;
- **Europhile press**: *The Independent, The Guardian, Financial Times, The Daily Mirror*.

This summary is a revised version of that observed by one of the most comprehensive studies of EU press coverage to date (Anderson and Weymouth 1999). Since that study the *Daily Express* and *Daily Star*, under the ownership of Richard Desmond, have moved towards a strong anti-European editorial stance. This shift has been identified by one of the original authors (Anderson 2004) and subsequently confirmed by others (Firmstone 2004; Price 2008).

The above summary, when looked at purely in terms of numbers of titles, may seem to suggest a fairly even balance of opinion among the UK press. However, when circulation is taken into account, Eurosceptic newspapers make up 77 per cent of the national press, with the Europhile titles accounting for just 23 per cent. This means the Euroscpetic press reach a potential readership of around 24 million people (ABC, November 2008). Furthermore, as suggested above, while the Eurosceptic press are often vehement and consistent in their attacks on the EU, the more Europhile titles are not equally supportive. Their general backing for the EU project is often tempered by caution and vigilance concerning specific proposals.

The use of Eurosceptic / Europhile categories to characterize EU related matters is not exclusive to news reporting. The terms are often used to distinguish between the positions of political parties, or to describe public opinion on EU issues. However, studies in these related fields have begun to usefully dissect the categories, and in particular the concept of Euroscepticism, to provide deeper and clearer understandings of opinions and positions in relation to the EU. For example, Szczerbiak and Taggart (2003) have defined political parties in terms of hard Euroscepticism (principled and total rejection of the EU) and soft Euroscepticism (contingent objection to particular elements of the EU). Similarly, Sorenson (2008) has deconstructed public opinion in to classifications of economic, sovereignty, democratic and political based Euroscepticism.

One of the benefits of these approaches is that they go beyond rather simplistic definitional categories to develop fuller awareness of complex social realities. For example, Sorenson's approach leads her to observe how public Euroscepticism can take many different forms in different member states across periods of time. This allows more nuanced and considered conclusions about the capacity of EU campaigns to foster public support.

Another benefit of these approaches is that by dissecting a term such as Euroscepticism, researchers are able to obtain much clearer definitions, and, therefore, more useful understandings of the matters under consideration. A common weakness of previous research has been the diversity and vagueness with which the term Euroscepticism has been applied. As Hooghe and Marks (2007) have commented, the term has many varieties and assumes different forms in different contexts. It has been used as a catch-all term for a number of diverse phenomena, and has the potential to mask important contextual variations. As Sorenson (2008: 7) says: "Conceptual disagreements have hindered the accumulation of knowledge". What is required, therefore, is a precise definition of the term. One way of achieving this is by dismantling it into concepts appropriate to the context under review.

Despite these benefits, to date, no such deconstruction of EU classifications has been applied to news coverage. It is argued here that the typical Europhile / Eurosceptic means of describing EU news coverage is neither a useful nor an accurate form of classification. In fact, the categories, and the terminology used to describe them, hide important variations in news production while providing a distorted picture of the overall character of EU news.

But why does this matter? The world is not black and white, but shades of grey; and an understanding of the shades of EU news production is important for the following reasons:

- First, if the EU's communications service wishes to successfully engage with the producers of EU news, it requires an informed and nuanced understanding of the nature of EU news production. Without this, the EU is likely to misdirect its attentions and resources.
- Second, an over-simplified categorisation of press coverage is not helpful for those wishing to suggest improvements in the nature of EU news reporting. Politicians and others who take a normative view of journalism must grasp the complexities of coverage before they can make meaningful calls for change. Ambitions for a fairer and more balanced reporting require a full account of any perceived distortions or imbalances in EU news.
- Third, a more nuanced understanding of EU news is important for those actually involved in its production – the journalists themselves. If journalists share the tendency of others to simplify and polarise the nature of EU news, they are missing the inevitable complexities of the real world. The need to simplify is a necessary characteristic of all forms of journalism; however, a reflexive journalism, aware of the nature and consequences of its simplifications, and aware of the complexities bubbling beneath these surfaces, is arguably a better journalism.

These issues offer a strong case for the need to offer a more nuanced version of the EU news landscape. They will be returned to in the conclusion of this article in the light of the findings presented below.

Methodology

The new empirical material discussed in this article is based on a combination of interviews with journalists and press officials, and analysis of EU news texts.

The selection of interview subjects used a purposive sampling technique in which subjects were identified according to their relevance to, and knowledge of, EU news reporting in the UK press. Twenty four interviews were conducted with Brussels based journalists, UK based political journalists, and members of the European Commission's press service. This press service was selected as it has been identified as the main focus for journalists

covering the EU (Baisnee 2001; Meyer 1999). The inclusion of UK based journalists in the sample was seen as being of particular significance as these reporters have been largely ignored by previous research in this field. While there has been some recent attempt to rectify this, studies have tended to draw on a relatively small number of sources (Firmstone 2004; Statham 2008).

The Commission's potential sample population therefore comprised spokespeople in its Brussels based DG Directorate General for Media and Communications and four press officers based in its UK Representations. Of these, 10 were interviewed. These were selected for interview following initial discussions with press officers and journalists to determine which officials played the key roles in relation to the UK press. Seven interviews were conducted face-to-face with interviewees; the other three were telephone interviews.

Interviews with journalists consisted of the following:

Table 1: *Interviews Conducted*

Newspaper title	Interviews with UK based journalists	Interviews with Brussels based journalists
Eurosceptic press		
Daily Express	NA	Regular freelance contributor
Daily Mail	Political editor	Regular freelance contributor
Daily Star	NA	NA
Daily Telegraph	Political editor	Brussels correspondent
Sun	Westminster correspondent	Regular freelance contributor
Times	Political editor	Brussels correspondent
Europhile press		
Daily Mirror	NA	NA
Financial Times	NA	Brussels bureau chief
Guardian	Political editor	European editor
Independent	Political editor	Brussels correspondent

All interviews with journalists were conducted on a face-to-face basis. The only newspapers not represented in the study are the *Daily Star* and *Daily Mirror*. This is due to the fact that neither newspaper has regular Brussels correspondents, nor were their UK based political journalists available during the times interviews were being carried out. However, the interviews conducted provide a thorough examination of the UK national daily press, incorporating titles from across the market sectors and from a variety of political stances. In particular, the gaining of an interview with a journalist from the Sun newspaper is significant as the title has been traditionally obstructive to researchers in this field (for example Anderson and Weymouth 1999; Firmstone 2004).

Interviews used a semi-structured approach, with an interview schedule designed to encourage interviewees to reflect on the nature of EU news and the potential factors shaping its production. All interviews were taped and transcribed.

Data analysis consisted of identifying emergent themes from interviews, as suggested by the approach of Miles and Huberman (1994). These themes, and the quotes used as evidence for findings below, have been selected as being reflective of a consensus among

interviewees. However, instances in which these themes are contested or contradicted will be noted and explained in the text.

Content analysis was conducted on a sample of EU news texts representative of a two-year period of news coverage from July, 2003, to June, 2005. This involved analysing four constructed weeks of coverage, amounting to 348 texts, to control for systematic variations in news production (Lacy *et al.* 2001; Riffe *et al.* 2005). In particular, content analysis was used to examine the character of EU news reporting across a range of variables including newspaper title, editorial agenda (Eurosceptic or Europhile) and the role and location (Brussels correspondent, other foreign correspondent, UK based political journalist, or other UK based journalist) of journalists. Texts were coded as being neutral, positive or negative in the positions they took in relation to the EU. Texts which were predominantly critical of the EU were coded as negative; those which were fundamentally approving of the EU were coded as positive; while texts meeting the journalistic norm of objectivity - defined in line with McNair (1998) as containing a balance of opinion, validated by sources - were coded as neutral.

The consistency and accuracy of content analysis was tested using inter-coder reliability. Coder agreement was calculated using Scott's pi formula (1955). Matters of fact, such as newspaper title, achieved full inter-coder agreement. The coding of the positive/negative/neutral nature of texts achieved a pi score of .78. This result is lower but within acceptable levels of inter-coder reliability. As Wimmer and Dominick (2006: 185) observe: "If a certain amount of interpretation is involved, reliability estimates are typically lower. In general, the greater the amount of judgemental leeway given to coders, the lower the reliability coefficients will be".

The focus of this article is on news production in one EU member state. While this places obvious limitations on its findings, there are also significant benefits to this approach.

First, case studies allow for a depth of analysis often not found in pan-national studies. This article draws on interviews with journalists from eight out of ten UK national, daily newspapers and analyses content from them all. Cross national studies tend to make their generalisations from a much narrower range of sources – for example, Gleisner and de Vreese (2005) only analysed material from three UK newspapers.

Second, pan-national studies have suggested a lot of common ground between EU coverage in the UK press and its coverage in other member states. For example, de Vreese *et al.* (2006) found a common negative pattern in EU coverage in the old 15 member states. Therefore, there is good reason to believe that the findings of this in-depth case study have a much wider significance. In short, both national and pan-national studies have strengths and weaknesses and should be seen as complementing one another.

Third, many of the ambitions of this article are outward looking in scope. Underpinning aims for research, set out in the introduction, included making recommendations about the communications strategy of the EU and for better informed criticism by those wishing to see improvements in press coverage of the EU. These aims are by their very nature designed to have a wider resonance than for the UK alone.

Research findings: the need for a new means of classifying EU news

This section presents some arguments for why the typical means of classifying EU news needs to be improved. First, it is argued that the current means of classification does not accurately reflect or describe differences in EU news production across the range of national newspapers. Second, it is argued the current system is overly simplistic, hiding

significant variations in how EU news is produced within individual newspapers and by different types of journalist. In particular, there are crucial differences in how news is produced by Brussels based and UK based journalists.

Mapping the landscape of EU news

A major problem with the current means of classifying EU news is that its categories and terminology do not fairly depict the overall landscape of EU news reporting in the UK press. Similar weaknesses in literature on political parties and public opinion have led researchers in other fields to dissect the term into more detailed and useful categories (Szczerbiak and Taggart 2003; Sorenson 2008). Such an approach is now needed to better capture the character of EU news reporting.

Findings of content analysis suggest that a majority of EU news is actually neutral in nature. Two-thirds of EU news in the UK press meets the standard of objective reporting. This is not to say that this reporting is free of any criticism of the EU, but that any criticism is balanced and validly sourced (McNair 1998). This finding is perhaps a surprise to those who would criticize the UK press en masse for its hostile reporting of the EU. What it suggests, is that critics of the press would be better to offer a more refined judgement of news coverage which targets sections of reporting that are genuinely negative in nature.

If we restrict findings to the third of EU news that deviates from being objective, we see that this is overwhelmingly negative in nature. Around 30% of UK press coverage of the EU is negative – while just over 3% is positive. This reinforces previous studies which have highlighted a strong negative tendency in EU news (Anderson and Weymouth 1999; Gleisner and De Vreese 2005; Morgan 1999; Norris 2000; de Vreese *et al*. 2006). However, what has been missing from this literature is a detailed, systematic breakdown of how this negativity is dispersed across the spectrum of press coverage.

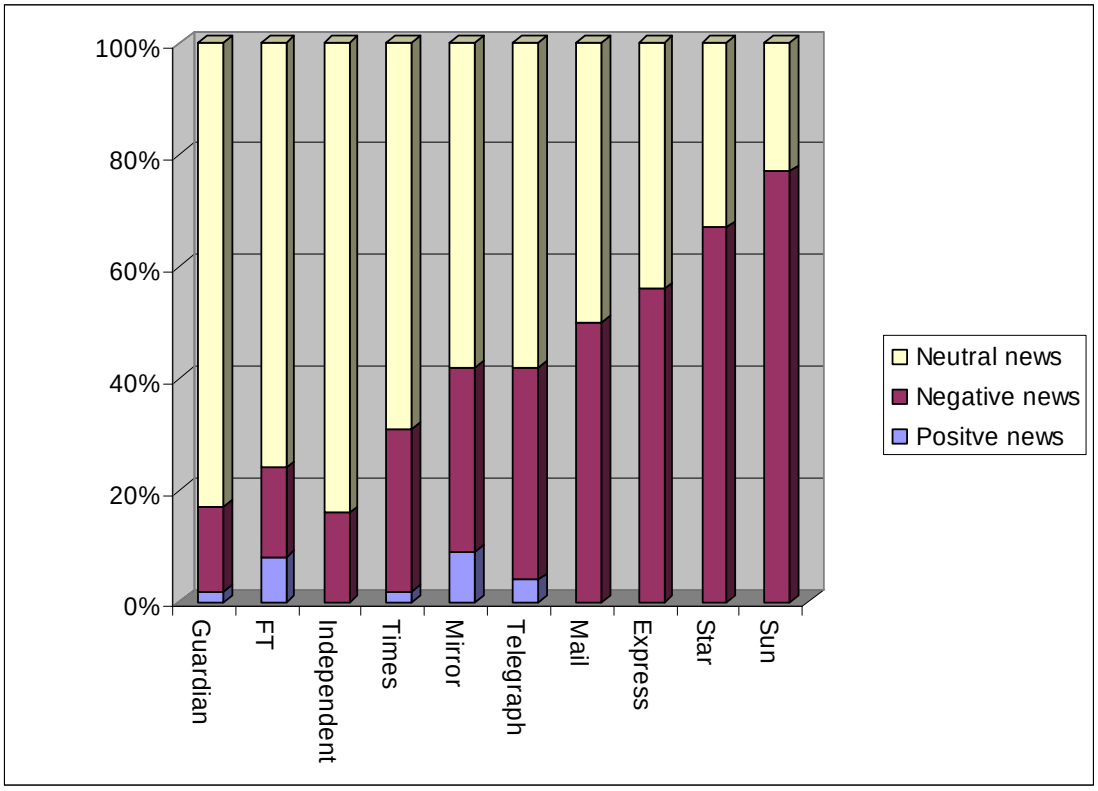
Findings here reveal that Eurosceptic titles are responsible for nearly three-quarters of negative EU news coverage in the UK press. However, that means that more than a quarter of the negative coverage of the EU is produced by so-called Europhile titles. Hostile coverage of the EU is far from confined to traditionally Eurosceptic titles and makes up a significant proportion of Europhile coverage.

Why is this? Part of the explanation must be found in the nature of journalism itself, in which news values are prone to prioritise bad rather than good news (Harcup 2003). Furthermore, normative versions of political reporting suggest it should perform a watchdog role by challenging and holding the powerful to account. This is why traditionally termed Europhile newspapers, in favour of the EU in principle, often find plenty of reasons to be critical of the EU in practice (Anderson and Weymouth 1999). Other explanations include the roles played by national sources in exploiting the EU for domestic political gain (Anderson and Price 2008), and the influence of an overwhelmingly sceptical public opinion feeding off a version of history in which Europe is seen as the 'other' (Daddow 2007; Marcussen *et al*. 1999; Smith 2006).

If findings are isolated to news emerging from Europhile titles, they show a far greater tendency for negative rather than positive coverage. Around one-in-six EU texts appearing in Europhile titles contain negative reporting of the EU, in contrast to less than one-in-twenty texts which contain positive coverage. In other words, there is around three times more negative than positive coverage of the EU in traditionally termed Europhile newspapers.

When the figures are broken down still further - as a proportion of each newspaper's EU coverage - it becomes clear that every newspaper contains more negative than positive coverage about the EU. For example, around 15 per cent of *The Guardian's* EU coverage is critical of the EU, while just two per cent is positive.

Figure 1: *The character of news as a proportion of each UK national newspaper's EU news coverage*



In light of these findings, it is argued the current means of classifying EU news, and its terminology, seems inappropriate and misleading. The term Europhile does not accurately depict a type of reporting that contains three times more negative than positive coverage of the EU. In addition, the large amounts of negative coverage mean that one term – Eurosceptic – is insufficient to usefully articulate its varying forms.

As the above findings show, the majority of EU coverage is objective in nature. However, when this objectivity is broken there is a strong tendency for it to move in a negative direction. This is true for all newspapers, regardless of their editorial position. Therefore, it is perhaps more worthwhile to distinguish between newspapers in terms of the frequency with which their objective reporting tends towards the negative. Also, it is important to understand why, and in what circumstances, a newspaper's coverage is more or less likely to take a negative character. Some of these factors will be discussed in the following section.

Mapping variations in EU news coverage

One of the problems with the current means of classifying EU news coverage is that it is too simplistic. The two groupings (Eurosceptic and Europhile) mask important distinctions

and divisions in the nature of coverage. While it is obviously impossible for a system of classification to accommodate every nuance and shade of reporting, it is argued here that the current system ignores some crucial differences in coverage – two of which will be addressed here. First, the current classification does not account for significant contrasts in reporting by Brussels based and UK based journalists. Second, it fails to account for crucial differences in how the EU is reported by quality and tabloid titles.

The findings of content analysis and interviews suggest that the location of journalists is as important in shaping the nature of EU news as the editorial agenda from which it emerges. Whether an EU news report is filed from Brussels or the UK is as crucial in influencing content as whether it is produced for a Europhile or Eurosceptic newspaper. News produced by UK based journalists is far more likely to be negative towards the EU than that produced by Brussels based reporters.

If we restrict findings to news produced for Eurosceptic titles, we find that UK based journalists tend to produce far more negative copy (62 per cent of their EU reporting is negative) than their Brussels based counterparts (27 per cent). It is interesting to compare these figures with the levels of negative reporting by UK based journalists working for Europhile titles (21 per cent). From this, we can see that in terms of levels of negative reporting, Brussels based Eurosceptic coverage is far more akin to UK produced Europhile reporting than nationally produced Eurosceptic news.

A similar pattern holds if we restrict findings to texts produced within individual titles. For example, in the cases of both The Times and Daily Telegraph, texts produced by their UK based journalists are twice as likely (just over 50 per cent) to contain explicitly negative portrayals of the EU than those produced by their Brussels based correspondents (25 per cent).

These findings are supported by the observations of press officers and journalists. The overwhelming feeling among interviewees is that reporting from the UK tends to be far more hostile than that produced from Brussels. Furthermore, the more time a journalist spends in Brussels, the less hostile their reporting tends to become – a phenomenon known as 'going native'. Examples of these views can be found in the following two comments from a European Commission spokesperson and a UK based journalist:

> The Brussels corps, even those who are fairly sceptical when they arrive, they go native very quickly. It sounds pejorative but what happens is they are favourably impressed by what we are doing and realise that we are actually doing quite a lot of sensible things that are beneficial. (Spokesperson of the European Commission)

> It causes much jocularity around here when we see guys going out there ready to tear the place apart and within months they're like lambs, and I'm not decrying them, that's just the way the system is over there. You're part of a cocooned media operation and they spoon feed you lots of stuff and you can get sucked into it. It takes a real journalistic resilience to kick against that and be made a member of the awkward squad. (UK based journalist for a Eurosceptic newspaper)

Differences between Brussels based and national based reporting are important because of the high levels of UK produced EU news. In fact, perhaps surprisingly, more of the UK press's EU coverage is produced by UK based journalists than by members of the Brussels press corps (Price 2008). Part of the reason for this, is that sections of the UK press have no representation in Brussels. However, if findings are restricted to those titles that have Brussels correspondents, as much EU news is produced from the UK as from Brussels. This makes variations in the reporting practices of national and Brussels based reporters highly significant when considering the character and causes of EU news content. Any

meaningful attempt to classify EU news therefore needs to take these variations into account.

There are a number of explanations as to why there is such a difference in the nature of national and Brussels based EU news reporting. One explanation lies in the news sources favoured by journalists, with Brussels reporters using a wide variety of EU sources and national based reporters relying heavily on domestic politicians (Price 2008; Statham 2008). For example, UK politicians are five times more likely to be quoted in texts written by UK based political reporters than in those by Brussels correspondents. In contrast, EU Commissioners are three times more likely to be quoted in texts written by Brussels based journalists than in those by UK based reporters. Previous studies have shown how political actors at a member state level have a tendency to exploit the EU for short term, domestic gain (Anderson and Price 2008; Lodge 1994; Peterson 1995) The reporting of UK based journalists therefore tends to reflect these negative discourses about the EU while the more positive portrayals which may be provided by EU level sources often fail to reach the radar of these reporters. Similarly, the lack of contact between UK based journalists and EU sources means they are largely free from this potentially inhibiting influence. Journalists can produce hostile news copy in the knowledge that they are highly unlikely to have to personally face or talk to anyone who may seriously contradict, or object to, its contents.

Further explanations can be found in the differing reporting cultures in which Brussels and UK based journalists operate. While Brussels based journalists predominantly perceive of their role as information provider, UK based political journalists prefer to conceive of themselves in the more active role of watchdog (Price 2008). In Brussels, the reporter's role is seen predominantly as one of providing a bridge between the remote complexities of the EU and the everyday lives of the public. In the UK, the role is primarily seen as one of holding officials, politicians and institutions to account. The latter of these roles encourages the tendency for national based journalists to produce hostile and negative reporting.

Similarly, Brussels based reporters work in a largely communal culture in which much information is shared among journalists and the enemy is perceived as the home newsdesks. In contrast, UK based journalists, and Westminster based political journalists in particular, operate in a much more competitive and belligerent environment (Price 2008). This latter, adversarial culture further promotes a negative tendency in news coverage produced from the UK.

We turn now to a second significant variation in the nature of EU news production – the difference between tabloid and quality coverage. Findings here suggest that tabloid coverage is far more likely to deviate from the journalistic norm of objectivity to present a polemic, negative version of events. Of course, this tendency is not exclusive to EU news and is a characteristic that has been observed in wider tabloid news coverage (Sparks and Tulloch 2000).

In terms of the EU, this characterstic manifests itself most obviously in tabloids following a Eurosceptic editorial agenda: the Daily Express, Daily Mail, Daily Star and Sun. The EU news of these titles contains a minority of objective coverage, with the majority consisting of critically polemic portrayals of the EU. This sets these titles apart from the others and supports the observations of many journalists who claim the tabloids report the EU in a fundamentally different way to the rest of the press. For example:

> I think the Eurosceptic papers like the Times and the Telegraph are in a completely different category to the tabloids like the Mail and the Sun, because they have

> correspondents here who take their jobs seriously, and maybe they are working under more difficult circumstances but I'm sure that none of them, while I've been here, would deliberately write stories that they know to be untrue… but that is very different from the Mail and the Sun. (Brussels based journalist)

There are, however, interesting findings when we look at the case of the *Daily Mirror*. Although the *Mirror* has a Europhile editorial agenda, findings show that around a third of its coverage is negatively hostile towards the EU. The majority of the *Mirror's* reporting (59%) is objective in nature, distinguishing it from the Eurosceptic tabloids, but only 8% is of a positively polemic nature. What these findings suggest is that the tabloid trait of producing non-objective, negative reporting outweighs the influence of a positive editorial agenda when it comes to the EU.

One factor at work here is likely to be that none of the tabloids have a permanent presence in Brussels. The above section highlighted tensions between Brussels correspondents and their UK newsrooms, suggesting these correspondents took a more positive view of the EU and had a mellowing influence on the negative tendencies of their UK colleagues. In the case of the tabloids, this mellowing effect is absent.

One outcome of this is that the current means of classifying EU news seems to place its divisions in misleading places. The Guardian, FT and Independent contain the lowest proportion of negative EU news, while the Eurosceptic tabloids contain the most (a majority) of negative coverage. In the middle, *The Times*, the *Telegraph* and the *Daily Mirror* produce surprisingly similar content (a majority of objective reporting, around a third of negative news and a small amount of positive reports), although obviously in a very different journalistic style. While the Eursceptic editorial agendas of *The Times* and the *Telegraph* are tempered by the reports and influence of their Brussels correspondents, the Europhile agenda of the Mirror is outweighed by the tabloid love of negativity, without a Brussels presence to act as a restraint.

What is clear is that the make-up of the UK press is more complicated than a simple division of Europhile and Eurosceptic titles. Instead of thinking in terms of a clear distinction between Eurosceptic and Europhile sections of the press, it would be useful to think in terms of a more complex spectrum of coverage accounting for actual variations in objective, negative and positive reporting. There are important differences in the nature of reporting not just between newspapers, but also within individual titles. A new, more nuanced form of categorising EU news is needed to capture these differences

Concluding comments: towards a new classification of EU news

This article has argued that the current means of classifying EU news coverage is insufficient in its complexity and misleading in its terminology. There are crucial factors shaping different forms of EU news which the current classification does not take into account. Crucial among these factors are whether a title belongs to the tabloid or quality sector, and whether the news is produced by Brussels or UK based journalists. Therefore, this article will now offer an alternative means of classifying EU news production which better captures the landscape of press coverage and takes into account the crucial factors of market sector and location of journalist.

Findings above show that the majority of EU news in the UK press is objective in nature. However, when coverage deviates from this it is far more likely to be negative and only very rarely of a positive nature. The findings suggested there was an increased tendency towards negative reporting when news emerged from a tabloid newspaper, and when the news was produced by a UK based journalist. Conversely, news was more likely to

maintain its objective character when reported by a quality title, and when it was produced by a Brussels based journalist. When added to the editorial agendas of newspapers, this produces the following influences on the character EU news:

Table 2: *Factors shaping the objective/negative nature of EU news production*

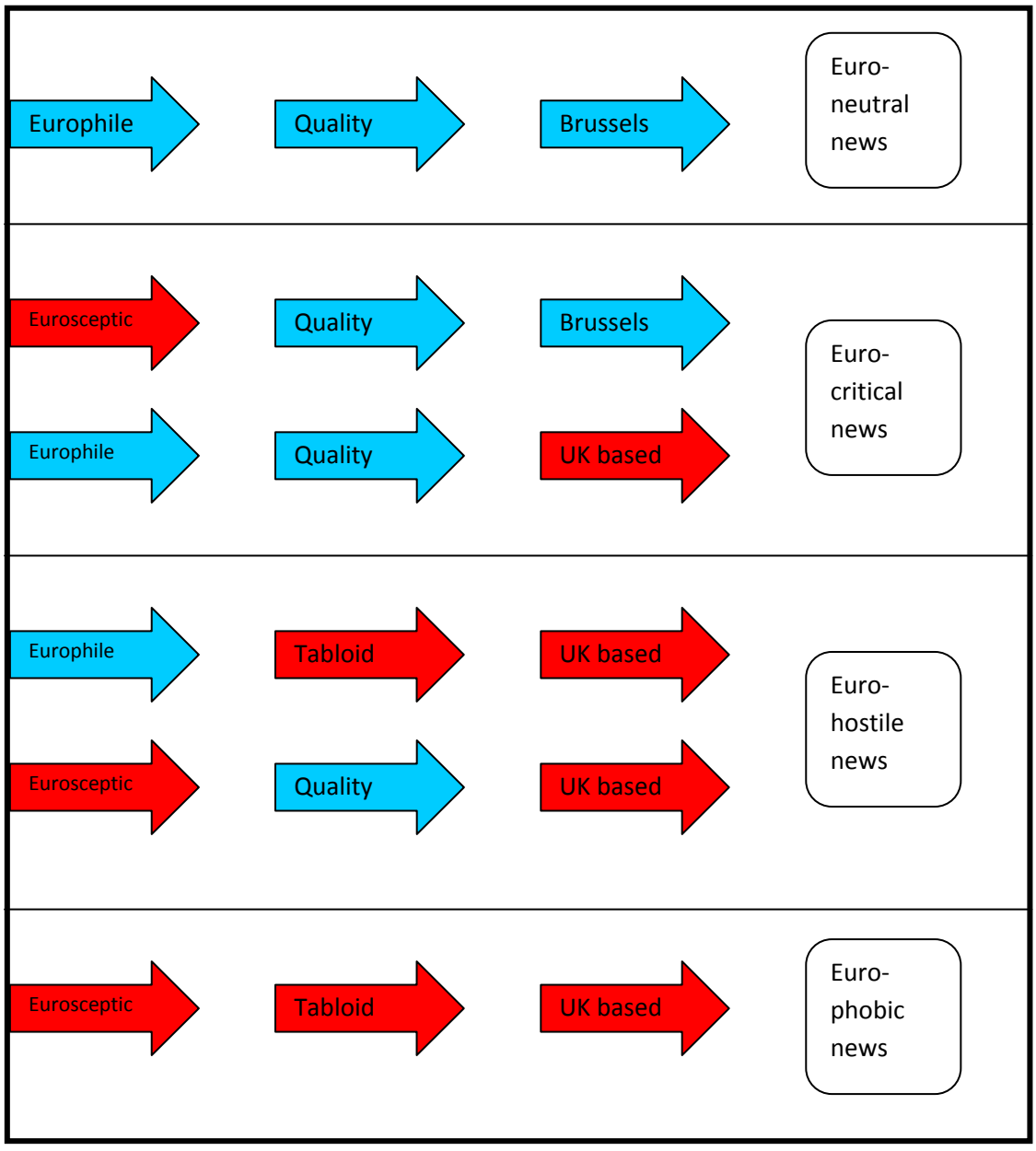
	Editorial agenda	**Market sector**	**Location of journalist**
Factor maintaining a tendency towards objective reporting	Europhile	Quality	Brussels
Factor encouraging a tendency towards negative reporting	Eurosceptic	Tabloid	UK

Taking these factors into account allows us to produce a more nuanced classification of EU news that better describes variations of EU news production both across and within individual titles. It is suggested that four categories, instead of two, better describe variations in EU news when market sector and location of journalist are added to the influence of editorial agenda. These categories are as follows:

- *Euro-neutral news*: comprises news produced by Brussels based journalists working for Europhile titles in the quality sector. It acknowledges that news produced by these journalists tends to be the most favourable to the EU and is overwhelmingly objective in nature. The term Euro-neutral is more accurate than Europhile due to the lack of positive portrayals of the EU.
- *Euro-critical news*: includes reports produced by Brussels based journalists working for the Eurosceptic qualities, and by UK based journalists working for the Europhile qualities. Unlike the Euro-neutral category above, this category has a key negative influence news production (either a Eurosceptic agenda or UK based location). As a result, although the majority of news is still objective in nature, around a quarter of reports contain explicitly negative portrayals of the EU. It recognises that copy produced by Brussels based reporters for *The Times* and *Daily Telegraph*, although influenced in subtle ways by a Eurosceptic agenda, is substantially different in character from their UK based journalists (see category below) – containing less than half the negative coverage of that of their homeland colleagues.
- *Euro-hostile news*: comprises reports produced by UK based journalists working for the quality Eurosceptic titles, and by UK based journalists working for a Europhile tabloid. Between a third and half of news texts produced by journalists in this category contain negative EU news. It is striking that the *Daily Mirror* appears in this category which, despite its Europhile agenda, is encouraged towards negative reporting by its tabloid nature and exclusive reliance on UK based journalists.
- *Euro-phobic news*: comprises news produced by UK based journalists working for the Eurosceptic tabloid press. Copy produced by journalists in this category is the most hostile towards the EU, containing a majority of negative coverage. The terminology here reflects the often zealous and emotional nature of reporting, which frequently

involves an explicitly coherent and polemic mix of news, comment and imagery designed to undermine and attack the EU. It also reflects interview findings in which many journalists identified news coverage of this kind as being a breed apart from the rest.

Figure 2: *A new classification of EU news reporting in the UK press (red arrows are factors encouraging negative reporting trend – blue arrows are factors encouraging objective reporting trend).*



Having set out a new classification of EU news, let us now turn to consider what lessons can be drawn from this. The introduction to this article set out some reasons why a new classification of EU news is important. These reasons included lessons for the EU's communication strategy, lessons for others seeking to challenge and change news

coverage, and lessons for journalists themselves. In light of the above findings, the following can be said:

- If the EU wishes to direct its attention to the most hostile and therefore potentially damaging news, then it needs to address news produced by national based journalists. In fact, previous studies have found the opposite to be the case, with the Commission in particular focusing its resources and attention on the Brussels press corps (Anderson and Price 2008; Baisnee 2007; Meyer 1999). Findings here suggest this is a mistake and that much more should be done to communicate with journalists based in the news rooms of the member states.
- Politicians and opinion formers who tar the so called Eurosceptic press with one brush are wide of the mark. The tabloid titles of this sector produce high levels of hostile reporting, but the majority of EU news produced by the quality Eurosceptic press (*Times*, *Telegraph*) is objective in nature – and this rises to a vast majority of reports in the case of their Brussels based journalists. Criticisms of this kind are therefore unfair. Similarly, those wishing to see a more balanced reporting of the EU would be wrong to ignore the Europhile press. Sections of this coverage – in particular tabloid reporting and news produced by UK based journalists – contain a significant minority of hostile reporting.
- Finally, journalists themselves may wish to reflect on the complex and varied nature of EU news production. There is clearly a tension that exists between Brussels based and UK based journalists within news organisations. Evidence here suggests that Brussels correspondents help newspapers present more balanced coverage of the EU, without losing a critical edge to their reporting. Those who believe journalism is about more than pandering to the existing prejudices of readers may reflect that having a permanent and long term representation in Brussels is a positive move – even for those critical of the EU. Surely closely informed and balanced criticism is better than a distant barrage of abuse.

This article has suggested a new classification of EU news production in the UK press and offered insights into factors affecting the nature of reporting. While it has focused on one member state, its conclusions have wider significance for understandings of EU news coverage and the relationships between politicians, citizens and the press. For those who wish to engage with EU news, an understanding of its complexities and influences is crucial if that engagement is to be a meaningful one.

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The Creation of FRONTEX and the Politics of Institutionalisation in the EU External Borders Policy

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Abstract

In a context of high politicization, if not securitization, of asylum and migration in Europe, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU – also known under its acronym FRONTEX – was created in 2004. Its activities have drawn a significant amount of attention and have been heavily criticised by human rights and pro-migrant groups. In contrast with most of the literature on FRONTEX, which focuses on its activities, this article examines the institutional issues associated with the creation and the work of FRONTEX, that is, the reasons for which Member States chose to create an *agency*, rather than establish another form of cooperation, and the specific mechanisms that they have put in place to exercise control over the activities of the Agency. The article, which is theoretically informed by the literature on European agencies, unveils a complex institutionalisation process, characterised by the existence of various models for increased cooperation and political struggles amongst the actors involved in the policy-making process.

Keywords

FRONTEX, European agency, EU asylum and migration policy, borders, irregular migration

ASYLUM AND MIGRATION ISSUES HAVE BEEN THE OBJECT OF CONTROVERSIAL DEBATES across Europe in the last few years. They have also been regularly at the top of the policy agenda of the European Union (EU) since it acquired its first competences on these issues with the Maastricht Treaty in 1993. Many scholars analysing the development of the EU asylum and migration policy have argued that it has generally been restrictive, mainly aiming to keep people outside of the EU territory (Joly 1996; Uçarer 2001; Brouwer and Catz 2003; Guild 2004; Levy 2005; Baldaccini and Guild 2007; Chebel d'Appollonia and Reich 2008). Some have even argued that the development of an EU policy on asylum and migration has been mainly driven by Member States' willingness to escape domestic constraints to the adoption of strict immigration rules, such as the control of national courts (Guiraudon 2000, 2003; Lavenex 2006). The development of the EU asylum and migration policy has also been analysed through the prism of the 'securitization' framework developed by Buzan and Wæver (Buzan *et al.* 1998). Drawing upon this theoretical framework, some scholars have claimed that asylum and migration have become 'securitized' (i.e. socially constructed as security issues) in the EU (Huysmans 2000, 2006; Bigo 1998a, 1998b, 2001, 2002; Guild 2003a, 2003b, 2003c; but see Kaunert 2009).

It is in this specific context of high politicization, if not securitization, of asylum and migration that the European Agency for the Management of Operational Cooperation at

Leonard, S. (2009). 'The Creation of FRONTEX and the Politics of Institutionalisation in the EU External Borders Policy', *Journal of Contemporary European Research*. Volume 5, Issue 3. pp. 371-388. Available at: http://www.jcer.net/ojs/index.php/jcer/article/view/239/164

the External Borders of the Member States of the EU – also known under its acronym FRONTEX[1] – was created by Council Regulation EC 2007/2004 of 26 October 2004.[2] Article 2 of this Regulation laid down the main tasks of the Agency, which are as follows: (1) coordinating operational cooperation between Member States regarding the management of external borders; (2) assisting Member States in the training of national border guards, including establishing common training standards; (3) conducting risk analyses; (4) following up on developments in research relevant for the control and surveillance of external borders; (5) assisting Member States when increased technical and operational assistance at external borders is required; and (6) assisting Member States in organising joint return operations.[3]

What is particularly remarkable about FRONTEX is the considerable amount of attention that it has attracted since its operational start in 2005, especially from the media and pro-human rights groups. Its activities have generated a significant amount of controversy and have been heavily criticised especially by human rights activists and pro-migrant groups. Some of these groups have even organised protests, notably in front of the seat of the Agency in Warsaw. It is therefore intriguing that there has been only a limited amount of scholarly work on this Agency to date. Most of these papers and articles have focused on the activities of FRONTEX. Focusing on the issue of border management in the EU, Jorry (2007) has examined the extent to which FRONTEX is likely to contribute to the implementation of the concept of 'Integrated Border Management' and can be seen as a major step towards the development of an EU common policy on external borders. Carrera (2007) has also analysed the role played by FRONTEX in the implementation of the EU Border Management Strategy, with a specific focus on the joint operations coordinated by the Agency in the Canary Islands. Pollak and Slominski (2009) have analysed the activities of FRONTEX through the lens of an experimentalist governance approach in order to question the extent to which FRONTEX has acquired organisational autonomy and has been accountable. In addition, Neal (2009) has examined the origins of FRONTEX from a security studies angle, focusing in particular on whether the establishment of FRONTEX resulted from attempts to securitize asylum and migration in the EU. In contrast, there has not been any detailed analysis of the institutional issues associated with the creation and the work of FRONTEX, that is, the reasons for which Member States chose to create an *agency*, rather than establish another form of cooperation, and the specific mechanisms that they have put in place to exercise control over the activities of the Agency.

This article precisely seeks to address this gap in the existing literature on the EU asylum and migration policy. It argues that it is always important to examine these institutional questions, because understanding the "politics of institutionalisation" is necessary to fully understand how an institution subsequently functions (Pierre and Peters 2009: 338). This is particularly relevant in the case of FRONTEX, given the potentially significant impact that FRONTEX and its activities may have on the development of the EU asylum and migration policy - which is itself one of the most dynamic and contentious policy areas in the EU. In order to develop a balanced and sophisticated understanding of the role of FRONTEX, it is necessary to understand the reasons for its creation and its specific mandate, as well as its institutional framework. This article aims to fulfil these goals by drawing upon the rich

[1] From '*frontières extérieures*', i.e. 'external borders' in French.
[2] It was later amended by Regulation EC 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams.
[3] In addition, Regulation EC 863/2007 established a mechanism for the creation of Rapid Border Intervention Teams (RABITs). Those are multinational teams of border guards that can be deployed at short notice to support the technical and operational capacities of a state facing a crisis at its borders. At the time of writing, no Member State had requested the deployment of a RABIT yet. However, RABIT training exercises take place regularly.

literature on European agencies. It is structured into two main sections. First of all, it examines the policy debates leading to the establishment of FRONTEX and the choice of an "agency" institutional set-up in the light of the literature on the creation of European agencies. In the next section, which also builds on the existing scholarship on agencies in the EU, the article analyses the various control mechanisms over FRONTEX that have been established, before drawing some conclusions.

The establishment of FRONTEX: why create an agency to increase cooperation in the management of the EU external borders?

In the area of external border management, the main aim of the EU is to develop an integrated management of the borders, with a view to ensuring a high and uniform level of control of persons and surveillance at the external borders. More precisely, within Title IV of the Treaty establishing the European Community, Article 62(2)(a) foresees the adoption by the Council of measures establishing "standards and procedures to be followed by Member States in carrying out checks on persons at such borders", whereas Article 66 concerns the adoption of measures by the Council to ensure cooperation amongst Member States, as well as between Member States and the Commission, in the policy areas covered by Title IV. "Integrated Border Management" (IBM) covers all the activities of the public authorities of the Member States relating to border control and surveillance, including border checks, the analysis of risks at the borders, and the planning of the personnel and facilities required.[4]

Amongst various models for developing such cooperation on external border management, Member States chose to establish a European agency. According to Majone (2006: 191), "agency" is "an omnibus label to describe a variety of organisations which perform functions of a governmental nature, and which generally exist outside of the normal departmental framework of government". They are specialised bodies staffed with experts that generally deal with matters of a scientific or technical nature (Mair 2005). Within the EU, an increasing number of agencies have been created over the last few decades, in three agency-creation waves in the 1970s, 1990s and 2000s respectively (Majone 2006: 191). Interestingly, the EU does not have a formal definition of agencies. A first basic distinction can be made between Community agencies on the one hand and second and third pillar agencies, which operate under the authority of the Council, on the other hand (Groenleer 2006: 161). According to the website of the EU, a "Community agency is a body governed by European public law; it is distinct from the Community institutions (Council, Parliament, Commission, etc.) and has its own legal personality" (European Union n.d.). In addition, within the category of Community agencies, one can distinguish between regulatory agencies and executive agencies. The former perform a variety of roles, set out in their own legal basis, whereas the latter execute more narrowly

[4] This concept has influenced the development of the Area of Freedom, Security and Justice since the adoption of the Tampere programme in 1999 and was precisely defined by the Council in 2006. The Council Conclusions on Integrated Border Management outlined the five main dimensions of IBM: (1) border control, which includes border checks, border surveillance and relevant risk analysis and crime intelligence; (2) the detection and investigation of cross-border crime; (3) the "four-tier access control model" (which includes activities in third countries, cooperation with neighbouring third countries, controls at the external border sites, and inland border control activities inside the Schengen area); (4) inter-agency cooperation for border management and international cooperation; and (5) coordination and coherence of the activities of the Member States and institutions, as well as other bodies of the Community and the Union.

defined tasks supporting the management of Community programmes (Commission of the European Communities 2008). Following this typology, FRONTEX can be identified as a Community agency of the "regulatory" type.[5]

Rationales for setting up agencies

The setting up of agencies is often understood with reference to the classic "principal-agent model", which was initially developed in the United States to account for the delegation of executive functions to federal agencies (Magnette 2005: 5). In such a framework, the "principals" are understood as "those institutions (…) that use their authority to establish non-majoritarian institutions through a public act of delegation", whereas "agents" "are those who govern by exercising delegated powers" (Curtin 2005: 92).

The rationales for delegation – or, in other words, the creation of agencies – have received much attention in the academic literature. In general, scholars have identified six main reasons for which delegating some functions to a given agency may be seen as advantageous by policy-makers. Firstly, agencies are seen as being able to provide policy expertise to policy-makers, as they are staffed with professionals characterised by a high level of expertise (Everson 1995). Secondly, it is considered that agencies contribute to enhancing the efficiency of decision-making, as they deal with technical and scientific matters, thereby allowing principals to focus on less technical tasks (Everson 1995; Groenleer 2006; Magnette 2005: 9). Thirdly, agencies, which are insulated from political pressures, are seen as being more capable of pursuing long-term policy objectives than governments, which generally feel the need to be more responsive to political pressures and public opinion (Majone 2006: 193). This claim is based on the following assumptions. Firstly, policy continuity is necessary to ensure policy credibility. Secondly, policy continuity is best ensured by the delegation of powers to agencies, as those are best able to preserve policy continuity despite possible changes in parliamentary majorities. Fourthly, agencies are often presented as giving more visibility to EU policies (Dehousse 2008), especially compared to other institutional arrangements such as the comitology system, thereby increasing their legitimacy and that of the EU in general. In that respect, delegation to agencies often has a strong element of symbolism (Wilks 2002: 148). Fifthly, it is considered that agencies can foster cooperation amongst Member States through information sharing and coordination activities (Magnette 2005: 9). Finally, agencies are generally seen as being able to ensure a greater involvement of stakeholders, for example from the industry or consumer groups, in the EU policy-making process. This involvement can take the form of representation in the Management Board of agencies.[6]

However, several scholars have emphasised that these rationales, although they evidently play an important role in political debates, are not able to fully account for the creation of agencies. The delegation process in the EU is not as neat and simple as suggested by the classic "principal-agent" model. First of all, as argued by Dehousse (2008), it is important to recognise that, in the EU, there are multiple principals – rather than one single clearly defined principal – and that each of them has its own interests. As a result, the analysis of the process of agency creation needs to take into account the political struggles amongst

[5] This is the typology recently proposed by the European Commission in its Communication "European Agencies – The Way Forward" of March 2008. Other typologies have been suggested, but discussing those is beyond the scope of this article.

[6] For example, the European Agency for Health and Safety at Work (EU-OSHA) brings together representatives of the European Commission, the Member States, employers and employees.

policy-makers in order to fully account for the delegation of functions in the EU. Evidence for this claim is provided by the case of the six new European agencies created between 1990 and 1994 (Kelemen 2002; Groenleer 2006). On the one hand, the completion of the single market project had increased the workload of the Commission to the point of overstretch. This required additional financial and staff resources. On the other hand, an increase in the size of the Commission was not an option favoured by all Member States in the Council. The compromise between these two positions was the creation of agencies to which tasks could be delegated. The Commission itself played an important role in this delegation process, as it proposed the establishment of these agencies and had a significant influence on their functions, powers and structure (Dehousse, 2008: 793). The creation of the agencies allowed the regulatory capacity of the EU to increase in a manner more acceptable to the Council than a direct expansion of the Commission would have been. Such a solution did not play into the hands of the Eurosceptics bemoaning the ever-increasing 'Eurocracy' in Brussels (Kelemen 2002: 100). Moreover, this institutional design was approved by Member States since it ensured their representation in the Management Board of each of these agencies (Groenleer 2006: 164).

Although it is important to recognise the *sui generis* character of each case of agency creation in the EU, it is also possible to make some general observations concerning the role of each institution of the so-called 'institutional triangle' (European Commission, Council of the EU and European Parliament) in the delegation process based on past examples. First of all, Member States in the Council can block the creation of European agencies, as has been the case with the plans for a European telecom agency (Kelemen 2002: 110). Unsurprisingly, it appears that they do not favour the delegation of tasks to European agencies that would question the very existence of national bureaucracies in a given policy area. In cases where they are willing to delegate some tasks, then they are likely to privilege the setting up of a relatively weak agency, which they can control through its Management Board and which is limited to the coordination of the activities of national bureaucracies in a specific policy area (Magnette 2005). As far as the Commission is concerned, it is likely to resist the delegation of tasks to an agency in policy areas where it has acquired large competences. Given its key-role as agenda-setter and legislation initiator, the Commission occupies a strong position in the agency-creation process. This has been evidenced by its refusal to submit a proposal for an independent European Cartel Office, which would diminish its powers in the competition policy field (Kelemen 2002: 111). Finally, the European Parliament, which is generally involved in the creation of first pillar agencies through the co-decision procedure[7], tends to emphasise issues such as transparency and accountability in the institutional design of agencies. Having examined the various rationales for setting up agencies, as well as the general positions of the institutions of the EU institutional triangle regarding the establishment of agencies, it is now possible to analyse the process leading to the creation of FRONTEX.

The creation of FRONTEX

The establishment of FRONTEX came as a response to the perceived need for an increase in cooperation amongst EU Member States with regard to external border controls. This was prompted by three main factors. First of all, as explained in the introduction to this article, migration has generally become an increasingly contentious issue in Europe since the 1990s, which has led European states to examine ways of reinforcing border controls to restrict the access of migrants and asylum-seekers to their territory (Collinson 1993; Joly 1996; Chebel d'Appollonia and Reich, 2008). Secondly, as the date of the enlargement of

[7] It is important to note that, in the case of the Agency that this article focuses on, i.e. FRONTEX, the European Parliament was not involved in the creation of the Agency through the co-decision procedure, but only through the consultation procedure.

the EU to ten new Member States in 2004 drew closer, there were specific concerns that these new Member States would not be able to effectively control the new external borders of the EU. There were increasing calls for strengthening cooperation amongst EU Member States on border controls as a way to alleviate the lack of border control capabilities of the future EU Member States and their difficulties to meet the Schengen/EU border control standards (Monar 2006: 75). In addition, the terrorist attacks on 11 September 2001 led to the identification of a wide range of measures aiming to reinforce "homeland" security, including the tightening up of external border controls (Monar 2005: 147; Mitsilegas 2007: 362). This was particularly visible in the Hague Programme adopted in 2004:

> The management of migration flows (…) should be strengthened by establishing a continuum of security measures that effectively links visa application procedures and entry and exit procedures at external border crossings. Such measures are also of importance for the prevention and control of crime, in particular terrorism.

These three factors explain the identification of the need for increased cooperation on external border controls amongst EU Member States. However, such cooperation could have taken other institutional forms than that of an agency. How and why, then, was it decided to create an agency? Answering this question requires the examination of the political debates and the policy process that led to the creation of FRONTEX.

An ambitious vision: the concept of a "European Corps of Border Guards"

Initially, cooperation on external border controls amongst EU Member States developed outside the EU framework, within the Schengen Group following the signing of the Schengen Agreement of 14 June 1985 (Monar 2006: 74-75). The Schengen *acquis* was integrated into the European Union legal framework by the Treaty of Amsterdam, which entered into force in 1999 (Peers 2006: 169; Kaunert 2005, 2007). Article 62(2)(a), within Title IV of the Treaty on European Community that governs visas, asylum, immigration and other policies related to free movement of persons, gave the Community the power to adopt measures concerning the "standards and procedures to be followed by Member States in carrying out checks on persons" at the external borders. What is important to emphasise with regard to that article is that, like others in Title IV, it was characterised by peculiar rules of decision-making. Indeed, the communautarisation of asylum and migration matters had only been partial, as a transition period of five years was in place until May 1, 2004. During that time, the Commission and the Member States were sharing the right of initiative. In addition, decisions had to be taken unanimously in the Council, whereas the European Parliament was only consulted on legislative proposals, rather than being fully involved in the policy-making process through the co-decision procedure (Kaunert 2005; Peers 2006).

Early 2001, Germany and Italy presented a joint initiative aiming to establish a "European Border Police" to the Council. This was followed by the launch of a feasibility study regarding the creation of a European Border Guard, organised by a group led by Italy and comprising, in addition to this country, Belgium, France, Germany and Spain. These countries were in favour of setting up such a body in order to share the burden of external border controls and increase the efficiency of such controls, notably through the development of technical expertise on the matter. This initiative received financial support from the European Commission based on the Odysseus programme (Monar 2005: 147). However, it is important to note that some Member States were not as enthusiastic about this idea. In particular, the British government favoured increased cooperation on external border controls, but was reluctant to see any centralisation in that policy area. This lack of complete agreement amongst EU Member States was reflected in the carefully worded

Conclusions of the Laeken European Council on 14-15 December 2001. The EU Heads of State or Government agreed on pursuing four objectives: (1) strengthening and standardising European border controls, (2) assisting candidate States in organising controls at Europe's future external borders, through the development of operational cooperation, (3) facilitating crisis management with regard to border control, and (4) preventing illegal immigration and other forms of cross-border crime. Nevertheless, their lack of agreement on the precise institutional form that their reinforced cooperation should take was evident in the vagueness of the call for the Council and the European Commission to elaborate "arrangements for cooperation between services responsible for external border control and to examine the conditions in which a mechanism or common services to control external borders could be created" (Presidency of the Council of the European Union 2001: 12). Thus, terms such as "European Border Guard" or "European Border Police" were not mentioned in the mandate, although they were used by the media and some governments.

The results of the Italy-led feasibility study were unveiled in May 2002. Those have often been criticised for their lack of precision and clarity, as the study failed to adopt a clear position regarding the establishment of a European Border Police. Actually, this certain degree of confusion only reflected the lack of consensus amongst the Member States involved in the study. The main idea put forward by this feasibility study was that the border guard authorities of the EU Member States should cooperate through a "polycentric" network, which would be based on a common training curriculum, common risk assessment and various *ad hoc* centres specialising in different issues relating to border controls (Monar 2006: 77). Following its Laeken mandate, the European Commission also tabled a Communication in May 2002 entitled "Towards Integrated Management of the External Borders of the Member States of the European Union". Based on an analysis of the challenges and the current situation with regard to the management of external borders, the Commission made several proposals to move towards a "European Corps of Border Guards". Those focused on "five mutually interdependent components: (1) a common corpus of legislation, (2) a common coordination and operational cooperation mechanism, (3) common integrated risk analysis, (4) staff trained in the European dimension and inter-operational equipment and (5) burden-sharing between Member States in the run-up to a European Corps of Border Guards" (Commission of the European Communities 2002: 12).

A first attempt at institutionalisation: the establishment of the External Borders Practitioners Common Unit

Acknowledging that a European Corps of Border Guards could not be established in the short-term, the Commission suggested that the "common coordination and operational cooperation mechanism" could involve at first the establishment of an External Borders Practitioners Common Unit, as well as the gradual development of a "permanent process of exchange and processing of data and information" between the authorities of the Member States. The Commission argued that this common unit "should most probably develop from the SCIFA (Strategic Committee for Immigration, Frontiers and Asylum) working group meeting in its formation of those responsible for the Member States services ensuring controls at the external borders" (Commission of the European Communities 2002: 14). According to the European Commission, this common unit "should play a full multidisciplinary and horizontal role" to gather managers and practitioners carrying out the full range of tasks concerning external borders security, that is, "the police, judicial and customs authorities and EUROPOL" (Commission of the European Communities 2002: 14). It would play four main roles:

1. acting as a 'head' of the common policy on management of external borders to carry out common integrated risk analysis;
2. acting as 'leader' coordinating and controlling operational projects on the ground, in particular in crisis situations;
3. acting as manager and strategist to ensure greater convergence between the national policies in the field of personnel and equipment;
4. exercising a form of power of inspection, in particular in the event of crisis or if risk analysis demands it (Commission of the European Communities 2002: 14).

In addition, the Commission expressed the view that, in the long term, the national services of the Member States should be supported by a European Corps of Border Guards. The proposal of the Commission was generally well-received as it contained at least some points with which each Member State could agree, although some still contested that increased cooperation efforts could ultimately lead to the establishment of a European Corps of Border Guards. This proposal was followed in June 2002 by a Council "Action Plan for the Management of the External Borders of the Member States of the European Union" (Council of the European Union 2002a). This document emphasised the issue of operational cooperation and coordination and endorsed the establishment of a common unit in the framework of the SCIFA. The idea of establishing a "European Corps of Border Guards" was also mentioned, but more cautiously than it had been in the Commission proposal. The Action Plan concluded that "[based] on the experiences of this gradual development, further institutional steps could be considered, if appropriate (…) Such steps could include a possible decision on the setting up of a European Corps of Border Guards, composed of joint teams, which would have the function of supporting the national services of the Member States, but not replacing them" (Council of the European Union 2002a: 27). This was in line with the generally more pragmatic approach of the Council. A few days later, this Action Plan was endorsed by the Seville European Council, which took place in an atmosphere of intense politicization of asylum and migration matters (Ludlow 2002). The Heads of State or Government "applauded" the approval of the Action Plan and "urged the introduction without delay" of the External Borders Practitioners Common Unit within the framework of the Council (Council of the European Union 2002b: 9).

The Common Unit was subsequently created under SCIFA+ (i.e. SCIFA and the heads of national border guards) and took the lead in coordinating various operations and pilot projects relating to border controls from 2002 onwards (Mitsilegas 2007: 365). Those aimed to improve operational standards and coordination. Amongst them, one can mention the "International Airports Plan" led by Italy, and joints operations at the maritime borders such as "Operation Ulysses" under Spanish leadership and "Operation Triton" led by Greece. *Ad hoc* centres were also created, including the Centre for Land Borders (Germany), the Risk Analysis Centre (Finland) and the Centre of Excellence at Dover for developing new surveillance and border control technologies (United Kingdom) (Council of the European Union 2003a).

The limits of pragmatism: challenges to the External Borders Practitioners Common Unit

Soon after their establishment, the effectiveness of the SCIFA+ arrangements began to be challenged, by both the European Commission and some EU Member States. The European Commission argued that experience had shown the structural limits of the SCIFA+ institutional arrangements. In its Communication on the Development of a Common Policy on Illegal Immigration, Smuggling and Trafficking of Human Beings, External Borders and the Return of Illegal Residents tabled on 3 June 2003, the Commission called for the establishment of a body which could pursue border management activities on a more systematic and permanent basis (Commission of the

European Communities, 2003a). It suggested leaving strategic coordination issues with the Common Unit, whilst entrusting operational tasks to a new permanent Community structure, which would be in charge of the daily management and coordination tasks in the area of external border controls. On the same day, the Presidency of the Council released a "Report on the Implementation of Programmes, Ad Hoc Centres, Pilot Projects and Joint Operations", which also highlighted several problems stemming from the institutional arrangements under SCIFA+. The report argued that the various activities approved by SCIFA+ had been hampered by serious deficiencies concerning planning, preparation, evaluation, operational coordination, the treatment of difficulties arising during the implementation of projects, and the commitment of the participating countries (Council of the European Union 2003a). In addition, the Presidency report emphasised the lack of a suitable legal basis for conducting common operations and establishing *ad hoc* centres of cooperation (Council of the European Union 2003a: 8; 33). These various activities were indeed, from a legal point of view, the products of intergovernmental cooperation. The Treaty on European Community had not given the Council "the competence to engage in such coordinating activities, but merely (…) the power to adopt legislation for that purpose" (Rijpma 2009: 9).

In response to the Commission Communication and the Presidency report, the Council adopted its "Conclusions on Effective Management of the External Borders of the EU Member States" on 5 June 2003 (Council of the European Union 2003c). They notably called for the Practitioners Common Unit (PCU) to develop operational cooperation distinctly from SCIFA+, after being reinforced as a Council Working Party by experts seconded from the Member States. These Council Conclusions were in turn endorsed by the Thessaloniki European Council on 19-20 June 2003, which asked the Commission "to examine in due course (…) the necessity of creating new institutional mechanisms, including the possible creation of a Community operational structure" in order to enhance operational cooperation in the management of EU external borders (Council of the European Union 2003d: 4).

A new attempt at institutionalisation: towards the establishment of an agency

The European Commission, which had showed its preference for such a Community structure in the previous years, rapidly seized this opportunity. It responded to this request by tabling a proposal for a Council Regulation establishing a European Agency for the Management of Operational Cooperation at the External Borders in November 2003 (Commission of the European Communities 2003b). The main objective of this Agency, according to the proposal of the European Commission, was to better coordinate operational cooperation amongst Member States in order to increase the effectiveness of the implementation of Community policy on the management of the external borders. The Commission justified the choice of establishing an Agency by highlighting "the clear need for creating an independent, specialised Community operational structure" (Commission of the European Communities 2003b: 7). It further argued that:

> …the Agency will be in a better position than even the Commission itself to accumulate the highly technical know-how on control and surveillance of the external borders that will be necessary (…). Moreover, the establishment of an Agency is expected to lead to increased visibility for the management of external borders in the public and cost-savings with regard to the operational cooperation (…). (Commission of the European Communities 2003b: 7)

The Commission argued that the Agency should have the following functions: (1) coordinating the operational cooperation between Member States on control and surveillance of the external borders, (2) assisting Member States in training national

border guards, (3) conducting risk assessments, (4) following up on the development of research concerning external borders control and surveillance, (5) assisting Member States in circumstances requiring increased assistance at the external borders, and (6) coordinating operational cooperation between Member States on the removal of illegal third country residents (Commission of the European Communities 2003b: 19).

The Council rapidly reached a political agreement on the draft Regulation, despite the requirement for unanimity. It agreed with the tasks allocated to FRONTEX by the Commission. However, and this was the main point of contention between the Commission and the Council, it disagreed with the composition of the Management Board of the Agency (Council of the European Union 2003b), which led to an amendment of this provision in the final text of the Regulation, as will be later explained. Involved in the decision-making process only through the consultation procedure, the European Parliament proposed several amendments aiming to strengthen its "communautarian" character (see below), but those were ignored by the Council.

Two looming deadlines arguably facilitated and accelerated the attainment of an agreement amongst Member States. First of all, the "big bang" enlargement of the EU was due to take place on May 1, 2004. This event had generated fears of uncontrolled migration flows from the East, notably in the media (Lavenex 1999). There was therefore some public pressure on EU Member States to demonstrate that they were taking measures to strengthen controls at the external borders of the EU and to support the future Member States in developing their border control regimes. Another factor that facilitated the swift conclusion of negotiations in the Council was of an institutional nature, as it concerned the move to co-decision on external borders matters. As explained earlier, with regard to measures concerning the crossing of external borders (amongst others), Article 67 of the Treaty on European Community provided for a transitional period of five years, during which exceptional decision-making rules applied. Whilst the European Commission shared the right of initiative with the Member States, the European Parliament was only consulted on the legislative proposals. In addition, the Council had to take decisions according to the unanimity rule. On the basis of Article 68(2) of the Treaty on European Community, the Council decided that measures concerning the crossing of the external borders of the Member States should be adopted according to the co-decision procedure as of 1 January 2005. This meant that the Commission proposal had to be swiftly adopted if the Council wanted to avoid the active involvement of the European Parliament in the adoption of the Regulation, which would have been allowed by the application of the co-decision procedure. At the time of the discussions of the draft Regulation, the European Parliament was only associated with the decision-making procedure through the consultation procedure, which meant that its opinion could be largely ignored.

Thus, it is evident that the establishment of an agency in order to increase operational cooperation on external border management was only one option amongst several. Various models for increased cooperation were considered and explored by the European Commission and the Member States. Following initial discussions that largely focused on the ambitious and rather vague – and also unacceptable for some – idea of a "European Border Police" (or "European Border Guard"), a pragmatic and more modest solution was adopted, in the form of the External Borders Practitioners Common Unit. However, such an institutional arrangement rapidly gave rise to criticisms. This led to a proposal by the European Commission for the establishment of a European Agency, citing some of the classic justifications for agency creation. In particular, it emphasised the policy expertise and technical know-how that the Agency would be able to develop. It also argued that the establishment of FRONTEX would increase the visibility of EU action in the field of border controls, which was significant given the importance of migration issues on the political

agenda of many European governments. These arguments convinced the Member States that an agency should be created to deal with operational cooperation in external border controls. In the Conclusions on the main elements of the Commission proposal on the establishment of FRONTEX, the Council noted that "the creation of an Agency is the most appropriate way to organise and develop the indispensable coordination of operational cooperation at the external borders" (Council of the European Union 2003b: 3).

Although FRONTEX does not embody the same high degree of cooperation on external border controls than a European Corps of Border Guards, it is nevertheless remarkable to observe such a significant development of operational cooperation in that policy area over a short period of time. As some states were initially reluctant to go beyond purely intergovernmental cooperation on external border controls, it was initially attempted to enhance cooperation through the work of SCIFA+. However, it was rapidly claimed by several actors, including the European Commission and the Greek Presidency, that this institutional model hampered successful cooperation amongst EU Member States and that it was necessary to adopt a more centralised model of governance through the creation of a Community structure. The European Commission then proposed the establishment of an agency to fulfil these tasks.

Thus, as observed by Dehousse, one should not under-estimate the role played by the European Commission in the establishment of a first pillar agency such as FRONTEX (Dehousse 2008: 793). In line with the literature on European agencies, it appears that the Commission was not reluctant to propose the establishment of an Agency which would be given tasks that were until then generally fulfilled by Member States, rather than by the Commission itself. Also in line with the literature, the analysis has demonstrated that Member States were able to agree relatively swiftly on the creation of an agency that they would be able to control through its Management Board and other mechanisms (see below) and which would be limited to the coordination of operational cooperation at the external borders. In that respect, documents on FRONTEX emphasise that "the responsibility for the control and surveillance of external borders lies with the Member States" (Article 1) and the role of the Agency is strictly limited to the coordination of Member States' actions. Finally, it is important to note that Member States' positions were particularly unchallenged in the negotiations regarding FRONTEX, as the European Parliament was only consulted on the draft Council Regulation. The lack of involvement of the European Parliament also meant that issues such as transparency and accountability received relatively less attention in the debates leading to the adoption of the Council Regulation.

The controls over FRONTEX

Having examined why EU Member States decided to establish an Agency to increase cooperation in external border management and which tasks they decided to give this Agency, it is now necessary to examine another important issue in any case of agency creation, i.e. the controls exercised over the agency activities. Indeed, as argued by Tallberg, "[every] decision to delegate essentially involves two choices – what powers to delegate and what institutional control mechanisms to craft" (Tallberg 2002: 28).

Such control tools (Everson *et al.* 1999: 13) are seen as necessary by principals, because it is generally considered that agents are likely to develop their own interests over time and may attempt to pursue their own policy (Magnette 2005: 11). This phenomenon is commonly referred to as "drift". According to Kelemen (2002), one can distinguish between "bureaucratic drifts" and "political drifts". The former refer to cases where an agency develops a political agenda differing from that of its political principals, whereas the latter concern cases where "future holders of public authority direct a bureaucratic

agency to pursue objectives different from those of the political coalition that originally delegated authority to the agency" (Kelemen 2002: 96). In that respect, Dehousse (2008: 796) argues that principals mainly fear a specific variant of political drift, that "in which agencies are somewhat 'captured' by one of their institutional rivals in the leadership contest". As a consequence, principals aim to design control mechanisms that will minimise the risk of bureaucratic and political drifts in the future.

This article is based on a broad definition of "control", understood as encompassing *ex ante*, *simultaneous* and *ex post* control mechanisms (also referred to as "accountability" mechanisms) (Busuioc 2009). *Ex ante* control mechanisms refer to decisions made during the negotiations leading to the creation of an agency, with regard to the boundaries of its competencies and activities. For example, if an agency has only limited powers, such as gathering or exchanging information, or has a tightly specified mandate, then it will, by definition, be significantly controlled in its activities. These issues have already been discussed in the previous section analysing the debates on the creation of FRONTEX. The remainder of this section will therefore focus on the various *simultaneous* and *ex post* control mechanisms considered during the negotiations leading to the establishment of FRONTEX, such as work programmes and reports of activities, budgetary control, hearings, the role of the Management Board, reviews of activities and access to documents.

Controls over FRONTEX activities

Management Board

One of the main mechanisms of control on the activities of an agency is the establishment of a Management Board. FRONTEX has such a Management Board, to which the Executive Director is accountable. The Management Board of FRONTEX is composed of one representative of each Member State and two representatives of the European Commission, who are "appointed on the basis of their degree of high level relevant experience and expertise in the field of operational cooperation on border management" (Council Regulation EC 2007/2004, Article 21). Each member of the Management Board has one vote, whereas the Executive Director has no vote, but can take part in the deliberations of the Board. Originally, the Commission had proposed that the Management Board be composed of twelve members and two representatives of the Commission. However, the Council considered that each Member State should have a representative in the Management Board of the Agency (Council of the European Union 2003: 5). In addition, during the consultation procedure, the European Parliament had proposed several amendments concerning the composition of the Management Board, but those were not taken into account by the Council. First of all, with regard to the composition of the Board, the European Parliament was of the opinion that the Council and the Commission should each appoint six members of the Board, bringing the total number of members to twelve. This was an attempt to reinforce the role of the Commission in the Management Board, thereby strengthening the Community character of the Agency, but it was not accepted by the Council (European Parliament, 2004: 18). The European Parliament had also suggested that the Management Board be chaired by a representative of the European Commission, but again, this amendment was rejected by the Council.

The Management Board of FRONTEX fulfils several functions (Council Regulation EC 2007/2004, Article 20). First of all, it appoints the Executive Director of the Agency on the basis of a proposal from the European Commission. In addition, the Management Board exercises disciplinary authority over the Executive Director. Moreover, it is responsible for adopting the general report of FRONTEX activities from the previous year, as well as the work programme of FRONTEX for the coming year after receiving the opinion of the

Commission. The European Parliament would have preferred some of these tasks to be entrusted to the European Commission. During the consultation procedure, it had suggested that the Commission itself should appoint the Executive Director of the Management Board and should have the power to dismiss him/her, but this amendment was not taken into account by the Council (European Parliament 2004: 20).

Thus, the Management Board has been tasked with several important functions regarding the control of the activities of the Agency. Given that it has a strong intergovernmental character, this means that control of the work of the Agency is to a large extent in the hands of the Member States, which have been considered the main stakeholders. It appears that, to date, they have generally been satisfied with the ways in which the Management Board has operated as a control mechanism of the activities of FRONTEX (House of Lords 2008). However, this has not been the opinion of pro-migrant and pro-human rights groups, which, in contrast, have expressed a certain level of dissatisfaction with the use of a Management Board as an accountability mechanism. According to the British Immigration Law Practitioners' Association (ILPA), "[a] Management Board is a weak method of scrutiny and for accountability at the best of times, but is particularly weak in the context of FRONTEX" (quoted in House of Lords 2008: 109). ILPA has also criticised the fact that the Management Board only comprises representatives of the EU Member States and the European Commission.

Work programmes and reports of activities

Another common way of controlling agencies is to require them to produce work programmes and reports of activities. In that respect, the Executive Director of FRONTEX is responsible for preparing, every year, the draft programme and the activity report, which will then be submitted to the Management Board (Council Regulation EC 2007/2004, Article 25). The Management Board is responsible for their adoption (Council Regulation EC 2007/2004, Article 20). Both reports are subsequently forwarded to the European Parliament, the Council, and the Commission, as well as to the European Economic and Social Committee and the Court of Auditors in the case of the activity report only (Council Regulation EC 2007/2004, Article 20). The European Parliament wanted this control mechanism to be reinforced by suggesting, during the consultation procedure, that the annual report on the Agency's activities should also be presented by the Executive Director to the European Parliament (European Parliament 2004: 22). However, this amendment was not included in the final text of the Regulation.

Budgetary control

One of the most powerful ways of controlling an agency is to adopt measures relative to its budget. For the European Parliament, which was sidelined during the negotiations of the Draft Regulation establishing FRONTEX and whose amendments to the legislative text were ignored, budgetary control is the main instrument at its disposal to exercise some control over FRONTEX activities. According to Article 29 of the Council Regulation establishing FRONTEX, the budget of the Agency has four different strands: (1) a Community subsidy, (2) a contribution from the countries associated with the implementation, application and development of the Schengen *acquis*, (3) fees charged for the services provided, and (4) any voluntary contribution from the Member States. When consulted on the Commission proposal, the European Parliament had suggested adding a fifth source of income, namely a contribution from the host Member State (European Parliament 2004: 23), but this amendment was rejected by the Council. In practice, the Community subsidy is by far the most important income strand for FRONTEX, which gives the European Parliament a substantial amount of leverage on the Agency. It

made use of it in October 2007, for example, when the Budget Committee of the European Parliament voted in favour of an increase of 30 million euros for the 2008 budget of FRONTEX, but at the same time voted to put in reserve up to thirty per cent of the Agency's administrative budget (EPP-ED Group 2007; House of Lords 2008).[8] In addition to the control by the budgetary authority, the Court of Auditors also gives its observations on the accounts of the Agency (Council Regulation EC 2007/2004, Article 30).

Hearings

In general, the activities of agencies can also be controlled through hearings. On the basis of Article 25 of Council Regulation EC 2007/2004, both the European Parliament and the Council "may" invite the Executive Director of FRONTEX to report on the activities of the Agency. During the consultation procedure, the European Parliament had expressed the opinion that this provision should be rephrased as to read "The European Parliament (…) or the Council *shall* invite the Executive Director of the Agency to report on the carrying out of his/her tasks". From the European Parliament's point of view, this amendment aimed to convey the idea that "Parliament should exercise political scrutiny as of right, and not simply as an option" (European Parliament 2004: 20). This amendment did not find its way into the final version of the Regulation. However, in practice, this has not prevented the European Parliament from managing to convey the importance, if not the necessity, of attending hearings to FRONTEX representatives, thanks to its budgetary powers.[9]

Reviews of activities

Another way of controlling agencies is to review their activities and make subsequent organisational changes. Article 33 of Council Regulation EC 2007/2004 stipulates that an independent external evaluation of FRONTEX will be commissioned within three years from the date at which it took up its responsibilities, and every five years thereafter. This disposition is rather vague as to the exact content of this evaluation, as it merely indicates that the evaluation should examine the effectiveness of the Agency, its impact and its working practices, and that it should include the views of "stakeholders at both the European and national level". When consulted on the Commission proposal, the European Parliament had expressed its preference for a closer control of the activities of the Agency, through the commissioning of the first independent external evaluation within two years of FRONTEX taking up its activities, and every two years thereafter. With regard to the content of the evaluation, the European Parliament had suggested that it should give particular attention to the following issues: the respect for fundamental rights, the need and feasibility of setting up a European Border Guard, and the added value of the Agency (European Parliament 2004: 24). The European Parliament had also suggested the insertion of an amendment to the effect that, like the Council, it would also receive the documents relating to the evaluation of the Agency. However, these proposals were not included in the final text of the Regulation.

Access to documents

Requiring agencies to give access to their documents is also another mechanism aiming to control their activities. Article 28 of Council Regulation EC 2007/2004 stipulates that FRONTEX is subject to Regulation EC 1049/2001, which concerns access to EU documents

[8] This decision was justified at the time on the grounds that the Agency had to improve both its accountability and its effectiveness.
[9] According to MEPs Moreno Sanchez and Deprez, "[at] the beginning [FRONTEX] did not come [to the European Parliament], but now they do (…) because they understand that they have to present their programme to the committee in the Parliament" (quoted in House of Lords 2008: 28).

that have not been publicly released. During the consultation procedure, the European Parliament had asked for Regulation EC 45/2001 to apply to the processing of personal data by the Agency (European Parliament 2004: 23), but this amendment was not taken into account by the Council.

Thus, this section has demonstrated that several control mechanisms have been put in place to avoid any unwanted "drifts" in the activities of FRONTEX. When it was consulted on the Commission proposal, the European Parliament put forward several amendments aiming to reinforce its own control powers and those of the European Commission over the Agency. However, in a context where the European Parliament was weak because of the consultation procedure, they were not accepted by the Council and were not included in the Council Regulation in the end. As a result, the various mechanisms of control over FRONTEX are firmly in the hands of the main stakeholders (i.e. the Member States), with the important exception of budgetary control, where the European Parliament can play (and has already played) a crucial role.

Conclusions

Drawing upon insights from the literature on European agencies, this article has shed light on FRONTEX by focusing on its institutional nature as an *agency*. It has analysed the process that led to the creation of FRONTEX, identifying and examining the various institutional configurations for increasing cooperation on external border management that were considered and, in some cases, even implemented on a temporary basis. It has also discussed the various justifications given by the Commission and the Council for establishing FRONTEX, whilst showing how the creation of FRONTEX can also be understood as the product of power struggles within the EU. Finally, it has examined the various control mechanisms designed to avoid possible "drifts" in the activities of the Agency.

In addition to shedding light on the origins of FRONTEX, this analysis of the "politics of institutionalisation" has also strengthened our understanding of the activities of FRONTEX since it became operational. In particular, it has demonstrated the lack of influence of the European Parliament, whose proposed amendments – aiming to increase its control over the Agency - were all rejected. This explains why the European Parliament has made a significant use of the budget control instrument to date, as it is the only significant control mechanism over FRONTEX that it has at its disposal. The isolation of the European Parliament – the traditional human rights champion in the EU - in the negotiations also contributes to explaining the relative low priority given to human rights issues in the activities of the Agency.

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Europeanization of Foreign Policy: Empirical Findings From Hungary, Romania and Slovakia

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Abstract

This article discusses the influence of the process of European integration on the foreign policy-making in the new member states from Central and Eastern Europe, using as case-studies Hungary, Romania and Slovakia. The impact of the integration process is examined from an institutionalist perspective. The paper is especially interested in the institutional change of the coordination of foreign policy-making at both national and European levels, and on the process of learning and socialization of national representatives participating and interacting with the EU system of foreign policy. The impact of European integration is contrasted with the role of domestic factors in shaping institutions and process. The limits of Europeanization of foreign policy-making are identified.

Keywords

Europeanization; European integration; foreign policy; Hungary; Slovakia; Romania

THE STUDY OF EUROPEANIZATION OF FOREIGN POLICY HAS BECOME INCREASINGLY popular during the last decade. Anticipating, and following, the Eastern Enlargement of the European Union (EU), several authors began to explore the impact of European integration on candidates and latterly on new members from Central and Eastern Europe (CEE) (for a review see Sedelmeier 2006). This article attempts to contribute to this burgeoning literature by providing evidences with regard the influence of European integration on foreign policy-making in three CEE countries, namely Hungary, Romania, and Slovakia.

The study of Europeanization of foreign policy has faced various theoretical hurdles, due to the weak formal power of the EU this field, coupled with the strong role of national governments. The Europeanization of foreign policy has been studied from different theoretical perspectives. For instance, there are studies undertaken from a public policy perspective, examining especially the process of bureaucratic reorganization or institutional adaptation. A different theoretical approach equates Europeanization with socialization of identities and interests. The basic assumption is that socialization is the result of prolonged participation in European foreign policy cooperation (see Smith 2000). These approaches examine the Europeanization of foreign policy either as the bottom up projection of national interests at European level, or as the top-down domestic impact of the EU. While the former is based on intergovernmentalist approaches, the latter is similar to the international regimes theory, which assumes that the EU foreign policy is the source of change of national foreign policy (for a review see Wong 2007).

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The scope of this paper is mainly limited to institutional adaptation and elite socialization in Hungary, Romania, and Slovakia. However, these two dimensions of Europeanization incorporate a less visible, but nonetheless present, dimension of power. Various studies of Europeanization of foreign policy overlook the power dimension embodied in this relationship. Whether defined as bottom-up or top-down, Europeanization is a relational concept. It connects two entities, one exercising a degree of influence over the other.

The main research questions addressed by this paper are: a) to what extent does Europeanization cause institutional convergence across the candidate and new member states? b) what role does domestic politics play with regard to the institutional adaptation in view of European integration? c) what is the extent of internalization of EU's norms by national officials dealing with European affairs? d) what is the role of national representatives dealing with European affairs in disseminating the EU norms within the political-administrative structures at national level? e) does the manner in which the elite from the new member states perceive the exercise and distribution of power within the EU alter the outcomes of the Europeanization process?

This article employs a top-down approach. It avoids using bottom-up perspectives since they over-extend and make the concept of Europeanization even more confusing and difficult to use. Therefore, the first section discusses the peculiar status of the Europeanization approach when applied to the study of foreign policy and makes the case for the top-down approach.

The second part examines the change of the institutional setting of foreign policy-making in view of European integration. The institutional setting refers to institutional actors and relationships among them. The actors are those involved in the coordination of European affairs and foreign policy-making (i.e. the permanent representations to the EU, foreign affairs ministries, prime-minister offices, foreign and European affairs committees of the national parliaments).

The third part explores the issue of elite socialization. Sociological institutionalism upholds the view that the very cooperation within the EU in foreign policy matters creates the context for the socialization of individual policy-makers through the transfer of EU norms and rules. However, it is assumed in this article that not all national actors perceive the EU norms and rules in the same way. It is asked whether the national experts and diplomats, representing the country in Brussels, have different views and preferences from those in the Ministry of Foreign Affairs (MFA), involved in day-to-day foreign policy-making. Do they perform the role of norm entrepreneurs in relation to political or institutional actors dealing with European affairs in the capital? This relates to the problem of the way in which foreign policy elite from the new member states perceives the exercise and distribution of power within the EU. If the perception is one of inequality, this might affect the socialization of policy makers from the new member states. The internalization of the norms of compromise and consensus seeking might be undermined if the perception of the national representatives is that the policy-making reflects an asymmetrical balance of power among the member states. The concluding section of the article summarizes the findings and discusses the limitation of the Europeanization approach with regard to the institutional adaptation and elite socialization.

A number of factors justify the selection of Hungary, Romania and Slovakia as the three case studies. First, the three countries have different integration records. Hungary was considered the frontrunner of the integration process, invited in 1998, acceding in 2004. Slovakia's invitation had been postponed in 1998, but the country was able to catch up with the Luxemburg Group and to join the EU in 2004. Romania, invited to join the EU in the second wave, alongside Slovakia, was not able or willing to become a full member

before 2007. The assumption behind the selection of cases is that the cross-national variation in the accession paths may provide useful insights for explaining differences in the organization of national systems of foreign policy. Second, all three are connected historically and geographically. The process of international socialization challenges the existing identities and interests of national officials, their conceptions of statehood, and relationships between national and supranational.

On the other hand, numerous analyses of Europeanization of foreign policy focus on single countries (see for instance Economides 2005; Miskimmon 2007; Pomorska 2007; Rieker 2006; Torreblanca 2001; Tsardanidis and Stavridis 2005; Wong 2006). Instead, a three case study approach provides a better understanding of why similar Europeanization pressures cause different responses across candidate countries. Also, the existing literature indicates that there is limited convergence of national policies of the old member states. The Eastern enlargement has further increased the diversity of actors and preferences within the EU. Thus, the study of the new member states is important insofar as it contributes to the general debate over the issue of convergence of national foreign policies and the future of the EU as a global actor speaking with a single voice.

This article uses mainly primary sources, specifically in-depth interviews conducted in Brussels, Bratislava, Bucharest, and Budapest, the study of official documents, media reports, and participant observation of Council's meetings[1]; also, secondary sources are used, such as national reports and similar studies covering other EU countries.

Europeanization: top-down or bottom-up?

In a recent review, Wong identifies five key research questions emerging from the literature dealing with the Europeanization of foreign policy (see Wong 2007). These five research questions are as follows: a) how can the process be conceptualized?; b) what is changing and what are the mechanisms and directions of change?; c) what is the scope of its effects; d) is it producing convergence? and e) what is the significance of informal socialization as a vector of change? In fact, these five questions revolve around whether Europeanization stands for the domestic impact of the EU or the projection of national interest at European level. Other questions arising from the literature are subsumed to the debate over the manner in which Europeanization is conceptualized. For instance, the question of convergence is a possible by-product of Europeanization, seen as a top-down process. In this sense, the domestic change caused by the EU leads to the gradual rapprochement of national policies.

The most controversial issue stemming from these questions is that of multiple conceptualizations of Europeanization. The current use of the Europeanization approach contributes to the conceptual confusion over who is doing what and how, which creates the risk of overstretching the concept (Radaelli 2000). Therefore, the following paragraphs examine the conceptual confusion created by the fact that Europeanization has been used indiscriminately. It aims to demonstrate that the conceptualization of Europeanization of foreign policy, as a bottom-up process, is misleading. By consequence, it makes the case for the use of top-down approaches.

The concept of Europeanization is a late entrant into the study of European integration. The appearance of this concept can be best understood in the context of stages of European integration (see Caporaso 2007: 24). In the initial stage of European integration,

[1] Internship to the Romanian Permanent Mission to the European Union in November – December 2005, at a stage when Hungary and Slovakia were already full members and Romania active observer pending the ratification of the Accession Treaty by the EU member states.

the explanatory accounts of this process were mainly of a bottom-up type. Starting with the 1950s, these approaches were concerned with explaining the flows from society and state towards regional integration. The main question in this period was what reasons European states have had for agreeing to relinquish parts of state sovereignty in favour of supranational integration. During this period, the theoretical approaches to European integration were heavily influenced by the mainstream thinking in international relations. As Caporaso (2007: 24) argues, both proponents of functionalism and intergovernmentalism (or realism) were operating within the theoretical paradigm of international relations. They were interested in describing and explaining the move from a decentralized system of balance of power of Westphalian type towards a proto-European polity.

The advancement of European integration during the 1980s shifted the theoretical focus away from bottom-up perspectives towards explaining the process of integration itself. During this stage, the process of European integration was being given a new impetus as a result of the developments leading to the adoption of the Single European Act (SEA) and the completion of the internal market programme. Likewise, the adoption of the Treaty of the European Union (TEU) and the move towards building the political union further stressed the need to examine and explain supranational integration. The attention was no longer directed exclusively towards the question of why the state delegates parts of national sovereignty to regional integration, but how the regional organization functions, who the main actors are, and how they interact.

Finally, during the last two decades, the focus of enquiry turned out to be on the domestic impact of the EU, the change that the EU causes on the very states that initiated the process of regional integration decades ago. The European Union was already a mature reality changing significantly the context in which member states operate. Therefore, what the concept of Europeanization brought about was a change in the analytical focus from member states, seen as sources of power-delegation to the EU, to a reverse, top-down relationship (see Börzel and Risse 2003: 57-8; Caporaso 2007: 23-7; Smith 2000: 613; Vink and Graziano 2007: 3-7).

However, the Europeanization of foreign policy was not studied from a top-down perspective alone. As already pointed out, this fact generated conceptual confusion. If one looks at the Europeanization applied to the study of national foreign policy from a bottom-up perspective, it is hard to avoid the impression that all is about a slightly modified version of intergovernmentalism or liberal intergovernmentalism. The bottom-up approach contends that EU member states attempt to project their national ideas, preferences and models at the European supranational level. By doing so, the member states do "Europeanize their previously national priorities and strategies and create a dialectical relationship. By exporting their preferences and models onto EU institutions, they in effect generalise previously national policies onto a larger European stage" (Wong 2005: 137). The national interest is no longer only national, but the EU's interest as well.

The similarity between this version of Europeanization and the classical intergovernmentalist account of European integration is striking. Originated in the international relations theory, intergovernmentalism is closely connected with the realist tradition. Among the key assumptions are those that the nation-states are the key actors of the international system and supranational institutions or transnational actors do not have a serious influence over the way national governments conduct their foreign policy. In essence, both classical and liberal intergovernmentalist approaches assume that the European integration is a function of the willingness of the member states, national governments having the last word as regard the supranational integration. In the context of European integration theory, the intergovernmentalist version of realism in

international relations contends that the direction and speed of the integration process is a function of the decisions and actions taken by the national governments of the member states (Nugent 2003: 482).

The main flaw of Europeanization, understood from a bottom-up perspective, is that it conflates two distinct approaches, namely Europeanization itself and intergovernmentalism. In contrast, the top-down version of Europeanization of foreign policy provides for greater internal consistency with the main thrust of Europeanization research agenda. There is a broad agreement with regard to the direction in which Europeanization operates as the domestic impact of European integration on polity, politics, and policy (Börzel and Risse 2003: 60; Caporaso 2007: 27; Delanty and Rumford 2005: 6; Vink 2002). Whether one speaks about policies in the areas where the European Community has exclusive, shared, or support competences in relation to member states (for EC's competences, see Craig and De Búrca 2008), the fundamental logic directing the research focus is from the EU towards the member states. Therefore, the top-down approach is the one favoured by this article.

Not only reasons of theoretical nature justify the choice of a top-down approach. Another motive is closely connected to a practical aspect, namely the length of membership. Arguably, at this stage it is more fruitful to examine the domestic impact of the EU rather than the other way round.

Europeanization as institutional change

This section examines how Hungary, Romania, and Slovakia have institutionally adapted their systems of foreign policy-making to the demands of the EU. This type of demand-compliance relationship covers two distinct conceptions of power. On the one hand, it is about "power over". In a classical conception, the power of A over B means that A can get B to do what B would not otherwise do. In this case, A is the one who exercises the influence while B suffers the influence (Dahl 1957 cited in Baldwin 2002: 177). Some authors have seen the nature of the relationship between the EU and the aspirant countries from CEE as a power relation of this type. On the other hand, it is the "power to" or Europeanization as empowerment. The candidates, even if expected to adjust, are not constrained by any pre-existing model. They have the "power to" reshape institution the way they wish.

The rest of the article discusses the manner in which the powers and responsibilities for European coordination were allocated across institutional actors. First, it examines the role of the MFA and the relationship between the Foreign Service and the prime-minister office or other state agencies responsible for coordination of European affairs. Second, it discusses the changing structure and functions of national coordination of European affairs and foreign policy at European level by looking at the Permanent Representations (henceforth PermRep) of Hungary, Romania, and Slovakia and their relationships with the capitals.

The institutional adaptation at national level – the changing role of the MFA

The entering into force of the Maastricht Treaty in 1993 replaced the loose framework of European Political Cooperation (EPC) characterizing the previous two decades with the Common Foreign and Security Policy (CFSP). Without representing a sharp break with the past, the CFSP stood for a step forward in the institutionalization of cooperation, rationalizing the policy process, establishing legally binding obligations, using authoritative decision making rules, and enhancing the autonomy of European

Community (EC) organizations (Smith 2004a: 176-190).

The development of the CFSP is the result of decades of cooperation among old member states. Thus, the institutional set-up of European cooperation in foreign policy matters was already in place at the time of accession of the CEE countries. The former socialist countries had to adopt the existing acquis and institutions in the field of CFSP, without having the option to project their own preferences as regard how the system should work. The candidates had to align their national positions to the EU common positions, common strategies, joint actions, and political declarations. Besides, the candidates had to refashion the administrative structure needed for taking part in the political and technical committees and working parties of the Council of Ministers. New political-expert positions such as political director or European correspondent, and new communication infrastructure for sending and receiving confidential information had to be created. The national embassies to the EU, which prior to accession performed classic diplomatic functions of information, early warning and representation, had to be updated into permanent representations, able to execute a wider and more complex range of functions in order to defend effectively the national interest (see Kassim 2001).

At the time of signing the Europe Agreements during the mid 1990s, all candidates were equally unprepared and all of them had to find ways to adjust to these demands. The accession demanded a special readiness of national administrative structures, resources and ways of interaction in order to fit into the loose "European administrative space" (Lippert *et al.* 2001: 983). The setting up of proper mechanisms for dealing with EU foreign policy is but a component of the overall conception of how the administrative capacity had to be reorganized in view of accession. Therefore, the question of what impact did Europeanization have on national foreign policy-making should be addressed in the broader context of how the coordination of European affairs had been adapted and who the most important institutional actors were. The integration process created opportunities for some actors and constraints for others.

For most of the 1990s, the European integration was treated as a top foreign policy priority by the CEE countries (Vachudova 2005) and handled accordingly by the actor best placed to deal with it, namely the MFA (Dimitrova and Toshkov 2007: 969). However, the dominant role of the MFA was challenged. At least two factors may explain why this happened. On the one hand, the accession talks involved participation and contributions from all ministries, given the technical content of individual chapters of negotiations. In turn, this fact raised the problem of hierarchy or why should the MFA be over other ministries as long as European integration is as much an external relations issue as it is about sectoral, domestic policies.

On the other hand, other political developments like changes of government, cabinet reshuffle, or coalition politics, led to the transformation of the systems of national coordination. Besides, the advancement of the integration process itself requested a constant assessment of how the coordination system responds to EU demands. The coordination of European affairs was a dynamic phenomenon. Throughout the period of accession talks and even after formal integration, the roles and responsibilities of different actors and their relationships changed occasionally.

The pre-eminence of the Hungarian MFA was challenged twice. During the first half of the 1990s, the challenger was the Ministry of Trade and Industry. Responsible for the international commercial relations of the country, the Ministry of Trade was deeply involved in the negotiations of Europe Agreement, the backbone of which was the expansion of trade and bilateral economic relations. This situation created a duality in the system (interview Hungarian MFA, Budapest, June 2008). Moreover, during the screening

process, a serious concern came up with regard to the ability and skills of the MFA's staff, used to the Cold War's generalities, to understand and answer the technical questions send by the Commission. The then Prime Minister, Gyula Horn, resolved the situation by simply transferring the entire European affairs office from the Ministry of Trade to the MFA, enhancing the required expertise of the MFA and streamlining the coordination process (Interview, Péter Balázs[2], Budapest, June 2008).

The second instance, following the formal accession of Hungary into the EU, was the transfer of the European affairs unit from the MFA to the Prime Minister Office since 1st of January 2005. An important factor was the steady competition between the economic and foreign affairs branches of the government. Besides the institutional competition, other factors played a key role as well. One aspect was the personal rivalry between the then Prime Minister, Péter Medgyessy, and the Foreign Minister, László Kovács. Another factor was the coalition politics resulting in the cabinet reshuffle, following the stepping down of Medgyessy as Prime-Minister in August 2004 and his replacement with Ferenc Gyurcsány. In addition, the fact that the Foreign Minister Kovács took over the post of European Commissioner in November 2004 meant that a key opponent to such a measure withered away. However, the management of European affairs by the Prime Minister Office was short lived. Instead of streamlining the coordination process, it resulted in an ineffective management. After the general elections in 2006, the European coordination returned to the MFA. The European Affairs Directorate of the MFA, headed by a European Director with the rank of State Secretary is the main coordinator body between the executive and the legislative. It also runs the Interministerial Committee for European Coordination (Kovács and Szabó 2006).

In Romania, the coordination of European affairs was centred on the Prime-Minister Office for most of the time. In 1992, the Department of European Integration was created within the Romanian Government. After the general elections in 1996, the role of this department was enhanced because of the appointment at its helm of a minister-delegate in charge of European integration. For a while, the European coordination moved from the Government's Department of European Integration to the MFA. This happened in 1999 against the background of tensions within the centre-right coalition cabinet headed by the then Prime Minister, Mugur Isărescu. The results of the general elections in 2000, won comfortably by the coalition built around the Party of Social Democracy in Romania (*Partidul Democrației Sociale din România*), led to the setting up of a brand new Ministry of European Integration, having a leading role in the coordination of the accession process.

The design of a completely new ministry was not a very popular option in other candidate states, though some similar arrangements came about (Dimitrova and Toshkov 2007: 975). Such a decision might be seen as an attempt of the new Romanian cabinet to demonstrate its *bona fide* credentials and determination, given the poor record of the country among other candidates (Vachudova 2005). In addition, many Western capitals and Brussels shared a gloomy image with regard to the return to power of the party responsible for the sluggish reforms in the early 1990s (European Report 2001). As soon as the objective of accession to the EU had been achieved, the Ministry of European Integration was transformed into a ministry responsible for regional development, while a newly created department, directly subordinated to the Prime Minister became responsible, jointly with the MFA, for coordinating European affairs.

The system of coordination adopted in the Slovak Republic was based throughout the

[2] Péter Balázs is a former State Secretary for European Affairs in the MFA and Ambassador to the EU. He was Hungary's first appointed European Commissioner and in 2009 was given the role of Hungarian Foreign Minister under the Gordon Bajnai administration.

accession on the executive. From a formal point of view, the Council for Integration into the EU, presided by the Deputy Prime Minister, supervised the coordination process. However, in practical terms the role of the MFA was instrumental in the management of European affairs (Interview, MFA, Bratislava, April 2008). After 2004, even if the position of Deputy Prime Minister for European Affairs still exists, the role of the MFA has been strengthened. This was because the coordination centred on the deputy prime minister did not work very well (Interview, Eduard Kukan[3], Bratislava, May 2008). For instance, if during the 1998-9 the number of staff in the Department of European Integration within the Office of the Government was around ten, as for 2008 it is five, while the corresponding number of expert personnel in the MFA grew from ten before 1999 to around 50 as of 2008. The increase in the number of staff went along with the change of the organizational structure. The Section of European Integration established in 1999 was divided after accession into two departments, one dealing with common sectoral policies and institutional affairs, the other with foreign and security policy.

While the coordination of the policies under the first pillar and of the integration process were subjects to multiple and frequent changes, the management of foreign policy remained mainly the responsibility of the MFA in all three countries. The organization of foreign ministries changed as well through the creation of adequate structures. In the Hungarian MFA, the European Foreign and Security Policy Department, under the political guidance of a political director with a rank of state secretary, deals with the CFSP related issues. Within this department, there are three sub-units responsible for EU Association and Partnership Relations, EU External Relations and Crisis Situations, and Regional Cooperation. The responsibility for the CFSP matters within the Slovak MFA belongs to the Directorate General for Political Affairs, which includes the CFSP and Security Policy Departments, as well as territorial departments. The sub-units of the CFSP Department are CFSP, Political and Security Committee (PSC), European Correspondent, European Neighbourhood Policy, and Stabilization Instrument. The Security Policy Department deals with Euro-Atlantic security, NATO, Permanent Delegation to NATO, European Security and Defence Policy (ESDP), Western European Union (WEU), and Crises Management. Within Romanian MFA, the European Union General Directorate, headed by a State Secretary, provides specific expertise for CFSP matters through the Department of External Relations (Relex) and Development Assistance.

The changing role of national coordination at European level

Among the institutional actors that gained the most with accession was the Permanent Representation to the European Union. The formal title of a diplomatic representation of a third state or candidate to the EU is "permanent mission". Once it becomes a full member, the title changes to "permanent representation" (PermRep). Before accession, the permanent missions in Brussels performed rather a traditional diplomatic role of representation and channel of communication. However, during the transition period from accession to full-membership the PermReps have experienced far-reaching transformations. For instance, measures such as the numerical augmentation of personnel, the organizational complexity and functional diversification reflect this type of change.

The setting-up of diplomatic offices to the EC by the CEE countries followed the establishment of diplomatic relations in the late 1980s-early 1990s. They began planning the transformation of diplomatic missions in the years before finalizing the accession talks. Both the problem of size and of internal organizational structure emerged. The main criteria for deciding the number of staff and internal organization were the compatibility

[3] Eduard Kukan is the former minister of foreign affairs of the Slovak Republic during 1998-2006.

with the structure of Council's formations, the indicative needs of various ministries in the capital and the models offered by other member states similar in demographic terms.

For instance, the size of the Hungarian PermRep was foreseen at around 60 diplomats, in contrast to 20 personnel in 2003 and even fewer before. Even if the Slovak PermRep is smaller, having around 50 diplomats out of the total staffing, both countries have drawn inspiration from the Austrian, Finnish, and Danish models. Romania, with the seventh largest population among EU's member states, staffed approximately 70 diplomats in its PermRep.

Several aspects were taken into consideration as regard the internal organization. For instance, the internal structure of the Hungarian Mission to the EU was oriented towards the European Commission's formations, since the accession talks were conducted with the representatives of the Commission. In anticipation of full-membership, the internal structure had to be reoriented towards the Council of Ministers' formations. Therefore, the figure of 60 diplomats/100 staff of the Hungarian PermRep was considered adequate for covering all the Council's formations (Interview, Péter Balázs, June 2008). Another challenge, originated back in the national capitals this time, was the question of hierarchical subordination and payments of people coming from different ministries. For instance, both the Ministry of Interior and the Ministry of Justice had to deal with Justice and Home Affairs matters. Similarly, the Ministry of Defence and the Ministry of Foreign Affairs had responsibilities in representing the national positions in the Political Military Group or Political and Security Committee (Interviews, Brussels, December 2007; E. Kukan, Bratislava, May 2008; Péter Balázs, Budapest, June 2008).

The range of functions performed by PermReps changed as well, not only the size and internal organization. The PermReps have, simultaneously, to defend the national interests at EU level and to mediate between the EU and their national capital, in a two-level-game logic (see Putnam 1988). They perform both upstream and downstream functions (Kassim 2001: 34-36). Along these functions, the PermReps are exercising a great deal of influence on national foreign policy-making. The fundamental lines of foreign policy continue to be defined in the national capitals, but PermReps influence the routine process of policy-making.

The function of reporting stands for informing the national capital about the developments within the EU Council, how different countries are positioned in respect to specific initiatives, what are the chances of proposal to be adopted. The main source of information gathering is the participation in Council's meetings at various levels and affiliated bodies, or in informal meetings with counterparts. A close interaction with other national representatives provides an invaluable source of complementary information. The advisory function is closely linked to that of information, because all reports and telegrams sent back home include suggestions and recommendations. The advisory function of national representatives is of particular importance in policy formulation and definition of national position. The recommendations they sent back home are taken into consideration by experts in the capital and used as foundations for formulating national mandates on specific topics. An important asset that national representatives in Brussels bring to the capital is that they have a comprehensive understanding of the EU; they interact directly with counterparts from other member states as well as European officials. In addition, national representatives know when a particular position is unsustainable. In such a case, to carry on with the national mandate received from the capital may eventually lead to isolation in the group. Therefore, they may convince colleagues in the capital that it is not realistic to go on and a change of the national position is required (interviews, Romanian and Slovak PermReps, Brussels, December 2007).

The important role played by PermReps is widely accepted by experts in the capital, especially those in the MFA (interviews, April-October 2008). According to some opinions, the recommendations from the PermReps are translated into national mandates and turn back to Brussels in most cases. However, this is mainly because numerous foreign policy issues on the EU agenda go far beyond the immediate interests of CEE countries. While the scope of EU foreign policy is global, the traditional and vital interests of CEE member states are mainly regional. In general, the adherence to EU statements or actions towards remote parts of the world is a formality, especially as long as it does require only political endorsements and not budgetary allocations or deployment of military or civilian personnel in crises management operations. In these cases, the role of PermReps is the most important. However, situation changes when vital interests are at stakes. Then, the PermRep "can never take over the responsibilities of a government, which is in contact with political parties, NGOs, media, so it is back home that such decision should be taken" (interview, Péter Balázs, June 2008) and the decisions are taken in the capital at the highest political level of the executive. In the aforementioned Slovak case for instance, in sensitive issues the role of the legislative turn out to be significant as well.

Europeanization as socialization of identities and interests

Previous studies of Europeanization maintain that the emergence of procedural norms of EU foreign policy were created and institutionalized through constant interaction, debate and trial and error learning (Smith 2004a). Various authors labelled these norms and rules as diffuse reciprocity, thick trust, mutual responsiveness, consensus-reflex, confidentiality, consensus, consultation, respect for other member states' *domaines réservées*, the prohibition against hard bargaining; all of them create a "culture of compromise" (see Glarbo 1999: 644; Lewis 2000: 261; Nuttall 1992; Smith 2004a: 120-124, 2004b: 107-109).

It has been argued that action within an institutional setting is driven either by a rational-choice logic of anticipated consequences and previously defined preferences, the so-called "logic of consequentiality", or by a "logic of appropriateness" and sense of identity, which uphold the view that the norms and rules of a given community are followed because they are considered right and legitimate (March and Olsen 1998: 951).

Accordingly, Europeanization stands for the change of norms leading to a change of preferences. Social learning is the mechanism whereby national policy-makers learn the norms and rules characterizing the EU foreign policy culture. In other words, their preferences and behaviour are being Europeanized. The process of transfer of norms and rules is mediated by the existence of the so-called norms entrepreneurs (see Börzel and Risse 2003: 58-59; also Sedelmeier 2006). The norm entrepreneurs are those policy-makers directly involved and the most exposed to EU norms and rules, such as the experts and diplomats from PermReps in Brussels, as well as those from the relevant European departments in the MFA. The question is whether these officials have been socialized according to the aforementioned "logic of appropriateness" or they have simply learnt the new norms and rules and behave in an instrumental, rational manner, according to the "logic of consequentiality". If the former, they may play the role of norm entrepreneurs, mediating between European and domestic levels; if the latter case, this scenario is rather unlikely.

Apart from the question of whether socialization follows an appropriation or instrumental path, another question relates to the fact that Europeanization as socialization depends to an important extent on the way in which foreign policy elite perceives the distribution of power within the EU. From a formal point of view, full EU membership grants an equal right to all members. In reality, the views from CEE, as well as from other old but small member states, highlight a different picture, one in which the large old member states are

still more influential in the political process and in the design and conduct of any given policy. The perception of inequality may well impact upon the socialization of policy makers from the new member states. The internalization of the norms of compromise and consensus seeking might very well be undermined if the perception of the national representatives is that the policy-making process reflects the balance of power among the member states. In this case, their policy preferences would mirror the instrumental view of how the power is exercised.

There is a general agreement that a process of learning characterized the first contacts between national officials and the EU. The learning process started even before the formal accession, during the period when the candidates were observers in EU institutions. The status of "active observer" is granted to the future members covering the period between the signing and ratification of the accession treaties: During this period, the national representatives were able to attend all Council's meetings and to familiarize themselves with the working methods and procedures. Hungary and Slovakia were observers for one year, between April 2003 and May 2004. For Romania, this was over one and a half years, between April 2005 and December 2006. The experience accumulated by experts from different ministries during the accession talks allowed them to grasp a good understanding of negotiations practices with representatives of the European Commission and of the *acquis communautaire* in their specific sectors of expertise. These people were the first choice for appointment by national ministries to the PermReps, because of this experience. However, since the PermRep deals mainly with the Council, they come across a completely different working style and organizational culture (interview, Péter Balázs, June 2008). For some national officials, this experience recalled past memories from school, the endeavour to learn and achieve an academic degree (interview, Slovak PermRep, Brussels, December 2007*)*. This view is shared, in one way or another, by most people that had participated, even on a sporadic basis, in the meetings within the Council, either being from the PermRep or the MFA at either senior or junior diplomatic level.

Also there is a general positive view on the environment in the Council, described as "family", "friendly", "good company". Beside the warm reception from the old member states, another facilitating factor for the easy adaptation of the representative of the new member states was the presence of fellow negotiators from other new member states, to whom they used to be in contact during the years of accession talks (interview, Péter Balázs, June 2008). At the same time, it is not always the case that the learning of new norms and rules is associated with a positive view on the working style in the Council. Too long and unnecessary talks were perceived as completely ineffective, a waste of time which could hardly be afforded in a meeting of a national cabinet (interview, E. Kukan, May 2008). Furthermore, as a senior Hungarian diplomat summed up, "we are working every day with such small details, invisible for normal citizens … is complicated, insane … we are discussing such small points that have no real influence to the real world and we don't have time for philosophical discussion about the future of the European Union" (interview, Brussels, December 2007).

Even if the length of meetings is a source of criticism for some diplomats, most of them shared the view that in a Union with 27 member states, it is necessary to compromise and seek consensus. The practical use of the norms of compromise and consensus seeking was learnt by the new member states for instance in working group meetings discussing, paragraph by paragraph, various documents. The enlargement, bringing the number of participants in the Council's formations from 15 to 27, plus the representatives of Commission and General Secretariat of the Council, or some others, raised the problem of effectiveness. When and how to speak was a new informal rule that emerged in this context and the old *tour de table*, now too time-consuming and ineffective, was replaced by the rule of speaking up only when one disagrees or want to amend a proposal and to

keep the time of intervention as short as possible (interview, MFA, Bratislava, May 2008).

The policy of alliance formations was another issue to learn. It is a common feature in the Council diplomacy that member states try to secure the support of other countries and presenting their own position as an expression of common European interest (Windhoff-Heritier *et al*., 1996). New member states were soon asked to give their support to one initiative or another, or at least not to oppose it. It also soon became evident that with the exception of a few strategic issues, there was no clear pattern of coalition formation, which tended to be temporary and topic based. The norm of respect for other member states' *domaines réservées* became associated with a redefinition of (1) what national priorities exist, (2) what the official position is in respect to other countries' concerns, and (3) how does the pursuit of national interest resonate with the common European interest. As a senior Hungarian diplomat pointed out "You always have to keep in mind that there isn't just the national position that you have to think about, but of course there is the overall position or the overall interest of the community that you are member of" (interview, Budapest, June 2008).

In the case of Hungary and Slovakia, some of the diplomats that arrived in Brussels in 2003 are already returning home. The direct experience of working within the Council's working groups and committees and interacting routinely with other national representatives is different from that of the senior or junior officials coming only occasionally from national capitals to Brussels. The fact that the staff of the PermReps have a deeper and more comprehensive understanding of the developments in Brussels is widely accepted in their respective capital cities. Their return at the end of the mandate stands for a valuable transfer of knowledge, skills, and understandings back home.

The assumption that the internalization of new norms and rules follows the logic of appropriateness, namely that those EU norms are internalized by individual officials because they are good and right on their own, is not sufficiently backed by empirical evidences. Even if some diplomats or national experts show a genuine appreciation of the way the EU works, most of them have a more instrumental view of the process. There is a constant attempt to balance between constraints of defending the national position and accommodating the positions of other countries.

The norms of compromise, consensus, consultation, and mutual understanding are necessary given the very design of the EU. In order to have a functional EU foreign policy, the participants must behave according to these norms; otherwise, the entire process enters into paralysis with negative consequences for all. Moreover, in many cases, the view of the Council is that of a structure where even if the voices of all are listened, there is a great diversity of interests and some countries are more influential than others are.

Looking at both the PermReps and the MFAs, more similarities than differences can be noticed as regard the perception of EU norms. The preponderant instrumental perception of EU norms makes the PermRep and the MFA unlikely candidates for influencing other national actors to redefine their interests and identities. An instance of minimal norm entrepreneurship of the MFA in relation to other actors was highlighted by a Hungarian senior diplomat: "when we put something down on paper or when we discuss it even with political decision-makers, we try to influence them ... I think that is also our duty to give a realist picture to the decision-makers of what they can expect... and it is up to the decision-makers whether they take the risk or not (interview, Budapest, June 2008).

Hence, the role of norm entrepreneurs that the PermRep and the MFA might play in relation to other institutional actors at domestic level takes the limited form of more balanced discourse with regard to contested foreign policy issues. The role of the PermRep

and the MFA in routine foreign policy-making is dominant; only in sensitive issues, touching upon the national interest, other political actors became involved and the issue is open to wide contestation. This point confirms the observation by Kal Holsti (1995: 267) that:

> …on routine and non-vital matters (...), the experts and lower officials of policy-making organizations define specific objectives in the light of their own values, needs, and traditions, often through informal alliances with bureaucrats in other countries. (...) In a crisis, where decisions of great consequences have to be made rapidly, the effect of bureaucratic processes may be reduced considerably.

This was the case with the issue of Kosovo declaration of independence in February 2008 for instance. In such a sensitive matter, the role of the PermReps in all three cases was limited and the MFAs attempted to soften the political stances coming from the national executives. In Slovakia, for instance, the political mandate issued by the National Council come to be the official position of the executive, constraining and changing the initial position of the MFA which was obliged to defend this mandate at the level of the EU General Affairs and External Relations Council (interviews, Brussels, December 2007; CTK 2007; BBC 2007).

Concluding remarks

This article explores the issues of institutional adaptation and elite socialization in three EU new member states from CEE. The extent of domestic change caused by the Europeanization pressures may be assessed as absorption, accommodation, or transformation. The degree of domestic change is low for absorption, modest for accommodation, and high for transformation (Börzel and Risse 2003: 69-70). The empirical findings presented here support the idea that the participation in the EU foreign policy-making is linked with both institutional change and socialization of foreign policy elite. Also, evidences suggest that neither simple absorption, nor radical transformation, but rather accommodation, best defines the extent of change as being modest.

On the one hand, this was due to the inner nature of European foreign policy. Designed as intergovernmental cooperation, it allows member states a larger space of manoeuvre in the design of national foreign policy-making. Besides, the CFPS chapter negotiated during the accession talks did not really raise any substantial problem, the content of the *acquis politique* in this field being less demanding then other sectoral policies (Edwards 2006: 146). There was an obvious institutional misfit between existing structures and procedures of EU foreign policy and those of the candidate states, but no unique template to emulate.

On the other hand, the European integration had an ambiguous status, eventually reflected in the very design of domestic coordination of European affairs. Even if initially European integration was approached as a matter of foreign policy, it soon became synonymous with profound reform of state, economy, and society (Vachudova 2005). Therefore, other institutional actors challenged the role of foreign affairs ministries in dealing with European integration. Also, differences among political systems and political competition across countries played a key role with regard to the design of institutions and inter-institutional relationships. Hence, despite the fact that European integration provided the incentive for transformation, the structural domestic change was shaped less by Europeanization pressures than by political and inter-institutional competition and emulation of existing models in like-minded member states.

The candidates accommodated EU demands by adapting their existing processes, policies, and institutions without fundamentally altering them. The former permanent missions to

the EU were reorganized as permanent representations, mirroring the internal structure of the Council's working group, and emulating the existing models in other member states. The number of staff and the complexity of the internal organization within foreign affairs ministries were augmented as well.

The sociological institutionalist assumption that socialization of national representatives causes the change of collective understandings and identities is rather weak. There are strong evidences that the new national representatives learned novel norms and rules. However, as Smith (2000: 619) points out, it is too much to expect national officials giving up their national loyalties. Instead, the indicators of a socialization effect might be found in the fact that national elites are more and more familiar with each other's positions and preferences. In addition, national officials learn that national foreign policy is strengthened by political cooperation, not weakened (Smith 2000: 619).

The learning process is part of an acclimatisation to the new policy-making setting. In the initial stage, the national officials learned the rule of the game. In the second stage, they started playing the game, assessing the implications of a particular position in the balance between national and European interest. The collective adherence of national representatives to the procedural norms of compromise, consensus-seeking, avoidance of hard-bargaining does not obscure the instrumental way in which these norms are perceived.

Even if the national officials have a more flexible approach, this is because they know that within the EU framework, a foreign policy position is not formulated in isolation, but in consultation and cooperation with others. These norms are not necessarily seen as right on their own, but as means towards getting out of stalemate and overcoming differences of interest inherent in a Union of 27. Therefore, the role of the PermReps or MFA in the dissemination of EU's norms and rules at domestic level is limited. The highly normatively institutionalized setting of EU foreign policy-making has a constraining effect on the behaviour of national officials. Within this setting, the national representatives behave as rational actors conforming to these norms and rules in order to avoid the costs of illegitimate action while at the same time calculating when conformity is worth the cost of complying and when not (Schimmelfennig 2000).

The perception of power relations within the EU embodies both the view that the larger member states exert a greater influence in the policy process and the acceptance, as fact, that EU membership enhances the standing of a small member. There is a general agreement that different countries, large or small have competing national interests and the common European interest does not always prevail. However, the membership is perceived as allowing a country to pursue more ambitious foreign policy objectives. EU membership offered a new platform to defend national interest, backed by the political and economic weight of the EU. In this case, the power nature of the Europeanization is the "power to" or Europeanization as empowerment. The EU member states have increased access to information, resources and decisions that go beyond what their own capabilities would normally allow (Jørgensen 2004: 48-50). EU membership also offers a stronger standing on the international stage for a member state. Along this logic, a small member states from Central and Eastern Europe might benefit from EU membership more than it might lose. Either way, the agreement on the existence of a power dimension affects the process of socialization. The socialization stands for learning of new norms and rules and their instrumental use.

The primary instrumental view of the EU procedural norms and rules by the national representatives has some wider implications. One aspect is that the primary allegiance of national officials is still towards the national interest. This is most visible in situations where

vital national interests are at stake. Among other striking examples, it is enough to recall the split within the EU caused by the United States' led military intervention in Iraq in 2003, or the division of EU member states on the issue of Kosovo's declaration of independence in 2008. Another aspect is that the national foreign policy is more influential with accession than before (see Tocci 2004). Before accession, EU membership was the first foreign policy priority of CEE candidate. Once this fundamental goal achieved, the order of priorities of the various national foreign policies of these new states changes as well.

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The European Space Agency and the European Union: The Next Step on the Road to the Stars

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Abstract
Given the outlook, the main questions considered in this article are whether a European position on a genuine common space policy is developing. If so, why is this happening now?; and what kind of potentials do these developments hold for the European integration process as a whole? This article will approach these questions through an analysis of past European collaboration in space affairs. It will describe the recent process of closer involvement between European Space Agency (ESA) and the European Union (EU). It will identify the motivations underlying this process. It will also try to gauge the strategic potential of an intensification of the coordination of national space efforts in ESA and the involvement of the EU. In the conclusion, the ever closer relationship between the EU and ESA will be considered against the larger picture of European politics and the ongoing process of European integration

Keywords
ESA; EU; Institutions; Integration

IN THE IMMEDIATE AFTERMATH OF THE SECOND WORLD WAR IT WAS CLEAR THAT NO continental European state could seriously contemplate the development of a world-leading space programme. It was thought that only Britain had the wherewithal to build a successful space programme, because Britain had the technology, scientists, and access to materials. But by the 1960's, France, not Britain, was leading Europe in space navigation and research (Gaubert 2009: 38). At first, most experts were inclined to ignore the French efforts, overwhelmingly overshadowed by the work of America's NASA but also because of the flavour of propaganda from Gaullist aspirations to French *grandeur*. While the process of European economic integration had enjoyed spectacular success since the 1950s (see Camps 1964; Moravcsik 1998; Hoerber 2006a), cooperation in the field of space navigation, satellites, research, and exploration lagged far behind and was late to develop, despite the fact that space fitted perfectly with Jean Monnet's definition of an ideal area for the advancement of European integration, *i.e.* too big for individual nation states (see Gaubert 2009: 41, 44) and a virgin field of politics, comparable with nuclear research under Euratom which he pushed strongly (Hahn 1958: 1002; Gerbet 1999 : 173). After many false starts, ten European states[1] eventually agreed to the creation of the European Space Agency (ESA) in 1975, to cooperate in the field of space, a membership which has now expanded

[1] Belgium, Denmark, France, Germany, Italy, the Netherlands, Spain, Sweden, Switzerland and the United Kingdom, were the founding members of ESA.

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to 17, plus Canada.[2] The fact that ESA membership also includes non-European Union (EU) states, such as Switzerland, or even extra-European states, such as Canada, highlights significant differences between ESA and the EU, but these are by no means only a matter of membership. There are also major differences in the rules and procedures which make up the institutional soul of both organisations. ESA is an archetypical intergovernmental organisation of the conventional kind, with the usual features such as a national veto, exclusively national funding and the controversial but inevitable concept of *juste retour* under which the majority of national funding contributions are given back to space companies of the same country (see Gaubert 2009: 43). There is no trace of supranational procedures such as direct democratic legitimisation through an elected parliament, 'own resources' as the EU has, or qualified majority voting in the governing Council. ESA was founded as an independent institution entirely separate from the European Communities, so the fact that there is now close cooperation with the EU is clearly significant and worthy of investigation. Recent developments in institutional collaboration and coordination have been described by former German Minister for Research and Education, Edelgard Bulmahn (until 2005), as "…dovetailing ESA into EU policy…." (FRG 2001)[3] This seems to foreshadow, for the twenty-first century, the development of a common European position on space policy.

Research Questions and Method

Given the outlook, the main questions considered in this article are whether a common European position on space policy is developing. If so, why is this happening now? And what kind of potentials do these developments hold for the European integration process as a whole? This article will approach these questions through an analysis of past European collaboration in space affairs. It will describe the recent process of closer involvement between ESA and the EU, and it will identify the motivations underlying this process. It will also try to gauge the strategic potential of an intensification of the coordination of national space efforts in ESA and the involvement of the EU. In the conclusion the ever closer relationship between the EU and ESA will be considered against the larger picture of European politics and the ongoing process of European integration.

Sources and Literature

Apart from primary sources from ESA, and European Commission and national Government documents, there is limited literature on the European space effort. One finds cursory references in books such as M. Telò, *Europe a Civilan Power?* (2006), or in connection with security issues such as Western European Union (WEU) satellites, *e.g.* Trevor C. Salmon & Alistair J.K. Shepard, *Towards A European Army – A Military Power in the Making?* (2003), Wade Jacoby, *The Enlargement of the European Union and NATO – Ordering from the Menu in Central Europe* (2004), or Romain Yakemtchouk, *La Politique Étrangère de l'Union Européenne* (2005), but none offers a structured analysis of the European space effort. Furthermore, they hardly go beyond the empirical analysis of a specific field of interest, mainly that of security. Hence, most current literature on European integration in connection with space is confined to an evaluation of whether more or less of the same, *e.g.* security, would favour or inhibit the European integration process, instead of making a serious attempt to develop ideas which could inform the integration process with a renewed sense of purpose and direction. The analysis of space exploration in this paper is

[2] Austria, Finland, Greece, Ireland, Luxembourg, Norway, and Portugal joined later. Since January 1, 1979, Canada has the special status of ESA 'cooperating state'.

[3] Original: "In der Einbettung der ESA in die EU-Politik wird ein Kernelement die Institutionalisierung der Zusammenarbeit zwischen ESA und EU sein, die bislang rechtlich nicht verzahnt waren." (translation by author).

an attempt – although by no means the only possibility – to promote the innovative idea of a European Space Strategy in a structured way as a progressive tool to foster European integration.

Examples of Collaboration

Since its inception, the European Space Agency has participated in numerous projects, missions and research programmes. Access to space is an obvious prerequisite for any space programme (Gaubert 2009: 42), and therefore the first major ESA project was the launch of a carrier rocket, Ariane, alongside other pioneering projects such as Meteosat (a weather satellite), ECS (a telecommunication satellite) and MARECS (a maritime communication satellite) (Harvey 2003: 169). The first Ariane launch took place on 15 December 1979, from the launch pad at Kourou in French Guiana (Harvey 2003: 169). This venture established the European gateway to space and broke the virtual monopoly enjoyed by the Americans on commercial launches. In 1992, the launch pad was upgraded to launch the redesigned Ariane 5 (Harvey 2003: 190). This upgrade enables ESA to conduct launches of heavier payloads, like Envisat - an earth resources satellite which was to observe the environment from space. The overall objective was to establish a commercial involvement in the Ariane programme and gradually hand over utility and control to commercial users, which has been successfully completed (FRG 2001: 2). In recent years ESA has also developed the Vega launcher, which is a smaller and more economic carrier, suitable for commercial applications in space. In connection with the other major European space projects, this launcher and future Ariane launches will feature Galileo positioning data, a breakthrough in mission management and control. Galileo will provide another source of information for rocket guidance, navigation and control, thus increasing the security and reliability of rocket launches. There are also concepts for reusable launchers, which would greatly reduce the cost of launching satellites and spacecraft. Both developments are steps towards the commercialisation of space technology, which is seen by the EC Commission as essential for the expansion of the European space sector (ESA 2004b: 1).

Another major ESA project was Envisat (Harvey 2003: 240). Envisat is a good example of European engagement in earth observation – one of the most important fields of European space investment (FRG 2001: 3). It was equipped with several devices such as (1) MERIS, which observes the so-called ocean colour, by means of solar radiation reflected by the (open and coastal) ocean surface; (2) MIPAS, which monitored chemical changes in the atmosphere; (3) ASAR, designed to scan the oceans at night and through cloud; (4) GOMOS, which is to monitor ozone depletion; (5) RA-2 to measure the ocean floor, waves, ice and polar sheets; (6) MWR to measure the humidity of the atmosphere; (7) LRR to gauge the distance between the Earth and the satellite; (8) SCIAMACHY to observe pollution in the atmosphere; (9) AATSR to measure sea temperatures; and (10) DORIS to measure distances (Harvey 2009: 242). The mass of data returned by Envisat's suite of 10 instruments now provides scientists with a global picture of our environment and is helping to meet the initial needs of the Global Monitoring for Environment and Security (GMES) initiative, pending the commissioning of the more sophisticated Sentinel satellites. Hence, earth observation is one of the pillars of the overall strategy of establishing Europe as an information power with first-hand access to primary data about our planet.

In addition, a major project undertaken was the launch of Galileo, founded in July 2003. This has been hailed as marking the dawn of a new era in satellite navigation (Amos 2005), which will provide a network of precise timing and location service, in competition with the American GPS system and the Russian GLONASS system, a lesser competitor. As far back as the early 1990s, the EU authorities agreed that Europe must have its own global navigation system. The decision to build one was taken in similar spirit to decisions taken

in the 1970s to embark on other well-known European endeavours, such as the Ariane launcher. The EC and the European Space Agency joined forces to develop Galileo as an independent programme under civilian control which will be guaranteed to operate at all times (see ESA website for Galileo). Thirty satellites should be ready by 2013. This is the most important joint venture between ESA and the EU, and the first of its kind (FRG 2001: 2). It has attracted major attention from the public and on the international stage not just because it is considered to be the most important technology project Europe has, but also because of its political ramifications. Because of the intense collaboration between ESA and the EU, Galileo can truly be seen as a pan-European project with a common purpose. This is yet another indication that a European Space Policy – in which Galileo and Global Monitoring for Environment and Security (GMES)[4] are major pillars (see ESA 2005a; Hoerber 2006b: 19-28) – is now acquiring a definite structure.

Finally, the International Space Station (ISS) was built with substantial European participation. As with Ariane, this project is at a stage where commercial use of facilities has become feasible and is, indeed, highly desirable (FRG 2001: 3). The commercialisation of space technology is clear evidence that European space endeavours are reaching maturity. Such commercial use of space should give demand for space services another boost, and is hence another reason for the increasing importance of space.

These very substantial space projects also mark Europe's accession to the status of major player on the international space scene. The ESA budget has been around 3 billion euros, compared with 36 billion euros for the USA, and 2 billion euros for Japan (Harvey 2003: 349; Gaubert 2009: 40; ESA 2003: 25; ESA 2004a: 33-4). Domestically, ESA directly employs around 33,000 people, while providing work indirectly for a further 250,000 individuals (Harvey 2003: 349). Hence, Europe's growing role in the space world also generates multiplier economic benefits at home.

Well publicised programmes such as Mars Express and Huygens have also increased public awareness of European space engagement. The political momentum for further cooperation and advance can clearly be felt. Similar impulses can be expected from the European Space Exploration programme Aurora. The political repercussions are considerable, as currently reflected in the changes under discussion for the institutional structure in ESA and the EU.

Different history, common purpose in the future?

The background of "different history, common purpose was described with much insight in the Council Resolution on a European Space Strategy in November 2000 (EC and ESA/C-M/CXL VIII/Res. I; see Dunk 2003, 83). It recognised that ESA was created in 1975 so that those European states with an interest in space could combine their resources to form a well respected space programme. In ESA, with its headquarters based in Paris, an organisation was created which could provide more structure and better focus than exclusively national projects (Crawford 1990: 191). In addition, after a few bad experiences dealing with NASA, due in most cases to the frequent changes in US policies on technology sharing and trade, many European states wanted to work in a reliable European space organisation, rather than to remain dependent on United States assistance (Crawford 1990: 191). Here is, indeed, one historical parallel between ESA and the EU – the desire to reduce dependence on America, albeit cooperation between the EU/ESA and US institutions is common ground between Western liberal democracies and

[4] For GMES the Frascati agreement provides for ESA-EU cooperation in earth observation, signed 26 October, 2005.

allies (for ESA-US cooperation see ESA 2003: 19), so that actual competition in the field of space policy is rather rare.

Although ESA is not part of the EU, yet the two organizations maintain close relations. ESA and the EU endeavour to cooperate as much as possible to ensure Europe's access to space and cutting-edge research in the fields of satellites, communications, environmental monitoring, and space technology. 2003 was a decisive year in achieving this goal. In January, the European Research Commissioner, Philippe Busquin, introduced a Green Paper on a European Space Policy (Gaubert 2009: 42), aimed at launching the debate on Europe's space policy with all players, *i.e.* national and international organisations, the European space industry, future users and the scientific community. Particularly for Europe's citizens, the Green Paper was also designed to stimulate interest in European space engagement, which is an indication that European space affairs have achieved a prominence in government policies such that in the near future a more direct democratic mandate might be required than ESA can provide. The engagement of the EU parliament seems to be the obvious choice – with direct democratic legitimacy as opposed to indirect democratic legitimacy as through ministerial representation in the ESA's Council of Ministers, for example. And this is exactly one of the strongest arguments for integrating ESA into the EU.

The Green Paper was followed, in November, by the White Paper on Space. In parallel the EC and ESA signed a Framework Agreement, which entered into force in May 2004, and which proposed a structured framework for the relationship between the EU and ESA (see ESA 2003a: 29-31; ESA 2004a: 37). The Space Council was set up under this arrangement and met for the first time in November 2004. It is made up of a joint meeting of the ESA Ministerial Council and the responsible Council of the EU, *i.e.* national ministers of research and development or economic affairs.

The agreement between ESA and the EU recognized the specific complementary and mutually reinforcing strengths of the two bodies, and committed them to working together while avoiding unnecessary duplication of effort (see ESA 2003b). There are two main goals. The first is progress towards a European Space Policy. This means that the EU will try to meet demands for services by using the ESA space programme and its infrastructures. In that respect, ESA is acting in reality as an EU implementing agency. The second goal of the agreement is to make proper and suitable arrangements for cooperation between the two organizations, while recognizing and respecting mutual independence. This is meant to facilitate joint space activities and provide a stable framework for EU-ESA cooperation. The objectives are ambitious and could open the door to new ways of cooperation such as an ESA management of EU space activities and EU participation in ESA projects (Creola 2001: 87). On 7 June 2005, the Space Council decided on the sharing of roles and responsibilities at the highest level, and established priorities and guidelines. Accordingly, the EU is in charge of ensuring the exploitation of space for the benefit of citizens, coordinating requirements, and securing the coordination and promotion of a single European position on the international stage. This means the EU has a framework-setting function and ensures the representation of European space interests abroad. ESA and its Member States are in charge of space exploration and space science, and provide the tools needed for space activities, in particular actual access to space and the necessary technology. In Galileo and GMES, for example, the priority for space applications to benefit Europe's citizens has been spelt out. ESA will continue to manage such programmes and cater more for the practical side of space technology, despite the fact that the dividing line to the political side which may be seen as EU responsibility is by no means so clear cut (Hobe 2004 : 27).

In addition, the possibility of an EU space programme which would absorb ESA is also under discussion. There are pros and cons for the incorporation of ESA into the EU - for proposals of EU membership in ESA see (Gaubert 2009: 43; Dunk 2003: 85). The main considerations are that the EU has, as its vocation, the representation of the best interests of the European peoples and it could, therefore, reasonably claim that the eminently important area of space activities should come under EU auspices for this very reason. In that way the EU could provide its citizens with additional benefits, not least because the principle that concrete and immediate benefits must accrue to the European peoples from space investment has been stressed frequently by the EU and the Member States (FRG 2001: 1). On the other hand, Euro-sceptics argue that the reason why ESA has been moderately successful is precisely because it is *not* under EU management, that the EU administration is already bloated and would, hence, not be able to manage a space programme properly (Crawford 1990: 144; Gaubert 2009: 37; Dunk 2003: 85) – for successful (intergovernmental) ESA projects such as CERN, ECMWF, ESO, EMBO see (Gaubert 2009: 38).

In sum, the discussion about changing the institutional framework of ESA and the EU in order to arrive at a common or, at least, a more coherent space policy, is a very strong indication that the superlatives in government statements – see for example the German Research and Education Minister's statement at the ESA ministerial Council, Edinburgh 14 November, 2001, entitled "Engere Zusammenarbeit von ESA und EU stärkt die Europäische Raumfahrt." - and press releases are no mere exaggerations. A sea change has taken place which gives a prominence to space affairs Europe has not seen before. This is based on the strong perception that space has great future potential for Europe.

This goes hand in hand with the main EU goal of creating the world's largest information-based workforce. It almost goes without saying that space sciences are seen as crucial to making Europe fit for the 21st century. The industrial application of scientific results is one aspect, *e.g.* pure research on the ISS. As such, information networks in communication satellites and information gathering in earth observation, *e.g.* GMES, are just as important for a successful European future. In addition, an EU space programme would be vital to a common European defence strategy (Bildt 2000: 6). The Western European Union (WEU) is becoming the defence agency of the EU and the military satellite network which already exists under the European wing of NATO in the WEU may come under EU command as set out in the recently unveiled European Security and Defence Policy (ESDP) (Dunk 2003: 84). If the EU is serious about maintaining its satellite military intelligence-gathering capabilities, it will need a sophisticated space programme to support them, for the operative management of which ESA seems perfectly suited.

The EU is also set on developing its own infrastructures to become the world's second space power, after the USA. In order to achieve this, Europe must maintain a competitive space sector able to lead the search for new discoveries, and guarantee access to strategic data and new services. Only progress by breaking new ground will enable its share of the global commercial market to be consolidated (ESA 2005b).

An EU space agency could also forge new links with the Russian space programme, such as have already been used extensively in the past. This could further strengthen Europe's second position in the field of space, by drawing on Russian first-hand knowledge and space techniques (Peter 2009: 32-3).

The White Paper also made recommendations for the future relationship between ESA and the EU. It made it very clear that EU issues and the issues of space are no longer divergent; therefore "…it makes sense to aim for a closer institutional integration, thus ensuring the place of space issues in the overall evolution of European policies" (Bildt 2000: 7). The

Ministers responsible for space affairs agreed on the need for "…a process of institutional convergence that does not exclude bringing the present ESA within the treaty framework of the European Union." (Bildt 2000: 7) The Ministers proposed that the European Council should define a policy for space every five years. ESA should include defence strategies (Slijper 2008), and there should be opportunities for discussion in the European Parliament as to the direction the programme is to take (Bildt 2000: 7). Again, as space affairs have steadily become more important in European political considerations, the issue of democratic legitimacy cannot be glossed over. Their growing centrality needs resonance in political legitimacy and eventually financial sanction from the EP, which again is a strong argument for bringing ESA into the political framework of the EU. However, this is not as simple as it seems, as Alain Gaubert – former Secretary-General of Eurospace – points out: "Dealing with it [harmonisation of the roles of ESA and the EU] by saying that ESA must become an agency of the Community would be like imagining the problem can be magicked away. The crux of the problem consists of establishing relations between two entities of profoundly different character so that ESA can become the executive arm of Brussels in space matters without losing its own dynamism." (Gaubert 2009: 43)

Strategic potential

For the EU the strategic potential of space seems promising. There are many possible future fields of engagement, such as commercial launches, missions to Mars, moon research or a moon base, observation of Venus, and the completion of the Galileo satellite system – a summary of objectives was outlined by the second Space Council on 7 June, 2005 (ESA 2005a : 1). As outlined by European commissioner Günther Verheugen, "Space is an area where the added value of a joint and coherent policy on the European level is very clear. The industrial dimension of space is key to increasing the competitiveness of European industry." (ESA 2004b: 1; see also Verheugen 2005) It is clear that the industrial and economic potential of this area of activity is now fully appreciated by the European political authorities.

Furthermore, pressure for militarization of the EU has recently found opposition in a reassertion of the EU as a "civilian power" (Telò 2006: 51; Yakemtchouk 2005: Chs. 7-9). The case for larger military budgets for European countries is made in Trevor C. Salmon and Alistair J.K. Shepard (2003: 206). Mario Telò argues that Europe is not seriously considering becoming a military power, and ought not to do so (Telò 2006: 54, 145). He points out that Europe woefully lacks military capabilities, Europe must be seen as a very effective and indeed powerful international actor, because it has shown that it is perfectly able to turn to good account its well-versed abilities as a civilian power (Telò 2006: 57). Again, in contrast with the American inclination to deploy the military as a direct power tool, the EU has agreed (under the 'Petersberg tasks') to increased military capabilities only as a means of making its civilian engagement more credible, that is military intervention as a means of last resort, the existence of which might make opponents more susceptible to preceding peaceful exercise of influence (Telò 2006: 75). Telò also stresses alternative and more innovative avenues of future development and cooperation than the military, *e.g.* space endeavours as in the Ariane and the Galileo projects. In its very European way, the latter, unlike the US supported Global Positioning System (GPS), is not intended primarily for military use but primarily for civilian use and hence is importantly independent of US influence (Telò 2006: 54, 176). Thus, a European Space Strategy could become another component of European "soft power" expertise and be deployed, alongside other elements, as an effective tool in the field of foreign policy. An active European space policy could, therefore, provide a reasonable alternative to (military) power politics of other major powers in the world, an approach which would be more in line with EU "soft power" expertise and its history of its own anti-war development. If it is right to believe that sophisticated information technologies will be central to future politics, then space

technology could well help provide the European authorities with this currency in the future. This specifically European path need not lack power and influence.

Space exploration is another field with great potential. In the European integration process, it could become the extension of the older logic of a peaceful development of Europe in the post war period. Space exploration can draw on the dynamism of European integration and develop the outreach potential of the European integration process with the same vigour and prospect of success that its leaders have shown in their original drive "to make war not only unthinkable but also materially impossible" (see Schuman Declaration; Burgess 2000: 64-5).The benefits of space exploration to the EU will, therefore, be in the non-military use of its own outreach potential and in economic benefits of active industrial expansion, and might eventually even give the integration process a new objective even a symbol which could act as a focus for the dynamic power that carries European integration forward. It is the argument of this article that there is much greater potential in Europe as a civil power rather than as a military power. This argument has been conjugated in this paper for the space sector which is why military space programmes have not been dealt with in greater depth. Readers interested in this aspect should consider reading Slijper (2008) and ESA (2003a: 43-5). For the dynamism in European integration and the need for renewal, see Hoerber (2006b: 11-19). For arguments about strengthening European identity through an integrated space policy see Nicolas Peter (2009: 36).

Conclusion

Until recently ESA, in particular, and space affairs, in general, attracted very little serious and thoughtful attention, either from politicians or the general public. For a long time, space had been seen as a field for experts, Sci-Fi 'geeks' and a few bureaucrats, at best a field of minor commercial interest. This has changed in the past decade. For one thing, the potential benefits of space exploration and development have been discovered by politicians and economists alike. In both fields it has been realised that space endeavours can yield important advantages to citizens and investors. The Galileo project is one of the best examples of the combination of both. Secondly, space has found a popular resonance far beyond the Star Trek community. The appreciation of an increased awareness of European citizens of space activities was reflected in the ESA Ministerial Council meeting of 6 December, 2005 (ESA 2005b). On a side note, however the influence of science fiction as a motivation for space research by eminent scholars such as Stephen Hawking or its influence on the interest of the general public in space affairs should by no means be underestimated. More and more often reputable, popular magazines feature space topics which cater for a general interest in the question as to where the undeniable parallels between earlier space fantasies and the present technological development might lead mankind (see *Lufthansa Exclusive*, 2007: 18-30).

From a political perspective, it is this narrowing gap between aspiration and what is feasible in space which makes space policies so intriguing. It is the combination of potential for profit, with all the positive repercussions for a competition-driven economy, and the as yet untapped potential of increasing popular interest in space, which could eventually generate political support for grander space projects in the future. This is the strategic and political background to the debate concerning the relationship between ESA and the EU. On the one hand, the EU has always been an eminently political organisation, sensitive to the political potential any innovation may offer. A European space strategy is only one of the most recent examples. On the other hand, ESA has outgrown its bureaucratic roots and has acquired a political relevance which goes beyond merely administering limited national space investments (Hobe 2004: 27). Hence, the idea of bringing ESA under the EU roof would be another *political* step which could well serve to

further enhance the political influence of the EU in the future. It would also confer on space policies a political prominence which might be an indication of the importance this field will have in the future. An indication of the increasing centrality of space policy was given as early as 2001 (see FRG 2001: 2). Further appreciation of the future importance of a European Space policy was expressed at the second Space Council meeting in Luxembourg (ESA 2005a). A concerted and common European space strategy might be the next move, taking Europe forward to a position long enjoyed by the Americans (Hobe 2004: 27), perhaps to a further small step for one man, but a big step for mankind. This would implement one element of further integration of all of Europe's public organisations (Gaubert 2009: 44).

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Achieving Economic Growth in the EU Through Lobbyism

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Abstract

At Lisbon in 2000, the European Union (EU) set itself a new strategic goal, namely to become the world's leading economy and to enhance social cohesion across the union, all within a decade. It is argued in this article that one fundamental barrier to the fulfilment of this dream is the fact that power is centralised in the Commission rather than the Parliament. The basic idea upon which our theoretical model is predicated is that a political system that centralises power lowers the cost of rent-seeking and therefore leads to a more economically harmful redistribution, as reflected in the annual EU budget. Here, the two main redistribution policies, (1) Common Agricultural Policy (CAP) and (2) the Structural Funds, consume more than four fifths of the total annual EU budget. Thus, if the EU is to achieve its strategic goal, a strong cure is needed to reduce redistribution and encourage more free trade. The simple cure for this 'EU disease' would be to strengthen the decision-making power of the Parliament at the expense of the Commission. In this way, power would be spread out between the democratically elected members of the Parliament rather than being concentrated with a few bureaucrats. Such constitutional change and decentralisation of power would increase the costs of lobbyism in particular and thereby reduce distortions of policy outcomes, clearing the road for free-trade policies and economic growth in the new millennium.

Keywords

Lobbyism; EU; redistribution; constitutional change

THE FOUNDATIONS OF THE EUROPEAN UNION (EU) CAN BE FOUND IN THE 1957 TREATY of Rome. At its 50th anniversary, the EU was able to celebrate a number of very important developments such as the creation of the single market, increased political stability and enlargement to the former communist bloc of central and Eastern Europe. The original and 'noble' purpose of the Treaty of Rome was for free trade among the European countries as a means to tie these nations together and strengthen their postwar economies. In this way, new wars between the large European states – Germany and France in particular – were to be avoided. It would be both expensive and foolish for a state to attack its best trading partner, as that nation would lose future gains from trade.

The main goal of the Lisbon Strategy, outlined in 2000, remained in line with this dream; namely, it was for the EU "…to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and

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better jobs and greater social cohesion" (European Council 2000). Thus, it can be stated that the EU dream is to become the world's leading economy in terms of competitiveness and economic growth. In spite of this simple starting point, free trade cooperation has paradoxically led to a number of policies that are closer to those of a planned economy than to free trade. Market protection and subsidies still exist, implying that there is room to modify the EU system in such a way that it better accommodates its original purpose.

The theoretical model set out in this article suggests that the paradox of 'missing free trade' is caused by a high level of lobbyism, which again is caused by the current political set-up in the EU. Basically, political decision-making power is centralised in the hands of the bureaucracy (the European Commission) rather than in the (publically elected) Parliament. The main question is this: How does power centralisation in the EU affect lobbyism and economic growth?

The bureaucratic element of leadership in the EU is clear since the European Commission has the exclusive right to initiate all legislation by submitting proposals to the Council of Ministers. The Parliament can ask the Commission to present legislative proposals to the Council, but still the Commission retains the formal power to initiate

At the same time, the Commission promotes the inclusion of affected interest groups in the process of policy formulation in order to draw upon the expert knowledge of external actors. Furthermore, the Commission acts as the enforcement agent of EU lawmaking and is by far the most influential institution in the EU, as also documented by empirical research (Gullberg 2009).

In this political climate, policymakers are confronted with special interest groups that pursue private goals that may conflict with the overall goals of society. So, if the dominant interest groups like a particular proposal, they may promote it; if not, they may block it. This means in contrast to traditional economic theory that the institutional setup of society must be taken into account because it determines how easy it is for dominant interest groups, bureaucrats or politicians to promote their own interests rather than those of the public. Economic theory has traditionally been 'institution-free', as it does not explicitly refer to any state. The government is just there to correct market failures (Mueller 2003). However, under the strong influence of interest groups and bureaucrats, government intervention may, in reality, prove worse than the 'disease' of market failure it was meant to 'cure'.

Much has been written about the behaviour of interest groups within the EU, see for example: George and Bache (2006), El-Agraa (2001), Greenwood and Aspinwall (1998), Jones (2001) and Mazey and Richardson (1993). This literature is interesting and informative, and can generally be placed within the discipline of political science. We supplement this literature by combining political science with the discipline of economics, (i.e. we apply an interdisciplinary 'political economy' approach). As in political science, we focus on public issues like the behaviour of interest groups, bureaucracies and political parties, and not the market as in economics. Thus, the arena for research in political economy is the political (non-market) arena of political science (Green and Shapiro 1994). However, to the political arena we now add the behavioural assumptions of economics and model the effect of institutional setup on lobbyism and the resulting EU policies.

There is no fully unified view on the effect that decentralising decision-making power has on growth. Some papers (see Glaeser *et al.* 2004) argue against such a positive relationship. The argument is that decentralisation – understood as checks and balances on those in power – does not cause economic growth, whereas human capital is one of the most important factors in causing it. However, our argument. as set out in this article, considers

rent-seeking behaviour. It is not the decentralisation as such that makes the economy more efficient in our model; rather, the resulting reduction in rent-seeking is the key. The same argument can be applied to the question of whether decentralised political systems always result in better policies (Mulligan *et al.* 2004).

Even though decentralisation tends to mitigate pressures from narrow interest groups, constitutions vary in their ability to raise the price on favourable regulation. To illustrate this, consider either a super-presidentialist system or a parliamentary one-party system. In each case, the price of achieving special regulation tends to be lower than in a political system in which a multiparty parliament shares political power with a popularly elected president (see Holler and Owen 2001).

The answer to the main question of how power centralisation may affect rent-seeking – given the existing quality of the institutional design – is found in the following way. Firstly, the rent seeking approach is presented in Section 2. On top of this approach, a hypothesis is deducted based on the theory of institutional economics and power centralisation in Section 3. Then, in Section 4, the stylised facts of the role of the Commission and the annual budget are presented, suggesting how the institutional set-up may be improved to reduce rent-seeking and generate more economic growth in the EU. Finally, a conclusion is given in Section 5.

Rent seeking

In this section, rent-seeking is broadly defined as actions taken for the sole purpose of influencing regulatory decisions. Such actions are socially inefficient and would not be undertaken unless it were possible to gain from the regulations. Actions could include the presentation of media campaigns and written reports, happenings, etc. Lobbyism may here be viewed as a specific type of rent-seeking, and we simply define lobbyism as deliberate attempts by a person or a group of persons to affect political decisions by undertaking actions of an influential nature. Thus, in contrast to the broad notion of rent-seeking, lobbyism necessarily involves face-to-face interaction and individual communication between lobbyists (those seeking to influence) and political decision-makers (those to be influenced).

Rent-seeking is to seek redistribution in one's own favour at the expense of one's fellow citizens. These redistributive gains could come in several shapes and forms, such as granted monopoly power, quotas or other benefits, or could be presented as political decisions considered helpful to the rent-seeker. Hillman (2003: 447) writes that rent seekers do not present themselves with the challenge of 'what productive activity can I undertake today to earn income?' Rather, they ask the question 'what can I convince someone to do for me today?' This general attempt to influence political decision-makers can take many forms; for example, the use of the media, production of scientific reports, or organisation of demonstrations. Social loss from rent-seeking arises when rents are contestable through persuasion or the rent-seeking of political decision-makers. That is, social loss due to rent-seeking arises because of the use of time and other resources in competition for rents.

Buchanan and Tullock (1962) were the first to show that the losses generated by a distorting policy are not confined to the dead-weight loss when resources are moved into or out of an affected activity. Tullock (1967) and Posner (1975) find that rent-seeking in itself captures all rents from successful monopolisation. The idea is that in order to obtain or maintain a monopoly (by defending a dominant position), it is necessary to incur rent-seeking expenditures. There is total rent dissipation when competition for rents is perfectly competitive. Lobbyism and rent-seeking are not limited to protecting monopoly

power but are relevant in all situations where "people feel that people in government are amenable to persuasion to provide privileged personal benefits" (Hillman 2003: 447).

More generally, Hillman and Samet (1987) have shown that if the contest for a price is perfectly discriminating (only the highest outlet wins the price), then all rent will be dissipated as expected (see also Lockard and Tullock 2001 for a more recent review of this strand of the literature). One of the fundamental results is that firms will undertake rent-seeking behaviour/lobbyism to maximise their expected utility. That is, they will allocate resources to rent-seeking behaviour as long as the expected utility of their investment is positive. The general conclusion is that rent-seeking has a negative effect on growth and investment (Murphy *et al*. 1993). Note that income transfers are not a loss to society *per se*, but that redirecting capital from the productive sector to rent-seeking activity is. Hillman (2003) argues that inefficiency may also arise if income transfers to incompetent politicians and bureaucrats encourage them to stay in power for a longer time. The wasting of resources results from the time spent and other resources reallocated to influence the political decision-makers. Such resources are not invested in productive capital.

Finally, two other types of costs must be added to the dead-weight loss. First, a person or a group of persons affected by the policy may engage in rent-seeking efforts to block or advance a proposal in the pipeline. Second, a person or a group of persons may engage directly in politics to get access to decision-making power. Overall, the state is pushed and pulled by lobbies and interest groups that are more interested in redistribution and favouring their own groups than in economic growth for society overall. In a pluralistic system characterised by free competition between interest groups to influence decision-makers, resources will be redirected from production to rent-seeking.

While consumers lose consumer surplus as described above, domestic producers experience an increase in producer surplus because they can increase their prices (due to reduced competition) and still sell more. In this case, we get the opposite situation: although society at large is worse off, the producers prefer this new situation (compared to the free trade situation). The overall lesson of this example, if we are to fully understand the choice of regulation, is that identifying the winners and losers of a proposed regulation (or government intervention in the market) is essential when such parties have rent-seeking power.

Crucially, the domestic suppliers are willing to invest up to their gain from market protection to persuade the national government to put tariffs or an equivalent quota on imports. This provides us with a quantitative measure of how far the suppliers are willing to go in their rent-seeking activities to influence policy-makers. As argued by Tollison (2000), producers may rationally spend up to this gain in producer surplus to promote legislation that is in their favour. In fact, they may spend enough of their gain to make deregulation socially unprofitable (see also Rowley 2001).

Even though society as a whole benefits from free trade, individual industrial groups might nevertheless face losses and therefore oppose free trade. The social cost of rent-seeking is simply the increase in gross domestic product that would result in a feasible system for reallocating resources from lawyers and lobbyists to more productive uses. The strong ability of rent-seeking agents to resist reallocation is yet another reason not to waste resources in attempting to persuade them to behave differently (Tollison and Wagner 1991). Added to the costs of seeking political gain, real resources may also be expended to protect this gain from being encroached upon by other competing groups (Tollison and Wagner 1991). If rent-seeking involves the provision of utility or real income to participants, these benefits should be weighted against the cost of rent seeking. If the lobbyist takes the bureaucrat and/or the politician out to dinner, for example, the value

that the regulator places on the dinner must be subtracted from the social costs of rent-seeking (Congleton 1988).

Model

Douglass C. North, who received the Nobel Prize in 1993, is the most prominent representative of modern institutional economics. This approach is basically the study of economic interaction in a world where economic agents do *not* have full information. This is in contrast to the standard assumption of full information in neoclassical economic theory. Because agents lack information, extra transaction costs must be added to the exchange of goods and services. North (1990: 54) writes that "[t]he inability of societies to develop effective, low-cost enforcement of contracts is the most important source of both historical stagnation and contemporary underdevelopment in the Third World" (cited by Zak and Knack 2001). For example, agents must use resources to protect against non-voluntary transactions such as theft and to screen the market to gain insight into potential buyers and sellers and their financial abilities. Also, resources must be employed to draft and enforce a contract (Coase 1960). These transaction costs will always be positive when the agents do not possess full information. Furthermore, to support the exchange of goods and services in a world with incomplete information, the agents need to construct 'rules of the game', i.e., institutions (North 1990).

Institutions can be both formal (rules that are written down) and informal (rules that are not written down), and both types matter to economic growth. Another more detailed definition is given wherein institutions are defined as persistent and connected sets of rules (formal and informal) that prescribe behavioural roles, constrain states, and shape expectations (George and Bache 2006). This view that *institutions matter* to policy outcomes is also the starting point here – how the institutional set-up will determine rent-seeking economic performance in the future.

One may argue that informal institutions and behavioural norms enforced at the decentralised level by agents could create savings on monitoring costs and third-party enforcement costs. Modern economic systems, however, cannot rely on such informal organisations only. Many gains cannot be realised in primitive trade without institutions, e.g. to make a long-term contract or loan, or insure a trade (Milgrom, North and Weingast 1990). Here, transactions typically take place only when one gives with one hand and takes with the other, face-to-face. Formal institutions sanctioned by the state are crucial to determining whether a society can accomplish economic growth in the long run (North and Weingast 1989).

Institutional economists tend to focus on the institutional circumstances that facilitate successful rent-seeking and the achievement of net gain among organised interest groups. Here, Schjødt and Svendsen (2002) emphasise that the ability to acquire favourable regulation is strictly related to the formation of political institutions and rules of the game.

Given this institutional set-up, successful rent-seeking and redistribution will then occur according to Olson's logic of collective action (1965). Rational producer groups will try to redistribute as much money as possible from the taxpayers and/or consumers to themselves. For example, a farmer lobby may represent one per cent of the total income in the EU. It follows that the group will only stop redistributing to its clients when the reduction in national income is 100 times as great as the amount they win in the re-distributional struggle. In contrast, if the interest group tries to change policies for the better, the group will only receive one per cent of the benefits but will bear all the costs.

This kind of rent-seeking will tend to result in redistribution from all EU taxpayers to special interest groups such as EU farmers.

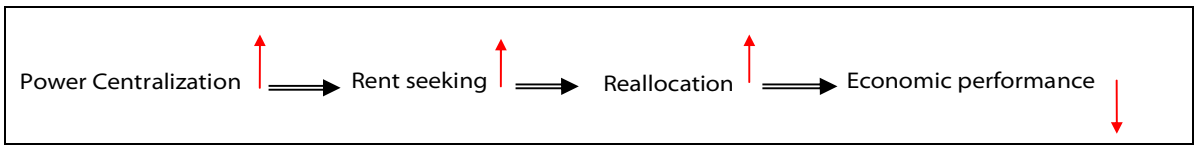
This theory suggests that asymmetrical political pressure against full market liberalisation will occur in the EU. For example, each of the farmers' organisations in France would have a strong economic incentive to provide the collective good represented by the status quo on its own; i.e. to maintain the Common Agricultural Policy (CAP). Therefore, this small group with only a few members will oppose full market liberalisation even in the absence of organisation and cost-sharing.

In contrast, none of the almost 500 million EU consumers would lobby for full market liberalisation on their own because each of them would gain only little and would then have to pay all the costs of rent-seeking in the absence of organisation. Even though the EU consumer group as a whole would receive, for example, ten times the money invested by collective action, this would not provide for the common good because the large group would not be organised. Therefore, a large, non-organised group will not act to promote full market liberalisation.

So, based on the ideas of Olson (1965), theory predicts that well-organised and small-sized 'Euro groups' such as farmers' groups or business groups are in a strong position to win the economic struggle in the EU political arena, for example by preventing price liberalisation, and thus to maintain the collective good of receiving subsidies for their groups. Such institutional sclerosis will slow down economic growth, as interest groups may achieve a net gain from being regulated as compared to what they would receive without regulation.

Figure 1 summarises the mechanisms that yield the economically harmful effects of rent-seeking. The mechanisms are sketched in Figure 1. Power centralisation attracts rent-seeking and the reallocation of resources to less productive or non-productive activities, thus reducing overall economic performance.

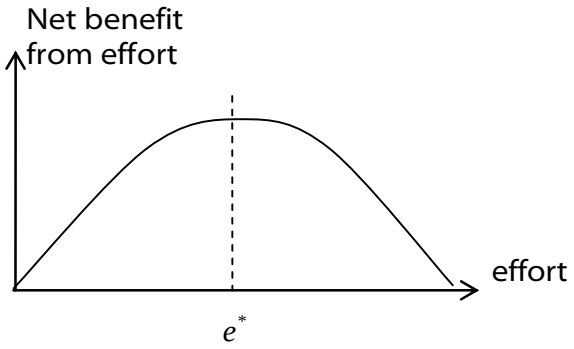
Figure 1: *Power centralisation and economic performance.*



Below we present a stylised model for rent-seeking activity. We assume that rent-seeking efforts yield no productive capacity whatsoever, so that any reduction in effort is beneficial to society.

The behavioural assumption of the lobbyist (rent-seeker) is that he/she chooses lobby activities first that yield the highest net benefit. That is, for each possible lobby activity, the lobbyist compares the cost and the benefit of providing this effort and then chooses the activity that yields the highest overall net benefit. In Figure 2, it is assumed that the net benefit function is strictly concave such that an interior optimum exists.

Figure 2: *Net benefit of lobby activity*



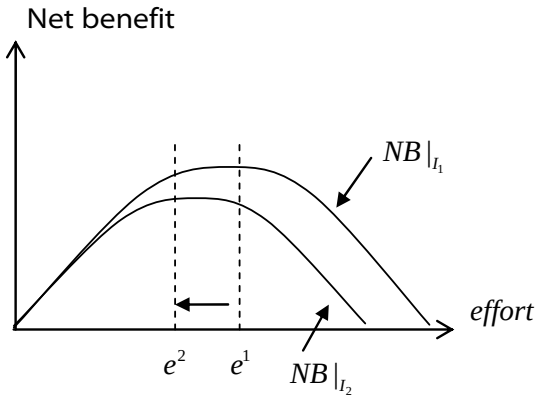
If we consider rent-seeking activity as a means of increasing the probability of changing the policy in a preferred direction (sometimes denoted to increase the probability of winning the price), then rent-seeking efforts can be reduced by:

1) Making the probability of winning the price smaller.
2) Reducing the increase in price as rent-seeking effort is increased
3) Increasing the marginal costs of rent-seeking efforts.

The mechanism is that rent-seeking invests effort as long as the expected marginal net benefit of the investment is positive; see Figure 2 above. Given the assumptions of the net benefit function, an optimum exists where the marginal net benefit is zero. Call this level e_L^*.

We are interested in mechanisms (that is, changes in the institutional setting) that may decrease e_L^* - the optimal lobby activity. Such a situation is shown in Figure 3. Here we compare two institutional settings, I_1 and I_2, and as seen, there will be more lobbying in I_1 than in I_2. In figure 3, $NB|_{I_1}$ and $NB|_{I_2}$ denote the net benefit from rent-seeking under institutional settings one and two, respectively. Here a decrease in the marginal net benefit of rent-seeking will reduce rent-seeking efforts, and hence, given that this effort is a waste for society, will reduce inefficiency.

Figure 3: *Change in institution changes optimal lobby effort*



One way to reduce rent-seeking is by creating a more diverse and decentralised power structure. This will make it more time- and resource-consuming for the rent-seekers to gain influence. One way to achieve power decentralisation then is to increase the marginal transaction costs of rent-seeking, in contrast to traditional economic circumstances where transaction costs are welfare-reducing. In our setting, transaction costs are welfare-increasing since they reduce detrimental rent-seeking efforts.

Note that lobbyism in particular is likely to be even more sensitive to a change in power centralisation than the broader notion of rent-seeking. That is, the cost of providing effort is particularly large (positive) for lobbyism. The more power is decentralised, the more cumbersome lobbyism becomes, relatively speaking, since it requires more face-to-face encounters or individual communication with various decision-makers. In the specific case of the EU, it is cheaper for a professional lobbyist to confront and convince one bureaucrat in charge of a directive proposal than it is to convince more than half of the members of the Parliament.

Overall, we simply hypothesise that the more centralised power is, the easier it is for rent-seeking groups, especially small-sized groups, to achieve favours. If one institution basically holds all of the power, a group only has to lobby one place, as opposed to a situation in which power is spread out over many institutions, such as the parliament and the government,; as a result interest groups are forced to lobby many places.

The Commission and the Budget

The EU Commission may be viewed in a positive light as a neutral bureaucracy with technical information helping governments to agree. The Commission has the executive role of drafting legislative proposals and safeguarding the Treaty – that is, implementing EU policies. Furthermore, the Commission is a technocratic body of about 20,000 civil servants and, hence, is not a political entity. Indeed, if the Commission is a neutral and independent agent, the main justification for the civil servants on the Commission is that they ensure the efficient provision of public goods and thereby make 'the pie as large as possible'. Still, the ability of the Commission to serve as an efficient provider of public goods may be questionable.

George and Bache (2006) list three main criticisms of the Commission. First, the Commission has the exclusive right to initiate all legislation by submitting proposals to the Council of Ministers, which is the main legislative body. Here, national ministers are gathered according to subject; e.g. agricultural issues are handled by the agricultural ministers. Thus, the nationally elected members of the Council of Ministers have the power to approve the proposals put forward by the Commission, so that there is indirect democratic control involved here. Also, the Council can ask the Commission to come up with legislative proposals in various areas, and so can the Parliament according to Article 36 of the Parliament's Rules of Procedure (Wallace and Wallace 2001). The Council of Ministers is, however, surrounded by extreme secrecy, which may be beneficial to negotiations but at the same time also hides what is going on from the public. At the end of the day, this right to initiate legislation enables the EU Commission to choose (and to some degree 'not to choose') between possible policies.

Second, the EU Commission is capable of 'Europeanising' a sector with the help of powerful national interest groups, which again may soften up local governments. Third, the EU Commission can itself create new networks among producers. It may, for example, promote the inclusion of affected interest groups in the process of policy formulation in order to draw upon the expert knowledge of external actors. Furthermore, the EU Commission can choose to subsidise groups such as consumer and public interest groups

(see also Spence 2006; Kohler-Kock and Quittkat 1999). These three institutional strongholds, especially the right to initiate legislation, mean that the EU Commission is the centre of decision-making power in Brussels. As lobbyists go where the power lies, professional lobbyists will invest their main efforts in trying to influence the EU Commission and its legislative initiatives.

In contrast, the EU Parliament, supposedly the financial controller of the Commission, does not have much political decision-making power, although it has gradually gained more power since the introduction of direct elections in 1979. As the co-decision procedure and various inter-institutional agreements have now been added to the EU decision-making process, the immense growth of legislative acts adopted by co-decision has turned the Parliament into one of the most lobbied institutions in the EU. The Parliament signs the Interinstitutional Agreement with the Council and the Commission for the Financial Perspectives. The Parliament is also the one that, every year, has to give the budget discharge to the European Commission – this is actually one of the strongest tools that the Parliament has (Corbett, Jacobs and Shackleton 2007). Furthermore, the EU Parliament must approve new commissioners and can, with a two-thirds majority, dismiss the EU Commission as a whole, though it cannot dismiss individual members. Finally, the EU Parliament participates in the legislative process as an advisory body that also may request commission initiate policy initiative developed from within the chamber.

Gullberg (2009) has undertaken a comprehensive empirical analysis based on interviews with interest group representatives and decision-makers in Brussels and Oslo. The sample includes representatives of major business and environmental NGOs and decision-makers from the executive branch as well as the European Parliament and the Norwegian *Storting*. She finds that business organisations lobby both the Parliament and the Commission but that they prefer to work with the Commission. The large business organisations also lobby the Council, even though the Council is generally considered a difficult venue in which to exert influence.

Overall, as the EU parliament cannot directly initiate legislation, the Commission is still the main target for lobbyists in the EU. Because the EU Parliament is not a 'real' parliament with the right to initiate legislation, the former British Prime Minister Margaret Thatcher has called the EU Parliament a *Mickey Mouse parliament*, meaning a discussion club without influence (Folketinget 2009). Overall, the fact that the Commission initiates legislation in the EU makes it easier for well-organised interest groups to achieve political favours at the expense of all EU taxpayers and/or consumers.

Non-regulated rent-seeking is likely to reduce economic growth in the EU system because voters cannot find out how decision-makers are affected by different interest groups. In other words, voters will not receive clear political signals convincing them that their tax money is being optimally invested for public goods rather than being redistributed to special interest groups. Voters will, if they are economically rational, ask for 'bang for their buck' (as one Pentagon general once put it). Examples of economically harmful redistribution systems that are not acceptable to EU voters in general prevail.

One must bear in mind that the EU does not function as a nation-state. Although the separation of power exists at the EU level, the institutions have a different role than in the national arena. Consequently, the European level and European policies may not exactly target the same kind of collective good as a nation-state would (Nugent 2003). Still, the priority of various expenses in the budget may be disputed. The biggest and most disputed expense is clearly the CAP, which consumes almost half of the total €122 billion budget (45.1%), see Table 1. Structural funding accounts for more than one-third of the

budget (37.2%). In total, these two main redistribution policies consume more than four-fifths (82.3%) of the total 2007 budget.

In stark contrast to the high priority of redistribution, we observe that collective goods such as education (0.7%), energy/environment (1.0%), EU-citizenship and consumer protection (1.2%), research (4.8%) and foreign policy issues (5.2%) have low priority.

Table 1: *The EU budget, 2007.*

	Budget 2007	
	Billion €	**%**
Agriculture	55.1	*45.1*
Structural funding	45.4	*37.2*
Education	0.9	*0.7*
Energy, environment, fishery, etc.	1.2	*1.0*
EU-citizenship, consumer protection, media etc.	1.4	*1.2*
Research	5.9	*4.8*
EU as a global partner, humanitarian aid, compensation for new member countries, etc.	6.4	*5.2*
Administration	5.9	*4.8*
Total	122.2	*100.0*

Source: Commission (2007).

Concerning the CAP, HM Treasury (2005) has calculated that the total welfare loss for the period 2007-13 amounts to €100 billion per year. Half of the total welfare loss stems from the fact that consumers have to pay artificially high agricultural prices, and the other half stems from the fact that taxpayers face higher taxes when financing subsidies to agriculture. For an average family in the EU, this welfare loss corresponds to an extra annual cost of €950 or a 15 per cent extra VAT on agricultural products.

France receives the lion's share of the agricultural budget; see Table 2. In 2002, France received €9248 million, corresponding to 22.0 per cent of the total CAP budget. Next Spain followed next at 14.7 per cent and Germany at 14.0 per cent. In other words, French farmer organisations have the strongest incentive to block any liberalisation of the CAP. Empirical evidence seems to confirm that militant French farmer's organisations actually did play a main role in blocking any attempt to reform the CAP (Ackrill 2005).

Table 2: *The allocation of the agricultural budget between EU countries, 2002 (Million € and %)*

	B	**DK**	**D**	**Gr**	**Sp**	**F**	**Ire**	**I**	**Lux**	**NL**	**A**	**Pt**	**Fin**	**S**	**UK**
Mil. €	939	1114	5880	2617	6194	9248	1599	5348	30	1156	1055	882	816	780	4380
%	2.2	2.6	14.0	6.2	14.7	22.0	3.8	12.7	0.0	2.7	2.5	2.0	1.9	1.9	10.4

Source: Landbrugsraadet (2003)

Beside the redistribution observed in the 2007 budget, another indicator of rent-seeking in the EU is the observation that the EU has protected its own producers by restricting imports of a whole range of agricultural products such as sugar. Other recent examples are import restrictions on shoes and textiles against China in particular to protect producer groups in Southern Europe, the watered down regulation of chemicals (REACH) and the critical choices of grandfathering and national implementation of quota systems for greenhouse gases (Svendsen 2003).

Measuring lobbyism is a difficult matter since it often takes place precisely in 'the lobby'; in other words, behind the scenes, where it avoids public scrutiny. A main challenge to future research is therefore to develop better data on interest organisation politics in the EU (Coen 2007; Berkhout and Lowery 2008). In contrast to US scholars, who can take advantage of large-n research on US interest organisations using lobby registration data, EU scholars do not have access to such high-quality data sources simply due to the fact that lobbyists are not registered and regulated at the moment. Formal legislation in the EU corresponding to the US Lobbying Disclosure Act from 1995 is non-existing at this time. In the absence of mandatory registration for lobbyists in Brussels, it is, for example, impossible to establish the actual number of lobbyists. The Commission estimates around 15,000 lobbyists and acknowledges a need for formal regulation of the area in its green paper on a European transparency initiative, presented in 2006 (Commission 2006). Thus, indirect rather than direct measurement methods have prevailed in EU research up until now.

Conclusion

We have argued that institutional changes which move power away from the Commission are necessary if the golden EU dream of economic growth and social cohesion is to come true. The fact that power is centralised in the Commission (the bureaucracy) rather than in the Parliament (with the directly elected members) lowers the cost of rent-seeking and leads to more economically harmful redistribution, which is reflected in the annual EU budget

This idea was inspired by theory from institutional economics, suggesting that the degree of rent-seeking will be determined by the design of the political system, that is, the degree of power centralisation. Overall, the model suggested how the institutional set-up facilitates rent-seeking, thereby affecting specific policy outcomes and economic growth. If one bureaucrat or politician basically holds all of the power, an interest group has to lobby in only one place, as opposed to a situation in which power is distributed between many individuals in several institutions such as the parliament and the government, forcing interest groups to lobby in many different places. Thus, the policy recommendation is that central power should be minimised and dispersed among institutions to undercut economically harmful rent-seeking by means of market liberalisation and free-trade policies as efficient cartel busters.

Furthermore, we have suggested how 'low-cost' rent-seeking primarily would take place among well-organised and small-sized 'Euro groups'. The crucial logic of group size gave interest groups such as farmers and business groups small-group advantage when trying to affect policy outcomes in order to provide the collective good of redistributing resources to their members. Such asymmetrical political pressure and the resulting institutional sclerosis will eventually slow down economic growth. Illustrative examples are the two main redistribution policies (Common Agricultural Policy and the Structural Funds), which consume more than four fifths of the total budget.

In conclusion, we argue that a political system that centralises political decision-making power gives rise to more rent-seeking, distorted policy outcomes and a risk of economic

decline, which again weakens overall public support for the EU system. This model has wide-ranging implications for the future design of the EU institutional setup and needs to be tested more rigorously in future research.

Thus, if the EU is to achieve its strategic goal as presented in Lisbon, a strong cure is needed to reduce redistribution and encourage free trade. The simple cure for this 'EU disease' is to strengthen the policy initiation power of the Parliament at the expense of that of the Commission. In this way, political decision-making power and the right to initiate legislation would be dispersed over a total of 750 democratically elected members of Parliament rather than concentrated on a few bureaucrats. Such constitutional change and power decentralisation would vastly increase the costs of lobbyism, thereby reducing distortions of policy outcomes and clearing the road for free trade policies and economic growth in the new millennium.

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Multiple Sources of Pressure for Change: The Barroso Commission and Energy Policy for an Enlarged EU

Jan Frederik Braun

Abstract

This article presents a preliminary analysis of how and why the role, work and status of the European Commission are changing in an enlarged European Union. It does so by focusing on multiple sources of pressure for change. These include: enlargement, new modes of governance, administrative reforms and changed leadership under Barroso. Combined, though not interlinked, these multiple sources of pressure are evidence of the increasing difficulty for the Commission to design and propose Community-wide answers to complex challenges in a more diverse Union. For this reason, the Commission under Barroso relies less on its traditional monopoly power to propose formal legislation and more on non-traditional modes of policy-making. Energy policy, especially its external dimension, constitutes a policy field that has been affected by enlargement, i.e. characterised by an increasing heterogeneity of needs and preferences among the member states. Not only does it resists Community-wide answers, it also allows the Commission, as an agent, to make use of bureaucratic drifts, i.e. exploit its strategic position in the EU's governance system and use of a range of formal and informal resources of expertise. To deliver sustainable European added value to this complex policy area, however, the Commission must focus more on pragmatic policy results by making smart use of the EU's increasing asymmetry, diversity and subsidiarity in a bottom-up approach. A non-legislative approach can serve as a *modus vivendi* to keep the momentum going in the Union's difficult struggle to establish a workable energy regime.

Keywords

Commission; Enlargement; external energy policy

THIS ARTICLE ANALYSES MULTIPLE SOURCES OF PRESSURE FOR CHANGE WHICH, PRIOR to and in the wake of the 2004-07 enlargements, explain how and why the role, work and status of the European Commission are changing in an enlarged European Union. These sources include: the rise of new modes of EU governance, administrative reforms in the Commission and changed leadership under President José Manuel Barroso. Recent studies about the effects of EU enlargement on the Commission have all documented a strong sense of continuity in terms of its institutional position and legislative output (see Settembri 2007; Kurpas *et al.* 2008; Peterson and Birdsall 2008). Without fundamentally changing matters, enlargement has interacted with multiple dynamics and reinforced trends and problems that pre-existed in the political system of the Union (Best *et al.* 2008).

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Noticeable changes such as the Commission's strategy of proposing less legislative acts in order to dedicate more attention to key proposals are explained as being less a product of enlargement than of the general Euro-sceptic, political context of recent years (Kurpas *et al*. 2008). Therefore, in the overall EU policy-making process, it does not seem possible to measure precisely the impact that enlargement has had on the Commission. Nor can enlargement be isolated from other factors. While acknowledging this fact, this article argues that energy policy constitutes a specific area where enlargement has added increasing complexity and difficulty in EU governance, not least concerning the role of the Commission.

The most recent enlargement of the EU with 10 new member states from Central and Eastern Europe (CEES), plus two Mediterranean islands, has more or less coincided with fundamental changes in global energy markets. These changes include issues such as increased competition for resources and greater concern about climate change. Furthermore, recent events such as the Ukrainian-Russian gas crisis and the Russia-Georgia war have shown wide divisions between member states in the larger EU because of the differences in foreign policy objectives and the strategic security dimensions of energy supply. Add the fact that the enlargement of the Union with states that are asymmetrically dependent on hydrocarbon supplies mainly from Russia has strengthened worries about structural energy import dependency (De Jong and Van der Linde 2008; Van der Linde 2008). Changes on global energy markets and enlargement are sources of pressure that have pushed energy to the top of the Union's current political agenda, with security issues dominating both internal policy debates as well as external relations (Natorski and Herranz-Surrallés 2008). Energy security is defined here as the provision of affordable, reliable, diverse and ample supplies of hydrocarbons (and their future equivalents) to EU member states and adequate infrastructure to deliver these supplies to their markets (see Kalicki and Goldwyn 2005).

In light of these developments, energy has gone from a minor portfolio to one of the prime dossiers of the first Barroso Commission. Hence it formulated in 2007 a new integrated climate and energy policy (Commission 2007a). This Energy Policy for Europe (EPE) covers in a comprehensive approach the three main dimensions of current energy issues, i.e. increasing security of supply and ensuring the competiveness of European industries while promoting environmental sustainability and combating climate change (European Council 2007: 11). Responding to follow-up calls from the European Council, the Commission drafted and adopted further proposals. These proposals included legislative initiatives on issues such as further integration in the internal energy markets ('the Third Package') and the '20-20-20 policy', which is focused on achieving a low carbon economy and a more sustainable and diverse energy mix (Commission 2007b and 2008a).[1] A principal objective of the EPE is identifying the 'European added-value' to national energy policy-making, as the principle of subsidiarity dictates that "an EU role is warranted where EU action genuinely has benefits" (Behrens and Egenhofer 2008: 15). This added-value has been explained in terms of:

- Completing the internal energy market with adequate policy harmonisation;
- Developing a European solidarity or crisis regime in case of an energy supply crisis;
- Building stronger external energy policy capabilities;
- Pushing the development and deployment of energy technologies

  (see Behrens and Egenhofer 2008; De Jong 2008)

[1] 20% reduction in greenhouse gas emissions, 20% share of renewable energy in EU final consumption and 20% improvement in energy efficiency by 2020.

Actually, achievements in the field of energy, including the adoption of the climate and energy package in 2008 and the activities towards enhancing EU energy security, such as the signing of the Nabucco Intergovernmental Agreement with Turkey in 2009, have been hailed by national capitals as one of the Barroso Commission's greatest successes (Kaczyński 2009).[2] More specifically, the climate change package has been dubbed as being among the top successes in over half of the Union's members, while achievements in energy security were particularly appreciated by some of the new member states such as Poland, Bulgaria and Hungary.

Despite this appreciation, however, the Commission's EPE proposals are marred by problems in areas such as design and implementation. The Third Package, for example, has been criticized by De Jong (2008) for being weakened by market design problems, especially in the areas of cross-border markets and their integration. Concerning the implementation of the 20-20-20 policy attempts, it has been noted that it fails to precisely highlight what national trade-offs exist between the approaches to the internal market, environmental policies and external energy relations (see Röller *et al.* 2007). Furthermore, this policy will lead to diverse implementation outcomes as members states "will take their own existing energy system as a point of departure and, based on their sovereignty over the energy mix, will seek solutions that serve the national interest first" (De Jong and Van der Linde 2008: 8).

To understand the weakness of the EPE proposals we must understand the Commission's incomplete competences in EU energy policy. These competences, or tools, are strongest in the areas of the internal market, competition and trade, while weak in foreign and security policy (Commission 2007; European Council: 2007; Van der Linde 2008). Member states resist increasing influence and competences of the Commission in the external dimension of energy policy because it is a complex issue located in the sphere of high (national) politics. Wide differences in areas such as the energy mix, import dependency, degrees of market liberalisation and limited cooperation in foreign and security policy all undermine the EU's ability to formulate a common external energy policy (see Behrens and Egenhofer 2008; Faber van der Meulen 2008).

This article argues that politically delicate problems such as energy policy cannot be solved through a dogmatic focus on institutional positions and the Community Method, i.e. the Commission's traditional monopoly power to propose formal legislation (Metcalfe 2004; Peterson 2006a).[3] And while 'continuity' seems to be the key term when comparing the Commission's actual output (in terms of acts adopted) under Prodi and Barroso's first college, in policy areas such as energy, the Commission is increasingly using non-legislative or 'soft law' such as Green Papers, White Papers and Communications as tools of policy-making (Kurpas *et al.* 2008). In addition to soft law, new modes of governance can be broadly defined to include voluntary agreements and the open method of coordination (OMC) as practised under the Lisbon process (Héritier 2001 in Jordan and Schout 2006). Instead of focusing on legislation or utilizing market mechanisms, these new modes seek to achieve policy goals via network governance, in which central bodies "have become increasingly dependent upon the cooperation and joint resource mobilization of policy actors outside their hierarchical control" (Börzel 1998: 260). In fulfilling complex policy goals such as energy and with a diminishing capacity to exert hierarchical authority,

[2] This survey was conducted among national experts from 25 member states in the spring of 2009. The experts were asked to name up to three successes and up to three failures of the Commission 2004-2009 as perceived by national capitals.
[3] Given the variety of institutional arenas in the first pillar, the term Community Method should be regarded as an ideal type notion (Wallace and Wallace 2000 in Stetter 2007).

the Commission needs to reconcile itself to the position of a strategic node in EU network governance (Peterson 2008). By serving as a network manager, it should focus on managerial tasks such as scrutinizing, national energy strategies and publicly name and shame member states. Supplementing its 'grand central approach', i.e. hierarchic policy-making with new modes of governance, the Commission can establish a *modus vivendi* in the EU energy policy. In order to achieve this goal, it needs to focus on promoting bottom-up policy mechanisms that depart from the member states' increasing diversity and asymmetry in energy issues.

To explore the central arguments of how and why multiple sources of pressure for change have affected the Commission, specifically its position on energy policy, this article aims to answer the following questions:

- To what extent are multiple sources of pressure affecting the role, work and status of the Commission in an enlarged Union?
- What does the Commission's changing role and channels of influence in the new Energy Policy for Europe tell us about its position in larger EU governance?
- How can the Commission add more effective European added value to this policy area?

To realise these aims, this article is divided into two parts. Firstly, we introduce the institutional characteristics of the Commission in the EU political system followed by a brief overview of the output and use of hard and soft law in an enlarged Union. Secondly, we discuss some of the rationales that are affecting the Commission in an EU of 27. Taking these diverse rationales into consideration, the general part is concluded by formulating three provisional statements about the effects of enlargement on the role and influence of the Commission in the EU system.

The second part of this article focuses on an individual policy case study, i.e. the external dimension of the EPE. Consistent with literature on delegation, by utilising powers delegated by member states and exploiting its institutional position and overlaps between different policy fields and competences, the Commission is able to find and create major duties for itself. Hereby, the Commission has been able to advance its own interests and policy preferences. While not immune from political member state control, delegation to the Commission has resulted in a degree of bureaucratic drift whereby the latter is able to use its policy discretion to move outcomes closer to its ideal position in certain areas of energy policy (Mayer 2008). This article concludes, however, by arguing that the Commission needs to invest more in new modes of governance to add to the European added value in energy policy-making.

Introducing the Commission in an enlarged EU

As an actor and policy-maker, the Commission has always been a politico-administrative hybrid. This is due to the dual nature of its internal organisation. It consists of a highly political top, namely the College of Commissioners, their cabinets and the Secretariat-General, and the services, or Directorates-General (DG), which constitutes the less politically oriented 'bottom level' (Fugslang and Olsen 2009). As a whole, the Commission performs four main tasks which are quite distinct from one another. Edwards (2006) outlines these as:

- Initiating legislation (1st-2nd-3rd pillars)[4];
- A mediating role (among member states and between institutions);
- Overseeing policy implementation (guardian of the Treaties and the *acquis communautaire*);
- Representing the EU internationally (3rd countries and international organisations)

While overseeing policy implementation is mostly an administrative and legal task, representing the EU internationally constitutes a balancing act, involving work that is often highly technical but also political tricky, "with the Commission having to conduct two-sided negotiations with both the EU's member states and its trading partners" (Peterson 2006a: 504). On the other end of the administrative-political scale, the Commission's exclusive right to initiate policy under the Community method of decision-making is a highly political job. This is because one of the most substantial parts of EU policy-making is the drafting stage. Although it is the work of the Commission alone when the Community method applies, it has the duty to consult with governmental, non-governmental and industry actors to make sure that its proposals are technically viable, practically workable and based on a bottom-up approach. This consultation serves a "dual purpose by helping to improve the quality of policy outcomes and at the same time enhancing the involvement of interested parties and the public at large" (Commission 2002: 5). Also, policy initiation can serve to extend the power of the Commission with regard to the creation of new legislative instruments, e.g. where new issues are raised.

What needs to be further mentioned is that the Commission is no neutral arbiter or technocracy, but a player with vested interests of its own to promote. These interests are to capture authority and establish itself as a significant player in different policy areas (Matláry 1997). Yet, while the discourses and referent objects in the documents presented by the Commission are focused on the sub-system level, i.e. the European economy and European integration as a whole (Natorski and Herranz-Surrallés 2008), it is not just a supranational actor that defends some "composite, supranational, general European interest" (Peterson and Birdsall 2008: 69). Rather, next to pursuing its own institutional interests, it is also an intergovernmental body wherein no officials from the services or members from the College of Commissioners truly act in full independence of external pressure, be it "political, ideological or national" (Diedrichs and Wessels 2006: 224). In sum, the Commission performs a rich variety of functions and is characterized by overlapping loyalties from its service officials, Commissioners and their cabinets. Because of these characteristics and the fact that it is under constant pressure to take on unknown tasks in response to the changing demands of EU integration, it can be argued that the Commission has always been "a strange institution in a strange institutional position" (Peterson 2006a: 503).

Since it is meant to represent the common interests of the Union, the 2004-7 enlargements seem to be less problematic for the Commission than for the Council. In fact, far from causing a system transformation or critical juncture for the Commission, the most recent enlargements (2004 and 2007), which welcomed 12 new states, 10 of which came from Central and Eastern Europe, are merely one of multiple rationales that have been used to reinvent the Commission. These rationales include an increasing awareness that the Community method is no longer the most apt and effective tool for moving European integration forward. For example, when comparing the acts adopted by the Prodi and the

[4] With few exceptions within the EC framework, the Commission has exclusive responsibility for initiating legislation. In other areas, such as in the 2nd and 3rd pillar, it shares this responsibility with the Member States.

first Barroso Commission, Kurpas *et al.* (2008) notice a significant decrease in new legislative proposals while measuring an overall increase in the use of soft law.[5] Regarding the latter, the most important factor for the increase is a much higher number of Communications and an even larger increase in the use of Green Papers under Barroso. Areas that are marked by an overall increase in soft law include new fields such as energy (see *table 1*).

Table 1: *Changes in output of Prodi Commission (1999-2004) and Barroso Commission (2004-2009)*

HARD LAW (Energy)			SOFT LAW (Energy)		
Directives			Communications		
Prodi	***Barroso***	***Change***	***Prodi***	***Barroso***	***Change***
9	7	**-22,2%**	13	36	**176,9%**
Regulations			Reports		
Prodi	***Barroso***	***Change***	***Prodi***	***Barroso***	***Change***
5	8	**60%**	9	6	**-33,3%**
Decisions			Other (White Papers, Green Papers, Opinions)		
Prodi	***Barroso***	***Change***	***Prodi***	***Barroso***	***Change***
20	14	**-30%**	1	3	**200%**
TOTAL HARD LAW			TOTAL SOFT LAW		
Prodi	***Barroso***	***Change***	***Prodi***	***Barroso***	***Change***
34	29	**-14,7%**	23	45	**95,7%**

Source: PreLex database (http://ec.europa.eu/prelex/apcnet.cfm?CL=en)

The fact that there have been fewer new proposals developed under Barroso indicates that the Commission is more hesitant "to apply hard law measures in 'unknown territory'" while its production of more soft measures suggest that it has "tested the waters at some depth before taking legislative action" (Kurpas *et al.* 2008: 16). This apparent reluctance of the Barroso Commission to present proposals on sensitive matters and avoiding controversy can to some extent be explained by enlargement, which has widened the range of socio-economic backgrounds amongst the member states. Also, in areas where the EU lacks competence, national administrations have little tradition of exchange and policy problems are not identical, using soft forms of coordination such as new modes of governance seems be the most logical method for moving cooperation forward (Stubb, Wallace and Peterson 2003).

Multiple sources of pressure for change

New modes of non-legislative governance such as the OMC, which was established by the Lisbon European Council in 2000, involves the "collective monitoring of the domestic policies of the member states" (Hix 2005: 37). Those are used in areas such as national labour markets and social policy, i.e. areas that resist uniform European solutions as they would "mobilize fierce opposition in countries where they would require major changes in the structures and core functions of existing welfare state institutions" (Scharpf 2002 in Best 2008: 227). The OMC, which is focused on consensus, benchmarking and flexibility, constitutes a significant departure from the orthodox model of European policy

[5] The output of the two Commissions under Prodi and Barroso compared by Kurpas *et al.* is based on data retrieved during both their first two-and-a-half years in office. In contrast with this study, the two legislative packages on energy from September 2007 and January 2008 were not included.

management – the Community Method. The OMC and other forms of new modes of EU governance have in common that they do not give "the Commission pride of place in operational management processes and [underline that] differentiation is the keynote of European policy management" (Metcalfe 2004: 84). Instead, decision-making is centralised in the European Council and the preparatory work is undertaken by prime ministers' personal offices, the Council secretariat and the relevant DG's of the Commission (Hix 2005). Furthermore, in essence, non-legislative modes of governance such as the OMC have two main features:

> The first is the agreement of a common set of goals, which the member state governments have promised to achieve independently and without recourse to EU legal instruments. The second involves 'naming an shaming', whereby the governments regularly monitor each other's progress towards the agreed goals, and publicly congratulate or admonish each other accordingly. (Hix 2005: 247)

The rise of non-legislative approaches like the OMC is not a consequence of enlargement. As Best (2008) explains, various forms of non-binding policy coordination, both within and outside of the Community framework, have been under development since the early days of the EU.[6] Other explanations describe this rise with reference to the Commission's success in the last few years as a policy entrepreneur (Mazey and Richardson 2006) or explain it as a response to the imbalance between market-creating and market correcting policies, which have been analysed by many scholarly accounts of European integration (Scharpf 2001). Without giving preference to either explanation, it is important to underline nevertheless that, in the face of multi-dimensional issues, differentiation is the keynote in European policy management. As a consequence, in policy areas where the application of the Community Method is politically unfeasible, European institutions in general, and the Commission in particular, will continue to use new modes of governance to become involved in new policy areas.

In addition to these rather exogenous developments on a macro-level, there are further indicators that point more towards changes within the Commission from 2004 onwards. These include, amongst others, the Kinnock reforms and changed leadership of the Commission under Barroso. Concerning the former, and under the leadership of Prodi's Vice-President Neil Kinnock (2000-04), an administrative reform agenda was pushed through between 2004 and 2007. These reforms were focused on creating specific changes in organisation, financial control and personnel policies and practices. To achieve these aims, it ushered in more systematic budgeting and personnel management, as well as better preparation and consultation mechanisms (Kassim 2004).

Furthermore, Barroso's leadership of the Commission constitutes another indicator of change within this institution. A general perception is that Barroso exercises weak leadership by visibly serving the interests of the larger member states, sometimes even at the expense of the smaller member states, while concentrating even more intensively than its predecessors on its role as a consensus-seeker (Kurpas *et al.* 2008; Kaczyński 2009). On the other hand, in reaction to the failed Santer and Prodi presidencies and as a result of subsequent treaty reforms, the President has gained in importance within the College since enlargement, hence the establishment of a highly Presidential Commission under

[6] Concerning examples of non-hierarchical negotiations between states completely outside the Community framework, Best (2008: 224-5) mentions the establishment of the second pillar (Common Foreign and Security Policy) at Maastricht. Regarding developments in non-binding policy coordination within the Community, he mentions the Cardiff Process on structural reform and a Cologne Process of Macroeconomic Dialogue leading to the 2000 Lisbon Strategy and the open method of coordination (OMC) (see Jordan and Schout 2006).

Barroso.[7] In the context of a considerable larger College, Barroso warned of the dangers of 'Balkanization' in the absence of a president that is seen by the other members of the Commission's political top as the last resort arbiter and authority (Peterson 2008: 763). In the first Commission ever in which each member state supplied only one Commissioner, reshaping the College according to the configuration of the Council, Barroso argued that a strong President was a purely functional necessity. In this context, it is possible to better understand his greater media presence and his successful efforts in personally linking himself to the major policy initiatives of the Commission, "from roaming tariffs to the proposals on energy and climate change, from reducing bureaucracy to the Commission's actions for growth and jobs" (Kurpas *et al.* 2008: 32). Furthermore, Barroso's embrace of policies such as better regulation strongly contributed to his position of respect in the European Council. The Commission President's standing in this institution is mentioned here because this constitutes one of the most important determinants of the Commission's standing in the overall EU system (Peterson 2006b).

New modes of governance, the Kinnock reforms and Barroso's changed leadership all serve as internal and external sources of pressure that have affected the Commission in several ways. To some extent, enlargement has merely interacted with and reinforced some of these sources of pressure for change that were already present. The Kinnock reforms, for example, were the result of the Santer Commission's resignation in 1999 rather than a response to the enlargements that were then looming on the horizon. And while it can be argued that the more consensus-seeking, more presidential approach of Barroso reflects his personal preferences, this cannot fully explain the above-mentioned increasing preferences for soft forms of coordination. Enlargement has increased the underlying diversity within the Union, underlining the limits of uniform European solutions in areas such as economic and social policy. Therefore, enlargement did "bring about some changes in the balance of forces within the Union regarding the design of specific forms of cooperation" (Best 2008: 238). This argument urges us to present three further provisional statements about why and how enlargement did bring about these changes.

First of all, enlargement has emphasised the central role of the Commission in delicate policy areas such as foreign policy; including the external dimension of energy policy. Schmidt-Felzmann (2008) argues that the EU serves as an additional avenue for member states to pursue salient foreign policy interests. Due to considerable advantages in administrative capabilities and material resources, larger states are more inclined to pursuing policies bilaterally if no consensus at the EU level can be achieved. This means that they do not need to seek EU agreement at all costs. Smaller states, like most CEES states that recently joined the EU, lack these advantages. Therefore, in seeking to strengthen their position in relation to dominant external actors such as Russia, these and other smaller states are actively seeking support from both their fellow member states as well as from EU institutions such as the Commission. Barroso has acknowledged that the central role of the Commission has been reinforced because the new member states "look at the Commission as the honest broker and the fair partner" (Barroso in Peterson 2007: 3). In playing the 'Brussels Game' new member states proactively lobby the Commission to have their interests taken into account while also approaching the latter as a mediator to resolve bilateral problems with, for example, Russia. The strategy of these states is trying to resolve problems at a low political profile while, for the sake of not being labelled as one-issue countries, downplaying or avoiding these problems at higher political levels in the Council. Also, in making sure that their interests are taken into account, smaller states rely on proactive lobbying of the Commission and fellow (larger) member states. One way in

[7] Literature commenting on the failed Santer and Prodi presidencies include Macmullen (1999) and Peterson (2006b).

which they pursue this goal is through "careful positioning of their nationals in the Commission and the Council Secretariat" (Schmidt-Felzmann 2008: 173).[8]

Secondly, Barroso's College is characterised by a two-tier system, with significant differences between 'old' and 'new' member states. Most new EU member states have only been allocated minor portfolios, rather than key economic portfolios such as Competition and Internal Market. Also, Barroso's Commission is dominated by "an intermediate generation of technocrats [*from*] the first post-Communist political classes" (Peterson 2008: 765). These technocrats from the CEES states seem to point to little incentive for any political activism. The previous arguments are made even stronger when one considers that the above-mentioned move of one Commissioner per member state has reduced the formal equality of Commissioners and that there is little doubt that Commissioners more closely represent their member states.[9]

These two statements highlight that enlargement, while having led to greater formalisation of official meetings and procedures, has also strengthened the use of informal channels to prepare and influence decision-making. This has led to more and more decisions being taken in "administrative spheres rather than in the political fora of the EU" (Eberlein 2004; Best *et al.* 2008: 12; Kurpas *et al.* 2008). Stated differently by a Director in the Commission services: "Enlargement pushes things down" (Peterson 2008: 768). This refers to how weak political authority, sometimes up to the level of the Commissioners and their cabinets, increasingly places responsibility regarding the actual content of proposals on the services. In an organisation consisting of "several sub-organisations with different wills" (Mazey and Richardson 2006: 283), and given that agenda setting and decision-making at the relatively early stages of the EU policy process are critical determinants of eventual policy-outcomes, the shift towards administrative governance seems to have gained importance in the enlarged Union (Peters 1992). In this context, a prominent question for future research agendas on European integration will be to analyse to what extent the services will "try to resort to more informal means of governing by networks, and in ways that allow for little political input from the College" (Peterson 2008: 773).

Consequently, it can be concluded that enlargement has added fuel to the fire of multiple sources of pressure that have changed the Commission both internally and in its role and influence in the larger system of EU governance. Having become one of Europe's flagship dossiers under Barroso, energy policy is considered here to be a highly relevant and specific policy area to analyse. However, EU energy policy is characterised by issues such as a lack of competence for the Commission in external policy, increasing complexities due to heterogeneity of energy situations in the enlarged Union and therefore a considerable degree of resistance towards legislative solutions. Considering these problems, we now turn to analysing how and why the Commission has exerted influence and has moved cooperation and integration forward in the external dimension of energy policy.

The Commission's shifting involvement in external energy policy for an enlarged EU

The absence of a coherent and credible external dimension constitutes the main weakness of the new Energy Policy for Europe. Van der Linde (2008) underlines that the internal and external dimensions of energy policy should be connected in order to develop coherent

[8] In exemplifying this claim, Schmidt-Felzmann (2008) states that it is no coincidence that Finnish nationals have been working on Russia and Russia-related portfolios in the Commission's Directorate General for External Relations (RELEX).
[9] This is because, following the enlargement of the EU, larger member states no longer nominate a second Commissioner to represent the political opposition in their country.

energy policy-making. This is because the internal market approach alone cannot secure results in the other policy areas of the EPE. "The market is a coordination mechanism for scarce resources but cannot by itself produce the transition to a larger sustainable fuel base nor generate a consistent crisis policy mechanism or other long-term goods such as long-term security of supply" (Helm 2006 in Van der Linde 2007: 278). Yet, where energy security has been focused upon, this has been at the national rather than at the Community level, with "oil and gas pipelines supplying the EU today having been constructed in the interest of energy companies rather than with the guarantee of the EU's energy security in mind" (Piebalgs 2009).

The 2004-07 enlargements have further complicated the formulation of a common external energy policy. This is because enlargement has strengthened the main characteristics of energy issues for the 27 member states, i.e. a combination of high heterogeneity of situations (if not preferences) and therefore the difficulty of choices (Van der Linde 2007). Factors such as limited domestic energy resources and geographical proximity, for example, make the CEES states traditional importers of Russian gas, mainly through the Ukrainian transit route. Also, as they are mostly small states, their markets (and often their companies) are too insignificant to influence or engage in security of supply strategies and the great cost involved. All this considerable heterogeneity is further reinforced by the fact that the member states of an EU of 27 have differing and complex relations with key external energy companies such as Gazprom (Larsson, 2006). In addition to issues such as specific long-term contracts, these relations are increasingly determined by joint ventures between Gazprom and European energy companies. The latter are increasingly taking place on the integrated European energy markets and are focused on the highly profitable midstream/downstream links of the gas-value chain (Mijknecht 2008).[10] At the same time, the asymmetric exposure to political and economic risks due to import dependence on only one or two suppliers has pushed the CEES states to insist on reinforcing solidarity among European member states and to reduce the dependency on countries such as Russia (Geden *et al*. 2006).

In fact, windows of opportunity brought about by external events have been mainly responsible for developing both the internal as well as the external dimension of the EPE (Natorski and Herranz-Surrallés 2008). Particularly encouraged by the Russian-Ukrainian energy dispute in 2006, the European Council expressed their regret over "increasing import dependency and limited diversification achieved so far", as well as the "limited coordination between energy players" (Council 2006a: 20). And while recognising these and other challenges formulated in a Commission Green Paper (2006a), the EU Heads of State or Government declined to endorse the Commission's call for a "Common European strategy for Energy" (Commission 2006a: 4). Instead, it decided to instigate the EPE, inviting the Presidency, the Commission, and the High Representative to take forward work on "the development and implementation of an external energy policy in a coherent and coordinated manner, making use of all available instruments including CFSP [Common Foreign and Security Policy] and ESDP [European Security and Defence Policy]" (Council 2006b: 10). A joint paper by the Secretary-General of the Council/High Representative for the CFSP (SG/HR) and the Commission, which was shortly published after the Council's decision, seems to underline the intergovernmental nature of the EU's latest proposals in external energy policy. This paper does not propose any transfer of power or authority from the Union's member states regarding energy issues. In contrast, it states that: "The legitimate right of individual member states to pursue their own external energy relations for ensuring security of energy supplies and to choose their internal energy mix is not in question" (Commission/SG/ HR/ 2006: 1).

[10] The midstream activities in the gas value chain concern supply/transport and trade of gas, while downstream activities focus on the distribution and retail of gas (Mijknecht 2008).

The sovereignty of member states over the energy mix is further emphasized in the Lisbon Treaty. The specific chapter on energy (Title XX, Article 176 A) mentions that the Union shall aim at promoting the interconnection of energy networks. At the same time, it indicates that any measures to that effect "shall not affect a member state's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply".[11] And while Article 2c makes energy a shared responsibility between the Union and its member states, this does not easily transform into a shared interest or view among the 27 member states. "It is therefore doubtful that effective policy-making, bridging the many differences, can be expected" (De Jong and Van der Linde 2008: 6). In sum, looking at both the establishment of the EPE and the Lisbon Treaty, measures that the EU should undertake in the external dimension of the EPE contain proposals that push for further integration, although due to resistance by the member states, their scope and their institutional linkage within the EU system remain ambiguous (Natorski and Herranz-Surrallés 2008).

To a large extent, this 'neither-fish-nor-fowl' character of the EU energy policy is noteworthy as closer integration of European energy markets has undermined the effectiveness of member states' national instruments. At the same time, the EU toolset is both incomplete and incomparable to that of the member states. The result is that "both elements of internal energy policy-making and external energy policy-making do not fully belong in the authority of either the Commission or the member states" (Van der Linde 2008: 9). The incompleteness of the EU and member states energy policy toolsets is nowhere more obvious than in the external dimension of the EPE. At the European level, two of the Commission DG's - External Relations (RELEX) and Trade, Transport and Energy (TREN) - have been delegated supranational competences in the external energy field with partners such as Russia. By virtue of the Union's common trade policy, DG TREN negotiates on behalf of all member states in international consultations on energy-related issues, while DG Trade holds the key responsibilities for all external economic matters (Smith 2006). At the national level, member states' toolsets focus on the mixed or non-economic or political-strategic kind such as foreign and security policy and trade promotion (Schmidt-Felzmann 2008; Van der Linde 2008). At the same time, this separation is not as clear-cut as it looks, as there are increasing overlaps in areas. For example, trade policy represents an EU competence, whilst stimulating trade relations is usually a member state's undertaking. With regard to control over competition, this applies to competition beyond the national markets of member states, not to competition within them. And while the EU sets and shapes the member states' economic policy-making into an EU mould, "in the foreign relations area, this mould is still in a pre-infant stage" (Van der Linde 2008: 9-10).

If we take these competency problems and overlaps into consideration, we can understand why the Commission relies on proposing energy legislation if it can be linked in some way to the internal market. Controversial issues in the Third Package such as the reciprocity clause serve here as a prime example. This clause, which prohibits third country companies or states ownership of European transmission networks, has been dubbed the 'Gazprom Clause' as it seems principally directed towards Russia's partially state-owned gas company. Hence, this clause has been interpreted as aiming not to enhance liberalisation of the market, but to create leverage in negotiations with third parties (Faber van der Meulen 2008). It directly links internal gas market designs to energy security, i.e. the Commission trying to use "low politics" competition policy in order to guarantee "high politics security of supply" (Faber van der Meulen 2008: 53).

[11] Treaty of Lisbon amending on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007.

This use of low politics 'Community tools' underlines that the Commission fails to secure the foreign policy powers needed to create a full policy toolbox to underpin any full-fledged external energy policy. Member states do not want to increase its autonomy in external energy relations. When one considers the EPE through the prism of intergovernmentalism, it is evident that the institutional settings are dominated by national preferences and that any possible outcome should be fully attributed to member states' preferences. In this view, the SG/HR not only controls the Commission, the latter's role is reduced to that of an agent, delegated with cost-reducing tasks such as providing information and instruments (Pollack 2003; Mayer 2008).

All this complexity leads us to conclude that a common external energy policy, where national energy cultures would become congruent with the EU's nascent culture, seems highly unlikely to be achieved in the short- or medium-term. Despite these valid assumptions, however, and like in other domains of European foreign policy, energy does raise questions concerning agent-structure problems and unintended consequences of delegation. The former revolves around the extent to which actors have the space to be creative and the extent to which the formal and informal properties of structure impose constraints and define the boundaries of possible behaviour (Wendt 1987). Delegation is a central element in conceptualising the relationship between different executive actors in terms of principal-agent, i.e. "principals demand certain tasks that agents supply" (Hix 2005: 28). A central implication of this approach, however, is that for reasons such as its own interests and policy preferences, the agent (Commission) sometimes wishes to diverge from the original policy intention of the principal (Council). In addition, despite the principal setting constraints, such as monitoring and designing rules and procedures which minimise the autonomy of agents, the delegation of power often results in a bureaucratic drift in which the Commission is able to use its policy discretion to move final policy outcomes closer to its ideal position (Pierson 1996). Key variables that define the relationship between the Council and the Commission in the larger EU system, i.e. the degree of autonomy that the latter is given by the former, depends on:

> The nature of the tasks in question, the institutional rules under which they operate, the degree of conflict between the principals and the amount and quality of information the principals have on the likely actions of the agents. (Horn 1995; Tsebelis 1999, 2002; Huber and Shipan 2002 in Hix 2005: 31)

First of all, with regard to the degree of conflict between the principles, i.e. taking the difficulty to reconcile the needs and preferences of member states into account, energy constitutes a policy area in which the Commission has become, at least potentially, a stronger player. As a policy entrepreneur, the Commission has greater ability to set the policy agenda when the Council is divided (Pollack 1997). In this case, the Commission can shape the policy agenda by manipulating the asymmetries between the member states. At the same time, there is little question that with regard to issues such as energy, enlargement has made the Commission's job "both much tougher and – if the EU [is] to have ambitions and pursue them collectively – more consequential" (Peterson and Birdsall 2008: 62).

Secondly, concerning institutions and institutional rules, while the joint paper by the SG/HR and the Commission does underline the legitimate right of individual member states to pursue energy relations on an intergovernmental basis, it also underlines the European dimension by stating that a coherent and focused external EU energy policy draws on the full range of EU internal and external policies. Also, "an effective external policy on energy depends on being able to harness our considerable collective resources and put them at the services of shared interests" (Commission/SG/HR 2006: 1, 4). By

placing energy holistically in the entirety of EU external relations, the Commission and the SG/HR do not approach energy policy merely in terms of market liberalisation. More importantly, by underlining that all EU foreign policy instruments are to be recalibrated in order to pursue an external energy policy suggests that the latter must be understood as a multi-dimensional issue, which resists uniform European solutions, but requires strong coordination. This latter point underlines that energy constitutes an issue that increasingly cuts across the national/supranational axes and therefore internal and external energy policy-making.

Hence, energy policy is cross-pillar in nature (Stetter 2007). In other words, it develops across multiple pillars, through interaction between those pillars, as well as through interaction with the foreign policies of member states. To clarify this further, "cross-pillar" means here that there is a much larger complexity of, and diversity within, the EU's foreign policy mechanism than the simplistic categorisations of EC versus CFSP/EDSP and Community method versus intergovernmental method (Stetter 2004). Instead, it might be more accurate to characterise EU foreign policy as "existing on a continuum, going from various degrees of supranational integration, over various degrees of intergovernmental integration, to purely intergovernmental cooperation" (Keukeleire and MacNaugthan 2008: 31).

This complex interaction between actors and between external and internal policy issues exemplifies that the role of the Commission in energy policy is not merely determined by formal Treaty provisions. This is due to the fact that it is often unclear what the competence of the Commission is or ought to be because of boundary problems in energy policy-making, The downside of this situation is that the Commission has struggled with major boundary problems between the first (EC) and second pillar (CFSP/ESDP) competences, which have led to a succession of border conflicts or "outright war" between the Commission and the Council or member states, as well as within the Commission's own structures (Keukeleire and MacNaughtan 2008: 86). On the other hand, boundary problems have also allowed the Commission to pursue a strategy of extending or creating its own competence where possible. It has done so by "building precedents" (Smith 2006: 324), or "redefining issues in ways that bend them towards those areas where [the Commission] yields power" (Matláry 1997: 143). As is further exemplified below, a weak or almost non-existent power to act in one issue area, such as in foreign policy, may successfully be coupled by the Commission with competition policy, defining the former issue in competition terms.

Thirdly, on the nature of the tasks of the Commission in the EPE, Mayer claims that, consistent with rationalist principal-agent conceptions of "agency slack" (2008: 257), it appears that the member states sought to control the Commission by drawing upon the SG/HR, whilst the Commission was only asked to provide information and technical assistance. Yet, when we consider the problem of bureaucratic drift, also taking into account the fact that the Commission is an actor with interests in capturing authority, the formal setting of the EU's networked administrative system allows it to exploit its position as an "animateur" (Ludlow 1991: 97) and "process manager" (Pierson 1996: 153). Or, stated differently: "It provides and applies its accumulated knowledge and 'occupying' a strategic location where it supervises and administers complex arrangements of increasingly coupled issue areas" (Mayer 2008: 253). As a process manager, for example, the Commission has played a prominent role in being in continuous interaction with third parties in developing the EU's structural foreign policy. A prime example of this concerns the EU's energy dialogue with Russia (Hadfield 2008; Romanova 2008). Also, based on its monopoly right to propose legislation hence being a major energy policy-maker, the Commission serves as a continuous centre of attention for lobby groups from the energy industry (Matláry 1997). Through it's role as an *animateur*, which allows it to raise any issue

of European concern, the Commission is often capable of exploiting the fuzzy notion of community interests (Mayer 2008: 260). At the same time, energy constitutes an issue in which the Council is heavily divided and strongly in need of new information or policy ideas. In this context, the increasing use of communications and other documents under the Barroso Commission have served:

> As stream of often-thorough conceptual and operational preparatory work. [These] have allowed the Commission to quickly deliver at those moments when the policy context was ripe for concrete policy actions. They have also contributed in terms of agenda setting, and putting 'external policy' actions in a clear strategic 'foreign policy' perspective. (Keukeleire and MacNaughtan 2008: 90)

In the context of agenda-setting in the right policy context, the increasing amount of Commission Green Papers that have been published since 2000 on a European energy strategy were not only released in the face of external windows of opportunities. They also increasingly preceded the formulation of new foreign policy orientations by Council actors.

For example, in 2004, Energy Commissioner Andris Piebalgs made proposals attempting to blend energy issues with more general external relations tasks. He did so by stating that the recently created European Neighbourhood Policy (ENP), which is fully coordinated by the Commission, could serve as a vehicle for conducting future dialogues with energy producers and transit countries (Piebalgs 2004). To achieve this, the Commission exploited vague clauses of the EC Treaty on measures in the spheres of energy, or Article 155, on Trans-European Networks, which it further expanded and incorporated in the ENP. The Commission "thus moved from relatively technical activities in economics or trade towards more geopolitical aspects during negotiations over strategic infrastructures" (Mayer 2008: 267-8).

This similar pattern was extended in the run-up and establishment of the EPE. Here, the Commission seized on windows of opportunity provided by peaking global hydrocarbon prices and promoted a clearly articulated view that energy security had moved from being a technical issue to an issue of international relations. More specifically, Piebalgs described energy security as an issue which was now "on the table of every energy minister, as well as foreign, finance and industry ministers across Europe" (Piebalgs 2006). In March of that same year, a Commission Green Paper proposed various measures and recommendations that would alleviate the weaknesses of the EPE by implying pooling of sovereignty and further integration in issues such as energy infrastructure and energy mix (Commission 2006a). While the Council rejected many of these far-reaching proposals, it did accept the idea of a regular Commission publication called the *Strategic EU Energy Review*. This review offers a single reference point "for all actors in European energy at both Community and national level, enabling not only an effective exchange of information but also a real coordination approach" (Geden *et al.* 2006: 12).

In January 2007, the Commission presented the first *Strategic EU Energy Review* with a number of proposals that the European Council adopted as a prioritised EPE action plan. This included the "establishment of an energy observatory within the Commission" (Council 2007) and the appointment of "European coordinators to represent EU interests in key international projects" (Commission 2007a: 19)[12]. Even more, in May 2007, the Commission launched the *EU Network of Energy Security Correspondents* (NESCO) "to assist

[12] These projects include the construction of the Nabucco gas pipeline. This pipeline aims to diversify the Union's gas supplies by bringing gas from non-traditional suppliers (e.g. Russia) via new transit routes. In November 2007, Energy Commissioner Piebalgs appointed Jozias van Aartsen, former Dutch Foreign Minister, as European Coordinator for this project.

the EU's early response and reactions in case of energy security threats" and serve as a "forum which can provide shared assessments of external factors impacting on Europe's energy supply" (Commission 2006b). Endorsed by the European Council in December 2006, this high level network consists of representatives from the Commission, the Council Secretariat and EU member states and consequently cuts across multiple actors and institutions. NESCO is also prominent in the Eastern dimension of the ENP, i.e. the Eastern Partnership (EaP), whose establishment was accelerated in the wake of the Russia-Georgia war. Providing a framework for deeper co-operation through both bilateral as well as multilateral channels with partners in Eastern Europe and the Southern Caucasus, in the EaP the Commission proposes mutual energy support and security mechanisms (Commission 2008b). As prominent tools, an energy security panel should be established to support work on strengthening energy crisis preparedness. For that purpose, it suggests linking its work with that of NESCO and bearing in mind the work being undertaken in other fora such as the Energy Community and INOGATE (Commission 2008b: 12).[13]

In short, economic integration in the single market has drawn issues of high politics (energy) into the EU remit. Through limited forms of delegation, member states have begun to share certain tasks in the areas of legislation and coordination with EU actors such as the Commission. The result is that:

> While the Energy Policy for Europe is linked with the intergovernmental CFSP framework, it is supplemented by a large number of Commission-controlled responsibilities and instruments. They compromise a substantial multifaceted and cross-sectional 'energy tool box of spheres of (shared or exclusive) community activity'. None of these spheres themselves can generate complete autonomy with regard to political objectives. Therefore, as a whole, they comprise a novel multi-level energy governance system with nested policy processes, drawing together a number of supranational, intergovernmental and member-state actors with a high degree of functional and organizational segmentation. (Mayer 2008: 271)

Consequently, within this novel system, one can argue that while member states persist in their national prerogatives in energy policy-making, the preferences of national governments are increasingly channelled into the EU decision-making process alongside those of executive actors such as the Commission (Stetter 2004, 2007). Although it is far from being independent from the member states, the Commission's relationship with the member states can increasingly be described as being interdependent through the multi-level energy governance system (Stetter 2007; Mayer 2008). Finally, the term "intergovernmental" has been used here several times, for example, to describe the enlarged Commission under Barroso and as an institutional approach towards explaining delegation in the EPE. However, in light of what has been argued here, in the enlarged EU, intergovernmentalism has acquired a new meaning. It does not mean a sharp, simple, enhanced rivalry between EU member states and the EU institutions. Rather, it refers to a more complicated process of bargaining and coalition-building, in which the Commission represents a central and influential player. It is influential not in the sense that it has acquired more formal powers or has played its role as a legislative initiator, but in the sense that it is a strategic node in the EU's network governance system (Peterson 2008).

[13] The *raison d'être* of the Energy Community is to provide a framework for the South East European region to rebuild its energy networks, hence offer a regional approach to energy security. INOGATE is an international energy co-operation programme between the EU, the littoral states of the Black and Caspian Seas and their neighbouring countries, which have agreed to work together in areas such as enhancing energy security and supporting sustainable development.

New modes of governance in EU energy policy-making: a non-legislative approach as a *modus vivendi*

Several scholars have recently criticised the meagre results of nearly two decades of European efforts to construct an energy policy (see Helm 2007; Van der Linde 2007; Natorski and Herranz-Surrallés 2008). While the Commission has made far-reaching efforts in strengthening existing internal market provisions via the Third Package, it has also been criticised for failing to clearly show how to strike a balance between the three dimensions of the EPE, i.e. reasonable prices, security of supply and environmental sustainability (Röller *et al.*, 2007). Also, the Commission has failed to demonstrate that policy-making at the EU level is more effective in achieving results in all three of these areas than policy-making at the national level (see Van der Linde 2007; Behrens and Egenhofer 2008; De Jong 2008).

To convince member states of the European added-value to national energy policy-making is crucial as effective hence structural results in this area requires a strong degree of relinquishment of national control to the European level; with inevitably more power to the Commission. Helm states that European energy institutions require 'expertise, information and regulation' (2007: 58). He further argues that essential elements in creating a viable external energy policy, such as establishing well-functioning European energy grids, require a top-down European perspective. This is because "[the European energy grid constitutes] a public good [...] and needs to be designed with the interests of the whole in mind – just as in mid-century the national grids were designed from a national perspective" (Helm 2007: 51).

Even more so in an enlarged Union, the Commission has failed to understand and make smart use of the increasing diversity and asymmetry among the member states. Whether as a legislator or in its broader role furthering EU policy through non-binding recommendations, opinions or other forms of 'soft law', the Commission has engaged too much in making proposals with a heavy top-down orientation. This governance by hierarchy denies the differences in the referent objects at the national level, i.e. the things that are considered to be affected by threats in energy security in national energy systems (Natorski and Herranz-Surrallés 2008).

Furthermore, in the controversial area of energy, it is highly unlikely to see the emergence, in the short- or medium-term, of - any effective and common energy policy. It will certainly not develop quickly enough to deal with current strategic energy issues. The most recent gas crisis in January 2009, caused by Russian-Ukrainian disputes over gas and transit prices, painfully underlined the shortcomings of the current crisis mechanisms in place. This lack of European added value undermines the energy security of the enlarged Union. According to Helm, the hope that a bottom-up process will lead to a well-designed system seems misplaced as he argues that, "it is not in the incumbents' (or even necessarily national) interest to take a European perspective" (2007: 52).

The EU, however, has extensive experience in building coherence by using harmonisation, coordination and only then unification. Therefore, Van der Linde claims that instead of pursuing a strong focus on unification – trying to coerce member states into giving up competencies – the EU should engage more in a bottom-up and tailor-made approach by making "smart use of diversity, asymmetry and subsidiarity" (2008: 2). In the face of heterogeneous energy needs and preferences and asymmetric exposure to disruption risks, the member states of an enlarged Union might require different policies rather than just one. Stated differently, "allowing member states to find their own efficient and appropriate solutions for (mostly localised) security of supply issues is the best tactic that at a minimum keeps the momentum going and allows for a search for cost efficient solutions" (Van der Linde 2008: 12). This evolutionary or economist approach to integration in energy policy, i.e. via harmonization, coordination and (only then)

unification, is the only workable way forward in directing 27 member states with asymmetric interests into a coherent approach.

In the context of increasing diversity within the Union, a variation on the Lisbon Strategy and the OMC can serve as a workable *modus vivendi* in establishing progress in external energy policy, hence in the overall EPE. This will take place through the creation of the groundwork for some benchmark for security of supply; peer-review systems for member states to look at each others' arrangements; learning from each other practices and making effective use of the practice of naming and shaming those which lack behind or are reluctant to contribute to agreed common priorities (Jordan and Schout 2006; Best 2008; Van der Linde 2008). Benchmarking and fostering convergence on common issues, however, only works when there is something at the end of the road, i.e. as a means to an end. In the case of energy, a crisis mechanism that effectively deals with disruption of supply by providing redistribution for a relatively short duration could serve as an incentive to member states in achieving specified targets set at the European level. Not only would this create a buffer against disruptions such as the one caused most recently in January 2009, it would create an ends, i.e. a sense of solidarity among larger and smaller member states alike.[14]

The EU can and must play an important supporting role by providing the stage where a broad framework strategy can be agreed and underpinning national measures with complementary (European) action. As a central node in the EU's networked administrative system, and as a process manager, the Commission can play a leading role. It can do so by, for example, creating and monitoring the aforementioned benchmark for supply security and the promotion of information exchange, i.e. the transfer of good practice and experience (Helm 2007; Best 2008). Also, by offering support in the development of a crisis mechanism, which is developed from the bottom-up, is cost efficient and avoids heavy bureaucracy, the Commission would let member states remain largely sovereign over their energy policy, yet would manage to share risks and costs in energy security. This will not only provide security for smaller 'follower' states, but it will also help overcome "the battle of wills" between the Commission and certain larger member states about vertical integration and the wish among the latter for strong European companies (Van der Linde 2008: 33-4). In the wake of enlargement, a variation on the OMC seems the most realistic and practically workable policy measure.

This need for a *modus vivendi* in the EU's multi-level energy governance system is in need of a network manager who provides not only leadership, but also motivation and trust (Jordan and Schout 2006). For obvious reasons such as its formal policy initiating role, good access to information and serving as a focal point of many sectoral networks, the Commission seems to be the most obvious candidate for this job. Yet, in providing leadership, motivation and trust in effective EU governance, the Commission still has far to go before it can provide either of these tasks in an apt manner Concerning deficiencies in trust, member states lack trust in the Commission as a provider of effective policy-formulation. Again, this is related to its often top-down approach, or its tendency to oversell its own analysis, but also due to the fact that actors in networks do not often recognise their interdependence. Enlargement has strengthened this lack of recognition as "it may require years before actors know, let alone trust one another" (Peterson 2008: 773). And finally, there is the problem of motivation, as the Commission often fails in motivating voluntary co-operation, assuming that it will occur spontaneously (Jordan and Schout 2006).

[14] Van der Linde (2008: 33) underlines that a crisis management mechanism arrangement for fuel, such as for gas, could be more complicated and more costly to realise in comparison with the oil crisis mechanism which has been developed by the International Energy Agency.

In light of this criticism, it is important to note that, in the Commission's second *Strategic EU Energy Review*, there has been a clear shift away from geopolitics towards a focus on pragmatic policy results. First, the overarching focus of the review is mostly inward looking. It has a strong focus on issues such as increasing energy efficiency, improved oil and gas stocks, as well as crisis response mechanisms. Also, in the context of a currently insufficient crisis mechanism, it is equally important to note that the Commission emphasises that speaking with one voice does not mean a single Community representative for external issues, but effective planning and coordination at Community and member state level. At the same time, with regard to the external dimension of energy relations, there is a much stronger emphasis on "energy interdependence provisions", which should be developed in "broad-based agreements with producer countries" (Commission 2008c: 8). This emphasis on interdependence is further articulated by underlining both the Union's quest for "security of supply" as well as external suppliers seeking "security of demand" (Commission 2008c: 7). Finally, the inclusion of major energy chapters in the EU's relations with neighbouring countries, e.g. via the EaP, is noted as an important step towards establishing a visible European added-value in energy policy (Behrens and Egenhofer 2008).

In the meantime, the call made in the review to update and improve existing Community rules on crisis mechanisms for oil and gas has been supported by the European Council of 19-20 March 2009. Stimulated by the January 2009 gas crisis, the European Council underlines the urgent need to:

> Establish adequate crisis mechanisms in the EU as well as to work to obtain clear guarantees from suppliers and transit partners that supplies will not be interrupted. The Council should examine by the end of 2009 the forthcoming Commission proposals to revise legislation on the security of gas supply. This should include an appropriate crisis mechanism ensuring the preparedness of all actors, including the energy industry, transparency and prior information through the development of EU and regional plans for security of supply; solidarity among Member States through the development of regional plans; and improved assessment and coordination through the redefinition of the threshold for deciding actions at Community level (European Council 2009).

Conclusion

This article has argued that multiple sources of pressure have affected the role, work and status of the Barroso Commission in several ways. While not being exclusively or even specifically related to each other, these sources of pressure have included: enlargement, new modes of governance, administrative reforms and changed leadership under Barroso. As a result of these pressures, the Commission under Barroso has become more presidential and intergovernmental and has increasingly used soft law to drive European integration forward. Furthermore, Barroso's preference for new modes of governance such as the Lisbon Strategy and the OMC seem to be driven by the realisation that the increasing underlying diversity in the Union resists Community solutions. This increasing use of non-binding forms of policy coordination is not a consequence of enlargement, but has been strengthened by it. More importantly, besides enlargement, in policy areas where uniform policies at the European level seem politically unfeasible or even desirable, the Barroso Commission seems to consider this the only way forward towards a 'Europe of results' of some sort.

The EU energy policy constitutes an area that has been affected by multiple sources of pressure. In particular, the external dimension of the EPE serves as a prime example of a policy area that is unsuitable for Community-wide answers. In addition, enlargement has

strengthened the diversity in the composition of energy mixes in the EU. Also, it has further complicated the problem that the inextricably interlinked internal and external energy policy making spheres do not fully fall under the authority of either the Commission or the member states. This deadlock situation makes the establishment of a common energy policy very difficult. Instead of a common policy, an analysis of the external dimension of the EPE tells us that energy is characterised by an interdependent, cross-sectional tool box of spheres in which the member states (Council) and the Commission are the main actors. While in this complex institutional setting member states maintain the main source of power and legitimacy, they have begun to share some of these sources with EU actors, notably the Commission. This is due to delegation in the cross-pillar energy setting, which is characterised by boundary problems, a high degree of conflict among principals and information asymmetry. This has led to a bureaucratic drift, allowing the Commission to exploit its strategic position as a node in the EU's networked system. As a process manager and *animateur*, it positions as an influential actor in external energy policy-making.

In an enlarged Union, intergovernmentalism has acquired a new meaning. It refers to more complicated bargaining and coalition-building in which the Commission represents an influential player - not in its role as a legislative initiator, but more as a strategic actor that focuses on pragmatic policy results through non-binding recommendations, opinions and other forms of soft law. In an area such as energy where the Council is highly divided, this strategy allows the Commission to shape the policy agenda.

Barroso's preference for non-legislative approaches in politically sensitive areas seems to be the only way forward in focusing on results rather than concerning oneself with institutional prerogatives such as the Commission did under Prodi. This is a reminder that the EU has extensive experience in building coherence by using harmonisation, coordination and only then unification, a non-legislative approach in (external) energy policy can serve as a *modus vivendi*. A focus on benchmarking for security of supply and peer-review systems, while pushing for cost-efficient tools such as a crisis mechanism, will avoid the trappings of fruitless exercises such as pushing member states into accepting a top down Community approach. At a minimum, this tactic of establishing cost-efficient solutions will keep the momentum going in the Unions struggles for deeper integration in energy and will provide European added-value.

To stimulate cooperation and integration via a non-legislative approach, the Barroso Commission should focus on offering leadership, motivation and trust as it strives for pragmatic and economic policy results. In addition to any effort it will make itself, however, the Commission makes very little of its own luck and is either strengthened or marginalised by broader political developments, which are almost entirely beyond its control. These developments include not only inward-looking issues such as amending the Treaties, but also political problems beyond its borders such as an assertive Russia which affects the EU in one-way or another. Much of the future status of the Commission during Barroso's second term will depend on these external developments. In the meantime, the Commission under Barroso can only do so much as it is highly dependent on the willingness of member states to cooperate and delegate to the European level. However, whether in energy policy or in any other area that has been highly affected by enlargement and other sources of pressure for change, the Commission can contribute to both its own relevance and the generally desired 'Europe of results' by engaging more in defining and implementing the distinct European added-value. By proposing to adapt different instruments such as the Lisbon Strategy to fit the post 2010 period and to channel strategies to deliver on the sustainable development targets by 2020, Barroso has made a first step in redefining his next Commission as the engine of the European project (Barroso 2009).

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The Draft Directive on Consumer Rights: Choices Made and Arguments Used

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Abstract:
The 2008 proposal for a Directive on Consumer Rights (hereinafter: the Draft) aims at reorganizing the *acquis* of four specific European directives on consumer protection into a more coherent codification of consumer rights. Specifically, it contains rules on precontractual information duties, on withdrawal rights for distance and off-premises contracts, on consumer sales and on general contract terms in consumer contracts. In replacing the four directives with a minimum harmonization character, the Draft marks a further step towards full harmonization of consumer contract law in Europe. This is an unsettling step because the level of protection offered to consumers in the Draft hardly exceeds the level of protection offered by the four directives mentioned earlier. Instead, it diminishes this protection in some regards. In light of all this, the question arises whether the policy choices underlying the Draft are, in fact, convincingly underpinned by solid argumentation. This article addresses this issue by first analyzing the Draft's use of the generic concept of "contracts between consumers and traders". It is argued that full harmonization of a badly delineated territory is ill-advised. Subsequently, the argumentative power of the policy considerations forwarded by the European Commission in its Regulatory Assessment Study is tested. The article concludes that the Commission's assessment of expected costs and benefits of the Draft is waver-thin and geared towards persuading the reader of the aptness of choices already made. In some respects, the evidence presented by the Commission is outright unconvincing. At certain points, the Draft even fuels the reader's suspicion of foregone conclusions. Overall, the need for reduction of the level of protection offered by the current minimum harmonization directives is poorly argued by the Commission and appears, in a number of important ways, not to reflect the socio-economic relationships that exist in at least some of the Member States.

Keywords:
European consumer law; full harmonization; domestic preferences; Regulatory Impact Assessment

THE SO-CALLED CONSUMER ACQUIS – THE COLLECTION OF RULES OF EUROPEAN ORIGIN governing contracts, commercial practices and products involving consumers – was not created "wie aus einem Guss" (as a unified whole). Instead, the *acquis* is a mishmash of various European directives and regulations that are badly coordinated, let alone harmonized. The 2008 Proposal for a Directive on Consumer Rights (hereinafter: the Draft) aims at reorganizing the "*acquis*" of four specific directives into a more coherent codification of consumer rights.[1]

[1] *Proposal for a Directive of the European Parliament and of the Council on Consumer Rights*, COM(2008) 614 final.

Van Boom, W.H. (2009). 'The Draft Directive on Consumer Rights: Choices Made & Arguments Used', *Journal of Contemporary European Research*. Volume 5, Issue 3. pp. 452-464. Available at: http://www.jcer.net/ojs/index.php/jcer/article/view/208/169

In essence, the Draft proposes a general framework for contracts between consumers and 'traders'. Specifically, it contains rules on precontractual information duties, on withdrawal rights for distance and off-premises contracts (also known as cooling-off periods), on consumer sales and on general contract terms in consumer contracts. Obviously, the Draft thus aims at replacing and integrating four existing Directives: 85/577/EEC (doorstep selling), 93/13/EEC (unfair terms in consumer contracts), 97/7/EC (distance contracts) and 1999/44/EC (sale of consumer goods and associated guarantees).

Moreover, the Draft seems to hint at slowly moving towards a genuine European Code on Consumer Law by proposing a full harmonization whereas the original four Directives were of a mere minimum harmonization nature.[2] Hence, the Draft is much more than a redraft of (a part of) the existing consumer *acquis*. In striving for full harmonization, the Draft follows in the footsteps of the 2005 Directive on Unfair Commercial Practices[3], which marked a fundamental change in EU consumer policy.[4] This is an unsettling step to say the least because the level of protection offered to consumers in the Draft hardly exceeds the level of protection offered by these four Directives. In some aspects it even diminishes this protection.[5]

In light of all this, the question arises whether the policy choices underlying the Draft are, in fact, convincingly underpinned by solid argumentation. This article addresses this issue by first analyzing how the Draft uses the generic concept of "contracts between consumers and traders". It is argued in the second section of the article that full harmonization of a badly delineated territory is ill-advised. In the third and subsequent sections, the argumentative power of the policy considerations forwarded by the European Commission is tested. In doing so, the analysis in the article is limited to the Draft and related explanatory policy documents. Hence, adjacent initiatives such as the *Green Paper on the Review of the Consumer Acquis* (2007), the *Common Frame of Reference* (2009), and the work done by the European Research Group on Existing EC Private Law (2009) will not be subject of investigation here. Although it may be useful to take notice of those issues in order to gain a richer understanding of the background against which the Commission has taken its current stand, it seems they can be left disregarded for the purpose of this article.[6]

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[2] Art. 4 Draft ("Member States may not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection.").

[3] Dir. 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market, OJ L 149/22; see ECJ 23 April 2009, joined cases C-261/07 and C-299/07.

[4] On the shift in EU consumer policy from minimum to full harmonization, see, e.g., *Geraint G. Howells*, The Rise of European Consumer Law - Whither National Consumer Law?, 28 Sydney L.Rev. 2006, 63 ff.; *H.-W. Micklitz et al.*, Understanding EU Consumer Law (2009) 58 ff.; *V. Mak*, Review of the Consumer Acquis: Towards Maximum Harmonization?, ERPL 2009, 55 ff.

[5] For criticism on this point, see, e.g., *Geraint Howells/Reiner Schulze*, Overview of the Proposed Consumer Rights Directive, in: Geraint Howells/Reiner Schulze (ed.), Modernising and Harmonising Consumer Contract Law (2009) 6 ff; *Hugh Beale*, The Draft Directive on Consumer Rights and UK Consumer Law - Where now?, in: Geraint Howells/Reiner Schulze (ed.), Modernising and Harmonising Consumer Contract Law (2009) 294 f.

[6] On these issues, see, e.g., *M.B.M. Loos*, Review of the European Consumer Acquis (2008) 1 ff.; *H. Schulte-Nölke*, How to Improve EC Consumer Law, Tijdschrift voor Consumentenrecht en Handelspraktijken 2007, 1 ff.; *Stefan Vogenauer/Stephen Weatherill* (ed.), The Harmonization of European Contract Law - Implications for European Private Laws, Business and Legal Practice (2006) ; *Jan Smits* (ed.), The Need for a European Contract Law - Empirical and Legal Perspectives (2005) ; *M. van Hoecke/F. Ost* (ed.), The Harmonisation of European Private Law (2000) .

Full harmonization of a badly charted territory

The Draft entails a coherent 'horizontal' directive for 'consumer rights' in a broad sense. This is evidenced by the sphere of application. The Draft covers 'consumer contracts', meaning all contracts between 'trader' and consumer concerning either the sale of tangible movables (sales contract) or the rendering of a service (service contract).[7] The definition of 'sale' used in the Draft is relatively clear, but 'service' is certainly not. The definition of 'service contract' in Article 2(5) of the Draft merely refers to "any contract other than a sales contract whereby a service is provided by the trader to the consumer".[8] It leaves 'service', as such, undefined. Perhaps Article 50 EC Treaty should be taken as a point of reference? This article considers 'services' to be "normally provided for remuneration" and to include, in particular, activities of an industrial or commercial character, activities of craftsmen and professions.[9] Contrary to Article 2 of the Services Directive (2006/123/EC), the current Draft does not exclude certain services contracts from its ambit. As a result, the Draft seems to have a wide sphere of application including most business-to-consumer (B2C) contracts. To mention but a few consequences thereof, a lawyer employed by a consumer would be obliged to fulfil the information duties laid down in Article 5 and a hairdresser paying a home visit would be obliged to make the customer sign an order form (on penalty of invalidity of the contract!). [10] On the one hand, then, the Draft has a rather wide ambit. On the other, however, it seems to be a limited attempt to harmonization.

Three issues deserve mentioning in this respect. Firstly, the Draft purports to harmonize *certain* aspects of the contracting process and it seems that national laws on general issues of contract law (offer, acceptance, unconscionability, mistake, misrepresentation, rescission for breach, damages for breach) are left unaffected.[11] This causes a certain ambiguity given the aim of full harmonization. For example, attempts at fully harmonizing precontractual information duties amounts to an illusive operation if the maximum harmonization character is easily circumvented by the use of national legal concepts such as misrepresentation.[12]

Secondly, the Draft merely merges four Directives into a single 'horizontal instrument' and it does not affect various specific directives such as those on consumer credit (2008/48/EC) and distance contracts for financial services (2002/65/EC). Furthermore, it does not affect the 'horizontal' Services Directive.[13] Hence, there is considerable overlap and even divergence. The Draft attempts to coordinate all these specific directives but the result is a patchwork of cross references. For example, the Draft is in principle not applicable to financial services, except in regard of the rules pertaining to off-premises selling and unfair contract terms.[14] However, the Draft simultaneously provides that the rules concerning off-premises selling are not applicable to insurance contracts, financial products with

[7] Art. 1 jo. art. 3 (1) Draft Directive.
[8] The Draft does not specifically exclude certain services from its ambit although some provisions are not (fully) applicable with regard to certain services. See, e.g., art. 19 and 20 Draft.
[9] Similar definition used by the Services Directive (Directive 2006/123/EC of 12 December 2006 on services in the internal market), OJ L 376, p. 36.
[10] See art. 5 jo. art. 2 (5) and art. 10 (2) jo. art. 2 (5) respectively.
[11] *European Commission Staff*, Commission Staff Working Paper accompanying the proposal for a directive on consumer rights - Impact Assessment Report (2008b) 34. Note, however, that in art. 24 ff. the Draft does to some extent provide for harmonization of rescission and damages.
[12] *Thomas Wilhelmsson*, Full Harmonisation of Consumer Contract Law?, Zeitschrift für Europäisches Privatrecht 2008, 227.
[13] Directive 2006/123/EC on services in the internal market, OJ L 376/36.
[14] This follows from art. 3 (2) Draft. See *EC*, Proposal for a Directive of the European Parliament and of the Council (2008) 13, recital 11.

fluctuating value and consumer credit.[15] If package travel or timeshares are involved, only the rules on unfair contract terms are to be applied.[16] More generally, the Draft is without prejudice to "the provisions concerning information requirements" contained in the Services Directive (2006/123/EC) and the E-Commerce Directive (2000/31/EC).[17] In effect, one can hardly uphold the assertion that this Draft offers a single instrument by any standard.[18]

Thirdly, the Draft understandably leaves the choice of enforcement instruments open to national legislators.[19] In private law, however, remedies and substantive rights are closely linked and in some instances even unidentifiably merged into one legal concept. Attaining full harmonization of consumer contract law without aspiring to harmonize the remedial aspects fully appears to be a less than comprehensive harmonization effort.

All in all, it is possible to conclude that the maximum harmonization character of the Draft is highly problematic. It sets out to fully harmonize a territory that is badly charted both in regard of the subject matter (what types of contracts are included?) and the legal aspects that are in fact to be harmonized (what aspects of the contracting process are included?).

Choosing between alternatives

After this brief survey of the ambit of the Draft and the deficiencies it brought to light, this section will focus on the arguments used to underpin the policy choices underlying the Draft. Does Europe really need this directive? Apparently, the European Commission is convinced it does. The arguments boil down to the following.

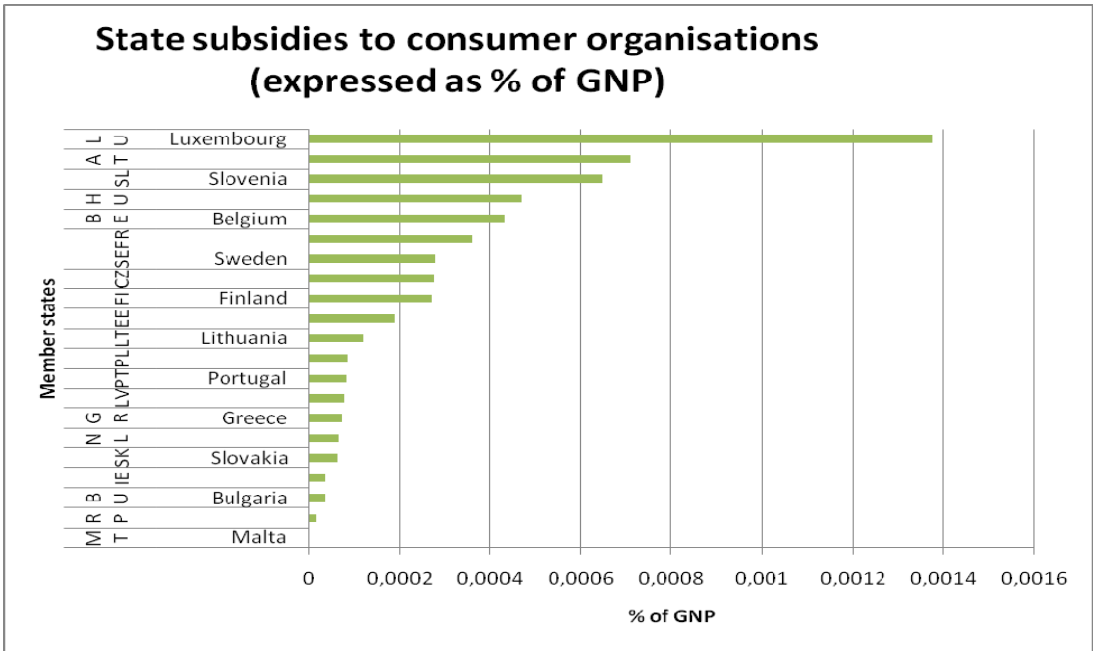
The core issue is the *legal fragmentation* resulting from the minimum harmonization clauses in the four directives. Member States have taken different routes towards different levels of consumer protection and unmistakably the result has been fragmentation (although arguably the intensity of fragmentation must have been attenuated as a result of the approximation character of these directives).[20] This is not merely unsurprising but also hardly a sign of failure of EC consumer policy. Minimum harmonization is what it says: a minimum. To define the outcome of minimum harmonization as the root cause of 'problem' downplays the fact that differences in the level of consumer protection in the different Member States may well be a matter of deliberate domestic choice and differences in national preferences within the European Union.

To start with, it seems plausible that national preferences, domestic wealth, socio-economic equilibria and media strength go a long way in explaining differences in

[15] Art. 20 (2) Draft.
[16] Art. 3(3) Draft.
[17] Art. 3 (4) Draft leaves it to the reader to find out exactly which articles in the Services Directive and E-commerce Directive are meant. I think the cross-reference should read art. 7, 21, 22 and 27 Services Directive (Directive 2006/123/EC on services in the internal market, OJ L 376/36) and art. 5, 6, 7, 10, 12 E-commerce Directive (Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ L 178/1).
[18] See *H.-W. Micklitz/N. Reich*, Crónica de una Muerte Anunciada: The Commission Proposal for a "Directive on Consumer Rights", 46 Common Market Law Review 2009, 481.
[19] See, e.g., art. 6 (2) Draft. Note, however, that this article does provide that member states "shall provide in their national laws for effective contract law remedies". It is quite unusual for a Directive to specify the branch of law within which the enforcement instrument shall be positioned.
[20] See *EC*, Proposal for a Directive of the European Parliament and of the Council (2008) 5. Evidence of legal fragmentation is presented by, e.g., *Hans Schulte-Nölke et al.*, EC Consumer Law Compendium - Comparative Analysis (2006) 1 ff.

consumer protection. Consider for example Table 1. This table displays subsidies given by EU Member States to private consumer organizations expressed as a percentage of gross national product (GNP).[21] Although the comparison presented in this table does not produce conclusive evidence on national preferences, it does shed some light on the disparate valuations placed on consumer empowerment and it may thus be indicative of differences in consumer protection preferences.

Table 1: *Member States' subsidies to consumer organisations*[22]



National institutional settings explain and even justify the existence of legal fragmentation between Member States.[23] Another type of fragmentation may be less convincing: the fragmentation caused by the various directives currently in force in the field of consumer contracts.[24] This is a serious issue by any measure, but as mentioned earlier the current Draft does little to eradicate this type of fragmentation.

As far as the Commission is concerned, the upshot of all this is that legal fragmentation undermines consumer confidence in the internal market, making consumers reluctant to engage in cross-border consumption,[25] and restrains businesses from entering other markets because legal fragmentation forms a barrier to entry.[26] The Commission uses the 'power of percentages': surveys show that 75 percent of traders that currently refrain from

[21] Admittedly, the table is far from perfect. Germany is not represented and the table does not indicate substitutes such as amounts spent by member states on public enforcement of consumer law.
[22] Source: (2006 data): Available at: http://epp.eurostat.ec.europa.eu; http://www.europa-nu.nl/9353000/1/j9vvh6nf08temv0/vh77krn6r4ws; and http://ec.europa.eu/consumers/strategy/sec_2008_87_en.pdf. Last accessed 30 October 2009.
[23] See *Willem H. van Boom*, Harmonizing Tort Law: A Comparative Tort Law and Economics Analysis, in: M. Faure (ed.), Tort Law and Economics (Encyclopedia of Law and Economics Series) (2009) .
[24] *EC*, Proposal for a Directive of the European Parliament and of the Council (2008) 12, recital 6.
[25] *EC*, Proposal for a Directive of the European Parliament and of the Council (2008) 12, recital 7.
[26] *EC*, Proposal for a Directive of the European Parliament and of the Council (2008) 12, recital ov. 7.

cross-border trade would engage in such trade if legislation were harmonized at EU level.[27] Apparently, consumers likewise state that they will have increased confidence in cross-border consumption if rules are identical. Overall objective is to "contribute to the better functioning of the B2C Internal Market and achieve a high common level of consumer protection" by stimulating "cross-border competition (and) thus provide consumers with wider range of goods and services at lower prices".[28] Against the background of these goals, the defined problem is framed by the Commission by presenting six policy alternatives[29]:

1. Refrain from legislative intervention and continue the status quo;
2. Stimulate self regulatory solutions and raise awareness by stimulating consumer education;
3. Promulgating four separate Directives that are both coordinated (e.g. as far as terminology and definitions is concerned) and fill certain loopholes;
4. Promulgating one general Directive, fully harmonizing consumer sales and services contracts and including new rules on passing of risk, exhaustive lists of general contract clauses deemed or presumed unfair, uniform withdrawal periods, information duties, etc.
5. Identical as option 4, but also including rules on recurring defects, information on after-sales and replacement parts
6. Slightly similar to option 4, but including an internal market-clause allowing traders and consumers choice of law (which would necessitate revoking the consumer protection rules under the Rome I Regulation)

The presentation of these policy alternatives seems to be classical example of 'framing choices'.[30] This presentation of a number of unviable alternatives encourages the reader towards preferring some alternatives to others. Alternative 6 is an unviable alternative (who would want to delete consumer protection rules from the newly enacted Rome I Regulation?), as is alternative 1 (who would want to do nothing in view of the problematic issues raised by the Commission?). This leaves the reader with the alternatives 2 to 5 to choose from. The Commission argues that the issue of legal fragmentation can neither be solved by the Member States individually, nor by the enactment of further instruments of minimum harmonization.[31] In the eyes of the Commission, choosing full harmonization is inevitable in order to eliminate fragmentation. Moreover, the Commission asserts that purely domestic contracts without cross-border aspects should be included in the harmonization effect because complete unification would prevent both fragmentation and 'distortion of competition'.[32] In conclusion, the Commission believes that essentially policy alternative 4 is the optimal solution.

One might be tempted to believe that full harmonization would be served optimally by the use of a regulation rather than by a directive; but the Commission argues otherwise. It

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[27] *European Commission Staff*, Commission Staff Working Paper accompanying the proposal for a directive on consumer rights - Impact Assessment Report (2008b) 38.
[28] *European Commission Staff*, Commission Staff Working Paper accompanying the proposal for a directive on consumer rights - Impact Assessment Report (2008b) 15-16.
[29] See also the policy alternatives presented in the Green Paper on the Review of the Consumer Acquis, COM(2006)744def.
[30] On the psychology of influencing decision-making by framing choices, see, e.g., *Dan Ariely*, Predictably irrational - the hidden forces that shape our decisions (2008) . Critical of the 'framing' method *H.-W. Micklitz*, The Targeted Full Harmonisation Approach: Looking Behind the Curtain, in: Geraint Howells/Reiner Schulze (ed.), Modernising and Harmonising Consumer Contract Law (2009) 73-75.
[31] *EC*, Proposal for a Directive of the European Parliament and of the Council (2008) 6.
[32] *EC*, Proposal for a Directive of the European Parliament and of the Council (2008) 8.

states that Member States should be left some margin of appreciation to preserve domestic legal concepts and, if they prefer, to implement the European rules in a cut-up version into national Consumer Law Codes. Thus, the Draft Directive would be adjusted to the national legal setting instead of the other way around.[33] The Commission believes that its choice (in essence no. 4) is ideal: the internal market will benefit from full harmonization because it 'levels the playing field' and stimulates SMEs in border regions into actually crossing borders.[34] It will enhance legal certainty for both consumers and businesses,[35] and it will lower the 'administrative costs' of cross border commerce for businesses.[36]

From the analysis presented by the Commission it can be gleaned that the Commission mainly considers legal differences between member states to be superfluous 'transaction costs' standing in the way of trade opportunities. In its policy documents, the Commission calculates that if a trader would like to enter the market for distance contracts (e.g. internet sales) in the EU, he would have to spend compliance costs in 27 Member States up to a total of some €70,000. In contrast, under the regime of the Draft the trader is said to face the expenditure of compliance only once to a mere total of some €5,500.[37] Taking away legal fragmentation by use of full harmonization eliminates 'transaction costs' and trade should flourish unimpeded, or so the Commission reasons. This distinctive way of reasoning raises the question whether these 'transaction costs' are just that or perhaps something more. As mentioned earlier, the idea of 'domestic preferences' might need some exploration as well.

The choice for of against full harmonization is a political decision. National governments reach a compromise and give up their national preferences.[38] Hence, full harmonization always comes at a cost if 27 Member States have different preferences: some may have to increase the level of consumer protection and others will have to lower their standards.

At first glance, full harmonization seems more in order with regard to some topics than others do. For instance, the Draft's attempt at a uniform withdrawal form may well be a reasonable effort at approximating the practice of withdrawal in Europe and at reducing unnecessary differences in the formats of such forms. However, for other aspects of the Draft it remains to be seen whether differences between Member States are mere 'transaction costs' or reflect national preferences.

There are two sides to the differences between Member States that deserve attention here. Firstly, differences may be salient points for regulatory competition. If Member State A maintains a withdrawal period of 20 working days for distance contracts and Member State B 10 working days, consumers in Member State A might prefer to do their internet

[33] *EC*, Proposal for a Directive of the European Parliament and of the Council (2008) 8.
[34] *EC*, Proposal for a Directive of the European Parliament and of the Council (2008) 12, recital 5.
[35] *EC*, Proposal for a Directive of the European Parliament and of the Council (2008) 12, recital 8.
[36] *EC*, Proposal for a Directive of the European Parliament and of the Council (2008) 8. Note that businesses are allowed to consensually offer more protection to consumers through their contract terms. See *EC*, Proposal for a Directive of the European Parliament and of the Council (2008) 18, recital 56. The Commission admits that certain businesses – identified as certain second hand shops and those businesses not engaging in cross border sales- will potentially be burdened by the Directive.
[37] *European Commission Staff*, Commission Staff Working Document - Accompanying Document to the Proposal for a directive on consumer rights - Annexes (2007b) 232.
[38] The literature on preferences and harmonization abounds. See the references at *Willem H. van Boom*, Harmonizing Tort Law: A Comparative Tort Law and Economics Analysis, in: M. Faure (ed.), Tort Law and Economics (Encyclopedia of Law and Economics Series) (2009) .

shopping in state B (all other things being equal). Fully harmonizing the withdrawal periods effectively stifles cross-border competition on points of legal protection.[39]

Secondly, giving up on differences may actually cause a setback for consumer protection. A case in point is doorstep selling in The Netherlands. After the introduction of an interventionist regulatory framework in the early 1970s, doorstep selling in The Netherlands has virtually ceased to exist. The 1971 Doorstep Selling Act (Colportagewet) obliged salesmen to register themselves and to file every single sales contract with the Chamber of Commerce. Up to this day, the filing requirement for substantial transactions (i.e. contracts with a value over €34) is in place.[40] Apparently, this system has rendered doorstep selling practices virulent before enactment of the 1971 Act unappealing marketing method in the Netherlands. If the Draft is adopted, this will have two important consequences for the Netherlands (apart from the harmonization of the withdrawal period):

- In the doorstep sales conversation the commercial purpose of the conversation no longer has to be actively disclosed by the salesman (see Article 11 (2) Draft, *a contrario*);
- Salesmen may no longer be obliged to file their sales contracts with the Chamber of Commerce (Article 10 (3) and 11 (5) Draft).

The Draft disposes of the Dutch preferences for a high level of consumer protection against doorstep selling. It is difficult to predict what the consequences of adoption of the Draft would be for the Dutch situation, given that the recent Unfair Commercial Practices Directive should (in theory at least) take care of rogue doorstep sellers.[41] Nevertheless, the issue remains whether the Dutch consumer (= voter) would in fact favour this Draft if it would lead to an increase of doorstep selling in The Netherlands.[42] Other countries may have a slightly different consumer culture, in which doorstep selling is a more accepted form of marketing.[43] In effect, full harmonization irons out legal differences and assumes that 'one size fits all' for European consumers. In view of these implications, national governments are well advised to take the interest of their domestic consumer culture at heart when deciding on the Draft.

Arguments used for founding choices made

In this section the methodology used by the Commission for founding its policy is reflected upon. From the outset it should be self-evident that choosing full harmonization needs firm and convincing underpinning because the level of protection offered by the Draft hardly exceeds the level offered by the current four directives.

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[39] On regulatory competition, see, e.g., *Willem H. van Boom*, Harmonizing Tort Law: A Comparative Tort Law and Economics Analysis, in: M. Faure (ed.), Tort Law and Economics (Encyclopedia of Law and Economics Series) (2009) .

[40] See currently art. 25 and 26 Colportagewet (Doorstep Selling Act) in conjunction with art. 3 Uitvoeringsbesluit Colportagewet (Doorstep Selling Regulations). See for overview of thresholds for doorstep selling in the EU, *European Commission Staff*, Commission Staff Working Document - Accompanying Document to the Proposal for a directive on consumer rights - Annexes (2007b) 178.

[41] See the list of 'agressive practices' (Annex I with the Directive Unfair Commercial Practices).

[42] Consumer organisations have alluded to this potential effect of full harmonization; see *European Commission Staff*, Commission Staff Working Document - Accompanying Document to the Proposal for a directive on consumer rights - Annexes (2007b) 181.

[43] *G. Howells/Twigg-Flesner*, What sort of Europe do consumers want?, 15 Consumer Policy Review 2005, 169 ff. rightly raise the question 'what sort of Europe' consumers want.

Indeed, it seems that consumers will gain little from this proposed directive.[44] It is difficult to ascertain why the Commission in its 'impact assessment study' asserts that 'important positive effects' on the level of consumer protection are to be expected from the Draft.[45] It is also difficult to find convincing evidence of such effects, which is all the more relevant since the Commission was asked at earlier occasions by several stakeholders to collect and present objective data on costs and benefits of further harmonization of consumer law.[46] The Commission has executed this assignment in the following three ways.

The Regulatory Impact Assessment Study

The European instrument for weighing the expected costs and benefits of proposed policy decisions is the so-called Regulatory Impact Assessment (RIA).[47] As far as costs of the Draft are concerned, one can think of the administrative burden imposed on businesses with respect to complying with newly imposed information duties. One of the plausible benefits, i.e. the decrease in compliance costs for European internet selling, was mentioned above (pages 459-460). The most important benefit – or rather the overriding objective advanced in support of the Draft – would have to be the increase of cross border consumption and trade. Calculating the expected size of this benefit, or even giving a ballpark figure approximating a best guess seems extremely perilous.

This by no means disqualifies impact assessments as an instrument of objective policymaking, it merely puts their value in the right perspective. RIAs are soft instruments of quantification and as such, they are useful for weighing policy alternatives.[48] However, the problem is that RIAs may give a sense of exactness that they in fact lack. A case in point is the use of evaluation grids with "+", "-" to indicate a strong, minor or negative impact on given policy objectives. Take for example the grid used by the Commission to evaluate the impact of introducing a so-called grey and a black list of unfair contract terms instead of a purely indicative list:

Nature of the "legislative change"	***Contribution to the better functioning of the IM***	***Minimising the burden of EU legislation for business***	***Enhancing consumer confidence***	***Improving the quality of legislation***
Introducing a grey and a black list of unfair contract terms with legal effects instead of a purely indicative list	+++	++	+	+

[44] See *Michael Faure*, Towards a maximum harmonization of consumer contract law?!?, 15 Maastricht Journal of of European and Comparative Law 2008, 441 f.
[45] See *European Commission Staff*, Commission Staff Working Paper accompanying the proposal for a directive on consumer rights - Impact Assessment Report (2008b) 36.
[46] E.g., *DTI*, UK Government's response to the EU Commission's Green Paper on the Review of the Consumer Acquis (2007) .
[47] See, e.g., *A.C.M. Meuwese*, Impact assessment in EU lawmaking (2008) 2 ff. The European Commission uses a standard protocol for RIAs; see *European Commission*, Impact Assessment Guidelines (SEC (2009) 92) (2009) .
[48] Generally on RIAs, e.g., *Colin Kirkpatrick/David Parker* (ed.), Regulatory impact assessment : towards better regulation? (2007) .

The Commission essentially asserts that replacing the current indicative list in the Unfair Contract Terms Directive (93/13/EEC) with a 'black and grey list' will have strong positive effects on the internal market, will minimize the burden of EU legislation for businesses, will slightly enhance consumer confidence and will improve the quality of legislation. It seems hardly possible to underpin empirically (either ex ante or ex post) any of these assertions,[49] however plausible they may be.[50]

Equally debatable is the calculation of costs of implementing the suggested policy decisions. The Commission expects the costs of the Draft for business to be negligible in comparison to the benefits that will accrue. It is foreseen that companies will incur some one-off costs of adapting their contract conditions and practices, but companies that already had ambitions to trade across borders would be supported more effectively by the Draft. Essentially, those companies win. The businesses that are inconvenienced without gaining major benefits are those that have no intention of cross border marketing (and second hand shops).[51] There may be some credence to this argument as far as B2C *trade* is concerned (although it seems more plausible by far that the viability of cross-border B2C trade depends on other factors than the legal regime, such as transport costs), but it remains to be seen whether unification of (some aspects of) consumer contract law will create favourable conditions for cross border B2C *services*. The regulated services, such as lawyers, especially seem to be mainly oriented on domestic markets for other reasons than the high costs of compliance with foreign consumer contract laws.

Furthermore, the Commission's RIA focuses mainly on the direct financial consequences of the Draft, thus underestimating the indirect financial consequences. For instance, the Draft proposes the introduction of a comitology procedure on unfair contract terms. The Draft proposes that Member States collect information on contract clauses declared unfair by national authorities (e.g. public consumer authorities, courts) and send this information to the Commission. The collection of Member State decisions on unfair contract terms is then used by the Commission to evaluate and, if necessary, to amend the 'grey and black list' frequently. For the purpose of this process, the Commission is helped by a proposed Committee on unfair terms.[52] The Commission estimates the costs of this administrative procedure at the mere annual salary of one civil servant (secretary of the committee). The direct costs of the committee members are ignored (who pays for them?), as are the indirect costs of collecting information at Member State level.[53]

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[49] See the critical remarks by *H.-W. Micklitz/N. Reich*, Crónica de una Muerte Anunciada: The Commission Proposal for a "Directive on Consumer Rights", 46 Common Market Law Review 2009, 474-475.

[50] Sometimes the plusses and minuses in the policy documents are less than persuasive. For instance, the Commission argues that a fully harmonized right to reimbursement of payments through bank card in case of annulment of the primary (sales) contract would *not* contribute to better working of the internal market but would help decrease the burden of EU legislation for business. At face value I would be inclined to argue exactly the opposite. Indeed, the calculations by the EC (see *European Commission Staff*, Commission Staff Working Document - Accompanying Document to the Proposal for a directive on consumer rights - Annexes (2007b) 209-210) indicate that there are substantial costs involved for business with introducing such a rule.

[51] *European Commission Staff*, Commission Staff Working Paper accompanying the proposal for a directive on consumer rights - Impact Assessment Report (2008b) 38-39; *European Commission Staff*, Commission Staff Working Document - Accompanying Document to the Proposal for a directive on consumer rights - Annexes (2007b) 232-233.

[52] Critical of this proposed comitology procedure, e.g., *H.-W. Micklitz/N. Reich*, Crónica de una Muerte Anunciada: The Commission Proposal for a "Directive on Consumer Rights", 46 Common Market Law Review 2009, 517.

[53] *European Commission Staff*, Commission Staff Working Paper accompanying the proposal for a directive on consumer rights - Impact Assessment Report (2008b) 39, merely states that the costs of collecting and giving information to the Commission are negligible. See also the critical remarks by

Even more pressing is the lack of appreciation of the indirect costs to businesses and consumers – both in terms of money, time and annoyance concerned with the *order form*. Article 10 of the Draft rather casually states that "an off-premises contract shall only be valid if the consumer signs an order form", but it does not include a threshold value for minor transactions nor does it exclude services as such. Some contracts are explicitly excluded from the scope of the specific rules on off-premises contracts (e.g. contracts concluded through automatic vending machines, insurance, consumer credit, door-to-door selling of foodstuffs) and consequently do not require the signing of an order form.[54] Other contracts, however, are not excluded and this inevitably results in the introduction of an overly burdensome and impractical formality for, e.g., trifle and emergency contracts. The plumber responding to an emergency call to repair sprung water mains, the doorstep seller that wants to sell Christmas cards or low-value lottery tickets for a charitable cause, or even the ambulant cashier at a temporary open-air parking facility, they all seem to be obliged to make the consumer sign a form. This formality is not actually worth the effort in case of most low-value transactions.[55] Therefore, the introduction of a threshold value should be considered in order to escape this superfluous formality.

Conclusion on the Impact Assessment

The RIA is illustrative but it remains unconvincing in some respects. The Commission's assessment of costs and benefits is waver-thin and geared towards convincing the reader of the aptness of choices already made. In some respects, the evidence presented by the Commission is unconvincing. Two more examples may illustrate this point.

The first example relates to the use of figures. The Green Paper on the Revision of the Consumer Acquis yielded over 300 responses.[56] Unsurprisingly, most responses originated from business representatives, consumer organisations, Member State representatives, lawyers and others. Hence, or so the Commission concludes, 62% of respondents to the Green Paper are in favour of full harmonization.[57] In my opinion this is highly unconvincing use of statistics.[58] At a closer look, the majority of business representatives favour full harmonization, consumer associations predominantly favour minimum harmonization, while the Member States emphasize the need for full harmonization where there is evidence of trade barriers impeding the internal market and consumer confidence.[59] These diverging responses need no numerical weight.

H.-W. Micklitz, The Targeted Full Harmonisation Approach: Looking Behind the Curtain, in: Geraint Howells/Reiner Schulze (ed.), Modernising and Harmonising Consumer Contract Law (2009) 55.

[54] Zie art. 20 ontwerp-richtlijn.

[55] See *Geraint Howells/Reiner Schulze*, Overview of the Proposed Consumer Rights Directive, in: Geraint Howells/Reiner Schulze (ed.), Modernising and Harmonising Consumer Contract Law (2009) 15.

[56] The responses were collected in *European Commission Staff*, Commission Staff Working Paper - Report on the Outcome of the Public Consultation on the Green Paper on the Review of the Consumer Acquis (2007) .

[57] *European Commission Staff*, Commission Staff Working Paper - Report on the Outcome of the Public Consultation on the Green Paper on the Review of the Consumer Acquis (2007) 4.

[58] Also critical of this juggling with statistics: *H.-W. Micklitz*, The Targeted Full Harmonisation Approach: Looking Behind the Curtain, in: Geraint Howells/Reiner Schulze (ed.), Modernising and Harmonising Consumer Contract Law (2009) 66-67; *Cristina Poncibò*, Some Thoughts on the Methodological Approach to EC Consumer Law Reform, 21 Loyola Consumer Law Review 2009, 357; *Michael Faure*, Towards a maximum harmonization of consumer contract law?!?, 15 Maastricht Journal of of European and Comparative Law 2008, 443 f.

[59] *European Commission Staff*, Commission Staff Working Paper - Report on the Outcome of the Public Consultation on the Green Paper on the Review of the Consumer Acquis (2007) 4; See the underlying report by *GHK et al.*, Preparatory Work for the Impact Assessment on the Review of the

A second example concerns the use of evidence on price similarities in consumer markets. In one of the policy documents the Commission presents an overview of retail prices charged for certain perfumes, MP3 players and sport shoes in various Member States. The commission finds substantial differences in price between Member States and infers a relationship between these differences and consumer rights.[60] Although it is not entirely clear how the Commission sees this relationship, what is striking is the fact that the price of many products is the lowest in the UK and most continental retailers charge an identical (!) higher price. If nothing else, this seems to indicate that there is a vertical price cartel on the European continent and it is clear that cartels are not a problem directly addressed by this Directive.

Positive effects of EU policy on consumer confidence

More daunting than calculating the costs of full harmonization is measuring the positive effects of full harmonization on consumer confidence. As mentioned earlier, one of the fundamental arguments forwarded by the Commission is that the Draft will help increase consumer confidence. In theory, consumer confidence should not be affected by disparity of national laws. To a large extent, the Rome I Regulation already gives precedence to the level of protection offered by consumer law of the country of residence of the consumer.[61] If consumers were really concerned with legal issues in cross border consumption, perhaps the European Union should rather focus on *educating consumers* on their domestic rights than on proposing full harmonization of those rights. Moreover, it seems debatable whether in practice fully harmonizing consumer contract law will have any effect on cross border consumption at all if language barriers, fear for the unfamiliar, affect for better known local brands and preference for lowest transport costs are more likely to be crucial factors in consumers' decision making.[62]

This does not preclude, however, that a positive effect in consumer confidence may follow from the 'assurance effect' that European legislation may have. A case in point is the duty on air carriers to inform customers of their rights under the Denied Boarding Regulation.[63] The Draft also holds a particular duty to inform of the rights under the Directive as far as guarantees are concerned: the guarantee must include a clear statement that legal rights

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Consumer Acquis - Analytical Report on the Green Paper on the Review of the Consumer Acquis submitted by the Consumer Policy Evaluation Consortium (2007) .

[60] See *European Commission Staff*, Commission Staff Working Document - Accompanying Document to the Proposal for a directive on consumer rights - Annexes (2007b) 7.

[61] Art. 6 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177. See *Thomas Wilhelmsson*, Full Harmonisation of Consumer Contract Law?, Zeitschrift für Europäisches Privatrecht 2008, 229; *H.-W. Micklitz/N. Reich*, Crónica de una Muerte Anunciada: The Commission Proposal for a "Directive on Consumer Rights", 46 Common Market Law Review 2009, 476..

[62] See *Thomas Wilhelmsson*, The Abuse of the "Confident Consumer" as a Justification for EC Consumer Law, 27 Journal of Consumer Policy 2004, 317 ff.; *Geraint Howells/Reiner Schulze*, Overview of the Proposed Consumer Rights Directive, in: Geraint Howells/Reiner Schulze (ed.), Modernising and Harmonising Consumer Contract Law (2009) 8; *H.-W. Micklitz*, The Targeted Full Harmonisation Approach: Looking Behind the Curtain, in: Geraint Howells/Reiner Schulze (ed.), Modernising and Harmonising Consumer Contract Law (2009) 53 and 71.

[63] Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, OJ L 46. Art. 14 (1) Denied Boarding Regulation reads: "The operating air carrier shall ensure that at check-in a clearly legible notice containing the following text is displayed in a manner clearly visible to passengers: 'If you are denied boarding or if your flight is cancelled or delayed for at least two hours, ask at the check-in counter or boarding gate for the text stating your rights, particularly with regard to compensation and assistance".

are not affected by the commercial guarantee.[64] Notwithstanding these two examples, the use of 'assurance effect' in European consumer law seems underdeveloped. If indeed lack of knowledge of consumer rights restrains consumers from cross-border consumption, why does the European Commission – which is supposed to aim for improvement of consumer confidence – not assist consumers in *recognizing* European protection?[65] The Commission may want to consider a less intrusive but possibly more effective legislative approach by introducing the compulsory use of standard phrases such as: "These contract clauses do not affect your rights under the European Directive on Consumer Rights; visit www.rightsforconsumers.eu for further information." It would be interesting to see if such an approach, which taps into the policymaker's marketing skills more than it does into its legal drafting skills, would have a beneficial effect on consumer confidence.[66] Psychological lab experiments might provide a helpful tool to answer this question.

It is striking that this aspect of "marketing" European protection is missing entirely in the Commission's policy documents. The Draft is said to be founded on the regulatory goal of improving conditions for cross-border competition and consumption, but what seems to be lacking is the acknowledgment that boosting confidence has much to do with changing attitudes and perceptions. Introducing harmonized legislation – which may not be recognized by consumers and business as the product of European legislative efforts – may well prove to be the least effective instrument for furthering these goals. Admittedly, building political support for consumer policy in the European Parliament, Council as well as in Member States is probably a lot easier if reference is made to goals pertaining to the internal market than if reference is made to such elusive ideas as 'harmonizing legal consumer culture'. Concerning the Draft, the latter reference proves to be more convincing.

Concluding Appraisal

Full harmonization of some general aspects of B2C contracts is a troubling adventure, especially if it is unclear which contracts do or do not fall within the scope of application. Furthermore, it is difficult to predict which aspects of the intricate contracting process are in fact fully harmonized. In view of this inherently difficult position, the European Commission makes a serious effort at substantiating the need for this full harmonization attempt. Disappointingly, on some points the argumentation is less than convincing. At certain points the Draft even fuels the reader's suspicion of foregone conclusions. Moreover, in some respects the Draft offers less protection to consumers than the current four directives it aims to replace. The need for reduction of the level of protection offered by the current minimum harmonization directives is poorly argued by the Commission and appears in a number of significant ways not to reflect the socio-economic relationship that exist in at least some of the Member States. That does not mean a compromise on this point is not inconceivable. It may even be rational for the EU to strive for a uniform "consumer legal culture" through instruments of full harmonization, but that would require an entirely different policy discussion (and further reflection on EU competence in that respect). In any event, Member States should be fully aware of what they forfeit when they agree to this Draft in light of both the uncertain benefits and certain disadvantages of full harmonization.

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[64] See art. 29 (2) Draft; see art. 6 (2) Directive 1999/44/EC.
[65] Similar arguments are put forward by *H.-W. Micklitz*, The Targeted Full Harmonisation Approach: Looking Behind the Curtain, in: Geraint Howells/Reiner Schulze (ed.), Modernising and Harmonising Consumer Contract Law (2009) 73.
[66] Note that the blue-button approach may have a similar effect on consumer confidence. On the blue-button approach *H. Schulte-Nölke*, EC Law on the Formation of Contract - from the Common Frame of Reference to the 'Blue Button', ECLR 2007, 332 ff.).

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JCER Special Commentary Series

Commentary Editorial: The Lisbon Treaty and the Constitutionalization of the EU

Christian Kaunert
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Constitutionalizing the European Union

When final result showed 67.1% of Irish voters in favour of the Lisbon Treaty, with 32.9% voting against, Irish political elites were visibly relieved. Irish Taoiseach Brian Cowen celebrated that 'today we have done the right thing for our own future and the future of our children'. Irish Foreign Minister Michael Martin concurred 'I am delighted for the country'. Thus, fortunes reversed by a massive 20% swing towards the 'yes' campaign compared to the first Lisbon referendum in June 2008. Voter turnout was up by 6% to reach 58%. European Commission President José Manuel Barroso celebrated that the support for the treaty 'shows the value of European solidarity and I am really glad with the result we are receiving from Ireland […] it shows the very positive response that Europe is bringing to the economic and financial crisis.' In agreement, Guy Verhofstadt, leader of the Liberal ALDE group in the European Parliament and former Belgian Prime Minister expressed his joy: 'Today is a beautiful day for Europe. Today is the first day of a new future for Europe, united, democratic, effective and strong. With this new Treaty the European Union will be able to tackle important problems such as the financial and economic crisis in a more European, coherent and effective way. We will be able to speak with one voice in the world and to provide the answers our citizens need.' Jerzy Buzek, President of the European Parliament, even suggested that 'Europe is back on track' (all above quotes cited in: Euractiv 2009).

However, the road to the entry into force of the Lisbon Treaty was very long and hard. The aim of this editorial, in addition to introducing the four commentaries, is to establish the larger context in which the Lisbon Treaty was negotiated. The Lisbon Treaty evolved out of the rejected 'Treaty Establishing a Constitution for Europe' and is part of what is commonly referred to as the process of treaty reform. This includes all EU treaties from the Treaty of Rome (1957) to the Single European Act (1986), the Maastricht Treaty (1992), the Amsterdam Treaty (1997), and the Nice Treaty (2001). Very soon after the Nice Treaty was signed, the so-called 'Post-Nice Process' was launched to start a significant debate about the future of Europe (Christiansen and Reh 2009). Christiansen (2008) suggests that this debate about a 'European Constitution' was deeply embedded in an active process of politicisation by EU elites, in particular the inclusion of language, symbols and other

Kaunert, C. (2009). 'Commentary Editorial: The Lisbon Treaty and the Constitutionalization of the EU', *Journal of Contemporary European Research*. Volume 5, Issue 3. pp. 465-471. Available at: http://www.jcer.net/ojs/index.php/jcer/article/view/250/170

trappings of statehood in that particular treaty. The outcome of this debate was first included in the Convention on the Future of Europe, which provided the blueprint for the Constitutional Treaty. However, when the treaty was rejected in two separate referenda in France and the Netherlands in 2005, a 'period of reflection' followed by another Intergovernmental Conference (IGC) led to the Lisbon Treaty, signed on the 13 December 2007.

Christiansen and Reh (2009: 4) analyse the process of treaty reform as a process of 'constitutionalization' on the basis of three major premises: (1) constitutionalization is a continuous process whereby Europe's normative basis is being transformed driven by formal and informal, explicit and implicit mechanisms, with each reform being connected to the previous one; (2) treaty reform is an important mechanism behind constitutionalization, amongst others; and (3) constitutionalization is a struggle between various actors over institutional choices overlapping with EU policy-making. Furthermore, they distinguish between three different key mechanisms in this process: (1) formal and explicit constitutionalization, which is the process most closely modelled on the domestic constitution-founding experience, leading to a 'European finalité' (the Constitutional Treaty falling into this category); (2) formal and implicit constitutionalization, which is the process which generates an 'EU constitutional order' through international treaties whereby the legal order increasingly moves away from traditional international law (successive EU treaties from Rome, to Maastricht, Amsterdam, Nice and Lisbon); and (3) informal and incremental constitutionalization, which de facto move the EU's legal order towards a constitutional order without relying on EU treaty reform (such as European Court of Justice verdicts).

Christiansen and Reh (2009) conclude that the process of formal and explicit 'constitutionalization' failed. This links to the argument advanced by Christiansen (2008) that the experiment of 'politicisation' of treaty reform was unsuccessful. The constitutional debate had been a radical departure from the previous practice of avoiding politicisation at all costs. Yet, the success of the Lisbon Treaty indirectly confirms also the failure of the Constitutional Treaty. Reforming the treaties of the European Union is possible only under conditions of low politicisation, despite the lessons of Nice which had seemed to indicate that a greater involvement of the European public would be beneficial for the European integration project (Christiansen 2008).

The process from a 'Constitutional Treaty' to a 'Reform Treaty'

How did the EU reach this point at which Lisbon, the failure of the formal and explicit constitutionalization, would be seen as a success in Brussels? At the very minimum it is still a formal and implicit step towards greater European integration via treaty reform. Initially, the outcomes of Nice were perceived as questionable, in both content and process in which they had been negotiated. The actual experience of the final summit was damaging, when negotiators bargained for three entire days (and nights) over the final issues, and were perceived to be more concerned with individual member state interests than 'European' interests as a whole. Consequently, the Nice summit ended in Declaration 23 intended to launch a wider debate about the 'Future of Europe' (Christiansen 2008: 40). Belgium, the EU Council Presidency in the second half of 2001, ensured a 'maximalist' interpretation of the post-Nice process. The decision to entrust the preparation of an IGC to a Convention was taken in Laeken (Norman 2003: 24). This Convention started in February 2002 and produced the first incomplete draft of the Constitutional Treaty on the 13 June 2003 in time for the Thessaloniki Council a week later. Subsequently, the Convention gained two more sessions to finish by 10 July 2003 for some 'purely technical' work (Norman 2003: 301). Under the Irish Presidency, the IGC finally approved the Constitutional Treaty on the 18 June 2004.

The participants of the Constitutional Convention were of considerable significance. Valery Giscard d'Estaing, a former French President, was nominated as the Chairman of the Convention, with Jean-Luc Dehaene and Guiliano Amato, former prime ministers of Belgium and Italy respectively, as Vice-Chairs. Sir John Kerr, a former UK Permanent Representative with excellent connections to the British establishment, was appointed as Secretary-General. Thus, the Convention had considerable and clear political and administrative leadership (Christiansen 2008: 40). The Convention was composed of national governments, members of the European Commission, and members of national parliaments and the European Parliament. While members of the Convention organised themselves in different sectoral working groups, the Convention can be seen as a top-down affair with the 'Presidium', bringing together the 12 key members of the Convention, steering the drafting of the treaty (Christiansen 2008: 40).

In the end, the Convention managed to set the agenda decisively for the Constitutional IGC. The IGC had the formal powers to decide on treaty reform, and followed the Convention in most respects. The Italian Presidency during the IGC in the second half of 2003 followed more or less a strategy of avoiding re-opening individual articles. While it practically failed in December 2003, it handed over the same strategy to the Irish Presidency, which succeeded in June 2004. However, as Christiansen (2008: 41) suggests, given the constitutional aspirations of the Constitutional Treaty, the Convention created significant public interest in a large number of member states, which subsequently made referenda a much-used method of ratification. Spain, France, the Netherlands, Britain, Ireland, Luxemburg, Portugal, Sweden, Denmark, and Poland all agreed to hold referenda in order to ratify the Treaty. However, during their respective referenda, on 29 May 2005 France voted No with 55%, on 1 June 2005 the Netherlands voted No with 62%, and, subsequently, Britain froze ratification of the Treaty on 6 June 2005. Subsequently, the feeling across member states became clear that France and the Netherlands were so central to the European integration project that the treaty would have to be re-negotiated (Christiansen 2008: 42).

The Commission identified a gap in the communication between the EU and its citizens, which was aimed to be filled through a programme of dialogue between citizens and elites, the so-called 'Plan-D'. The European Council summit of 17 and 18 June 2005, decided that a 'reflection-period' lasting until 2007 was necessary, which would enable a renegotiation of the treaty. Despite this official reflection amongst member states in the hope for better domestic conditions for re-negotiation and ratification, a possible re-negotiation of the Constitutional Treaty was very much helped along by EU-level factors. A number of domestic factors also made this signing more likely. Firstly, France elected Nicolas Sarkozy as President, who argued successfully for a smaller 'reform treaty' in the French presidential (May 2007) and parliamentary elections (June 2007). He suggested that he would choose to ratify this 'mini-treaty' by parliament. Given that France presented the most significant stumbling block to ratification of the CT, this became a formidable chance for the EU to maintain the momentum for treaty reform. EU political elites still regarded treaty reform as necessary, but following Sarkozy, they argued that the new treaty should not be presented as a constitutional project, but rather a 'mini-treaty'. Ratification of an 'ordinary' treaty was perceived to be more easily achievable. This resulted in a strategy of active de-politicisation of negotiations towards a 'Reform Treaty' (Christiansen 2008: 42).

Under the German Presidency of 2007, rapid progress was made to renegotiate what was eventually to become the Lisbon Treaty. In addition to positive domestic conditions with the fresh election of French President Sarkozy, a number of other coincidental factors also helped. UK Prime Minister Tony Blair had announced his forthcoming resignation from government, which may have provided him with more room for manoeuvre to take

political decisions that his successor would have to implement (Donnelly 2008: 21). Finally, German Chancellor Angela Merkel proved to be an expert and very skilled negotiator, especially to overcome Polish obstructions against the new voting procedure. The fact that the German 'Grand Coalition' proved much more stable than expected added a sense of leadership from Germany.

However, despite some Polish obstructions by President Kaczynski, it was in fact (again) the British delegation that had again become the biggest obstacle just before the IGC summit. A significant new opt-in/opt-out mechanism to the Justice and Home Affairs provisions, even in areas that Britain and Ireland had not previously received such a mechanism , meant that the Lisbon Treaty was a 'different beast' to the Constitutional Treaty, at least in the British and Irish version. In the British context, this concession strengthened the domestic argument against holding a referendum as a method for ratification, subsequently often used by Prime Minister Gordon Brown to ensure British ratification.

The Lisbon Treaty was eventually signed by the Heads of State or Governments in December 2007. It is notable that the vast majority of provisions of the Constitutional Treaty were also included in the Lisbon Treaty:

1. The EU's voting system will become streamlined and more reflective of population size. A majority vote in the Council of Ministers will need 55% of member states representing 65% of the overall EU population to approve.
2. In addition, majority voting will also become the rule in significant policy areas previously decided by unanimity: migration, criminal justice and judicial and police co-operation; the European Court of Justice (ECJ) will also gain jurisdiction in these areas for the first time.
3. The treaty creates a full-time standing president of the European Council, who will be selected by the European Council for a two-and-a-half-year period, renewable once. The person will also prepare and host EU summits.
4. A new 'foreign minister' or 'High Representative for Foreign and Security Policy' will be created by merging the posts of External Relations Commissioner with the current 'High Representative' in the European Council. The post will also lead a 'European External Action Service'.
5. The treaty gives legal force to the Charter of Fundamental Rights.
6. National parliaments will acquire new rights to stop Commission proposals from becoming legislation. If half of all 27 national parliaments disagree with a proposal, then a majority of national governments (or a majority of members of the European Parliament) can insist for this draft measure to be deleted.

How can we explain the constitutionalisation process?

Various scholars (Haas 1958; Lindberg 1963; Moravcsik 1998, 1999; Pollack 1997, 2003; Tallberg 2003, 2006; Beach 2004, 2005; Stone Sweet and Sandholtz 1997; Stone Sweet *et al.* 2001; Kaunert 2005, 2007, 2009) analyse EU treaty reform and EU institutional design in detail.

The predominant explanatory theory used in the European integration literature is liberal intergovernmentalism. According to this theory, European integration can best be explained as a series of rational choices made by national leaders (Moravcsik 1998: 18). Throughout a large series of works, Moravcsik (1998, 1999) portrays the EU as largely intergovernmental and dominated by national interests. National leaders make choices in response to constraints and opportunities derived from economic interests of powerful domestic constituents and the relative power of each state in the international system.

Moravcsik offers a model of a two-level game consisting of a liberal theory of national preference formation and an intergovernmentalist account of strategic bargaining between states. This model is then tested across the five most salient negotiations in the history of the European Community (as it was then called) in his view: (1) the Treaty of Rome in 1957; (2) the consolidation of the customs union and the common agricultural policy during the 1960s; (3) the establishment of the European monetary system in 1978/79; (4) the negotiations of the single European act in 1985/86; and (5) the Maastricht treaty on the European Union signed in 1991.

The first stage in his model accounts for national preferences (Moravcsik 1998: 24). They are defined as ordered and weighted sets of values placed on substantive outcomes. These preferences are exogenous to a specific political environment, and thus are not changed in response to any action of any actor (Moravcsik 1998: 25). In his model, two categories of motivation account for underlying national preferences for and against European integration (Moravcsik 1998: 26), notably geopolitical and economic interests. The second stage of his model (Moravcsik 1998: 50) is interstate bargaining. If one chooses an intergovernmental setting for analysis, it is hardly a surprise to find that the character is intergovernmental. Wincott (1995: 602) makes this point lucidly. Moravcsik chooses to isolate treaty reform from day-to-day policy-making. Treaty reform is constructed as an event rather than a process. This seems to be at odds with the fact that the EU has negotiated a significant amount of different treaties, each reforming the predecessor. This in itself is an indicator of the procedural nature of treaty reform.

The missing dimension: ratification as part of the process

The problems encountered in the ratification process of the Constitutional Treaty, which later became the Lisbon Treaty raise serious questions as to whether there is not, at least, one dimension missing in Moravcsik's model. While he clearly emphasizes the control of member states on the treaty formation process, he fails to see the importance of domestic political factors at the next stage – the ratification process.

During their respective referenda, on 29 May 2005 France voted No with 55%, on 1 June 2005 the Netherlands voted No with 62%, and, subsequently, Britain froze ratification of the Treaty on 6 June 2005. Ratification of the Lisbon Treaty began in December 2007 and also ran into serious problems. While most EU Member States ratified the treaty by parliamentary vote, Ireland put the text to a referendum. The first Irish no-vote (53%) in a referendum on the Lisbon Treaty on 12 June 2008 made ratification of the treaty uncertain. Subsequently, Eurosceptic commentators (again) called for an abandonment of the treaty. However, in sharp contrast to the aftermath of the no-votes in France and the Netherlands, no member state stalled ratification.

This meant that Ireland (similarly to the situation after the first Nice referendum) became the most significant and obvious obstacle to ratification. 53% of voters rejected the Lisbon Treaty either because of a tangible lack of knowledge about the treaty or because they felt they had not been properly informed. Given the fact that there was absolutely no appetite for renegotiating the Lisbon Treaty (again) amongst other EU governments, the Irish government decided to enter into non-treaty negotiations, in which it secured a series of legal guarantees. At the EU summit on 18-19 June 2009, the Irish Taoiseach Brian Cowen received a declaration designed to reassure the Irish reservations derived from the first referendum.

It is at this point that the first commentary in this special series picks up the story. **Ben Tonra** examines the Irish ratification process in its complexity and importance. In the end, 67.1% of the Irish electorate voted in favour of the Lisbon Treaty, while 32.9% voted

against. However, while European elites were relieved by this result, the outcome was by no means assured. A much better yes-campaign than in June 2008 alongside a favourably changed, i.e. negative, economic climate provided some help to the Lisbon Treaty.

However, there were significant obstacles to ratifying the Lisbon Treaty, both before and after the Irish referendum: from Karlsruhe, to Warsaw and Prague. Prior to the Irish Referendum, the German Constitutional Court had to decide whether the Lisbon Treaty could be seen as compatible with the German 'Basic Law', i.e. the German Constitution. The commentary by **Lars Hoffmann** provides an excellent analysis of the verdict of the German Constitutional Court, which will 'come to haunt the Europhiles amongst us'. Nonetheless, the court eventually approved the Lisbon Treaty with the requirement to make changes to the German accompanying laws to ratification. The third commentary in the series, by **Kamil Zwolski**, however, sheds light on the extraordinary situation in Poland, where President Kaczynski had first signed the Lisbon Treaty in 2007, before delaying ratification significantly from Spring 2008 until October 2009. Nonetheless, this problem was ultimately also resolved. The final commentary, by **Petr Kratochvíl** and **Mats Braun** analyses the situation in the Czech Republic, where after all member states had completed ratification, one Head of Government still held out against the treaty to delay entry into force. In fact, there were even significant fears in the corridors of Brussels that Czech President Klaus might hold out until the next UK election in May 2010, whereby a new Conservative government under Prime Minister (hypothetically) elect David Cameron might withdraw the British ratification act in order to hold a referendum against the Lisbon Treaty. In the end, it did not come to this, but the commentary by Kratochvil and Braun analyses lucidly how domestic political factors influenced the 'near death' situation in the Czech Republic very significantly. Thus, all commentaries put together provide an excellent picture just how much ratification needs to be analysed as a process separate from treaty formation. As such, European integration theories, such as liberal intergovernmentalism, are still in need of improvement in order to capture these important processes.

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JCER Special Commentary Series

The 2009 Irish Referendum on the Lisbon Treaty

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The Context and Issues

The result of the 2008 Irish referendum on the Lisbon Treaty came as a considerable shock to the Irish body politic. The Irish electorate had, yet again, broken with the established political consensus on Europe. The vote on 13 June 2008 was based on a strong turnout (at over 53 percent) and a comparatively decisive result (53. 4 percent 'no' as against 46.6 percent 'yes'). However, as the only EU member state ratifying the treaty by way of referendum, the electorate's decision placed the Government in an immediate quandary.

In the first instance, it was abundantly clear that there was no willingness among Ireland's EU partners either to reopen negotiations or to abandon the treaty altogether. The issues to be addressed, the proposed solutions and the balance of interests and arguments among the member states was the same as it had been when the Lisbon Treaty was signed on 13 December 2007. Second, the ratification process was already well advanced with over a dozen member states already having ratified the treaty. Finally, it was not clear precisely on what the Irish electorate's verdict had been based.

The Government's reaction to the defeat first centred on identifying the issues which had led to the 'no' vote. As part of this analysis, the Government commissioned Milward Brown IMS to conduct a detailed quantitative and qualitative survey with preliminary results published in September (Millward Brown IMS 2008). In their subsequent analysis of this data, a research team from the UCD Geary Institute concluded that the referendum result had been a function of general attitudes towards European integration, respondents' knowledge of the EU, a number of specific policy issues and some domestic political factors (Sinnott *et al.* 2009). The report noted that a low level of knowledge substantially increased the likelihood of a 'no' vote, not least due to misperceptions as to what the treaty actually contained. Notwithstanding strong support for the EU in general terms, there were also specific policy concerns underlying the 'no' vote. These included the loss of an Irish seat at the Commission, taxation policy, workers' rights, Irish neutrality and social policy (particularly abortion). Support was also weakest in specific demographic groups; women, urban manual workers and young people.

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On 15 October 2008, the EU Council agreed that the Irish Government would 'continue its consultations' on a way forward. In the meantime, the head of the EU Legal Services, Jean Claude Piris, was tasked with investigating how Irish concerns might be addressed, without requiring amendment of the treaty and thereby restarting the entire ratification process. The Government also requested a Parliamentary Sub-Committee to consider Irish options on the Lisbon Treaty and their implications.[1]

On 11 December 2008, the Council agreed an outline package of measures designed to facilitate the holding of a second referendum in Ireland. This followed a model used to secure a second and successful Danish referendum on the Maastricht Treaty in 1993. Following negotiation – and most especially difficult bilateral talks with the UK – the final package included: an EU Council Decision to maintain a single Commissioner from each member state; three legal guarantees on taxation, social issues and neutrality (which were registered with the United Nations and which are to be appended as protocols to the next EU accession treaty); and a Declaration on workers' rights. Based on this outcome, the Irish Government announced, on 8 July 2009, that a second referendum would be held on 2 October 2009 to ratify the 28th Amendment of the Constitution (Treaty of Lisbon) Bill 2009 (Irish Government 2009).

The referendum was conducted in the midst of a profound economic crisis and with unparalleled levels of dissatisfaction with the Government. The international financial crisis, which broke in September 2008, had a devastating impact on the Irish economy. By the summer of 2009, unemployment had risen by 85 percent to 11.7 percent, with medium-range forecasts of 15 percent. Property prices collapsed by upwards of 35 to 45 percent over the same period and Ireland had entered a deflationary cycle with prices falling by as much as 6 percent. The economy contracted sharply with GNP falling by just under 12 percent over the year. As a result, government finances fell into disarray, with a series of budgets and 'mini' budgets in 2008 and 2009 resulting in substantial public spending cuts and tax rises being implemented and planned so as partially to fill an estimated €22 billion hole in the public finances. All of this occurred as the Government unveiled plans in September 2009 to borrow €54 billion so as to purchase underperforming, property-related bank loans at a premium price over current market value in order to stabilise the banking sector. Unsurprisingly, an Irish Times/MRBI poll published in early September 2009 indicated that 85 percent of the electorate was dissatisfied with the Government's performance and that the main governing party in the coalition had only 17 percent support – a drop of more than 50 percent compared with its performance in the 2007 General Election.

The Campaign: Players and Themes

In the teeth of economic crisis and unparalleled electoral hostility, the Government was not well placed to conduct a successful referendum campaign. 2009 saw the establishment of a number of civil society groups dedicated to campaigning in favour of the Lisbon Treaty. Three of these groups are especially notable; *Ireland for Europe*, *We Belong* and *Generation Yes*. These groups were focused on bringing non-party political figures into the debate and translating the treaty into direct, succinct and accessible political messages. These centred on reaffirming Ireland's place in Europe, in strengthening Ireland's voice in the EU and the benefits accruing from Ireland's EU membership.

[1] See Department of Foreign Affairs website. Available at: http://www.lisbontreaty.ie/files/oireachtas_sub_cttee_eu_01122008-3.pdf, last accessed 4 November 2009.

The leaderships of the main social partners mobilised strongly. Employers and business groups, such as the main Irish Business and Employers Confederation (IBEC), as well as the Small Firms Association, the Irish Small and Medium Enterprises Association, the Irish Exporters Association and the American Chamber of Commerce Ireland all campaigned and argued for a 'yes' vote, with IBEC declaring that "The outcome of the next referendum will define Ireland's future relationship with Europe, and therefore with the world at large. A positive result is vital to ensure that Ireland remains a constructive partner in Europe and is an essential building block on the road to economic recovery," (*Irish Times* 2009a). Exceptionally, several individual companies also campaigned directly. The chief executive of Ryanair, Mr Michael O'Leary, argued that "Ireland's future success depends on being at the heart of Europe and our membership of the euro," while he – in his characteristically colourful manner – also condemned opponents of the Lisbon Treaty as being "headbangers", and "economic illiterates". Intel Ireland also secured its parent company's support to campaign on the treaty with its General Manager, Jim O'Hara, insisting that "Ireland has always punched above its weight in Europe, so why is it putting itself in a situation where it is cutting itself adrift from Europe? Luckily, we have one more chance to get it right" (Kennedy 2009). Their campaigns, including a substantial spend on print media ads, focused on the need for a 'yes' vote to underpin national economic recovery, to generate jobs and to send a clear international signal that Ireland was a committed member of the EU.

For its part, the Trade Union leadership – through the Irish Congress of Trade Unions and many of the largest individual trade unions – also rowed in to support the treaty. A dedicated campaign organisation, the Charter Group, was also set up a group of trade unionists to draw attention to the benefits of the Charter of Fundamental Rights. Significant, too, was the unqualified support on this occasion of the main farming organisations; the Irish Farmers Association (IFA) and the Irish Creamery Milk Suppliers Association (ICMSA). In 2008, the IFA initially withheld its support for Lisbon as part of its campaign against EU trade policy in WTO trade negotiations, although it ultimately endorsed the treaty on the eve of the vote. On this occasion, the IFA campaigned early for a strong 'yes' vote, insisting that "the future of the Common Agricultural Policy is up for renegotiation in the next couple of years, and we feel it is much more important for us to be involved in the heart of those negotiations, that we can influence what is likely to happen going forward rather than being on the periphery as we might be if we were to vote No" (*Irish Times* 2009b).

Each of the main political parties supporting the Lisbon Treaty also dedicated resources to their own individual campaigns. Reflecting criticism that their efforts in 2008 had been lacklustre and more focused on developing local election candidate profiles, these parties linked a 'yes' vote to jobs, economic recovery and EU membership. For the very first time, the Green Party officially campaigned in favour of a 'yes' vote – having narrowly won a 2/3rds majority in a party plebiscite. While there were only limited instances of an intensive door-to-door party canvass, these parties held a variety of public meetings, publicity events and extensive national poster campaigns all of which marked a substantively higher level of party activity compared to 2008. Critically, the main opposition parties appealed to the electorate to refrain from using their vote as a means to punish the government. They insisted that the referendum was an issue above party politics and that the national interest depended on a 'yes' vote.

Those campaigning for a 'no' vote in the referendum presented themselves as political insurgents and the voice(s) of those marginalised from a well-entrenched political consensus. They contested the legitimacy of a second vote on a treaty which was unchanged from that on which the Irish electorate had already delivered a decisive verdict. They also sought to reassure the electorate that a 'no' vote would make no

difference to Ireland's rights or standing as a member of the European Union. The 'no' campaign was composed of a very heterogeneous set of political groups, with some shared themes centring upon national sovereignty, distinct visions of a 'different' kind of European Union and demands that the sovereign will of the Irish people, once expressed, had to be respected.

In the early stages of the campaign the conservative argument was most closely associated with Cóir (English translation: 'Justice'). Set up in 2003, Cóir brought together a number of conservative Catholic and anti-abortion activists. With a comparatively strong grass roots base and provocative campaign slogans and images, Cóir swiftly emerged as a major force in the campaign. By and large avoiding major media debates and in the absence of a strong leadership figure, Cóir focussed its efforts on local activism and a vibrant national poster campaign. Their concerns related primarily to the Charter of Fundamental Rights and the role of the European Court of Justice, which they argued opened the door towards further liberalisation in the areas of abortion and euthanasia. Cóir also underlined economic fears by claiming – through one of its most high profile posters – that the Lisbon Treaty could threaten Ireland's minimum wage, driving it down to levels found in Central and Eastern Europe.

On 10 September 2009, in an interview with the Wall Street Journal, Declan Ganley gave the first public indication of his intention to re-enter the political fray and campaign against the Lisbon Treaty. His Libertas organisation had exploded onto the political scene in the successful 2008 campaign against the Lisbon Treaty. In the aftermath of his and his party's crushing defeat in the June 2009 European Parliamentary elections, Ganley had pledged to stand aside from any Lisbon rematch. Claiming in his Wall Street Journal interview that he had been provoked by the 'lies' of the government and pro-treaty campaigners, Ganley launched a new Libertas campaign on 14 September 2009. Having lost some key lieutenants from 2008 the second Libertas campaign centred on a series of high-profile national media events. A Libertas poster campaign emerged in the final weeks of the referendum. Ganley's campaign centred on the political and constitutional implications of the Lisbon Treaty, and claims that the undemocratic nature of the European project was exemplified in the lack of respect shown the first Irish 'no' and the EU's weak democratic foundations. Libertas also sought to address the economic themes of the campaign, by insisting that the only job that would saved by a 'yes' vote would be that of the Taoiseach (Prime Minister), Brian Cowen.

The intervention by the UK Independence Party (UKIP) in the Irish referendum campaign generated considerable media attention. Mr. Nigel Farage, MEP, attended several media and publicity events in Ireland over the course of the referendum and was a comparatively prominent interviewee in the media. The Europe for Freedom and Democracy Group in the European Parliament (of which UKIP is the largest member) distributed a leaflet to all Irish homes that claimed the treaty would "… open the door to immigration" (EFDG 2009). Rejecting charges of racism and bigotry (the leaflet identified migration from Turkey as a particular cause of concern), Mr. Farage insisted that his party continued to deal with the immigration issue "in an utterly responsible way".

The campaign on the left of the political spectrum was perhaps more fragmented organisationally but arguably more coherent politically. A broad variety of smaller political parties, organisations, single-issue groups and bespoke campaign groups came together on a number of issues and themes. Perhaps the highest profile and most striking contribution came from Joe Higgins MEP. Fresh from his surprise victory in the June 2009 EP elections, Higgins headlined a small but committed Socialist Party campaign centred on the issues of workers' rights and anti-militarisation. His high political credibility, coupled

with his unique status as the only Irish MEP opposed to the Lisbon Treaty, gave him a strong media profile throughout the campaign.

Other left-wing groups (such as the Socialist Worker's Party and its allied *People Before Profit* movement) and trade union groups and a number of local government councillors, similarly coalesced around a political agenda that critiqued the 'neo-liberal' orientation of the European Union and its foreign policy aspirations. Their efforts were focused on door-to-door canvassing and media events. More traditional opponents and critics of the EU were to be found in the People's Movement and the Peace and Neutrality Alliance.

A key theme among all these parties and groups was workers rights and the threat seen to be posed to those rights by series of judgements from the European Court of Justice. These judgements, Vaxholm/Laval (2004), Viking (2007), Ruffert (2008), and Luxembourg (2008), it was argued, signified the predominance of the rights of capital over those of labour within the European Union. The Lisbon Treaty was represented as moving the European Project further in a neo-liberal, free market direction.

Sinn Fein provided another focus for left-wing and nationalist opposition. As the only political party opposed to the ratification of the Lisbon Treaty with national parliamentary representation, Sinn Fein played an important role in local canvassing and a national poster campaign. Their efforts were led by former MEP, Mary Lou McDonald and Sinn Fein party leader, Gerry Adams. Sinn Fein's efforts centred on a critique of the Government for not renegotiating the Lisbon Treaty after the first referendum and the weakness of the 'guarantees' obtained from the other EU member states. The party also underlined themes of EU militarisation, workers' rights and the threat of further market liberalisation.

A third set of actors arguably played a significant role in the referendum campaign. The Referendum Commission had a much higher profile in 2009 compared to 2008. Its Chairman, the High Court's Mr. Justice Frank Clarke, took an active media role in explaining the provisions of the Lisbon Treaty and addressing issues of fact as they arose in the debate. This generated some criticism – most frequently from 'no' campaigners – but the judge had strong public credibility and was seen very much as an independent figure. He was regularly interviewed in the media as an impartial source of information and in the closing weeks of the campaign had a weekly slot on national radio to address voter queries. The Commission's media and communications budget of just under €3 million was to fulfil its statutory role to encourage the electorate to vote and to provide impartial and factual information on the treaty.

The role of the media should also be addressed. Ireland has a mix of both public and private national and local media. In the aftermath of the 2008 campaign there was some comment on the role of UK-owned print media (particularly that of News Corporation) translating a British euro-sceptic editorial position into the Irish editions of many of their British-based titles. This was again highlighted in the 2009 campaign in the role of the Wall Street Journal (also owned by News Corporation) in profiling Declan Ganley's re-entry to the Lisbon debate and its subsequent, widely cited, editorial comment which argued that the core claims of the Irish Government's campaign were based on "patent absurdities" and that much of Ireland's earlier economic success had been achieved despite EU policy rather than as a result of it (Wall Street Journal, 16 September 2009). By contrast, many in the 'no' campaign were highly critical of the overwhelming pro-Lisbon editorial line maintained by almost all Irish-owned print media, and the statement from the Chief Executive of the Broadcasting Commission of Ireland that there was no requirement in its guidelines to ensure equal air time for both sides in a referendum, but that there was a requirement for fair and balanced coverage. It is notable too, that several of News

Corporations' Irish editions (such as the *Sunday Times*) did not offer as trenchant an editorial line against Lisbon in 2009 as they had done in 2008.

Finally, it is also useful to review the financial resources spent in the referendum campaign. According to an analysis published in *The Irish Times*, the civil society groups, political parties, sectoral groups and major companies supporting a 'yes' vote in the campaign had a combined total expenditure of approximately €2.75 million. (*Irish Times* 2009c) Political parties and groups campaigning for a 'no' spent about €800,000. A further €5 million was spent by the Referendum Commission (€4 million), the Department of Foreign Affairs (€700,000) and the European Commission Office in Dublin (€150,000) in support of information campaigns on the EU, the Lisbon Treaty and the referendum itself. Much of this latter expenditure was criticised by individuals and groups within the 'no' campaign for being either implicitly supportive or insufficiently critical of the Lisbon Treaty.

The Result and Immediate Analysis

The final result was more decisive than anticipated. While opinion polls in the closing weeks of the campaign had signalled a strong lead for the 'yes' side, indications were that the as yet undecided voters – about 20 percent of the total – were breaking more strongly towards a 'no' vote. In fact, the reverse was evident in the final tally. When the ballot boxes were opened on 3 October 2009, it was soon clear that movement towards a 'yes' vote had been sustained and substantial. With an increased turnout (from 53 to 58 percent) compared to the 2008 campaign, 67.1 percent of the electorate voted 'yes' as against 32.9 percent who voted 'no'. This represented a more than a 20 percentage point swing from 'no' to 'yes' on the same treaty within 16 months. Of the 43 electoral constituencies, 41 voted 'yes' with just two (in the northeast of the island) voting 'no' by very narrow margins. In some constituencies, such as those in the southern Dublin suburbs, the 'yes' vote topped 80 percent.

Post-referendum analysis centred on the economic rationale behind the 'yes' vote. Whether out of fear or out of hope, the Irish electorate was characterised by many commentators as having voted in expectation that a vote for the Lisbon Treaty would underpin efforts towards economic recovery and jobs. For their part, most 'no' campaigners highlighted their limited resources, the overwhelming mobilisation of traditional political elites and the electorate's fear and insecurity as explanation for the nature and scale of the 'yes' vote. For their part, 'yes' campaigners pointed to the civic mobilisation of the political centre, the electorate's associated rejection of extremist politics and a more hard-headed assessment of Ireland's place in Europe and the national interest.

A post-referendum poll conducted by the European Commission and reported in *The Irish Times* (2009d) confirmed that a substantial number of voters had switched sides in the 16 months between the two Lisbon referenda. Among those that had switched to a 'yes', 25 percent believed that the treaty would help the economy through the economic recession, 29 per cent said they changed their vote as result of increased information and communication and 21 per cent claimed that they felt more engaged in the public debate this time. These results confirmed some trends identified in an earlier exit-poll conducted by the opposition Fine Gael party which surveyed 1,000 voters at 33 national polling sites.[2] This study also indicated that 17 percent of those voting in October 2009 had not done so in 2008 and that these 'new' voters supported the treaty by a margin of over two to one. Strikingly, the study also claimed that the 'gender gap' identified in the first referendum

[2] See Fine Gael Website. Available at: http://www.finegael.org/news/a/1235/article/, last accessed 4 November 2009.

had been eliminated but that there was an ongoing issue with younger voters, 41 percent of whom voted 'no'.

While it is possible to argue the merits and pitfalls of referenda as the means by which complex international accords such as the Lisbon Treaty are ratified, there is no doubt that it does force the body politic to engage seriously and substantively with the issues. While such efforts are rarely sustained over time – and in the Irish case even when the lessons learned are forgotten – their value should not be underestimated. There is also, arguably, some merit in the analysis proffered by the President of Ireland during her October 2009 State Visit to Luxembourg when she argued that those who had bemoaned the Irish referendum 'episode' had missed the point. She insisted that it had illustrated the nature of the Union as being one in which "the democratic and consensus-based credentials of the Union and its sensitivity to the customised needs of each of its sovereign members, its assertion of the value of the voice of its citizens, have all proved their worth, their strength, their integrity and ultimately their unity of purpose."

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JCER Special Commentary Series

Don't Let the Sun Go Down on Me: The German Constitutional Court and its Lisbon Judgement

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Introduction: The Karlsruhe Conundrum

It was in May 2000 that Joschka Fischer spent ninety minutes in front of a gathered audience at Berlin's Humboldt University with his Foreign Minister-hat 'removed'. In his speech Fischer outlined a bold and ambitious vision for the European Union[1] and followed a tradition of post-war German politicians championing European unity and integration.[2] In fact, Fischer's speech inspired other heads of state and government at the time so much that a significant number of leaders followed his lead and delivered their own vision of Europe during the following six months.[3] This started off what was to become the Debate on the Future of Europe[4] that culminated in the Convention on the Future of Europe,[5] the Treaty establishing a Constitution for Europe[6] and later on the Lisbon Treaty. The German Constitutional Court in its June 2009 judgement on said Treaty,[7] though declaring it compatible with the German Basic Law, failed to live up to the visionary example set by many German politicians and pointed out above. Instead the Court positioned itself as a euro-sceptic voice seemingly poised to slow down the European project – if not determined to strike down any future attempts at integration in new policy areas.

Although the President of the Court's Second Senate proclaimed that '*Das Grundgesetz sagt 'Ja' zum Vertrag von Lissabon*'[8], it ruled that the accompanying laws passed by the *Bundestag* to incorporate the Lisbon Treaty[9] needed to be revised before German

[1] Fischer (2000).
[2] Former German Chancellors Konrad Adenauer, Helmuth Schmidt and Helmuth Kohl were all known for their outspoken support and vision of a united Europe.
[3] See, Blair (2000); Chirac (2000); Jospin (2000); Rau (2001).
[4] The dedicated *Futurum* website and since been taken offline by the European Commission.
[5] See http://european-convention.eu.int.
[6] Official Journal of the European Union (2004).
[7] BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. (1 - 421). See also: http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html.
[8] See http://www.tagesschau.de/inland/lissabon102.html, last accessed 4 November 2009.
[9] For the vote on the issue, see Bundestag Stenographisher Bericht 16/157, S. 16483 A (http://dip21.bundestag.de/dip21/btp/16/16157.pdf); for the text of the original accompanying

Hoffmann, L. (2009). 'Don't Let the Sun Go Down on Me: The German Constitutional Court and its Lisbon Judgement', *Journal of Contemporary European Research*. Volume 5, Issue 3. pp. 480-488. Available at: http://www.jcer.net/ojs/index.php/jcer/article/view/247/172

ratification could be completed. In Germany, the judgement meant that the pro-Lisbon majority among the national political leadership – across both government and opposition parties – were reassured that the ratification process could be completed prior to the second Irish referendum, scheduled for 2 October 2009. Yet, the Lisbon-critical forces were also encouraged mainly because of the 72 pages of 'small print'[10] that the judges deemed necessary in order to explain their decision which turned the '*Ja zu Lissabon'* effectively into a '*Ja, aber …*'.

The detailed legal ramifications and judicial nuances of the treaty have been commented on already.[11] The aim of this paper is to explore the political consequences that the legal reasoning of Europe's most influential national constitutional Court may have on the future relationship between Germany and the EU as well as the European integration project as a whole. It is clear that the judgement is not a ringing endorsement of the European integration process. Rather the Court uses its long verdict to establish itself as the national guardian of German sovereignty on the basis of the legal boundaries set by the *Grundgesetz*. Of course, the Court is within its rights to do so – but it is not obliged to do so because it is interpreting the existing legal status. As many commentators would agree with, the judges' interpretation is far from uncontroversial. Thus, this article sets out to make a normative argument about the judgement's shortcomings and its potential political ramification for German-EU relation as well as the wider European integration process. The judgement addresses a wide range of important issues related to legitimacy, democracy and sovereignty. The following sections will address these issues by exploring the Court's reasoning with regards to the division of competences between the national and European level, the legitimacy of the European Parliament as a supranational assembly and the role of national parliaments in the European integration process.

The *ultra vires* virus

The Court clearly used the Lisbon judgement to elaborate on its 1992 Maastricht decision,[12] in which it declared the Treaty of Maastricht as compatible with the Grundgesetz but claimed legal guardianship over potential infringements by the EU into areas of national, i.e. German, competences.[13] In spite of its words, the Court, however, never acted upon the implied Maastricht 'promise' to use *ultra vires* judicial review to control or even prevent an expansion of EU legislation and competences and thereby defending the sovereignty of the German legal system. The fact that it is brought up again seems to indicate its readiness to take up the task that the Court set itself first in the 1973 *Solange* Judgement[14] and followed up in its judgements of 1987[15] and 1992 (Maastricht) seventeen years ago.

A clear indication for the Court's ambition to become more active and use ultra vires reviews to contain integrationist moves, is the list of competences that have 'always been deemed especially sensitive for the ability of a constitutional state to democratically shape itself.'[16] Clearly, what is meant by this is that there are certain policy areas that must remain

laws see *Bundesdrucksache* 16/8489 (http://dipbt.bundestag.de/dip21/btd/16/084/1608489.pdf) and *Bundesdrucksache* 16/8919 (http://dip21.bundestag.de/dip21/btd/16/089/1608919.pdf).

[10] The English language version has 72 pages – slight variations in length of the German version may be possible.

[11] For a critical view see Halberstam and Möllers (2009) and for a supportive analysis see Schorkopf (2009).

[12] Bverfg, Case 2 BVR 464/98.

[13] Weiler (1995) and Baquero Cruz (2008).

[14] BverfGE 37, 271 (*Solange I*).

[15] BverfGE 73, 339 (*Solange II*).

[16] BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. 252.

at the national level if sovereign member states continue to exist and are not to dissolve into a fully federated European Union. According to the verdict, these areas are for instance criminal law, the use of force (police and military), fiscal policy, the social state, and cultural policies including education, family and religious law and laws regulating religion. The list seems arbitrary and the Court gives no indication as to the reasoning behind its selection. Policy areas such as the power to print money or conducting trade negotiations would surely be considered 'state-defining' to the same extent as the five issues listed by the Court. Despite a vivid and ongoing debate in academia about the Europeanisation of private law,[17] there is no mentioning of this legal area in the Court's list. Although Lisbon does not explicitly grant new powers to the EU in these new policy areas, they are, of course, those policy fields in which further integration is expected over the coming years. For the German Court to include this seemingly arbitrary list must surely mean that, after the warning shots that were given up by the 1992 Maastricht judgement (in a time when the popular support of the European integration project was much more pronounced), it is now preparing to take a much more active part in monitoring the detailed effect of EU integration on the German legal and political system.

Of course, the Lisbon Treaty itself is not attempting to transfer powers in any of these policy areas from the national to the EU level. Thus, the Court does not see any reason to strike down the Treaty on the basis of competence transfer. So why address the issue of state sovereignty in the first place? Considering that the Court's overall euro-cautious tone applies throughout the judgement, it seems clear that the judges foresee future treaty changes or even competence expansion based on the current Treaty Article 308 EC (see below). The Court is thus positioning itself to potentially strike down these integrationist moves. By including a state-defining competence list, the Court lays the legal foundation upon which it can build its *ultra vires* reviews of future EU legislation or even competence expansion by preventing 'legal instruments […] that transgress competences or that violate constitutional identity […] and […] keep within the boundaries of the sovereign powers accorded to them by way of conferred power.'[18] The Court even goes as far as to stipulate that the German legislature would need to create a new legal mechanism specifically aimed at facilitating *ultra vires* review 'to safeguard the obligation of German bodies not to apply in Germany, in individual cases, legal instruments of the European Union that transgress competences or that violate constitutional identity.'[19] Clearly, all indications suggest that – Lisbon or no Lisbon – we can brace ourselves for a much more euro-critical German Constitutional Court that is keen to scrutinize EU legislation in order to safeguard the German legal order against any further integrationist moves.

1230 for 1 or the EP slap-down

In its build-up to striking down the accompanying laws that are required to make the Lisbon Treaty legally applicable in Germany, the Court seemingly *en passant* takes a swing at the European Parliament by raising questions of its legitimacy and democratic viability as a democratic actor. The Bundesverfassungsgericht acknowledges that the EP may contribute to the legitimacy of the European Union but in its view it cannot.

The key criticism by the Court is based on the fact that the election procedure to the European Parliament is not based on a strict one-person one-vote principle. Instead there are national quotas that allocate a specific number of seats to each member state. The numbers are adjusted to broadly reflect the population size of the different members but,

[17] See, e.g., the H.i.i.L. Project on 'National Resistance to the Europeanisation of Private Law' at the University of Tilburg; www.tilburguniversity.nl/faculties/law/research/ticom/research/hiil_nrepl.
[18] BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. 241.
[19] BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. 241.

of course, they are not exactly proportional. The Court elaborates on this point and, whilst striking down the case's complainant's claim that this means that the EU is undemocratic and thus the Treaty of Lisbon is incompatible with the German Basic Law, elaborates on its view that the European Parliament 'is not a body of representation of a sovereign European people[20]. 'The fundamental rule of electoral equality thus 'only applies within a people, not in a supranational body of representation, which remains a representation of the peoples linked to each other by the Treaties.'[21] Of course, from a practical perspective the EP can never be a one-person one-vote chamber, due to the very nature of the European Union as a Union of states and peoples. In such a *sui generis* union, even the lower chamber, in federal state system the one that is traditionally much more (though never completely)[22] proportionate in its representation, must always allow smaller countries and their citizens to be represented. Since the European Parliament would need to have at least 1230 seats for all member states to have at least one seat, it is very likely that the EU will never adopt a fully proportionate system. The problem arises from the logic that the Court takes away from this: 'the European Union, as a supranational organisation, must comply as before with the principle of conferral that is exercised in a restricted and controlled manner.'[23] 'The deficit in the direct track of legitimisation of the European public authority that is based on the election of the Members of the European Parliament.'[24] Thus, in characterising the EU as a supranational organisation, and (only thereby) deeming the Treaty of Lisbon as compatible with the German constitution, the Court denies any developments towards a politically more integrated Union. It seems that the Bundesverfassungsgericht uses its judgement to draw a line in the sand. As the Lisbon Treaty comes right up to this line, future integration attempts look like they are destined to be bounced back (behind the line) by the Karlsruhe Court. It is therefore not so much what the Court says about Lisbon with respect to EP legitimacy but rather what it says about the nature of the European Union and the essence of the European integration process that makes this a judgement that will most certainly come back to haunt the Europhiles among us.

The Bundestag to the Rescue

The Court's analysis of legitimacy in the Union of 'conferred powers', is then cleverly linked to the issue of legitimacy through the citizens at the member state level. The Court, facing a Union that is not a federal state but only a *Staatenverbund*,[25] clarifies that legitimacy must therefore come from the citizens through national elections and national parliaments to the EU level of governance. It refers explicitly to the 'legitimising connection of elections and other votes […].'[26] And whilst not striking down the Lisbon Treaty, the Court goes on to rule that a revision of the accompanying laws that were passed by the Bundestag and Bundesrat in April 2008 is necessary. The Court's reasoning provided for the requirement for redrafting these focuses on two issues in the Lisbon Treaty: the passerelle clause (Article 48.7 TFEU) and the flexibility clause (Article 352 TFEU). The former allows member state governments, by a unanimous vote in the European Council (and following consent by national parliaments as well as the European

[20] BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. 280.
[21] BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. 279.
[22] Even in Germany with the frequent occurrence of *Überhangmandate* as well as the 5 per cent threshold a misrepresentation of parties in relation to their actual share of the votes is the norm. This is without even considering the parliamentary legitimacy according to the German Constitutional Court with regards to the Bundesrat (which the Court deems to 'be […]a chamber of a National Parliament') or even the election of the US President.
[23] BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. 298.
[24] BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. 293.
[25] Unfortunately, the Court does not provide us with a definition of this newly created term.
[26] BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. 295.

Parliament) to move existing competences from a special legislative procedure (i.e. unanimity voting) to the ordinary legislative procedure (i.e. qualified majority voting). The latter provides for the possibility to obtain legislative power for the Union to achieve specific objectives already set out in the Treaties, but where the Treaties have not provided the necessary powers to the European Union. This clause is based on the current Article 308 EC, which, however, is restricted to just the objective of the common market as opposed to Article 352 TFEU that refers to all 'objectives set out in the Treaties'.

The German Court maintains that the involvement of the German legislature is crucial in these areas. The accompanying laws that were originally passed by the *Bundestag* and the *Bundesrat* are therefore not sufficient to guarantee the necessary scrutiny of the German government when applying either Article 352 or 48.7 TFEU. The Court insists that the government can only act at the European level with regards to these articles if and when it has received prior approval/instruction to do so by the *Bundestag* and – where necessary – the *Bundesrat*. According to the judgement only the explicit approval of the German legislature can provide the necessary legitimacy to increase EU competences.

The judgement requires the legislator to strengthen the position of the *Bundestag* and *Bundesrat*[27] vis-à-vis the European integration process and requires the German government to consult much more extensively with the German Parliament.[28] The incorporation of national parliaments into the European decision-making process has been a popular subject and the idea was first launched in the Declaration on the Future of Europe[29] annexed to the Treaty of Nice that called on the member state governments to consider 'the role of national parliaments in the European architecture.'[30] The Treaty of Lisbon took care of this idea and included a Protocol on the Role of National Parliaments[31] that provides for a special procedure whereby national parliaments can block EU legislation and force the Commission to re-evaluate its legislative proposals. However, the German Constitutional Court states that in cases when either the passerelle or the flexibility clauses are used, the *Bundestag's* tacit approval cannot be taken for granted. Rather it is necessary for the German legislature to empower explicitly the German government to act at the EU level with regard to the aforementioned articles. It seems that the Court is thereby impeding the use of the two clauses by complicating the related national procedures. The fact that this would at best slow-down and at worst prevent future integrationist moves can be regarded as a welcome, if not wanted, by-product. In fact, in light of the arguments made in the previous section, it seems clear that the Court finds that the aforementioned metaphorical line is crossed by the Lisbon Treaty's passerelle and the flexibility clauses (the same is also true for the more restricted 'emergency brake procedure' of Articles 82.2 and 82.3 TFEU – see below). And though the *Bundesverfassungsgericht* does not strike down the Treaty, it installs instead stricter national control in order to prevent the clauses from being used to transfer any new or additional powers from the national to the EU level. In my view, the effectiveness of its ruling on this matter is questionable for three reasons.

[27] The *Bundesrat* is only involved if and when relevant legislation affects the area of competence of the German *Länder*.
[28] Interestingly, the Constitutional Court also strengthened the role of the parliament vis-à-vis the government in two other – non-Europe related – judgement that followed the Lisbon judgement. See http://www.bundesverfassungsgericht.de/entscheidungen/es20090617_2bve000307.html and http://www.bundesverfassungsgericht.de/entscheidungen/es20090701_2bve000506.html.
[29] European Union (2001).
[30] European Union (2001).
[31] See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:0148:0150:EN:PDF.

First, the judgement implies that the *Bundestag* has a distinct role not only to be informed by the German government (see Article 23.3 of the *Grundgesetz*)[32] but to control and instruct it actively in the application of the two Lisbon Treaty articles 48.7 and 352. Of course it is important that any government informs its parliament of its activities, be it at the national, international or European level. Yet, it is questionable whether the government should be *restricted* in its activities, especially at the European and international level, by the need for explicit instructions to act. This is what the Lisbon judgement does: it restricts the German government in its capability to act at the European level, because the *Bundesverfassungsgericht* demands that any action needs to be first authorised by the German Parliament. The government may only act 'if the German Bundestag and the Bundesrat have adopted within a period yet to be determined a law pursuant to Article 23.1 of the Basic Law which takes the purpose of Article 48.7(3) TEU Lisbon as an orientation.'[33] The use of 352 TFEU requires 'constitutionally […] ratification by the German Bundestag and the Bundesrat on the basis of Article 23.1 sentences 2 and 3 of the Basic Law.'[34]

According to my understanding of legitimacy and national parliaments, it is not evident why these houses of parliament should hold a legitimate mandate to participate in the decision-making procedure at the European level.[35] National MPs are elected to form and hold to account their national government for its actions. But they do no not have a mandate to participate directly or indirectly in the decision-making process at the European level. This does not mean that a parliament should not control the government when it makes decision related to the EU, foreign policy, or even military actions. The argument made here is related to areas that do not fall within national competences, i.e. already existing European competence and thus areas in which national parliament no longer have a legislative prerogative and it is the governments that act in the best interest of their citizens. National parliaments should make sure that the government does exactly that: act in the best national interest but they should not be encouraged to legislate actively in areas and on policies for which they did not receive a mandate by their respective electorate. Furthermore, national parliamentarians are unlikely to have the necessary knowledge to form informed and independent opinions on subject matters that fall outside their legislative competences. Thus, the only motivation for parliamentarians to 'control' the government in these specific decisions surrounding Treaty Articles 48.7 and 352 would be to score national political points which can hardly be the intention of the *Grundgesetz's* Article 23 which regulates the relationship between Germany and the European Union (which is incidentally the Article that the Court cites in demanding a closer and more active involvement of the *Bundestag)*.

Second, there is a substantial body of academic literature that questions the effectiveness of legislative control with regard to executive actions.[36] This is of course not the place to analyse the German political system with a view to the effectiveness of the *Bundestag* to control the government. Yet, it is useful to point out that the German constitution seems to be much more concerned with guaranteeing a stable government through solid and continuous support by the Parliament than to arm it with legal and political weapons to scrutinise its every move. Historically, this is only logical given the experiences of the Weimar Republic. Practically it means that one of the key tasks of the German parliament is to provide the government with a working majority.[37] Therefore, the governing parties will

[32] See http://www.bundestag.de/dokumente/rechtsgrundlagen/grundgesetz/index.html.
[33] BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. 319.
[34] BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. 328.
[35] See also Kiiver (2006); Donnelly and Hoffmann (2003).
[36] See Hayward (2004) and Larking (2008).
[37] Note the 'constructive vote of no-confidence', which prevents parliament from creating a power vacuum by dismissing a government without installing a new one.

always control a majority in the *Bundestag*. It may be legally possible, yet, politically unlikely, that MPs from the same political party/parties that form the government at would withdraw their support for governmental actions at the European level (or on any other issues). Internal consultations as well as executive authority (especially with regard to European matters) make an effective and impartial scrutiny of the German government by the *Bundestag* unlikely. When combining this with the existing pro-European consensus among the current parliamentary parties (including the two largest ones, CDU and SPD), it seems inconceivable that the German parliament would stop the German government from taking decisions at the European level, that, after all, the government deems to be in Germany's best interest. The current German political reality and constitutional tradition notwithstanding, the Court in its judgement is not only encouraging, but demanding closer scrutiny for the government's action at the EU level. Failing to do so, or so the judgement leads us to believe, will force the Court to step in and protect German interests where necessary: 'in Germany, participation must, on the national level, comply with the requirements under Article 23.1 of the Basic Law (responsibility for integration) and can, if necessary, be asserted in proceedings before the [German] Federal Constitutional Court.'[38]

Third, the Court extends the parliamentary control also to the areas of criminal law and social security law (Articles 48.2 and 82.2/82.3 TFEU). In these matter only, the Treaty stipulates (in Article 82.2/82.3 TFEU) that any member of the Council can raise an objection and prevent legislation by referring the matter to the heads of state and government in the European Council. This provision gives an indirect veto power to any government representative by preventing a decision from being taken. The Bundesverfassungsgericht, obsessed with the dominant position of the Member States as 'masters of the treaties'[39], would be expected to support this additional safeguard for member states governments. Yet, it declares that the German Council member 'may only exercise this right on the instruction of the German *Bundestag* and, to the extent that this is required by the provisions on legislation, the *Bundesrat*.'[40] The judgement thus declares that the relevant accompanying law must be amended to take into account the involvement of the German Parliament. Effectively, what the Court has done is, however, weaken the national government. If the Court's demands were fulfilled German government representatives would be severely restricted in their actions and could not call for an ad hoc referral to the European Council because prior instructions to do so by the *Bundestag* are necessary. If anything, the Court paved the way for more not less integration, because 'the more Community-friendly procedure is [and remains] the default.'[41]

Since the obligation of the judgement, the German Bundestag has reconvened for a special session to amend the accompanying laws in order to guarantee compatibility with the Lisbon judgement. The Bundestag has ratified three new laws regulating the cooperation of government and parliament as well as three new laws regulating the cooperation between Bundestag and Bundesrat concerning matters related to the European Union[42]. The laws are in line with the judgement of the Court and thus require explicit instruction by the legislature for the government to act in areas of the passerelle and flexibility clauses. With regards to the aforementioned emergency clause, the Bundestag clearly saw the problems (i.e. its potential disability to act unless specifically instructed) and thus deviated from the judgement, stating instead that the government representative in the Council has to refer the issue to the European Council if instructed to

[38] BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. 236.
[39] BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. 231, 235, 271, 298, 334.
[40] BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. 400.
[41] Halberstam and Möllers (2009).
[42] See http://www.zeit.de/newsticker/2009/9/8/iptc-bdt-20090908-570-22334624xml; for the legislative documents (only available in German) see: http://www.bundestag.de/dokumente/textarchiv/2009/26961025_kw37_begleitgesetz/index.html.

do so by the German Parliament. The law does not, however, make the instruction a condition for referral meaning that the German government maintains the authority to act without the explicit instruction of the Bundestag or (where applicable) the Bundesrat.[43]

Conclusion: The integration sunset?

Overall, the judgement, although not preventing the Lisbon Treaty from entering into force, must be treated with great caution. Its potential for preventing future integration should not be under-estimated. If the German Constitutional Court is really going to find the (judicial) time and interest to apply its self-conferred *ultra vires* review powers, we could soon see a clash between the European Court of Justice and the German Constitutional Court. It is now easy to envisage a situation whereby the European Court upholds a specific legislative measure because it considers it to fall within the legal competences of the European Union, whereas the German Constitutional Court takes a different view and claims legal superiority over the ECJ, thereby questioning (if not challenging) the fragile legal structure that holds together the EU legal order and sees EU legislation taken precedence over national legislation in case of conflict. The German Constitutional Court suggests in its Lisbon judgement that it will strike down EU legislation, even if the EU has competences to act, in case the legislation is not in line with the German constitution. If anything, the Lisbon Treaty narrows the scope of legislation that can be considered in line (see the abovementioned list of state-defining powers). Adding to this the well-established role model functioning of the German Court with regards to other European constitutional courts, the consequences could be much more devastating than even the Court might anticipate.[44]

This is not to say that the Lisbon Judgement marks the beginning of the end for the European integration process. Still, the *Grundgesetz* might say '*Ja*' to Lisbon, but the German Constitutional Court might not necessarily do the same when it comes to future integrationist moves at the European level. The highest court of the most populous member state has just replenished its judicial stockpile in anticipation of future EU ambitions to press forward with an ever closer and ever more integrated Union – seemingly keen to become much more active in its defence of what it perceives to be its own German as opposed to European area of judicial competence. Thus, the Humboldt University might have to wait quite some time before another German foreign minister inspires its students with a European vision that is as bold as Joschka Fischer's and yet remains compatible with the latest views of Germany's Constitutional Court.

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[43] The German states: '(1) Der deutsche Vertreter im Rat muss in den Fällen des Artikels 48 Absatz 2 Satz 1, des Artikels 82 Absatz 3 Unter- absatz 1 Satz 1 und des Artikels 83 Absatz 3 Unterabsatz 1 Satz 1 des Vertrags über die Arbeitsweise der Europäischen Union beantragen, den Europäischen Rat zu befassen, wenn der Bundestag ihn hierzu durch einen Beschluss angewiesen hat. (2) Wenn im Schwerpunkt Gebiete im Sinne des § 5 Absatz 2 betroffen sind, muss der deutsche Vertreter im Rat einen Antrag nach Absatz 1 auch dann stellen, wenn ein ent- sprechender Beschluss des Bundesrates vorliegt.' See original Paragraph 9 of the Gesetze über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union; Bundesdrucksache 16/13923. Available at: http://dipbt.bundestag.de/dip21/btd/16/139/1613923.pdf.

[44] In fact, the judgement has already motivated some conservative Czech Senators to demand increased control for the Czech parliament vis-à-vis its government with regards to passerelle and flexibility clause (L. Kubosova, 2009).

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JCER Special Commentary Series

Euthanasia, Gay Marriage and Sovereignty: The Polish Ratification of the Lisbon Treaty

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Observing the ratification process of the Lisbon Treaty in Poland must have been a peculiar experience, even for an attentive foreign observer. The government of Jaroslaw Kaczynski announced a Polish victory when the treaty negotiations were concluded in October 2007, only to block the ratification of the document in Parliament a few months later. Polish President Lech Kaczynski praised his brother's government for securing Poland's demands; yet, after Parliament finally passed ratification, the President decided not to sign it straight away. The sharpest disagreements concerned alleged 'new powers of the EU' in the area of euthanasia or gay marriage, supposedly brought about by the Charter of Fundamental Rights of the European Union. Yet, it is the Charter itself (together with the Declaration granting the Charter legal status) which makes it clear that such new powers do not exist. The aim of this commentary is to disentangle the baffling process of ratifying the Lisbon Treaty in Poland.

The outcome of the first Irish referendum on the Lisbon Treaty abruptly hampered the second attempt at reforming the EU, after the Constitutional Treaty was rejected in the respective referenda in France and the Netherlands in 2005. Some scholars and experts have attempted to explain which factors played a role in encouraging these states to reject reform of the EU (e.g. Carbone 2009) by pointing to domestic political factors. Other authors, despite ratification problems, have analysed how the Lisbon Treaty would affect different EU policies, such as foreign, security and defence policy (Whitman *et al.* 2009) or the Area of Freedom, Security and Justice (Kaunert 2010 forthcoming). Barrett (2008) considered three kinds of solutions after the Irish 'no': (1) Ireland eventually accepting the treaty; (2) the abandonment of the treaty by the EU; (3) other states moving forward without Ireland. Of these three options, the first, Ireland's secession from the EU, was politically difficult to envisage. Boudewijn *et al.* (2008) has argued that secession can only be voluntary; therefore, there was no point considering this possibility if the Irish government in Dublin wanted to stay in the EU.

However, in addition to Ireland, the situation in two other countries also threatened to further complicate the future of the Lisbon Treaty: the Czech Republic and Poland (see, Gros *et. al.* 2008; Kaczynski 2008). Ireland joined the then European Economic Community (EEC) in 1973 and so is well established within the EU structures. Despite this, its

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government still found itself under pressure and was expected to come up with a solution to the crisis. Poland, on the other hand, is a much younger EU Member State. In addition, it is also perceived to show a rather ambivalent attitude towards European integration. The Polish President Kaczynski and the opposition party, 'Law and Justice', are renowned for their strong Euroscepticism. Nonetheless, President Kaczynski did not gain anything domestically by delaying the signature of the Ratification Act until the second Irish referendum; nor did he strengthen Poland's position abroad in any way. Rather the contrary: he demonstrated that in the face of an institutional crisis in Europe, Poland was not the country to rely upon.

This is rather surprising; the Lisbon Treaty was negotiated on the Polish part by the government of Jaroslaw Kaczynski, the leader of the conservative Law and Justice Party and twin brother of the President. When the Inter-Governmental Conference concluded negotiations on the Treaty of Lisbon in October 2007, President Lech Kaczynski expressed his enthusiasm about the final outcome. He said that Poland got everything it wanted from the negotiations, underlining, for example, the abandonment of EU 'state symbols' in the new treaty (PAP 2007), which were included in the Constitutional Treaty. The then Parliamentary opposition, including the leader of the Civic Platform, current Polish Prime Minister Donald Tusk (TVN24.pl 2007a), was also enthusiastic about the outcomes of the negotiations. However, this enthusiastic stance was about to change significantly only a few months later, when the process ratifying the treaty was initiated in the Polish Parliament.

The first part of this commentary outlines the conflict among the main (Parliamentary and non-Parliamentary) political forces between December 2007, when the treaty was signed, and April 2008, when it was ratified by the Polish Parliament. It explains how it was possible for the Law and Justice government to conclude negotiations, call it a success, and later, after moving into opposition, to block ratification in Parliament. The second part looks in more detail at domestic political factors, shedding more light on some of the main arguments in this ratification conflict.

Between comedy and drama: the ratification process

In order to understand the nature of the conflict over ratification, it is important to briefly explain what Polish negotiators actually secured in the negotiations. However, it is necessary to start with a brief overview over the constitutional ratification procedure in Poland. According to the Constitution of the Republic of Poland, as adopted in 1997, there are two options for how an international agreement can be ratified. As a first option, the Prime Minister merely informs the Sejm (the lower chamber of Parliament) that he intends to submit an international agreement to the President for ratification. As a second option, a special statute granting consent for ratification is necessary, which must be passed by the Sejm and the Senate with a 2/3 majority. The Sejm consists of 460 MPs and the Senate consists of 100 Senators. In February 2008, the Sejm decided that the agreement of both Houses of Parliament would be necessary for Poland to ratify the Lisbon Treaty, referring to Article 90 of the Constitution (Poland 2008a). After Parliament grants consent in the form of a Ratification Act, the President has 21 days to sign it, veto it, or refer it to the Constitutional Tribunal. It was therefore a legally ambiguous situation, which sparked controversy among some constitutionalists (Gazeta.pl 2008a), when President Kaczynski announced that he was not obliged to sign the Ratification Act (Gazeta.pl 2008b).

What did Polish negotiators actually secure during the negotiations? When the Lisbon Treaty was finally signed in December 2007, a number of Declarations and Protocols were attached. Two of these documents were crucial for the Polish negotiators. Firstly, EU Member States had agreed to include the so called 'Ioannina Compromise' (Conference of

the Representatives of the Government of the Member States 2007a). This provision applies to majority voting in the Council; it allows a number of states to freeze the legislative process when they do not represent enough Member States (13 out of 27) or enough of the EU population (more than 35 percent but four Member States minimum) to form the blocking minority. When this happens, the Council must then do "all in its power to reach, within a reasonable time (…) a satisfactory solution" (Conference of the Representatives of the Government of the Member States 2007a). The intention of the Polish negotiators was to allow medium and small Member States to maintain some control of the legislative process in the Council even when the big states reach a consensus. What Polish negotiators apparently did not take into account was the fact that states such as Germany can also use the provisions of the Ioannina Compromise for their purposes; they can do so even more easily, taking into account their population (Gazeta.pl 2007a).

The second, more controversial element which played a major role in the ratification of the treaty in Poland was the Charter of Fundamental Rights. It covers areas such as human dignity, freedoms, equality, solidarity, citizens' rights and justice. The document was originally signed by the Presidents of the Council, the Commission and European Parliament in 2000 as a proclamation (European Parliament 2007). Since then, its legal status remains uncertain, with the European Court of Justice actually referring to the provisions of the Charter on a number of occasions (Menéndez 2007). The document was first incorporated as part of the Constitution for Europe; later, in 2007, the Declaration was included in the final outcome of the Lisbon Treaty negotiations, granting the Charter "a legally binding force" (Conference of the Representatives of the Government of the Member States 2007b). Poland, however, wanted an opt-out; thus, it signed the Final Act which included the so called British Protocol. The intention of this Protocol is to provide an opt-out for the UK, Poland and, (as of November 2009), the Czech Republic from the Charter's legal applicability in national courts and on national legislation, as well as from the jurisdiction of the European Court of Justice (Conference of the Representatives of the Government of the Member States 2007c). Jaroslaw Kaczynski and his government expressed the concern that the Charter could indirectly introduce homosexual marriages or euthanasia to Poland (Gazeta.pl 2007b). Needless to say, these concerns were legally groundless. The Charter only applies to "the institutions and bodies of the Union" and to the Member States "only when they are implementing EU law" (The European Parliament, the Council and the Commission 2000). However, EU law does not regulate controversial moral issues; thus, the Charter cannot enforce them. Further, an additional safeguard was provided by the aforementioned Declaration which states that "The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union" (Conference of the Representatives of the Government of the Member States 2007b).

Despite this, the fundamental factor explaining the conflict emerged in October 2007 when Jaroslaw Kaczynski and his Law and Justice Party lost the Polish parliamentary elections. A new majority was formed, consisting of the Civic Platform and the Polish People's Party; Donald Tusk became the new Polish Prime Minister. The spark which ignited the clash was a Resolution adopted by the new Parliamentary majority on 20 December 2008 (Poland 2008b). In this document, Parliament expressed its satisfaction about the signing of the Lisbon Treaty seven days earlier. However, the Resolution also underlined the importance of the Charter of Fundamental Rights and signalled that Poland would be willing to withdraw from the British Protocol, fully accepting the Charter. The President, whose brother negotiated the treaty, referred to the Resolution as an infringement on the national agreement (Gazeta.pl 2008c).

Jaroslaw Kaczynski and Law and Justice, now the major opposition party, were unimpressed. Kaczynski announced that his party would support the ratification of the treaty in Parliament only if the opt-outs were safeguarded in the Ratification Act (Gazeta.pl 2008d). As already mentioned, a 2/3-majority (307 votes) in the Sejm was necessary to ratify the treaty. Without the support of the Law and Justice Party, some votes would be missing. Thus, Prime Minster Tusk had to seek a compromise with Kaczynski's party. A parliamentary debate on the ratification took place in March 2008. In order to support the treaty, Kaczynski demanded that the Ratification Act must be preceded by a preamble. In this preamble, the Law and Justice Party wanted to include various guarantees, such as legal primacy of Polish law over EU law. The party also wanted a reference to the British Protocol, as well as references to the Christian roots and the national sovereignty of Poland (Gazeta.pl 2008d).

The Civic Platform opposed these demands. Sejm Marshall, Bronislaw Komorowski, explained that such a preamble would be pointless, because the Ratification Act would expire the moment it is executed, i.e. the moment when the President signs ratification (Komorowski 2008). Instead, in order to obtain a compromise, Tusk agreed that the Sejm could adopt a non-binding resolution in which the concerns of the Law and Justice Party would be addressed. However, Kaczynski insisted on the safeguards becoming part of the Ratification Act. In the end, the Law and Justice Party agreed to support the parliamentary majority's version of the Ratification Act if one condition was fulfilled. In order to make it difficult for any political force to change the conditions secured by Kaczynski during the treaty negotiations, the party wanted to state into the Ratification Act that a consensus among the government, parliament and the president would be necessary to change these safeguards (Gazeta.pl 2008e). The parliamentary majority opposed the idea. At this point, President Lech Kaczynski proposed another compromise version of the Ratification Act (Gazeta.pl 2008f).

In the end, a compromise was achieved during a 5-hour meeting of the President and the Prime Minister. The conditions of the compromise were the following (Gazeta.pl 2008g):

a) Lech Kaczynski would withdraw his proposal and support the government's version of the Ratification Act without any safeguards demanded by Law and Justice.
b) Parliament would adopt a Resolution addressing all the concerns of Law and Justice.
c) Parliament would begin to work on a law defining the roles of the various state organs in EU policy-making (the so called Competence Law).

Following this compromise, the Sejm and the Senate ratified the Lisbon Treaty at the beginning of April 2008. Even though the President was *de facto* representing the interests of the Law and Justice Party during his meeting with the Prime Minister, 56 MPs from this party still decided to vote against ratification (Gazeta.pl 2008h). The Senate ratified the treaty after the Sejm; thus, the first phase of the ratification process in Poland was over.

The only piece missing now was the signature of the President, who announced that he would ratify the treaty in June or July 2008 after Parliament had passed the Competence Law (Gazeta.pl 2008i). However, the Irish referendum in June 2008 changed everything. Following the rejection of the Lisbon Treaty by Irish voters, the President introduced the argument that ratification of the treaty on his part was pointless. Yet, he also assured that Poland would not become an obstacle if other countries ratified the document (Wirtualna Polska 2008a). This was the President's position from June 2008 up until 2 October 2009, the date of the second referendum in Ireland.

In the meantime, European leaders were trying to influence the President into signing ratification regardless of the Irish 'no'. French President Nicolas Sarkozy, holding the presidency of the EU in the second half of 2008, advised Lech Kaczynski not to hide behind Ireland's rejection. "Poland should take responsibility for itself" (Wirtualna Polska 2008b). Kaczynski's Office explained that the President was ready to sign the Ratification Act but Poland did not want to participate in putting international pressure on Ireland (Wirtualna Polska 2008a). However, the signs of impatience with the Polish President were coming not only from abroad. In January 2009, the Polish Parliament adopted a resolution in which it requested the President to sign the Ratification Act, as well as to support ratification of the Lisbon Treaty in other countries (Poland 2009c). The Law and Justice Party voted against this resolution, while the President suggested that Poland would not keep ratification on hold provided that other countries ratify the treaty. In the end, one week after the Irish 'yes' on 2 October 2009, the President signed the ratification.

The events outlined above constitute the major stages in the Polish ratification process between December 2007, when the treaty was signed, and October 2009, when Ireland voted in favour of the treaty. In order to better understand why the ratification has been such a painful procedure in Poland, some of the factors playing a role in Polish politics should be briefly examined.

The domestic politics explanation

It is important to appreciate the significant role that religion and the Catholic Church play in domestic politics in order to explain the ratification problems of the Lisbon Treaty in Poland. The Church has had a prominent political influence in Poland since 966 when the process of Christianisation began. More recently, two factors strengthened the position of the Catholic Church in Poland especially. Firstly, the role of the Church as a central anti-Communist force from 1945 until 1989 strengthened its political role. Secondly, the election of Karol Wojtyla to become Pope John Paul II in 1978 also increased its political appeal. Furthermore, roughly 90 percent of Poles declares themselves to be Catholics; although, only half of them claim to follow the Catholic Church's teaching (Willma 2009). The Law and Justice Party and President Kaczynski can rely heavily on religious voters, thus providing the Church with some political influence, or even power. This fact strongly affected the ratification process of the Lisbon Treaty in Poland.

The Charter of Fundamental Rights was portrayed in Poland as a threat to 'Christian values' such as the traditional family unit and human life. This was used by both Lech and Jaroslaw Kaczynski, who portrayed themselves as the guardians of such traditional Christian values. The President made it clear when taking part in a 2008 Easter mass: "The role of the Catholic faith must be secured in the treaty as much as possible in secular law. (...) In Poland, Catholic tradition is interwoven with national tradition". When referring to the role of the Charter, the President noted that "most of the Charter's elements are entirely legitimate". However, he suggested that other points could "lead later to allowing marriages which are not marriages between a man and a woman" (Gazeta.pl 2008j).

For the purpose of this analysis, the role and position of the Catholic Church needs to be separated from the more radical voices from the city of Torun – the headquarter of Redemptorist Tadeusz Rydzyk's Radio Maryja. Rydzyk, sometimes referred to as Father Director, is a very controversial figure. He manages not only a radio station, but also a TV station, a newspaper and even the University of Social & Media Culture in Torun. His relations with the mainstream Catholic Church remain unclear. The Church itself is divided as to how to treat him. While Rydzyk has been accused of anti-Semitism and ultra-nationalism on many occasions, he still maintains a degree of popularity and influence, particularly among some of the older Catholics. All leading Law and Justice politicians,

including Jaroslaw Kaczynski, did not hesitate to frequently accept invitations to Radio Maryja, providing *de facto* legitimacy to Rydzyk's activities. Rydzyk himself has been very critical towards the Lisbon Treaty, accusing political elites of suppressing the "real debate" (Gazeta.pl 2008k) about the document in Poland. He voiced this concern particularly in March 2008, the time of the culmination of disagreements over ratification in the public debate.

Some nationalists tried to fan the fear of Germany; quite a traditional move in Polish debates on major European issues. Anna Fotyga, Minister for Foreign Affairs in the government of Jaroslaw Kaczynski, and later working for the President, suggested that the Charter of Fundamental Rights would allow German citizens expelled from Poland after the Second World War to claim back their properties (Money.pl 2007). This argument was strongly rejected the next day in the media; predominantly on two grounds. Firstly, it was emphasised that law cannot work backwards. Hence, courts cannot refer to the Charter when considering cases which precede the existence of the document. Secondly, EU law experts noted that the Union does not regulate property laws. Therefore, the Charter cannot constitute a legal basis for potential claims (TVN24.pl 2007b). However, just like in the cases of gay marriage and euthanasia, those who raised these issues were not really concerned with a good understanding of the Lisbon Treaty. Their goal instead was to win Rydzyk's approval and to present themselves as the only patriots defending the national interest.

Just as nationalists supported by Radio Maryja tried to pull the Law and Justice Party in one direction, some pro-European members of the party argued that Poland risked being embarrassed on the European scene. There were a number of well-known individuals, as well as a group of younger MPs, who were strongly determined to support ratification (Wronski *et al.* 2008). Kaczynski could not completely ignore these voices within the party if he did not want to expose his brother to the danger of impeachment in the future. In order for Parliament to potentially impeach a President, a two-third majority is necessary in the Sejm and the Senate (307 votes). In order to block impeachment, a minority of more than one-third of votes in the Sejm is necessary (153 votes). The Law and Justice Party had 159 votes in the Sejm in March 2008; therefore, if the party was deserted by at least seven MPs, the President would be vulnerable. On the other hand, if Kaczynski decided to support the more pro-European faction in the party, he would run the risk that those members who were close to Rydzyk would leave and create a new anti-European party under the auspices of Radio Maryja. The compromise arranged by the President and the Prime Minister, as explained previously, was a convenient solution to this problem.

Conclusion

Polish ratification of the Lisbon Treaty occurred on 10 October 2009, when President Kaczynski ceremonially signed the ratification documents. For Eurosceptics, it was a meaningful 'incident' when the President's pen did not work and he had to borrow another one. One nationalist humorously concluded that this fact proved that objects could also be intelligent, sometimes even more intelligent than some people (Michalkiewicz 2009). On the other hand, he also lamented that the ratification of the treaty may eventually lead to the partition of Poland. These radical voices have been marginal in Poland since the October 2007 Parliamentary elections, when the fundamentalist, right-wing party 'League of Polish Families' was swept from political scene, obtaining a mere 1.3 percent of votes. However, this does not mean that nationalist populism has disappeared from public debate. As it was outlined in the first part of this commentary, the Law and Justice Party did not hesitate to use even the most nonsensical arguments to delay ratification of the Lisbon Treaty. The Office of the President constituted another centre of gravity for Eurosceptics. When looking at anti-European

populism coming from the outside of the political establishment, the group of religious fundamentalists concentrated around Tadeusz Rydzyk and Radio Maryja, certainly played some role in the battle over the ratification. The mainstream Church was much more restrained and diverse. While it was generally sceptical towards the Charter of Fundamental Rights at the beginning of 2008, it later became more sympathetic towards the document. One prominent representative of the Catholic Church admitted in December 2008 that there was nothing in the Charter that would challenge Christian values (Wiśniewska 2008). However, the successful conclusion of the ratification process in Poland does not mean that there are no more controversies sparked by the treaty, or that there will not be any more. In Poland, there are different shades of scepticism towards European integration; the Law and Justice Party and President Kaczynski are sometimes openly hostile towards the EU. However, there are other voices too. The current, officially very pro-European, government of Donald Tusk does not belong to the federalist camp either, but certainly is of a more pro-European conviction.

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JCER Special Commentary Series

The Lisbon Treaty and the Czech Republic: past imperfect, future uncertain

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Introduction

The future evolution of the European integration process remains a deeply controversial issue. The failed Constitutional Treaty and the Lisbon Treaty are just two recent cases in point. The current problems are certainly not the first of their kind historically, but while in the past the need for treaty renegotiations constituted rare exceptions, in today's EU-27, this has become commonplace. This article explores the problems with the Lisbon Treaty (LT) ratification process in the Czech Republic (CR) and its repercussions for the EU. We will proceed in three steps. First, we will describe the general situation on the Czech domestic scene regarding the elites´ attitudes towards the European Union. Second, we will present a more detailed analysis of the Czech debates about the LT. Finally, we will briefly point to some limitations of the existing theories of European integration which are related to their inability to reflect the profound changes in the integration process caused by the Eastern enlargement.

The background

First of all, we should shatter the myth that the resistance towards the LT in the Czech Republic can be explained as a consequence of a particularly Eurosceptic public opinion. According to the Eurobarometer polls, the Czech population belongs to the EU mainstream in almost every respect. For instance, when answering the question as to whether EU membership is considered a 'good thing', the Czech Republic is only slightly

Kratochvíl, P. and Braun, M. (2009). 'The Lisbon Treaty and the Czech Republic: Past Imperfect, Future Uncertain', *Journal of Contemporary European Research*. Volume 5, Issue 3. pp. 498-504. Available at: http://www.jcer.net/ojs/index.php/jcer/article/view/246/174

below the EU average.[1] However, what is specific about the Czech Republic is the political elite? The Civic Democratic Party (ODS), as the main rightist party, is commonly described in the literature as being soft-Eurosceptic. Further, the Euroscepticism of the Czech Communist Party, the third strongest political force in the country, is of an even more radical persuasion.[2] Hence, there are strong parties on both right and left which stand in a permanent opposition to further political integration. This, in combination with the frequently expressed Euroscepticism of the country's president, contributes to a Eurosceptic image of the country[3], which has manifested itself in the discussions on the LT.

The ODS coined the term 'Euro-realism' for their position on the EU already prior to the Czech membership, which, incidentally, they did not oppose (unlike the Czech Communists). The Euro-realism of the ODS can be described as a view of the EU as dominated by big powers striving for the fulfilment of their own interests, in which the small/middle-sized states gain the most if they protect their own sovereignty and reject further transfer of power to the EU level. The party is sceptical towards the increased influence of the EU institutions, since they are considered to be easily controlled by the big states.[4]

As a consequence of the position of the ODS, the Czech approach at the Convention on the Future of Europe, similarly to the CR's later approach regarding the ratification of the Constitutional Treaty and the LT, has been to some extent reluctant and divided. During the Convention on the Future of Europe, the Czech delegates held diverging views on most of the essential questions regarding the future treaty, such as those of the inclusion of the Charter of Fundamental Rights, the use of the term 'constitution', the increased powers of the European Parliament, etc.[5] More fundamentally, the split was between the ODS, which rejected the Constitutional Treaty and called for a 'Europe of Democracies', and other parts of the elite, which held a more pro-integration view that was less based on intergovernmentalism.[6]

After the Convention and the Intergovernmental Conference of 2003, the ODS profiled itself as being strongly against the treaty.[7] The party's resistance to the Constitutional Treaty (TCE) was principled, and, since many ODS members argue that the TCE and the LT are virtually the same, the same criticism is being applied to the LT. The resolution of the

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[1] Eurobarometr 69. (2008). Národní Zpráva Česká Republika [National Report Czech Republic]. Available at: http://ec.europa.eu/public_opinion/archives/eb/eb69/eb69_cz_nat.pdf, accessed 17 July 2009.

[2] Hanley, S. (2008). "Embracing Europe, Opposing EU-rope? Party-based Euroscepticism in the Czech Republic", in A. Szczerbiak and P. Taggart (eds) *Case Studies and Country Surveys: Opposing Europe? The Comparative Party Politics of Euroscepticis*,. Oxford: Oxford University Press, 243-262.

[3] Only comparable in the EU to the UK (with the EU reluctant Conservatives) or Poland with its Eurosceptic President.

[4] The ODS thus comes to the opposite conclusion on this compared to most academic literature focusing on small states. See, e.g., Thorhallsson, B. and Wivel, B. (2006). Small States in the European Union: What Do We Know and What Would We Like to Know? *Cambridge Review of International Affairs*, 19(4), 655.

[5] Kratochvíl, P. and Königová, L. (2005). Jak utváret Evropu: konvencne nebo konventne? Konvent jako alternativní metoda přípravy základních smluv evropské integrace [How to shape Europe: Conventionally or by a Convention? The Convention as an alternative method of preparing funding treaties of European integration]. Mezinárodní vztahy, 2/2005, 24-41.

[6] Kratochvíl, P. (2003). National Report on the Czech Republic, in *Positions of 10 Central and Eastern European Countries on EU Institutional Reforms: Analytical Survey in the framework of the CEEC-debate project*, edited by C. Franck, 25.

[7] ODS. (2004). Stejné šance pro všechny: program pro volby do Evropského parlamentu [Equal Opportunities for All: A Manifesto for the Elections to the European Parliament]. Available at: http://www.ods.cz/volby/programy/2004e.php, accessed 7 July 2009.

party congress in 2006 is illustrative of the party's position. It prohibited politicians from the party from accepting any new transfer of powers to the EU or extending the qualified majority voting in the council to more issues.[8]

Yet, the Civic Democrats have not opposed the LT in the same way as the TCE, primarily due to two factors: first, between 2007 and 2009, the ODS was in a coalition government with two smaller pro-European parties (the Christian Democrats and the Greens). Thus, a rejection of the Treaty could have endangered the continuation of the cabinet. Second, it was believed that a non-ratification of the Treaty could have had negative consequences for the upcoming Czech EU presidency in 2009. Despite these two factors, the party leadership had a hard time convincing the majority of the party to accept the Treaty.

Assuming that political parties attempt to maximise their votes, the splits in the ODS on the LT are difficult to understand. The ODS voters are in fact more positive towards the treaty than the average Czech voter.[9] Thus, an explanation for the party's reluctant approach to the treaty is to be found in the party's internal discourse. The latter has developed in a Eurosceptic direction that was largely influenced by current president Václav Klaus since the middle of the 1990s.

The debates on the Lisbon Treaty

The LT was ratified in both chambers of the Czech Parliament during spring 2009. Currently, only a very small part of the political elite, led by Mr. Klaus and a few senators loyal to him, have played a pivotal role in delaying the completion of the Czech ratification process. Therefore, in the following sections, we will take a more detailed look at their arguments against the treaty.

To understand the argumentation of the LT critics, it is helpful to look at the first request of the senators to the Constitutional Court on this matter dating back to Spring 2008. In this request, the senators posed six specific questions regarding the Treaty.[10] These points are also the ones most frequently used by Klaus and his followers in their criticism of the Treaty. The first question referred to the division of competences, the second to the flexibility clause, the third to the passerelle, the fourth to the possibility of the EU being a subject of international agreements, the fifth to the increased competences of the EU within the former third pillar, and the sixth to the status of the Charter of Fundamental Rights.[11]

President Klaus argued in the hearing on the LT at the Constitutional Court that the main problem of the compatibility between the LT and the Czech Constitution is the alleged fact that the Treaty would give the EU the 'competence-competence', the competence to acquire competences by itself through the flexibility clause and the so-called passerelle, which enables 'smaller revisions' of the Treaty without the normal process of treaty ratification. President Klaus argued that "there cannot be a possibility for EU institutions to interpret the range of transfer of competences by themselves, or even transfer

[8] ODS (2006). 'Usnesení 17. kongresu ODS' [Resolution of the 17th ODS Congress], available at: http://www.ods.cz/akce/kongresy/17.kongres/stranka.php?page=450, accessed 1 October 2008.
[9] STEM (2008). Informace z výzkumů STEM trendy 10/2008 [Information from the STEM surveys – trends]. Available at: http://www.stem.cz/clanek/1635, accessed 17 July 2009.
[10] The court verdict stated that these points do not contradict the Czech Constitution.
[11] Senát (2008). Žádost o posouzení souladu Lisabonské smlouvy s ústavním pořádkem ČR Senát Parlamentu České republiky podává [Request of examination of the compatibility of the Lisbon Treaty and the Constitutional Order of the Czech Republic, required by the Senate of the Czech Republic].

competences from our country, whether we agree to this or not."[12] Given the fact that the Czech Government is present in the Council, Klaus' point only makes sense if the "we" in the above sentence is understood as meaning the Czech Parliament. The fact that the LT enables some changes to EU competences if the Council decides so unanimously means that the Czech Parliament has lost the 'competence-competence', which is unacceptable to Mr. Klaus. Therefore the President´s position should not be understood as being that of an intergovernmentalist; what he favours could be called an inter-parliamentary model of integration.

However, even if the criticisms sometimes target substantial points in the Treaty, the general overall argument is based on the assumption that the LT moves the EU one step further towards becoming a state. Therefore, it is very difficult to suggest any modifications to the Treaty that would satisfy this rather small group of the Czech political elite. Klaus, for instance, has repeatedly stated that European cooperation should be based on intergovernmental cooperation, where no states can be overruled by the others.[13] Thus, he actually rejects any form of qualified majority voting (QMV) or simple majority voting in the Council. Since any new treaty revision that would replace the LT is likely to include the increased use of the co-decision procedure (ordinary legislative process), including QMV in the Council, it is hard to imagine what sort of a deal would ever satisfy this group of Czech LT critics.

Since the LT has been approved by both chambers of the Parliament, only two actors have recently influenced the LT ratification process in the Czech Republic: the Constitutional Court and the President. The hearing at the Constitutional Court and the negotiations about the additional requirements of the President – represented two, essentially independent processes which only rarely intersected. We will first discuss the Court´s ruling.

The verdict of the court was positive, as anticipated, regarding the compliance the Lisbon Treaty with the Czech Constitution. However, the verdict was surprisingly clear and straightforward. The group of senators who filed the complaint was criticised by the Court for using strategies aimed at delaying the ratification process; in the future, such requests to the Court regarding international treaties should be made without "unnecessary delay".[14] As already mentioned, the very same senators had already filed a complaint against the LT before. This time, the senators' complaint was broader, attacking the LT as a whole. Yet, the thrust of the argument was essentially the same as before: the senators fear that the LT transforms the EU into a superstate, thus depriving the Czech Republic of substantial parts of its sovereignty. Interestingly, the senators expressed their doubts not only about the compatibility of the LT and the Constitution, but also about the Treaty of Rome and the Maastricht Treaty.[15] The Court hearings were quite tense as the lawyer of

[12] Klaus, V. (2008) Vystoupení prezidenta republiky na jednání Ústavního soudu o Lisabonské smlouvě [The Speech of the President during the negotiations of the Constitutional Court on the Lisbon Treaty], available at: http://www.klaus.cz/klaus2/asp/clanek.asp?id=KO4l54HvOCa4, last accessed 4 November 2009 .

[13] Klaus, V. (2007) 'Před debatou o euroústavě' [On the upcoming debate on the Constitutional Treaty], Hospodářské noviny (13 June).

[14] Rozhodnutí Ústavního soudu ČR (the Verdict of the Constitutional Court) The Constitutional Court of the Czech Republic, available at: http://nalus.usoud.cz/Search/ResultDetail.aspx?id=63966&pos=1&cnt=1&typ=result, last accessed 4 November 2009.

[15] Návrh skupiny senátorů (A proposal made by a group of senators), 28 September 2009, The Constitutional Court of the Czech Republic, available at: http://www.concourt.cz/assets/N_vrh_Lisabonsk__smlouva_29-9-2009.pdf, last accessed 4 November 2009.

the complaining senators accused the chairman of the Court, Pavel Rychetský of being biased, basing their argumentation on the judge´s prior meeting with the German ambassador for a private discussion over the ratification process. However, this objection was rejected by the Court.[16]

While the senators´ complaint was widely anticipated, no one expected that President Klaus would come up with additional requests. Therefore, it came as a complete surprise when on 8 October 2009 the Swedish Prime Minister Reinfeldt was informed by Klaus about this; i.e. the request that the Czech Republic needs an opt-out from the Charter of Fundamental Rights and Freedoms to ensure that the Sudeten Germans, expelled from the country after the Second World War on the basis of the decrees of the President of the republic (the so-called Beneš decrees), could not reclaim their land and damage the country.

It is obvious that the President took this step not because he fear the property claims raised by Sudeten Germans, but rather because this opt-out allowed him to sign the Treaty without losing face. There are at least two arguments which convincingly show that President Klaus used the Sudeten German card as a mere pretext. First, Klaus had never ever mentioned his concerns regarding the expelled Germans previously in the debates on the Charter of Fundamental Rights.[17] Second, the vast majority of Czech lawyers are convinced that the Charter does not increase the chances for successful lawsuits arguing for the return of property to the expelled Germans, not least due to the fact that the Treaty cannot be used retroactively.

Nevertheless, the strategy of re-kindling the fear of Sudeten Germans is a favourite strategy of Czech populist politicians. It never fails to excite the public and gather support from those who are keen to protect Czech "national interests". As a result, knowing the popular attitudes, most Czech politicians from the ODS and the Social Democratic Party were rather uncertain how to react. The President still has a number of supporters in the ODS and the party´s reaction was correspondingly muffled. Surprisingly, the Social Democrats supported the President´s demand on a guarantee for the Beneš decrees, even though the Social Democrats supports the inclusion of the Charter in the LT. However, the reaction of the Czech Communists who unequivocally stood behind the President is not surprising, nor the reaction by the Greens and Christian Democrats who opposed his decision.

The disunity of the Czech political elites coupled with the weakness of the caretaker government resulted in the general acquiescence to the President´s requirement. We should note that other options were available, but none of them were used by Czech politicians. One obvious way would have been to file a competence complaint to the Constitutional Court, which could have decided that the President´s signature is not needed for the ratification process. Instead, Czech politicians – and subsequently the European Council – agreed to the opt-out from the Charter in order to finish the ratification process as soon as possible. The strategy of the Czech government, from this perspective, turned out to be a successful one. Very few had anticipated that the Czech ratification process would be completed already on the 3 November 2009. The protracted drama of the Czech ratification process took an abrupt end when Klaus in a rather emotional press conference declared that he respects the decision of the Constitutional

[16] Czech US holds hearing on the Lisbon Treaty, MPs fail with objection. České noviny, 27 October 2009, available at: http://www.ceskenoviny.cz/tema/index_view.php?id=404780&id_seznam=2583, last accessed 4 November 2009.
[17] This was confirmed by the former Foreign Minister Alexandr Vondra (Alexandr Vondra: Stalo se dnes, Radiožurnál, 8th October 2009, available at: http://zpravy.ods.cz/prispevek.php?ID=11296, last accessed 4 November 2009.

Court, even if disagreeing with the content of the decision, and that, accordingly, he had signed the treaty. It remains to be seen if there will be a Czech debate on the domestic legitimacy of this newly acquired opt-out.

A note of integration theory

After the recent enlargement rounds, the consequent increase of heterogeneity and the related problems with deeper integration in the Union have been frequently discussed in the academic literature. Some scholars even came up with new theoretical models that try to grasp Eastern enlargement specifically.[18] However, most of these approaches simply rely on the gradual socialisation of new member states into the community structures, thus stressing the one-sided asymmetrical transfer of norms from the EU institutions (and the old member states) to the new member states.

The significant difficulties during the ratification process of the Lisbon Treaty leads us to the question as to whether the problems surrounding the Treaty are nothing new from a theoretical perspective and whether they can be compared to similar situations in the past (e.g. problems with the Maastricht Treaty ratification), or whether we should interpret the present process as a challenge to some of the existing theories of European integration. Given the limited space, we will focus merely on one theory, and a most influential one at that, which we believe is in need of substantial reformulation should it remain a useful analytical tool for the enlarged Union – liberal intergovernmentalism.[19]

Sure, Moravcsik and his followers could see the assertiveness of the new member states as the confirmation of their emphasis on the role of national governments. However, two concepts, on which liberal intergovernmentalism relies strongly, are challenged by the Lisbon Treaty ratification process. The first problem pertains to the concept of a two-level game,[20] which features prominently in the liberal intergovernmentalist account of the integration process.[21] Moravcsik starts from the assumption that national governments seek the support of EU institutions, using them as a legitimising leverage in the domestic context. However, once a member state government feels (or at least pretends so) that its own citizens provide it with legitimacy in its opposition to further integration, the whole structure of the game, with the EU level overruling the domestic level, collapses.

The second problem is related to the way liberal intergovernmentalism describes international negotiations. Here, the concept of bargaining power looms large. The main assumptions underlying this concept are the willingness of the parties to reach an agreement and their preparedness for trade-offs. However, the experience with the Czech approach to ratification (as well as the Czech political elites´ actions during the Czech EU

[18] Among others, Friis, L. and Murphy, A. (1999) The European Union and Central and Eastern Europe: Governance and Boundaries. *Journal of Common Market Studies*, 37(2): 211-232; Fierke, K. M. and Wiener, A. (1999). Constructing institutional interests: EU and NATO enlargement. *Journal of European Public Policy*, 6:5: 721-742(22); Schimmelfennig, Frank (2001). The Community Trap: Liberal Norms, Rhetorical Action, and the Eastern Enlargement of the European Union, *International Organization*, 55 (1): 47-80.

[19] Moravcsik, A. (1998) *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht*. London: Routledge/UCL Press; Moravcsik, A. and Schimmelfenning, F. (2009) "Liberal Intergovernmentalism," in Antje Wiener and Thomas Diez, eds. *European Integration Theory*. Oxford: Oxford University Press.

[20] Putnam, R. (1988). Diplomacy and domestic politics: the logic of two level games. *International Organization* 42 (3): 427- 460.

[21] See also Moravcsik, A. (1993) Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach. *JCMS: Journal of Common Market Studies*, 31 (4): 473 – 524**.**

Presidency) starkly contradicts these assumptions: Even though costs for non-compliance in terms of a quick ratification are high (the often-quoted danger of a lower number of commissioners, the decreased credibility of the country, etc.), and, although the EU partners of the country have been trying to make ratification more acceptable for the Czech Republic, none of these steps changed the unwillingness to ratify the Treaty in some corners. Substantial parts of Czech political elites underwent some Europeanisation during the Czech Presidency, but even this shift has not been sufficient to accelerate ratification. In other words, the high level of politicisation of the issues linked with an ideological motivation against the Treaty´s ratification prevents the emergence of a compromise based on a trade-off with some other issues, and basic mechanisms of bargaining fail here. To sum up, the increased stress on the relevance of domestic politics coupled with the growing resistance to Europeanisation in some new member states challenges some basic tenets of liberal intergovernmentalism.

Conclusion

The LT ratification process faced a number of serious obstacles; however, it was successfully ratified in the end. There are at least two lessons learned from ratification: First, it is highly probable that no treaty revisions can be expected in near future. Even a small country can block something which other countries and their politicians invested substantial political capital – risking it becoming an unattractive option. Second, speaking about the situation in the Czech Republic, the willingness of a part of the political elite led by the Czech President to block any steps toward deeper integration is high and growing. The absence of Europeanisation (or even the existence of a process of "de-Europeanisation") in the country (as well as in Poland and some other member states) will certainly create similar obstacles to further integration in the future as well. As a result, the gradual creation of a multi-speed Europe, in which Eurosceptic countries will be sidelined, is now more probable than ever.

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Book Review

Dimitry Kochenov (2008) *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law*

The Hague: Kluwer Law International

Peter Van Elsuwege
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The provocative title of this book immediately reveals the author's critical assessment of the European Commission's pre-accession monitoring in the fields of democracy and the rule of law. The subject of analysis is the application of the conditionality principle to the ten Central and Eastern European new Member States: Estonia, Latvia, Lithuania, Poland, the Czech Republic, Slovakia, Hungary, Slovenia, Romania and Bulgaria. While certainly not being the first to write on problems of political conditionality in the context of EU enlargement, Dimitry Kochenov follows an approach differing in many ways from the traditional academic literature on this subject. In contrast to the countless political science contributions, this book proceeds from a legal perspective. Moreover, it is not limited to one or two target countries but includes a very thorough analysis of the entire eastern enlargement process. It is by far the most comprehensive, critical and detailed scrutiny of the Commission's pre-accession monitoring reports ever published.

The work is divided in two main parts. In the first part, entitled "*the law*", the general legal framework of EU enlargement is clearly expelled. Specific attention is devoted to the principle of conditionality and the place of democracy and the rule of law in this respect. The difference between the management of enlargement in practice and what can be found in the EU Treaty is striking. Although the reference to Article 6(1) TEU underlines the importance of democracy and the rule of law in the legal enlargement procedure on the basis of Article 49 TEU, no provisions regarding the level of compliance with those criteria are included in the Treaty. Hence, a network of "conditionality instruments" has been developed in the course of the pre-accession process. Eight different types of legal-political instruments of conditionality are identified (pp. 76-77).

The second part deals with "*the application of the law*". After a clarification of the notions "democracy" and "the rule of law", the European Commission's practice is (very) critically analysed as far as the reform of the candidates' legislatures, executives and judiciaries is concerned. The numerous illustrations of inconsistencies, shortcomings and simple mistakes in the Commission's annual progress reports lead the author to the conclusion that "[t]he Commission demonstrated total powerlessness when faced with candidate

countries unwilling to conduct the required reforms" (p. 208). The assessment of democracy and the rule of law conducted by the European Commission is, therefore, essentially understood as a political exercise which does not necessarily reflect the actual progress made by the candidate countries.

The concluding chapter makes a clear distinction between the principle of political conditionality as such and its application by the European Commission in the course of the preparation of the fifth and sixth rounds of EU enlargement. It is argued that the identified problems and inconsistencies are "not caused by an ill-formulation of the principle itself or failures in the workability of the conditionality idea, but by the poor application of the principle" (p. 311). By pointing at this gap between "conditionality on paper" and "conditionality in practice", six drawbacks of the Commission's practice are identified. Given the crucial role the principle of conditionality is about to play in the context of current and future enlargement waves – but also in other areas such as the European Neighbourhood Policy – a revision of its application is indeed recommendable. In this respect, the author suggests that "[c]onditionality can only become a true principle of enlargement, when the whole accession process is mostly moved away from the sphere of politics into the realm of the law" (p. 312). The question is, of course, whether such an evolution is feasible and even desirable given the inherent political inspiration of enlargement. In any event, the work of Dimitry Kochenov clearly illustrates the tension between law and politics in the field of EU enlargement. Accordingly, it forms a very significant and original contribution to the academic literature on the subject.

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Book Review

David Judge & David Earnshaw (2008) *The European Parliament (2nd Edition)*

Basingstoke: Palgrave Macmillan

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The general intention of this book is to produce a comprehensive insight into how the European Parliament (EP) works. More specific aims are to first to identify the characteristic features of a Legislature- (1) legitimation (2) linkage (3) decision-making, second to assess whether the EP conforms to those characteristics and third to analyse the relevance of these functions for the EP with reference to two different models of the EU: (1) the federal analogy and (2) multilevel governance. However, the basic structure of this edition remains the same as that of the first edition, purely because the reviewers of the first edition have been in favour of this structure (see preface p. xi).

This edition includes a comprehensive updating of data and information to take account of (1) the 2004 elections (2) the elections in Bulgaria and Romania in 2007 (3) internal organisational changes within the EP- to party-groups, committees, rules of procedure, leadership structures; and major changes to the EP's political powers- status incorporated in the Lisbon Treaty. Furthermore, it promises to provide the 2009 election results and information about changes in the EP's membership and in the composition of party groups on the Palgrave Macmillan website following the election in June.

Judge and Earnshaw's description of how the EP moved from a talking shop into a fully-fledged EP eloquently shows how the powers of the EP were increased by the introduction of the formal treaties: the Single European Act 1986, Maastricht Treaty 1992, Amsterdam Treaty 1997, Treaty of Nice 2001, Constitutional Treaty, and Lisbon Treaty 2007 (chap.2). It is useful to have this historical account at hand to see how the EP's powers were extended. However, it is descriptive, the authors do not ask why the EP was strengthened by these Treaties, and they do not question whether the evolution of the EP could be explained within a theoretical framework.

The chapter (5) on party-groups in the EP will be a great source of information for undergraduates on the issues of what a party group is, how a party group is formed, what structure they tend to have, and the recent changes in the party groups. One of the interesting findings was the increase in the number of non-attached MEPs. It was noted that after the disintegration of the *Identity, Tradition and Sovereignty Group* and the Romanian election there were 30 unattached MEPs by February 2008. However, the authors do not ask why the MEPs are gradually becoming unattached. Additionally, it is almost impossible to get a sense of what Judge and Earnshaw's views are on the very interesting topic of "the development of the left-right politics in the party-groups" (p.141-142) since they heavily rely on Hix's findings in *Executive Selection in the European Union:*

Does the Commission President Investiture Procedure Reduce the Democratic Deficit? (1997) and *Democratic Politics in the European Parliament* (2007).

Moving on to the discussions on the linkage role of the Legislatures, the authors begin by examining the electoral procedures structuring the 2004 European parliamentary elections. To build on this they develop the analysis by looking at how the EP acts as a representative body and how it links citizens and decision-makers in the periods between elections. Judge and Earnshaw conclude by saying that "the EP provides the only direct linkage between EU decision-makers and the 27 electorate of the EU" (p.111-112). Having done this in two separate chapters (3 and 4) they make it easier for the reader to comprehend the linkage role of the EP and its interconnected nature with legitimacy and representation, but it causes confusion as the title of the chapters are strikingly alike, and at times these chapters feel repetitious and oversimplified.

One of the interesting findings of the Chapter 4 was of female MEPs' position in the EP. It is noted that there is an upward trajectory of female representation, in particular it was found that there is an increase in female representation in EU-15 member states (in 2004 it was up to 32.5%, n=185) but the overall increase was moderated by the lower percentage of female representatives from the new member states (37 out of 162, 22.8%). With these evidences in hand the authors asked: why are there so few women in the Parliament? Why, in nearly three-quarters of member states are there more female representatives in the EP than in national parliaments? Is there European effect? (p.95).

While writing about women MEPs one cannot escape from mentioning that out of 12 MEPs the authors interviewed for this book only 1 of them was female. This could be used as a measurement of how representative the outcomes of these interviews were, and question why have the authors failed to interview an equal number of women MEPs in the light of the considerable increase in the female representatives.

The examination of the formal powers of the EP is carefully done by looking at the different decision-making mechanisms, and its role in appointment and dismissal of the Commission was assessed by the use of a case study on the appointment of the Barroso commission in 2004. The subsequent chapter (8) analyses the complexities around the legislative influence of the EP by questioning how influential the EP is in decision-making. Assessment of the EP's power of rejection with the use of case-studies- rejection under co-decision (1): "take over bids directive 2001"; and rejection under co-decision (2): "software patents 2005"- was one of the ways to show the EP's strength in decision-making.

The final chapter focuses on the question of "A Parliamentary Europe?" It aims to both monitor the normative debate about the deepening of legitimation through parliamentary institutions and to examine the practical steps taken to enhance legitimation through coordination of the activities of national parliaments and the EP. It suggests that if the "future of Europe" is "parliamentary, we need to understand what "parliamentarization" entails. And it concludes with same words as in the first edition: "In the study of the European Parliament, where you start from determines where you finish" (p.299).

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Book Review

Brigid Laffan & Jane O'Mahony (2008) *Ireland and the European Union*

Basingstoke: Palgrave Macmillan

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Ireland and the European Union? It's been a rollercoaster ride – with dizzying highs and crashing lows, Ireland's progress over the course of membership has been marked successively by plunging the depths of economic crisis in the 1980s, followed by the rapid and spectacular rise of the Celtic Tiger period before the dizzying descent into the current morass of exponential deficit and borrowing. Once hailed as the economic success story of integration in Europe, this small, peripheral state is now derided as the equivalent of an Icelandic-type financial collapse, give or take a spelling error or two. At times the home of the most positive of Europeans (when Eurobarometer asks whether membership has been a 'good thing', the Irish habitually return positive ratings in the 70-80% range as the transfers from CAP and Structural Funds flowed in), Ireland has more recently returned not one but two negative referenda results on crucial European treaties. It's a fascinating story and an intriguing case study of small state Europeanization, and this publication tells it exceptionally well. Indeed, *Ireland and the European Union* will become *the* core text for practically all political and international relations modules at Irish universities for some years to come.

Brigid Laffan and Jane O'Mahony firmly place their study in the theoretical framework of Europeanization and do so in an easy manner, well structured and, as usual with these authors, with a perceptive and analytical rigour that is a benchmark for other small state studies in the canon. Tracing the path from independence from the UK in the 1920s, through the conservatism of the mid-century, to the preparation for and negotiation of accession to the EU, the authors initially lay down a useful contextual framework for the modernization and move toward Europe by a society that had seriously lagged behind its continental counterparts in terms of prosperity and societal change. For Ireland, as the authors explain, 'embracing international liberalization and economic growth would carry with it the seeds of deep societal change and challenge' (p14).

Chapters range from how successive Irish administrations 'managed' Europe; effects on political parties and parliament; referenda and Irish attitudes to treaty changes; various policy sector discussions, including a sharply focused, incisive chapter on foreign policy and notions of Irish neutrality; and the effects of membership on the British-Irish dynamic, as Ireland moved from dependence on the UK for economic trade as well as policy frameworks, toward a wider and much healthier interdependence with a broader range of economic and political partners within the growing EU. The final two chapters are as neat an encapsulation as one can find on whether Ireland can be considered a model for small states within a larger union, as well as what the Irish experience tells us about the EU itself.

While Laffan & O'Mahony note the difficulty in isolating 'EU' effects in a definitive manner, their analysis of the complex interaction between Ireland and the EU through a period of heightened globalization of the international economy is as effective as can be found on the academic text market. In the final chapter, they explore the notion of the EU as a geo-political framework or 'scaffolding' for the Irish state, mediating this island nation's relationship with the global political economy and, in particular, bridging its strategic ties to both the United Kingdom and the United States. These core relations were approached, not in an ideological or philosophical manner, but in a pragmatic, adaptable style by the Irish state elite illustrating the 'tactical wizardry' (according to former Commissioner Chris Patten) of the Irish in its attitude to the opportunities afforded to a small state in a large union.

More so than any other previous publication on Ireland and Europe, Laffan and O'Mahony offer an articulate, coherent, comprehensive, analytical yet readable account of the complex relationship between a small state in the throes of rapid modernization and societal change on the one hand and an emerging, evolving multi-level governance entity on the other. Its core value as a case study is in its illustration of how the process of Europeanization is not 'an all-pervasive and powerful process that squeezes member-state institutions, national identities and domestic choice of all meaning. The obligations of membership, the ties that bind, are thick enough to enfold the member states, but thin enough to allow for considerable domestic choice and latitude' (p.263). They argue that notwithstanding the tangible benefits in terms of economic development, financial transfers and geopolitical positioning, the EU remains a distant and little understood entity for the majority of people.

The authors note that the text was completed in the aftermath of the negative referendum on the Lisbon Treaty in 2008. Whereas successive Irish governments had positioned the state as a committed member of the Union, and the Union itself providing a strong anchor in a rapidly changing world, they note that 'the anchor is now loose of its moorings' and that Ireland's long-standing consensus on the EU is over.

Thus this publication comes at what might be a tipping point in Ireland's relationship with the European Union – the indulgence of an electorate biting the hand that feeds in successive European referenda may well be seen as flagrant hubris before the economic crash which brought home the realisation of where our interests truly lie. Thankfully, this period has also seen publication of Laffan & O'Mahony's text which can help our students and citizens reflect on the evolution a relationship which has many twists and turns in the tale still to be told. It is a major study, and destined to become the classic study, of Ireland's most vital relationship for many years to come.

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Book Review

Edward Best, Thomas Christiansen and Pierpaolo Settembri (2008) *The Institutions of the Enlarged European Union: Continuity and Change*

Cheltenham: Edward Elgar Publishing

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E.H. Carr once wrote of nation states: "They are an anomaly and an anachronism in a world which has moved on to other forms of organization" (Carr 1946: 37). The first part of his statement, made over sixty years ago, may be a stretch but the latter part seems somewhat more salient in light of the 2004 enlargement of the European Union to include twelve new member states. This new edited volume turns its attention to the issue of EU enlargement and, more specifically, to the issue of the Union's stability in its aftermath.

As the preface informs us the book collates research conducted by a number of scholars working under the auspices of the EU-CONSENT program that spans Europe, bringing together research focused on the widening and deepening of the EU. The purpose of the collection is clearly articulated by the editors and is two-fold:

> First, to expand earlier academic contributions with regard to a time frame which allows more solid conclusions and an approach that charts change beyond and across individual EU institutions; second, to complement rushed ex post assessment performed by the EU institutions themselves, in a way that its findings can be meaningfully used in a debate on the future membership and institutional settlement of the EU (p. 2).

Measured against these criteria the book should be considered a success. In seeking to investigate how the institutions of the EU have responded to the arrival of twelve new member states the editors present eleven clear and well-researched chapters. Eight deal with specific institutions with a further three focusing on legislative output, comitology and EU governance in general. I must admit that after I browsed the titles of the chapters and read the introduction I was preparing myself for a somewhat dry exploration of the EU's institutional apparatus. Thankfully these preliminary expectations were unfounded and whilst the book is far from a page-turner (even in political science terms) there is enough fresh content to hold the attention of those interested in the EU's development.

Methodologically the book is impossible to capture in the space of a review. The contributors – all experts in their fields – have been unshackled save for the requirement of academic rigour. Suffice it to say that they all take that requirement seriously and each chapter discusses its methodological approach with clarity and concision. This more than compensates for the lack of uniformity.

A simple question permeates the book, namely how has the EU avoided breaking down in the aftermath of admitting twelve new member states? Simplifying somewhat, the answer provided is through a combination of assimilation of the new members and adaptation of the existing system. Crucially, there has been no fundamental transformation of the institutions. Three broad conclusions are offered. First, the direct impact of enlargement on the institutions of the EU has been limited but sufficiently significant to keep the wheels turning. Second, enlargement has interacted with trends already present in the EU, especially the trend towards decision-making taking place through informal channels. Third, enlargement increased the pressures for reforms targeted at improving the efficiency of the EU's machinery. The message is clear: enlargement itself cannot be isolated as a single cause of any changes. As ever, context is of fundamental importance.

A key theme running through the book is the tension between administrative efficiency and democratic accountability. It is in relation to this tension that the book offers what I consider to be its most interesting and also its most troubling findings. The post-2004 trajectory seemingly places a premium on efficiency at the expense of accountability. Findings across the chapters report that the EU has enhanced its administrative efficiency since 2004. But in the drive to maintain efficiency in the face of increasing complexity and a greater number of actors decisions are more frequently taken behind the scenes, through informal arrangements or are being shunted into technical and bureaucratic areas. This new research suggests that the ability of citizens in the member states, and in particular the new member states, to hold decision-makers to account is weakening. The European Parliament, the supposed democratic institution of the EU, has seen its powers increased through a reform of comitology. The Lisbon Treaty, currently languishing in political purgatory, promises to extend the Parliament's powers still further. Yet, despite this, the Parliament has failed to become more efficient as a guardian of accountability. It is, of course, for individuals to decide what a suitable trade-off between efficiency and accountability looks like but for the Euro-sceptics this research provides further ammunition to the old democratic deficit charge.

But the Euro-sceptics are not the primary target audience for this book. During my reading it struck me, as someone who completed a specialised masters degree in EU politics, that this would be an excellent addition to the syllabus of such programs. Providing an up to date consideration of *all* EU institutions – not just the glamorous ones – it would appeal to postgraduate students who may struggle to keep up to date with such a rapidly changing institutional environment. Used in tandem with a core EU text this book would extend students' basic knowledge and the contrasts to be drawn between a generic text and a text that focuses explicitly on the impact of enlargement would unquestionably be fruitful. But the appeal does not end there. Advanced undergraduates may find much of interest here although 'advanced' is a word I would stress. Readers lacking a solid grasp of EU basics run the risk of getting lost in the thicket of abbreviations and acronyms. Students aside, the book is to be recommended to anybody engaged in analysing or reporting on the EU who may find that what they think they know has subtly changed in the post-2004 setting.

In short, this is a timely offering that informs us that the EU is assimilating new members and adapting to new pressures without undergoing a fundamental transformation. One major caveat is that although enlargement has yet to cause significant distress the effect

may be delayed. The contributors and editors are reflexive enough to draw attention to this. The conclusion, effectively 'more of the same' is far from the most exciting but is somewhat comforting nonetheless. But the darker side of the findings remain the most contentious and the meticulous work presented in this collection deserves to spark further research into the EU's weakening democratic accountability. EU scholars take note.

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Book Review

Thomas Christiansen & Torbjörn Larsson (2007) *The Role of Committees in the Policy-Process of the European Union*

Cheltenham: Edward Elgar Publishing

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This edited volume aims to guide the reader through the institutional 'jungle' of committees that 'prepare, shape, and implement the decisions that are taken by the European institutions' (p. 1). The book focuses on the established committees within the 'community method' and the second pillar. Although the individual chapters dedicate a great deal to explaining how these committees are involved in the EU policy-process (agenda setting, decision-making and policy-implementation), the editors make clear in the introduction that the underlying goal of the volume is to examine the implications of the normative and empirical analyses of committees. In particular, they are interested in two different issues. Firstly, they ask whether the workings of the committees are characterised by deliberation, persuasion or strategic bargaining. Secondly, they investigate the degree of formalisation of the EU decision-making. The two subsequent chapters provide much of the theoretical discussion on these two issues.

Torbjörn Larsson provides a theoretical discussion on the deliberative supranationalism of the EU level of governance and on the role of the committees within (Chapter 2), whereas B. Guy Peters looks at different forms of informal governance in the EU and investigates the implications for efficiency and democracy (Chapter 3). In the former, the author's main conclusion is that ' the committees and groups of the EU are there to compensate for the lack of the existence of a people and to promote output legitimacy that satisfies different kinds of minorities' (p. 37). Peters on the other hand, indicates that the effect of informality on the level of democratisation of governance largely depends on the particular form of governance adopted.

The following chapters are for the most part empirical, with the evidence usually consisting of interviews and documents. In Chapter 4, Torbjörn Larsson and Jan Murk focus on the committees of the European Commission. Firstly, they differentiate between the 'comitology' committees and various other expert groups. The latter, on which the authors focus, can be found under different names in the literature: advisory committees, expert committees, consultative committees. Yet the authors prefer the term 'expert groups' in accordance with the Commission's internal statistics. Larsson and Murk find that there are approximately 1545 such expert groups, which could be further distinguished between regular versus sub-groups, permanent versus *ad hoc* and active versus passive.

Consequently, the authors use this typology to study the expert groups' role in the EU policy-making. Finally, the authors go back to the main issues that were set for comparison in the introduction and find that expert groups open up the otherwise closed deliberation of the Commission.

In Chapter 5, Eve Fouilleux, Jacques de Maillard and Andy Smith focus on the 175 working groups in the Council of Ministers. As these groups are part of the intergovernmental compromises, the authors explore their relationship with well established conflict dimensions: northern versus southern and small versus big countries. They find that Council working groups do not often make distinctions between technical and political issues and conclude, on a normative note, that the problem with Council working groups does not concern their transparency but the lack of ability of the outsiders to make sense of the available information on the negotiations.

In Chapter 6, Simon Duke looks at the role of the, often ignored, committees and working groups in the Common Foreign and Security Policy (CFSP). The emphasis here is on the 'high' committees such as the Political and Security Committee. Duke concludes that in the CFSP context, committees are less about strategic bargaining as they focus on trying to build a consensus. His findings regarding formalisation are rather inconclusive, however. This can be regarded as a 'sensitive' area and any attempt to formalisation may bring a tension between the intergovernmental and *communautaire* aspects of CFSP. Similarly, the author finds difficulties in addressing the criterion of legitimacy due to the intergovernmental nature of CFSP.

In Chapter 7, Christine Neuhold and Pierpaolo Settembri look at the 20 standing committees of the European Parliament (EP). They explore their historical evolution, their dynamics and their relationship with party groups in the EP. One of their main conclusions is that EP committees are largely open deliberative arenas, with a potential for 'opening up' the legislative process of the EU.

The following three chapters focus on the so-called comitology committees. Guenther F. Schaefer and Alexander Türk (Chapter 8) provide a detailed discussion of how comitology committees work in practice. The authors dismiss the usual critique of comitology as 'an opaque and intransparent mode of decision-making' (p. 195) and argue that the unique nature of the EU level of governance leaves much to be discussed about what should be required for the committees to be considered legitimate and accountable. Pamela Lintner and Beatrice Vaccari (Chapter 9) use six case studies to further elaborate on the issue of legitimacy and accountability of the comitology committees by concentrating on the EP's 'right of scrutiny'. Finally, Alexander Türk (Chapter 10) looks at the case-law of the European Court of Justice (ECJ) in order to investigate how it has influenced comitology. Türk concludes that the ECJ has strongly influenced the committee system by supporting and enhancing the deliberative aspect of comitology. In the area of transparency, the author maintains that the ECJ has been attempting to strike a balance 'between efficiency of the comitology process with a protection of individuals' interests' (p. 245).

In the concluding chapter, Christiansen, Larsson and Schaefer offer a rejoinder to the two questions posed in the introduction by drawing comparisons between different types of committees and between committees of the same type operating in different areas. In general, the book provides an excellent overview of the different committees that operate in the EU system of governance. The comparative observations in the concluding chapter further enhance the utility of the book, especially for those who are interested in investigating the EU committee system in conjunction with issues such as deliberative supranationalism, accountability and legitimacy.

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