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The European Union Policy Process: Policy Making in the Community Pillar

PhD in Political Science
Trinity College Dublin
2003

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Abstract

This thesis examines the policy making process of the European Union (EU), an entity whose reach and depth is in constant evolution. More specifically, it evaluates the degree to which two competing theories – liberal intergovernmentalism and supranational governance – explain how policy is produced in three domains of EU's Community pillar: education, consumer policy and telecommunications. The theories are tested in a structured, replicable and in-depth manner across three stages of the policy process from policy formulation to implementation. This thesis shows that neither theory offers a best 'fit' as to how policy is produced in the EU. Member state executives largely control the pace and scope of policy formulation. However, they do not control policy outcomes in negotiation. The European Parliament plays an important decision making role and the rules of the game matter. Finally, in implementation both theories overlook the ability of national systems to adopt and adapt to EU legislation.

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List of Abbreviations and Acronyms

BEUC	Bureau Européen des Unions de Consommateurs (European Consumers Organisation)
BSE	Bovine Spongiform Encephalopathy
BT	British Telecom
CC	Consumer Committee
CCC	Consumer Consultative Committee
CEDEFOP	European Centre for the Development of Vocational Training
CEN	Comité Européen pour la normalisation
CENELEC	Comité Européen de normalisation electro-technique
CEPT	Conférence Européenne des Administrations des Postes et des Télécommunications
CFI	Court of First Instance
CFSP	Common Foreign and Security Policy
CoR	Committee of the Regions
COFACE	Confederation of Family Organisations in the EC
COREPER	Committee of Permanent Representatives
CPE	Consumer Premises Equipment
DG	Directorate General
DG EAC	Directorate General for Education and Culture
DG INFSO	Directorate General for Information Society
DG SANCO	Directorate General for Health and Consumer Affairs
EC	European Community
ECJ	European Court of Justice
ECOFIN	(Council of) Economic and Finance Ministers
ECSC	European Coal and Steel Community
ECTS	European Credit Transfer System
ECU	European Currency Unit
EEC	European Economic Community
EEJ-NET	European Extra-Judicial Network
EFA	European Food Authority
EHLASS	European Home and Leisure Accident Surveillance System
EP	European Parliament
ERG	European Regulators Group for Electronic Communications Networks and Services
ERT	European Roundtable of Industrialists
ESC	Economic and Social Committee
ETSI	European Telecommunication Standards Institute
ETUC	European Trades Union Confederation
Euro Coop	European Community of Consumer Cooperatives
GAP	Groupe d'Analyse et de Prévision (of SOG-T)
GATT	General Agreement on Tariffs and Trade
GSM	Global System for Mobile Communications
ICT	Information and Communication Technologies
IGC	Intergovernmental Conference
IT	Information Technology
ITRE	European Parliament Committee on Industry, External Trade, Research and Energy
ITU	International Telecommunications Union

MEP	Member of the European Parliament
NA	National Agency
NARIC	Network of National Academic Recognition Information Centres
NGO	Non-Governmental Organisation
NRA	National Regulatory Authority
OJ	Official Journal
OMC	Open Method of Coordination
ONA	Open Network Architecture
ONP	Open Network Provision
PTO	Public Telecommunications Operator
PTT	Postal, Telephone and Telegraph Administration
QMV	Qualified Majority Voting
RAPEX	Community system of rapid exchange of information on the dangers linked to use of consumer products
RSC	Radio Spectrum Committee
RTD	Research and Technical Development
SEA	Single European Act
SEA	Single European Market
SMP	Significant Market Power
SOG-T	Senior Officials Group on Telecommunications
TAO	Technical Assistance Office (Socrates Implementation Office)
TEC	Treaty establishing the European Community
TENs	Trans European Networks
TEU	Treaty on European Union
ToN	Treaty of Nice
UMTS	Universal Mobile Telecommunications System
UNICE	Union of Industrial and Employers' Confederation of Europe
WTO	World Trade Organisation

Introduction

There has been a substantial and significant shift in responsibility from the state to the European Union (EU) [1] in economic, social, legal, constitutional, and even to a certain degree in foreign and security policies. Policies made at the EU level have consequences for every level of governance in Europe. Subnational, national and EU politics are increasingly intertwined as the EU is used by its member states as a means to resolve collective problems. The rules made and policies decided upon in Brussels have penetrated the lives of every EU citizen, whether they are aware of it or not. As the EU's policy reach expands and becomes more politicised, a number of key questions come sharply into focus. Where does power lie within the EU? Who controls the policy process, determines the outcomes achieved and by what means? The very legitimacy and democratic accountability of the Union demands that these questions are answered. Solving this puzzle is of vital importance, not just for practitioners and scholars of the EU but also for its citizens. This dissertation analyses the policy making process of the European Union. In analysing the policy making process of the EU, this thesis will make a significant contribution to understanding where the dynamic of power lies in the European Union.

The process of EU policy making is distinctive and constantly in evolution. The EU does not stand still: it is a system in transformation (Wallace, 2001), an experimental process (Laffan et.al., 2000). EU policies are negotiated between social, economic, political and legal actors according to a number of methods or modes. Three main variants of EU policy making have been classified as: the Community method, the intergovernmental method and the coordination method (Stubb, Wallace and Peterson, 2003, 139-141). The specific focus of this research is the analysis of the Community method of policy making in the EU. The Community method involves collective decision making between a number of national and supranational actors according to specified rules and procedures. Since the inception of the European Economic Community in 1958, it has become the classical mode of policy making in

[1] The term 'European Union' or 'EU' will generally been used in place of 'European Community' or 'EC', except when referring explicitly to the pre-Treaty on European Union period.

the first pillar of the European Union (Stubb, Wallace and Peterson, 2003, 139).[2] The European Commission has described the Community method as follows: 'the Commission initiates and executes policy; the Council and European Parliament decide upon legislation and budgets – whenever possible in the Council using qualified majority voting – and the European Council exerts political guidance. The Court of Justice adjudicates disputes and reinforces the legal authority of the Union' (Commission 2001, White Paper on European Governance, 29). For example, competition, telecommunications, agricultural policy, cohesion, fisheries, environment policy, consumer protection, and education policy are decided by the Community method. Policy output is in the form of binding EU legislation, such as directives, regulations and decisions. In the first or Community pillar, competence can be exclusively accorded to the European level, as in telecommunications; it can be shared, as with consumer protection; or it can complement or support national action, as with education.

The second method or mode of policy making is the intergovernmental method and is prevalent in the second and third pillars of the Union. Here member state executives are the primary decision makers and the EU's supranational actors play a more limited role. It has been used in polity-building domains such as the Common Foreign and Security Policy, European Security and Defence Policy and Justice and Home Affairs. Policy output is more often than not in the form of conventions, resolutions and joint actions. The third method is that of open coordination. This is a softer, less-binding method of policy making and has recently emerged as a means of coordinating policy action in areas where member states are reluctant to yield competence to the EU level. It comprises areas such as national employment policies, economic and social progress (the Lisbon agenda), justice and home affairs policies and pensions policy, where member states compare and measure national policies according to commonly-determined standards. Open coordination includes methods such as measuring 'best practice' and benchmarking and has been used to extend policy cooperation to new areas.

[2] Since the Treaty on European Union (1993), the first pillar of the European Union incorporates the existing European Community, which encompasses the majority of EU responsibilities, e.g. internal market policies, agriculture and competition. The second pillar consists of the common foreign and security policy and common security and defence policy and the third pillar (Justice and Home Affairs) formally comprises Police and Judicial Cooperation in Police Matters.

Political scientists have put various explanations of EU policy making forward and this literature will be discussed in greater detail in the following chapter. These explanations come from a number of schools within political science: international relations, comparative politics and public policy. However, two explanations of policy making dominate the scholarly terrain: liberal intergovernmentalism and supranational governance. The fact that both theories have been the subject of extensive discussion and criticism attest to their ongoing importance and relevance as explanations of EU policy making.

In the late 1960s and 1970s intergovernmentalism perceived national governments as the central actors in EC policy-making and the prime motivation for European integration was held to be the national interest. Intergovernmentalists such as Stanley Hoffmann were not prepared to abandon their insistence that states must be seen as being in control of the process. In other words, the main postulate of an intergovernmental approach to the EU is that national governments have successfully retained power, despite the evolving integration process. In line with its realist and neo-realist ancestry, intergovernmentalism assumed states to be unitary actors or black boxes and started from the realist position that the modern nation-state is still the ultimate arbiter of its own destiny. Following the success of the Single European Act in the late 1980s, intergovernmentalism was adduced to have missed out important facets of the integration process. However, this did not mean that the primacy of the nation-state as the main actor was abandoned and the most up-to-date variant of intergovernmentalism is to be found in the work of Andrew Moravcsik.

Andrew Moravcsik's 'liberal intergovernmentalism' rests on the assumption that the European Union is essentially a passive tool of the member states. In this view, member state governments are again the crucial actors in European integration; the interests or preferences of these actors are a product of liberal interest-group politics within each member state; and member governments then bring these preferences into intergovernmental bargains, which in turn reflect the preferences and the bargaining power of the various member governments (Moravcsik, 1998). For the most part, his integration framework is successful in explaining the grand bargain negotiations based on the empirical evidence with its use of intergovernmental decision-making. However, his concentration on intergovernmental bargaining overlooks the

independent influence of supranational actors such as the Commission, Parliament and Court of Justice and the constraints of the decision-making rules and process other than unanimity. While liberal intergovernmentalism does not rule this out *a priori*, its predictions that the relationship between the member states and the supranational actors is that of principal and agent is not intuitively persuasive. Moravcsik did not examine or try to explain the process of institutionalisation below the level of grand bargaining, i.e. what happens after the principals delegate decision-making to the agents. Of course, this does not mean that his theory cannot be applied to decision making situations other than grand bargains.

In sum, therefore, Moravcsik devotes little attention to the independent role of institutions in shaping state preferences, strategies and bargaining outcomes. The main criticism levelled at Moravcsik's liberal intergovernmentalism is thus that it plays down the role of supranational institutions in European integration. Moravcsik's view that the aggregation and conciliation of national interest primarily motivate the EU and its continuing development appears too limited. Supranationalism cannot be regarded simply as a controlled means of implementing intergovernmental bargains when one considers the independent powers of EU institutions such as the European Court of Justice. Moravcsik fails to recognise that a member state's behaviour in negotiations may be exogenously as well as endogenously determined. He fails to appreciate the significance of EU membership itself impacting upon national preference formation in the sense that the norms of the European institutions are internalised in the domestic environments. His proof of grand-bargain negotiation is persuasive but his neglect of other types of EU bargaining is a weakness in his research project. Similarly, defining events that precede interstate bargains are overlooked, discounted, or treated in an *ad hoc* fashion, and events that follow instances of bargains appear to be irrelevant.

Neofunctionalists, in opposition to intergovernmentalists, assumed that if there is a problem cutting across frontiers and there is a felt need, actors at the sub- and supranational levels will mobilise resources, and the problems will be solved. At the heart of neo-functionalism lies the thesis that the pooling of sovereignty and transference of competence to deal with certain tasks would engender a process of spillover whereby more and more of an individual state's tasks would be carried out

by the European Union. In simple terms, therefore, it is fair to say that neo-functionalism entailed an erosion of states' competences and that institutions such as the European Commission would increasingly take on the role of initiative. The main criticism of neo-functionalists centred around their over-emphasis on the role of supranational institutions in driving the integration process i.e. structure, to the detriment of the power of agency, i.e. the member states.

Sandholtz and Stone Sweet acknowledge the neofunctionalist heritage in their work on supranational governance and they propose a theory of integration that views intergovernmental bargaining and decision-making as embedded in processes that are provoked and sustained by the expansion of transnational society, the pro-integrative activities of supranational organisations, and the growing density of supranational rules. And, they argue, these processes gradually, but inevitably, reduce the capacity of the member states to control outcomes (Sandholtz and Stone Sweet, 1998). In other words, they do acknowledge that member state governments are important actors in this process, but argue that the integration-relevant behaviour of governments, whether acting individually or collectively, is best explained in terms of the embeddedness of governments in integration processes, that is, in terms of the development of transnational society and its system of governance. However, criticisms of their approach include their failure to fully articulate this in a systematic fashion and to establish and show empirically the causal link between increasing transnational exchange in specific areas and integration in those areas. Indeed, according to Mattli, they devote inadequate attention to the preferences of governments and show a lack of understanding of the nature of collective action problems that may impede progress towards integration (Mattli, 1999, 5).

Both theories discussed above are not explicitly clear on exactly what they wish to explain. Indeed, it appears that they implicitly seek to explain outcomes at one level of governance (e.g. day to day routine policy making or historical treaty amending decisions). In addition, both theories do not differentiate between the stages of the policy process, i.e. policy formulation (pre-negotiation), negotiation and implementation (post-decision). According to Peterson, the debate between the competing explanations of EU integration is a phoney war in many respects as these

'complementary perspectives masquerade as incompatible rivals' (Peterson, 1999a, 290). Indeed,

> 'none does a very good job of explaining outcomes at *all* levels. As such, EU scholars must choose if they are to be credible. But the choice is not between rival general or 'meta theories' of European integration or EU governance. Rather, it is about what, precisely, is being explained, and at what level of analysis in a system of government which is clearly and uniquely multi-layered' (Peterson, 1999a, 290).

Even if the war between these competing explanations is phoney, it cannot be declared over just yet. Definitive conclusions as to the applicability of the theories cannot be made until they are both tested fully and systematically across all phases of the policy process. The present research makes a contribution to this debate by putting the two dominant theories to the test with concrete and extensive empirical policy analysis.

This dissertation uses the methodology of analytic narrative to test the two competing theoretical frameworks outlined with empirical analysis in three policy case studies. Education, consumer protection and telecommunications are the three policy domains analysed in this dissertation. The process of EU policy making is divided into three distinct phases to facilitate analysis: pre-negotiation, negotiation and post-decision. The methodology of an analytic narrative (Bates et.al., 1998) enables the testing of theories in a qualitative manner using the case studies selected. It involves the generation of clear, testable propositions from the two explanations for each of the policy making stages, i.e. what each theory proposes at each of the stages of policy making. Practical or observable implications of what we would expect to observe if the propositions were correct are also generated. These propositions and observable implications are then tested against the empirical evidence of the case study material in order to systematically evaluate the explanations in each of the policy areas and across the phases of policy making.

Attempts to draw conclusions as to the performance of competing theories on the basis of a small number of case studies must always be done with great caution. Even

so, the three cases analysed will provide significant insights into the EU's policy making process. As the findings of the empirical analysis are evaluated, conclusions will be made as to the 'goodness of fit' of the competing theoretical explanations of how policy is produced in the first pillar of the EU. We will also gain a well-developed sense of the dynamic of policy making in education, consumer protection and telecommunications policy.

This dissertation will proceed as follows. The relevance of the empirical focus of this research has been outlined briefly. This will be elaborated further in Chapter 1, where previous research on EU policy making is reviewed. International relations, comparative politics and public policy approaches to the study of the EU will be analysed. Chapter 1 will also outline the reasons behind the selection of liberal intergovernmentalism and supranational governance as theories to be tested.

Chapter 2 then describes the research design implemented in this study. The use of the analytic narrative methodology will be justified. This methodology enables us to push qualitative policy analysis beyond the boundaries of detailed descriptions of policy settings and less structured analysis. It will marry the testing of theories with the investigation of empirical evidence at two levels of policy analysis – macro and micro. The macro analysis concentrates on examining the broad development of policy making in the specific case study areas selected across stages. The micro-analysis focuses on the negotiation of specific legislative proposals. The use of two levels of analysis maximises the opportunities to put the theories to the test. The propositions and observable implications for each theory will then be generated for each of the policy stages. Finally, the selection of cases that are investigated in this study will be justified and outlined briefly. Education policy is an example of a distributive policy in the first pillar. It is also defined as a complementary competence or supporting measure. Consumer protection is a market-correcting or cushioning, regulatory policy. It is also defined as a shared competence between member states and the EU. Finally, telecommunications policy is a market-making, regulatory policy and one were the EU possesses what is termed exclusive competence.

Chapter 3 sketches the functions of the actors involved in the process of policy making in two ways. First, the functions of the main policy actors are described. Second, the formal and informal interactions of each of the institutional actors at each of the stages of the Community pillar policy-making process are considered. Finally, a means of representing the macro dynamic of each of the policies is generated. In brief, it is posited that the process of policy making in the first Community pillar of the EU can be described in the following way. Actors are at the centre of the policy process. They negotiate over a set of policy instruments to achieve policy results. The resources they possess and the salience they attach to issues influence their behaviour in negotiation. However, who the relevant actors are, the feasible set of policy instruments on which they negotiate and the negotiating result itself are also influenced by the institutional structure and dynamic. The nature of policy result can differ depending on the interaction of these factors. The application of this tool of representation is one step in exposing the underlying mechanisms of policy making evolution in the cases selected.

The presentation of the cases and findings begins in Chapter 4 with education policy. The broad process of institutionalisation of EU education policy is explored, followed by a macro analysis of the theories across each of the policy stages. The micro level analysis examines the negotiation and implementation of the SOCRATES II programme. Chapter 5 analyses EU consumer policy. Again, the broad process of institutionalisation of EU consumer policy is explored, followed by a macro analysis of the theories across each of the policy stages. The micro level analysis focuses on Directive 1999/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees. Chapter 6 investigates the development of the EU's telecommunications policy in terms of broad institutionalisation, followed by the macro analysis of the theories across each of the stages of telecommunications policy making. The micro level analysis concentrates on the negotiation of Regulation 2887/2000/EC of the European Parliament and of the Council on unbundled access to the local loop. In the concluding chapter, the findings are summarised, and the conclusions are drawn together.

Chapter 1: Explaining the EU

1.1 Introduction

According to Peterson (1999a, 292-3), explaining the European Union – what it does, how it does it and with what effect – is one of the most important challenges facing political science as a discipline. Any viable general or 'meta-theory' of EU politics faces the task of describing, explaining and predicting both EU polity-building and policy-making. The 'theories' of integration that emerged in the 1950s and 1960s offered rival narratives of how and why regimes of supranational governance developed and how closer cooperation in relatively narrow, technical, economic spheres of life could generate wider political integration among countries (Rosamond, 2000). Each theoretical conception was grounded in a particular set of assumptions about the way in which the world operated and the rivalry between these competing narratives, their assumptions about the state of the world and their theoretical descendants has persisted in tandem with the development of the European Union. At the same time, these theories were also used to try to explain how the EU's policy making process worked, that is, to explain the series of actions which combine to produce a change or development in policy at the European Union level. This chapter provides a brief survey of how they try to explain policy making in the EU, together with an evaluation of the efficacy of these competing explanations.

The first generation theories or explanations of European integration appeared after the initial success of the European Coal and Steel Community and European Economic Community (EEC) in the 1950s and early 1960s. These theories came from the international relations school and purported to be 'grand theories' of integration, namely broad explanations and predictions of how integration would proceed. In so doing, they also offered conceptualisations of how policy itself would be produced within this process of integration.

The earliest 'integration theory', neofunctionalism, was developed by Ernest Haas who used the European Coal and Steel Community as a case study in an attempt to dissect the

integration process to derive propositions about its nature. He famously defined political integration as:

> the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new centre, whose institutions possess or demand jurisdiction over the pre-existing national states (Haas, 1968, 32).

Haas portrayed supranationality and the processes associated with it, not in terms of a variety of possible legal formulations, but by describing the institutions, powers, limitations, decision-making capacity and executive facilities of the European Coal and Steel Community, as well as the powers still wielded by the member states or especially created and conferred upon the new organ. Consequently, he described the functions of actors involved in this process in this manner: 'the High Authority both legislates and administers, while the Council of Ministers legislates as well as controls the primary legislator. The Assembly tends toward controlling but certainly cannot legislate. Only the Court is clearly and solely a judicial agency' (Haas, 1968, 51).

Haas posited that once established, the central institution (here he meant the High Authority, now the European Commission) would affect political integration meaningfully by following policies giving rise to expectations and demands for more federal measures - spillover. Haas spoke of supranational actors' roles in facilitating spillover in very general terms and did not develop specific mechanisms to show this. He referred to occasions when the governments would be determined to agree but may find themselves unable to formulate the necessary compromise, then the High Authority would be asked to step in and mediate. He allotted the supranational actors a key role as potential 'agents of integration' and again they would be expected to both facilitate the transfer of élite loyalties to the European level and to play the role of 'honest broker' facilitating decision-making between recalcitrant national governments. Indeed, he added that when the governments, for identical or converging reasons, would be determined *not* to find a federal solution to their problems, a High Authority initiative

would be neither solicited nor respected. In general terms, therefore, Haas acknowledged that while the attitudes of national political élites would influence the development of the integration process, supranational political élites also had a role to play in encouraging the process of integration and consequently in the production of policy (Haas, 1968, 524). Lindberg went further and identified the conditions for integration more explicitly. New central institutions, for instance, help political groups 'restructure their expectations and activities' in response to integration; and member states must possess 'the will to proceed' if integration is to continue. Lindberg put meat on the bones of the concept of spillover – it could be functional in that the initial task and granting of power to the central institutions creates a situation or series of situations that can be dealt with only by further expanding the task and the granting of power. As mentioned above, it could also be political, that is, as the result of integrative efforts of political élites (See Nelson and Stubb, 1998).

Neofunctionalism suggested that observers seeking to explain the emergence and development of EU policy should focus their attention on the major societal groups, and in particular the political and economic élites at the European level (Hix, 1994). It is the interests and activities of these actors that were said to shape the EU political process. The deterministic logic of spillover also stressed and implied a diminishing capacity of member states to direct policy making. The failure of neofunctionalism to explain the development of European integration following publication of Haas' work has been well documented. Indeed, every student of the EU is well aware of the pathologies of this theory, how it was soon to be falsified by the leadership and strategies conducted by De Gaulle in the 1960s, and how it was reformulated and practically abandoned by Haas and Lindberg in later years in light of its inability to acknowledge the ability of member states' executives to control the development of policy.

The direct theoretical riposte of Stanley Hoffann's intergovernmentalism seemed to offer a more convincing explanation of this newly developing policy process. Based on realism, intergovernmentalism assumed first that the member state is a unitary actor and it is the governments of the member states who define the limits of integration and whose

perceived interests primarily determine the degree and pace of European integration reached. Hoffmann saw supranational actors and in particular the European Commission as purely faithful agents of member states wishes. The role of national governments was to promote the interests of their peoples to the best of their abilities within the adversarial world system and they did so in cooperation with each other in this new arena. The actors created in this process, while trying to assert some kind of independent behaviour and role, did not affect national governments' behaviour in any meaningful way. National governments held all control. To quote Hoffmann,

> as for the common organs set up by the national governments, when they try to act as a European executive and parliament, they are both condemned to operate in the fog maintained around them by the governments and slapped down if they try to dispel the fog and reach the people themselves (Hoffmann, 1996, 224).

While Hoffmann's interpretation of integration and how policy-making proceeded in the EEC held sway for a considerable length of time, realist intergovernmentalism also had its own pathology, namely the assumption of the unitary nature of member state actors. This theoretical approach ignored the possibility and indeed the existence of political conflict and competing views of what is vital for member states at the domestic level. In addition, the adoption of the 1992 programme and the passage of the single European Act highlighted the entrepreneurial role of supranational organisations such as the Commission and interest associations in the formulation, negotiation and implementation of policy and the possibility of functional spillover in response to the single market initiative (Sandholtz and Zysman, 1989).

1.2 Lessons from International Relations

It is true to say that students of the European Union developing theories of integration have tended to claim ancestry from the two 'grand theories' outlined briefly above. Depending on developments within the European Community (and then Union) sphere, either one or the other of these paradigms has been perceived as being in the ascendant. In more recent years in particular, the two main 'theories' of integration, Moravcsik's

liberal intergovernmentalism and Stone Sweet and Sandholtz's supranational governance[1], have demonstrated this ancestry. It is beyond the scope of this study to outline in great detail the essence of these two approaches, as well as their pathologies. Indeed, this has been done to considerable effect elsewhere (Diez, 1999; Puchala, 1999). But it is necessary to examine what these students of the EU have to say with regard to the production of policy in the EU. To examine what they have to say therefore, we shall begin with the work of Andrew Moravcsik.

It has been claimed that the most comprehensive and compelling theoretical treatment so far of the puzzle of European integration, namely to explain why sovereign governments in Europe have chosen repeatedly to coordinate their core economic policies and surrender sovereign prerogatives within an international institution is to be found in the work of Moravcsik, especially in his large study *The Choice for Europe* (Puchala, 1999; Moravcsik, 1998).[2] According to Moravcsik, in the history of the EC, the most important of such choices are five treaty-amending sets of agreements that propelled integration forward and his central claim is that the broad lines of European integration since 1955 reflect three factors: patterns of commercial advantage, the relative bargaining power of important governments, and the incentives to enhance the credibility of interstate commitments. Most fundamental of these was commercial interest. European integration resulted from a series of rational choices made by national leaders who consistently pursued economic interests – primarily the commercial interests of powerful economic producers and secondarily the macro-economic preferences of ruling governmental coalitions – that evolved slowly in response to structural incentives in the global economy. When such interests converged, integration advanced (Moravcsik, 1998, 3).

What does Moravcsik's framework tell us about European integration? At its core, Moravcsik argues, European integration has been dictated by the need to adapt through policy coordination to trends in technology and in economic policy. This explanation of

[1] The use of this term is contested even by these authors, See Sandholtz and Stone Sweet, 1999.
[2] Indeed, it could be argued that most works on the EU today are responses either in support of or in opposition to Moravcsik's ideas.

national preferences for integration is grounded in political economy, not economics. According to Moravcsik, preferences for such policies emerged from a process of domestic political conflict in which specific sectoral interests, adjustment costs and, sometimes, geopolitical concerns played an important role. The negotiated outcomes reflected the relative power of states – more precisely, patterns of asymmetrical independence. Those who gained the most economically from integration compromised the most on the margin to realise it, whereas those who gained the least or for whom the costs of adaptation were highest imposed conditions.

Moravcsik uses game-theoretic language taken from regime theory to construct his principal-agent model, which, he asserts, explains the choices to pool and delegate sovereignty to international institutions. He conceptualises these choices as efforts by governments to constrain and control one another – in game-theoretical language, by their effort to enhance the credibility of commitments. Moravcsik's framework assumes, above all, that the primary political instrument by which individuals and groups in civil society seek to influence international negotiations is the nation-state, which acts externally in negotiations as a unitary and rational actor on behalf of its constituents (Moravcsik, 1998, 22). Governments transfer sovereignty to international institutions where potential joint gains are large, but efforts to secure compliance by foreign governments through decentralised or domestic means are likely to be ineffective. Significant pooling and delegation tend to occur, not where ideological conceptions of Europe converge or where governments agree on the need to centralise policy-making in the hands of technocratic planners, but where governments seek to compel compliance by foreign governments (or, in some cases, future domestic governments) with a strong temptation to defect.

Unlike the single theories of neofunctionalism or intergovernmentalism, Moravcsik offers a multicausal explanation in an explicit framework consistent with rational state behaviour (Moravcsik, 1998, 9). Moravcsik assumes that states act rationally or instrumentally in pursuit of relatively stable and well-ordered interests at any given point in time and that implies a division of major EC negotiations into three stages: national

preference formation, inter-state bargaining, and the choice of international institutions. Moravcsik presents alternative theories and hypotheses to explain each of the three stages. He hypothesises that supranational entrepreneurs 'may' play a role in the second of these phases and pits theories that stress supranational entrepreneurship and interstate bargaining power against each other to try to explain efficiency and distributional outcomes of interstate bargaining.

Moravcsik claims that both neofunctionalist and intergovernmental studies looking at supranational leadership within the EU have yet to derive or test falsifiable propositions about treaty-amending bargains. Similarly, he holds that many studies conclude that supranational leadership constitutes a 'necessary' condition for integration, but nearly all demonstrate:

> only that the supranational entrepreneur attempted to propose initiatives, mediate between governments, and mobilise societal groups, and that some proposals by supranational authorities eventually were accepted. What they do not show is that supranational actors were *essential* actors (Moravcsik, 1999, 53).

He develops a number of assumptions and hypotheses using the negotiation analysis, international regime theory, international law, and American politics literature on the role of third-party political entrepreneurs to test whether and why supranational entrepreneurs (here he seems to talk mainly of the role of Commission presidents, little or no mention is made of the European Parliament (EP) and European Court of Justice (ECJ)) are involved in treaty-amending bargains. These are:

1. Bargaining power in international negotiation stems in large part from the generation and manipulation of information and ideas. This enables supranational entrepreneurs to act as initiators, mediators, and mobilisers.
2. Information and ideas necessary to reach negotiated outcomes are costly and scarce for governments and their constituents.

3. Centralised supranational authorities enjoy privileged access to information and ideas (Moravcsik, 1998, 58).

In his research, Moravcsik found none of these three assumptions about supranational actors held true, with the exception of the influence of the Commission and Parliament in the Single European Act negotiations. In fact, he states that he found that bargaining was dominated by governments, which were quite capable of bargaining efficiently without the assistance of supranational entrepreneurs like Monnet, whose actions were at best redundant and futile. Commercial opportunities were the basic source of national government preferences, which determined the nature and speed of integration in the 1950s and onwards. In industrial trade, agriculture, transport, and atomic energy, preferences followed commercial export opportunities. Industrial trade liberalisation was widely viewed as inevitable: interstate conflict arose over its form and scope. This arrangement was then embedded in institutions mainly to enhance the credibility of commitments, that is, to 'lock in' implementation and enforcement decisions on which governments might later be tempted to defect. Federalist ideology, however, is still required to account for the general institutional structure of the EC: its quasi-constitutional form, and the modest tendency of more 'federalist' countries to favour greater transfers of sovereignty (Moravcsik, 1998, 157).

It must be pointed out, however, that Moravcsik's examination is biased in favour of one part of the integration process – polity making. As Puchala points out, the origins of EU governance and its future evolution have much to do with the explicit interests of member states, their initiatives and influence and asymmetries in power among them (Puchala, 1999, 330). Moravcsik, in concentrating on treaty bargains, does not explicitly examine EU policy making and therefore omits empirical evidence that could point to certain autonomous roles for EU supranational actors in policy making. In other words, his focus on the treaty making 'grand-bargains' should be acknowledged. As Fritz Scharpf points out,

> Since only intergovernmental negotiations are being considered, why shouldn't the preferences of national governments have shaped the outcomes? Since all case studies have issues of economic integration as their focus, why shouldn't economic concerns have shaped the negotiating positions of governments? And since only decisions requiring unanimous agreement are being analysed, why shouldn't the outcomes be affected by the relative bargaining powers of the governments involved? (Scharpf, 1999, 165).

Similarly, Moravcsik's tendency to talk of the generic 'supranational entrepreneurs' highlights his overall failure to disaggregate these actors and look at their individual roles and influence – for they may influence the process of intergovernmental bargaining in different, more informal ways. If he wished his 'theoretical framework' to be fully comprehensive, it would need to be applied and tested against other types of EU bargains that do not take place in intergovernmental conferences or at European Council summit meetings (Caporaso, 1998, 347).[3]

Concentration on Moravcsik's work in *The Choice for Europe* could lead to the impression that Moravcsik had nothing else to say on the subject of policy making in the EU and the role of supranational actors in this process. This is not the case. In his earlier journal articles, he did acknowledge that supranational actors play a role in EU policy-making and he spoke of the delegative role of supranational officials. In his 1993 Journal of Common Market Studies article, he outlined the three most important instances in which the Treaty of Rome delegates Member State authority to supranational officials as external representation, agenda-setting and enforcement. In the common commercial policy of the EC for example, the Commission represents the Community, but he qualified this with the statement that tight control is maintained by the Article 113 Committee. Secondly, delegating the power of proposal to the Commission provides a means of setting the agenda, and thereby avoiding time-consuming or inconclusive

[3] As Moravcsik himself pointed out, subsequent to the publication of *The Choice for Europe*, what he offered was not a comprehensive theory of European integration, but a narrower theory, 'namely a proposed solution to what is arguably 'the most fundamental puzzle confronting those who seek to understand European integration'. Indeed, he further acknowledged that 'many events in the EC are not properly within the specified domain of my theories' (Moravcsik, 1999a, 174-5).

'cycling' between difficult proposals or an arbitrary means of proposal selection. Finally, he also acknowledged that with regard to enforcement (the ECJ), by taking the definition of compliance outside of the hands of national governments, a supranational legal system strengthens the credibility of national commitments to the institution. But most importantly, even at this early stage of his theorising, he strongly asserts that the scope of delegation is explicitly limited by national governments (Moravcsik, 1993, 511-13). Yet he does suggest and it is worth quoting this phrase:

> The expansion of judicial power in the EC presents an anomaly for the functional explanation of delegation as a deliberate means by national governments of increasing the efficiency of collective decision-making. While supranational delegation undoubtedly creates benefits for governments, the decisions of the Court clearly transcend what was initially foreseen and desired by most national governments (Moravcsik, 1993, 513).

While he chose not to focus on this in his seminal work, in a later and more recent article he returned again to the subject of 'supranational entrepreneurship' (Moravcsik, 1999b). Yet again, however, this 'supranational entrepreneurship' was to be examined in a particular area – treaty-amending negotiations. Based on non-cooperative bargaining theory, he argues that what he terms 'the power resource view' implies that effective informal entrepreneurship requires asymmetrical control over informational and ideational resources unavailable to the principals of a negotiation – namely national governments – yet necessary for effective initiation, mediation, and mobilisation. In essence, therefore, in terms of his principal-agent model of integration, informal supranational entrepreneurship can be defined as exploitation by international officials of asymmetrical control over scarce information or ideas to influence the outcomes of multilateral negotiations through initiation, mediation, and mobilisation. That is to say, 'informational and ideational asymmetries create windows of opportunity that supranational entrepreneurs exploit to influence interstate negotiations' (Moravcsik, 1999b, 274). Such a basic proposition (elaborated in five alternative theoretical

frameworks, along with sets of observable implications) is easily invalidated as empirical evidence shows that there is little evidence of informational or ideational asymmetries in treaty-amending negotiations such as over the Single European Act and the Maastricht Treaty. Moravcsik uses this lack of evidence to conclude that supranational actors (in particular the Commission) do not even have informal powers in treaty-amending negotiations and thus that any work that asserts this is misguided and mistaken. In his own words:

> These findings support an interpretation of EC negotiations in which the preferences and influence of national governments are the major determinants of treaty-amending bargains. Governments themselves can and generally do provide decentralised entrepreneurial leadership – that is, information and ideas necessary for efficient negotiation – at relatively low cost, compared to benefits. *The bold claims about informal supranational entrepreneurship that dominate recent research on European integration are greatly exaggerated (my emphasis)* (Moravcsik, 1999b, 298).

Moravcsik uses this single proposition to infer that supranational actors have no role in treaty-amending negotiations. However, using what he calls his 'two-level network manager' approach, he does predict that rare moments of comparative entrepreneurial advantage enjoyed by informal entrepreneurs arises where they help mobilise new and previously unorganised domestic and transnational social actors, and advanced packages of policy proposals blocked by failures of domestic coordination. These moments are more important than what he calls 'daily decision making in the EC'. At this level of analysis, he does acknowledge that the EU maintains a complex set of rules and autonomous, effective supranational administrators and judges. But again he alludes to the principal-agent reasons for their existence, that is, these institutions stem primarily for the desire to lock-in credible national commitments to efficient decision-making and compliance in areas where governments have invested specific assets and are vulnerable to foreign defection. (Moravcsik, 1999b, 302).

In sum, therefore, Moravcsik's highly influential theory of liberal intergovernmentalism asserts the autonomy and control exercised by the member state governments particularly in treaty negotiations and while on occasion appearing to acknowledge that supranational actors may play some kind of a role in day-to-day policy making, he has relegated these actors firmly to the sidelines. As mentioned above, the main 'descendant' of neofunctionalism and the main theoretical competitor of and riposte to Moravcsik's model is that of 'supranational governance' of Sandholtz and Stone Sweet.

Sandholtz and Stone Sweet make an important point concerning integration theory. In their opinion, most theorising on integration endorses either the following statement or its opposite: the distribution of preferences and the conduct of bargaining among the governments of the member-states broadly explain the nature, pace, and scope of integration, and neither supranational organisations nor transnational actors generate political processes or outcomes of seminal importance (Sandholtz and Stone Sweet, 1998). Sandholtz and Stone Sweet acknowledge that in some policy domains of the EU, competence is organised relatively exclusively at the national level (along the lines of intergovernmentalist thinking), but in other policy domains, authority is mixed and a new supranational politics has emerged. Supranational politics is specified as the political processes that take place, in multiple arenas, once supranational governance has been established (Sandholtz and Stone Sweet, 1999, 145). Their label of supranational politics refers to the politics that goes on in arenas organised at the EC level (in this dissertation this primarily encompasses policy making in the first pillar), 'once authority to make rules has been transferred to that level. 'Supranational governance' is one of the products of those politics' (Sandholtz and Stone Sweet, 1999). Their theoretical construction that incorporates this mode supranational governance is 'neofunctionalist' in that they underplay the role of governments, they echo theories of spillover and they argue that as transnational exchange rises in any specific domain (or cluster of related domains), so do the costs, for governments, of maintaining disparate national rules:

> As these costs rise, so do incentives for governments to adjust their policy positions in ways that favour the expansion of supranational governance. Once

> fixed in a given domain, European rules – such as relevant treaty provisions, secondary legislation, and the ECJ's case law – generate a self-sustaining dynamic, that leads to the gradual deepening of integration in that sector and, not uncommonly, to spillovers into other sectors. Thus, we view intergovernmental bargaining and decision-making as embedded in processes that are provoked and sustained by the expansion of transnational society, the pro-integrative activities of supranational organisations, and the growing density of supranational rules. ...These processes gradually, but inevitably, reduce the capacity of the member-states to control outcomes (Sandholtz and Stone Sweet, 1998, 5).

They state that the capacity of supranational organisations to make rules in a given policy domain appear to vary as a function of the level of transnational activity (Sandholtz and Stone Sweet, 1998, 14). Trade is not the only the only kind of transnational activity imagined. They explicitly include the activities of interest groups, business elites, knowledge-based elites (epistemic communities) and networks, 'to the extent that these people operate at the supranational level', and they declare that 'intra-EC exchanges could be economic, social or political' (Sandholtz and Stone Sweet, 1999, 146). Identifying their dependent variable as the differential movements from national to intergovernmental to supranational governance, across policy space, and across time, they, they test their three independent variables: transnational activity, the creative work of supranational organisations, and the scope and density of European rule structures, on a number of case studies that show limited success of their 'model'. The application of such a framework to other case studies may show whether their conceptualisation indeed helps colour in the picture of what determines the rise of supranational politics.

The above analysis highlights the tendency of various authors working primarily within the discipline of international relations (in spite of their occasional denials) to try to answer the questions of why and how the EU develops in a certain direction through the development of some kind of a grand, all-encompassing theory. It also demonstrates the assumptions lying behind the theories of European integration and the concomitant privileging of the interaction of certain actors within certain contexts, which may lead to

the discarding of 'all other forms of interaction, thus implicitly ruling out the possibility that integration may result from interactions among different actors within, and across, different contexts' (Branch and Øhrgaard, 1999, 124). Scholarship on the EU is not confined to these theoretical efforts, however. Authors also study the governance of the EU using the tools developed by comparative politics. As Rosamond points out, those who use this approach treat the EU as a useful location for the study of policy-making dynamics. The EU is looked on as an instance of a complex policy system in which perspectives on policy-making developed largely in the context of national polities can be put to the test and perhaps developed. Attention is focused on the interaction of interested actors and the processes of agenda setting, policy formulation, legislation, interest intermediation and policy implementation. The analysis of these processes raises questions about the location of power and the relationship between formal and informal policy processes in policy networks (Rosamond, 2000, 15). One of the most important theoretical constructs 'borrowed' from comparative politics and economics is that of neo-institutionalism and rational choice and historical institutionalism in particular.

1.3 Comparative Politics Approaches

Historical Institutionalism is a variant of neo-institutionalism, a theory that developed in economics, political science and sociology. In political science, neo-institutionalism developed in reaction to the excesses of the behaviouralist revolution where theorists sought to re-establish the importance of rule systems in guiding, constraining, and empowering social and political behaviour (See Scott, 2001). The basic premise of new institutionalist analysis is that institutions affect outcomes. According to Aspinwall and Schneider, 'institutions contain the bias individual agents have built into their society over time, which in turn leads to important distributional consequences. They structure political actions and outcomes' (Aspinwall and Schneider, 2001, 2). The new institutionalists in political science have grouped themselves into three quite distinct camps: rationalist, historical and sociological.[4] Rational choice or rational theorists view institutions as primarily formal governance or rule systems and are conceptualised largely

[4] This chapter concentrates on rationalist and historical variants of new institutionalism. Sociological institutionalism identifies the normative and cultural mechanisms by which behaviour and identity are constructed (See further Scott, 2001 and Aspinwall and Schneider, 2001).

as sets of positive (inducements) and negative (rules) motivations for individuals, with individual utility maximisation providing the dynamic for behaviour within the models (Peters, 1999, 45). Organisations and institutions take the specific form they do because they solve collective action problems (efficiently) and thereby facilitate gains from trade. Rules are accepted when they lower the transaction costs of a participant and/or decrease the overall level of uncertainty. Preferences are treated as stable properties of actors. The methodology of this variant of institutionalism is primarily deductive and formal.

Mark Pollack in particular, has used the principal-agent analysis encompassed in rationalist institutionalism and indeed in Moravcsik's liberal intergovernmentalism to look at supranational and subnational activity in EU policy making. Pollack has accepted that such studies should begin with the intergovernmental analysis of preferences of and bargaining among member governments and institutions. He contends that both monitoring and sanctioning activities are difficult and costly to principals such as the member governments, and that these difficulties can create a limited amount of discretion, or slack, to supranational agents like the Commission and the Court – even in political systems like the EC, in which member state principals remain the dominant actors (Pollack, 1996, 447). He has concentrated on the role of the Commission in the policy process and has found (using this principal-agent analysis) that the Commission exercises a greater role in some policy sectors than in others. The Commission's authority is greatest when it is supported by diverging member state government preferences, explicit EC rules authorising Commission policy discretion, information asymmetries benefiting the Commission, pro-integrative Court decisions, and alliances forged with transnational interests (Pollack, 1998, 23). Rational choice institutionalism, however, runs into difficulty, when it is unable to account for the existence and continuation of the European Parliament.

Historical institutionalism, particularly in the work of Paul Pierson when applied to policy making in the EU, differs from rational-choice institutionalism in its broader focus, which includes informal institutions. Pierson acknowledges the role of member states executives in the creation of institutions and policies, but stresses that these

institutions and policies evolve over time into something quite different than originally envisioned. In other words, in contrast to rational choice institutionalists, he holds that in the EU, institutions and organisational institutions do not necessarily evolve from an historically efficient process, but may develop beyond the intention of the member states, thereby creating gaps between the states' preferences and the actual operation of the institutions (Pierson, 1996, 2000a, 2000b). In addition, individual actors' preferences are not stable and often emerge from the decision situation (endogenous), rather than preceding or determining the decision. Institutions are also 'sticky' in that once created, they prove costly to change. This may then result in 'lock-in' to a particular path of development or incremental change. Two types of institutional change are distinguished and may come together in the form of a critical juncture. Change may result from factors or processes exogenous to the institutional system such as an external crisis or may be more incremental as a result of forces internal to the system (Pierson 2000a, 2000b, Scott, 2001). Again, such change is also conditioned by previous institutional choices – so-called path dependence.

The brief description of historical institutionalism above does not touch on the debate on the very nature of institutions within this theoretical paradigm. Historical institutionalists disagree somewhat as to the definition of institutions. March and Olsen for example argue that not just the *strategies* but also the *goals* actors pursue are shaped by the institutional context. They refer to a 'logic of appropriateness' in their research whereby behaviour is also constrained by cultural dicta and social norms. They hold that:

> Although self-interest undoubtedly permeates politics, action is often based more on discovering the normatively appropriate behaviour than on calculating the return expected from alternative choices. As a result, political behaviour, like other behaviour, can be described in terms of duties, obligations, roles and rules (March and Olsen, 1984, 744).

Intuitively in the European Union, notions of these informal norms and duties strike a chord. Although they are still relatively young, the institutions of the EU are not free of

values. As Armstrong and Bulmer point out in their study of the Single European Market, embedded within them are values and norms which evolve gradually over time through learning-by-doing (Armstrong and Bulmer, 1998, 40).

In *The Governance of the Single European Market,* Armstrong and Bulmer provide an historical institutionalist narrative of how the single European market (SEM) was realised and regulated. Most of the issues and policy processes examined by Armstrong and Bulmer had to do with secondary or follow-on rule-making and implementation, or, in Moravcsik's phrasing, the EC's 'everyday' legislation delegated to EU institutions as a result of the prior intergovernmental decisions that endorsed the Cockfield White Paper, authorised an Intergovernmental Conference at the Milan summit and finalised the Single European Act at Luxembourg. The construction of the SEM, as Armstrong and Bulmer show in their careful and deep analyses, involved deregulation, reregulation, shifting the locus of regulatory authority, sorting policy instruments among policy implementers and generally developing complementarities instead of reinforcing contradictions among local, national and supranational interests. For Armstrong and Bulmer, using the lens of historical institutionalism as a methodology for research, it follows that the European Union is in reality an assemblage of regulatory regimes, that is, governance regimes variously organised, variously mixing local, national, and supranational agents, variously institutionalised, variously rule based and concurrently operating to order transnational society (Armstrong and Bulmer, 1998).

Indeed, in another work, Bulmer goes on to class neo-institutionalism as a middle-range rather than a fully blown grand theory, commenting that it does not entail a teleology of integration. Rather, its variants are agnostic on the end-goal of the integration process and are more of a set of assumptions about EU bargaining rather than a theoretical model. 'The most modest sales pitch for new institutionalism is that it offers a methodology for research. This methodology generates research questions and orientations rather than mapping out a macro-social model of integration' (Bulmer, 1998, 368). Nevertheless, whatever its theoretical status, it is increasingly used as a means to analyse and conceptualise policy making in the EU.

Armstrong and Bulmer's work also highlighted a general feature of EU decision-making that has recently been addressed through the policy networks literature is that of the importance of informal processes. In the policy networks literature Brussels is oftentimes described as being 'an insiders' town, and policy networks are analysed as formal structures and procedures of the EU that are interwoven and supplemented by a myriad of informal relationships and working methods. Hence, the term 'policy network' is a metaphor for a cluster of actors, each of which has an interest, or 'stake', in a given EU policy sector and the capacity to help determine policy success or failure. EU policy networks can bring together a diverse variety of institutional actors and other 'stakeholders': private and public, national and supranational, political and administrative. Policy network analysis grew in the early 1990s to the extent that no one now denies that policy networks are omnipresent in EU politics. According to Börzel, the network approach is a useful toolbox for analysing public policy-making including EU policy making but it has been found that policy networks are unable to deploy any theoretical power in explaining policy process and policy outcome (Börzel, 1998). In addition, the empirical identification and categorisation of discrete networks has prompted much discussion among students of the EU and comparative politics. (Rosamond, 2000, 124).

Along with the variants of neo-institutionalism and policy network analysis, there is also more empirically oriented scholarship in European studies. This type of policy analysis tends to focus on the functions, type of and roles of actors in the EU policy process, in particular of the supranational actors, e.g. the Commission, European Parliament and European Court of Justice. The rationale for such studies lies again in the idea of different levels of analysis. For example, Cram has spoken of the difference between supranational actors' roles, influence and autonomy in major *constitutional* (her emphasis) decisions and in the day-to-day activities of the EU institutions and their relationship with other actors and interests (Cram, 1997, 2). She has examined the role and functions of the Commission in particular, looking at its action in broad ways in a number of policy areas. She concludes that the Commission has played an important agenda-setting role in shaping the environment in which policies are developed, in

justifying a role for the EU, mobilising support for its action, and in selecting the types of policy intervention pursued by the EU (Cram, 1997). Smyrl, on the other hand, points to the Commission's role in the identification of the 'problems' the EU should tackle. He focuses on its role as an 'expert' bureaucracy and holds that it can convince political decision-makers (member state executives) to adopt its policy preferences on their merits, through gradual intellectual persuasion over the course of policy formulation and alternative specification (Smyrl, 1998, 97). Peterson talks of how the Commission is neither a 'government' nor an apolitical bureaucracy, and as such is difficult to categorise in a general political science context. He has also looked at the idea of presidential leadership of the Commission President and has examined occasions when a president can or cannot exercise 'leadership' or authority over the Commission and receive member state support for integrative projects (Peterson, 1999b, 97).

Yet the Commission's agenda-setting role is not the only role specified by EU experts in the EU policy making process. Pierson, Laffan and Spence have also examined the process or policy manager role of the European Commission. Laffan in particular has examined two roles of the European Commission: policy entrepreneur and policy manager. She has shown how the role of the Commission as a policy manager as opposed to policy entrepreneur has received far less attention in the literature (Laffan, 1997a, 424-7). She distinguishes between the Commission's capacity to manage and implement programmes/laws and the Commission's internal capacity for organisational self-regulation and argues that:

> The paucity of human resources impairs the Commission's ability to engage in stringent monitoring of national implementation, to collect data and engage in *ex post* evaluation. ...It has a strategic position at the proposal stage of the policy process, which it loses at the post-decisional phase. It is much more dependent on national actors for implementation and national management of programmes (Laffan, 1997a).

In other words, the Commission has now become the principal and national actors who have the task of implementing programmes and laws are multiple agents.

Experts have also moved beyond examining the position of the Commission (and other actors such as the ECJ) in the EU's policy process purely in terms of their formal competences laid out in the *acquis communautaire.* Adrienne Héritier in particular has led the field in this type of analysis. In recent work, she talks about 'subterfuge' policy strategies and patterns that 'make Europe work' against the odds of the given institutional conditions and the enormous diversity of interests. This strategy comprises of, for example, the creative use of institutional channels, windows of opportunity, elements of surprise and 'a policy of stealth' to accommodate diversity and escape deadlock in negotiations (Héritier, 1999). By concentrating on these strategies of 'subterfuge', Héritier deals with the middle stage of EU policy-making, the decision-making stage. She argues that the diversity of actors' interests and the presence of unanimity on occasions for certain institutional reforms will mean that the decision-making process is quite likely to end in deadlock unless escape routes (instigated by supranational actors) are used to bring about institutional innovation. She then outlines strategies of subterfuge used by the Commission and the ECJ to reconcile conflicting interests, based on the bargaining theory of Luce and Raiffa. In a number policy areas she shows that at the agenda setting stage actors may exploit windows of opportunity opened up by 'external shocks' or 'events', in the form of natural disasters or the pressure of international treaties, or new internal factors such as ECJ rulings. If a decision-making process becomes stalled, the Commission in particular can use strategies such as package deals [offering side payments, multiple decision deals or threats of retaliation in other policy areas to actors with no interest in the decision under negotiation], framework legislation [legislation which takes on board the diverse goals without spelling out who is to bear the costs] and differentiated solutions such as the phasing-in of compliance and optionality to move policy making forward (Héritier, 1999, 12, 57).

The European Court of Justice has also received significant attention by policy analysts. Within this burgeoning literature there is significant disagreement about the extent of the

Court's political autonomy from member states and the extent to which it can decide cases against their interests. Contending interpretations of the purpose of the ECJ in the policy process fall into two camps: the intergovernmentalists who view the ECJ as an agent simply implementing the preferences of the Member States and the neofunctionalists who argue that the ECJ enjoys extensive autonomy vis-à-vis Member State preferences to pursue an integrationist agenda. In an article on the internal market, Garrett interpreted the actions of the ECJ as simply reflecting the preferences of the Franco-German alliance (Garrett, 1992). In subsequent works he has argued that the uncertainty existing for all national governments of the Community on whether their partners would honour existing intergovernmental agreements, made it rational for them to allocate the enforcement function to an independent supranational agency to which all would abide. The Court could not move too far from the underlying consensus of the governments on the course of European integration. Legal and neofunctionalist scholars often recognise the ECJ as the most 'autonomous' institution of the EC in relation to the Member States. Scholars demonstrate this by tracing the ECJ's 'constitutionalisation' of the European Community's legal system. This constitutionalisation has occurred in two ways. First, through a series of landmark judgements since the early 1960s, the ECJ, using the Treaties, has created a system of EC law which is supreme to national law, and in many cases is directly applicable by national courts in Member States, bestowing rights directly upon individuals. In addition, the ECJ has through its jurisprudence expanded the competences of the EC to incorporate many policy-areas not envisaged by the original Contracting Parties. Burley and Mattli adhere to this school of thought and argue that European legal integration corresponds most closely to the neofunctionalist model of integration (Burley and Mattli, 1993, 41-76). The Court, in their view, drives integration forward by means of its interpretation of the Treaty.

The literature on the ECJ has concentrated primarily on its judicial agenda-setting capabilities and its capacity to exert an independent influence in EU enforcement has so far received more limited attention. Tallberg has highlighted this tendency and has shown that the ECJ's establishement of the principle of state liability has meant that the ECJ may exercise independent influence not only through agenda-setting, but also by

moving the enforcement of state compliance beyond governments' original intentions when delegating supervisory competences. Tallberg has shown how the ECJ exploited its judicial independence and member governments' lack of intrusive monitoring mechanisms and succeeded in introducing a form of decentralised sanction in the Francovich case in November 1991 concerning state liability that national governments on repeated occasions had decided against.[5]

The existing literature, as we have seen so far, has examined the inputs of the Commission and the ECJ separately and independently. This is also the case with the examination of the position of the European Parliament in the EU's policy process. Much of the literature focuses on the democratic legitimacy of the Parliament as a representative actor. Studies that do examine the role of the Parliament tend to concentrate on the operation of the legislative procedures such as codecision and the degree of power the EP holds as a result of this. Tsebelis and Garrett, for example, argue that the Maastricht version of codecision took the agenda-setting powers away from the Parliament in favour of the Council, because the Council could confirm the text it originally approved, if it failed to reach an agreement with the Parliament. On the other hand, the reform of codecision in the Amsterdam Treaty, they contend, put the Parliament in the same position as the Council. Such work has sparked widespread debate among students of the EU and many analytical models have been developed with numerous hypotheses positing the agenda-setting and legislative power of the European Parliament. However, such studies' concentration on theory building and formal modelling have been weakened in the past by their neglect of the empirical confirmation of their propositions. Thus, hypotheses on the nature of the EP's powers abounded, but there was little empirical justification for these models. Steunenberg, one of the leaders in this field of legislative study, admitted as much when he said: 'Most of the models have not yet been put to a test in the sense that the outcomes they predict have yet to be confronted with the

[5] The principle of state liability was first established in the *Francovich* case in 1991, and then subsequently developed in *Brasserie du Pêcheur, Factortame III, British Telecommunications, Hedley Lomas, and Dillenkofer* in 1996. In *Frankovich*, the Court determined that an individual can claim compensation from a state which has failed to implement EU directives, given that three conditions are satisfied: (1) the directive confers rights on individuals, (2) the contents of those rights are apparent from the directive, and (3) there is a causal link between the state's failure to implement the directive and the loss suffered. See further: Tallberg. 2000.

actual outcomes of decision-making' (Crombez, Steunenberg and Corbett, 2000, 363-381; 369)).[6] Indeed, Richard Corbett goes even further when he pointed out, as an MEP and as such a 'practitioner', that much of the empirical evidence flies in the face of theories such as that of Tsebelis and Garrett and that this type of academic work is 'based on a lack of knowledge of the realities of decision taking and has gone off at a tangent' (Crombez, Steunenberg and Corbett, 2000, 373, 378).

Drawing all this literature together therefore, what conclusions can we draw about the nature of policy making in the EU? Some experts downplay the role of supranational actors in the policy making process in favour of member state executives as the drivers and controllers of policy making or else acknowledge existence of these supranational actors but underplay their role and importance. This is mainly found in studies of treaty negotiations. Those who do acknowledge that supranational actors operate according to certain roles and thus exercise influence on member state executives differ as to the types of roles performed and the degree of influence exerted. They also concentrate on policy making within the EU system, mainly in first pillar decision-making. Finally, studies of these supranational actors and intergovernmental actors such as the Council of Ministers are not interactive but concentrate, on the whole, on looking at the isolated activities of each of the main supranational actors, namely the Commission, Court of Justice and Parliament.

1.4 Conclusion

According to Scharpf, the complexity of multi-level European polity is not adequately represented by the competing 'intergovernmentalist' and 'supranationalist' approaches as such tools are ill suited to deal with multi-level interactions (Scharpf 2000, 5). For example, in the intergovernmental perspective, the multi-level polity of the European Union is conceptualised in a single-level model of intergovernmental interactions. This perspective is seemingly pushed to the limits of its plausibility when it is asked to explain situations where member states are subject to European constraints in the exercise of their

[6] A research project aimed at addressing this empirical deficiency through the examination of more than 70 policy negotiations using these formal models is currently led by Robert Thomson, Frans Stokman, Chris Achen and Thomas König and its results will be published in book and journal form in 2004.

own governing powers; where both citizens and corporate entities are increasingly affected by European law; and where the range of problems for which solutions are being sought at the European level has increased substantially (Sandholtz and Stone Sweet 1998; Schmidt 1998; Pollack 2000; Scharpf 2000). Similarly, however, the supranational perspective of comparative politics theories cannot easily represent a European polity in which member states continue to be endowed with a wide and strong range of governing powers; in which the competencies of supranational actors come from agreement among member states; in which European legislation depends to a significant degree on the agreement of member governments; and in which member states are in control of the actual implementation of European regulations (Moravcsik 1998; Scharpf 2000). It is perhaps fair to infer, on the basis of the discussion in this chapter, that their goodness of fit in accounting for policy making in the EU when applied to empirical data will be quite poor.

It is easy to come to the conclusion that the EU as a policy making arena is a complex multi-level institutional configuration, which cannot be adequately represented by the models that are generally used in international relations or comparative politics. Yet it is not enough to merely draw this conclusion based on an examination of the theories themselves. The theories must be tested systematically using empirical evidence of actual policy making for such criticisms to be truly taken seriously. The aim of this thesis is to put two perspectives to the test in three policy domains: education policy, consumer protection and telecommunications policy. The two perspectives, liberal intergovernmentalism and supranational governance, have been chosen for two reasons. First, this chapter surveyed the main literatures that try to explain EU policy making. As it has shown, of all the explanations put forward, liberal intergovernmentalism and supranational governance have dominated the intellectual field of European Union studies but have yet to be tested adequately with empirical evidence of EU policy making at a deep level. The purpose of this thesis is to address this deficit. Second, of all the theoretical frameworks developed to explain the process of EU policy making, these two come closest to providing a full picture of what happens at each stage of the policy process, i.e. at pre-negotiation or policy formulation, negotiation and post-decision, when

policy outcomes that have been negotiated must then be implemented. While multi-level governance accounts analyses interactions across all the levels of policy making actors, i.e. the local, subnational, national and transnational levels, it is still more of a metaphor or methodology for research than a fully-fledged theoretical explanation with assumptions and explicit hypotheses about EU policy making in pre-negotiation, negotiation and post decision that can be put to the test. Yet it is possible to use the methodology of an analytic narrative to isolate both propositions and assumptions in both supranational governance and liberal intergovernmentalism for each of the policy making stages so that they can be tested against the empirical evidence of the case studies.

Chapter 2, therefore, concentrates on the two main competitors for the explanation of the policy process, liberal intergovernmentalism and supranational governance, and uses the methodology of analytic narratives (Bates et al, 1998) to generate propositions that will be tested against empirical evidence generated in three case studies to see whether, in fact, the criticisms outlined in this chapter are justified. In Chapter 2, the methodology used in order to test the theories will be outlined explicitly. If we do find that the goodness of fit of these theoretical models is indeed quite poor, we will in any case be able to derive important insights into the process of policy making process in each of the three areas.

Chapter 2: Testing explanations of EU policy making

2.1 Introduction

This chapter focuses on setting up the testing of the two theoretical explanations of policy making in the EU selected from Chapter 1. It outlines the decisions that were taken in the course of this research regarding the selection of cases, measurements of concepts, and methods of analysis. Section 2.2 explores the reasons behind the approach taken in this study, as well as the specific methodology used, namely that of an analytic narrative. Second, the two theoretical frameworks to be tested, i.e. the conceptualisations of liberal intergovernmentalism and supranational governance, are restated in a more structured way using the chosen methodology. This involves the enumeration of propositions and the observations expected if these propositions were to be true at different stages in the policy process. Finally, the cases to be examined are outlined briefly, along with the reasons for their selection.

As pointed out in Chapter 1, one assessment drawn by those working within the field of European Union studies is that none of the conceptual frameworks/theoretical constructs developed by EU scholars since the late 1950s manages to come up with a successful, all-encompassing and yet parsimonious theory of European integration (Puchala 1999; Peterson, 1999a). A common remedy to this theoretical pathology is to try to combine these theoretical conceptualisations into one syncretic approach. However, this theoretical path has been found to be fraught with difficulty and has led to the conclusion by some that synthesising the insights of supranational institutionalism and intergovernmentalism and elaborating some version of a unified theory would be a mistake as they appear to explain different phenomena that have been occurring in the experience of the EU (Puchala, 1999, 330). Prompted by this realisation, an alternative solution has been proposed, namely the acknowledgement that while the competing theories may set out to seek to explain outcomes at all levels of EU governance, in fact, they may implicitly end up trying to explain outcomes at one specific level (Peterson, 1999, 290). Peterson and Bomberg are of the opinion that a theory which seeks to explain or predict 'big decisions', such as the launch of Economic and Monetary Union,

should not be judged by how well it explains or predicts a decision to change the way pig carcasses are measured (Peterson and Bomberg, 1999, 9). The concentration on building an all-encompassing theoretical explanation as outlined briefly here has hopefully pointed to the fact that recent scholarship on the EU has tended to involve more theory-building rather than theory testing (Peterson and Bomberg, 1999, 3). One of the central aims of this dissertation is to try to redress this balance. Rather than endeavouring to construct a new 'theory' of European integration, this dissertation represents a more modest attempt to test a small number of approaches developed to look at and explain policy making in the EU and to try to begin to find out what they respectively can and can not help explain. How is this to be done? Each school of thought offers its own 'take' on how policy is produced in the EU and it is possible to use the more formalised qualitative methodology of analytic narratives to evaluate and compare these explanations. The methodology involves the derivation of a number of propositions for each of the perspectives at different stages of the policy making process, together with the outline of the practical implications for each of these propositions we would expect to observe in empirical reality in the case studies if these propositions were true. Once derived, it is then possible to compare these propositions, together with their implications, in a qualitative manner against the actual empirical evidence gathered to see whether they do indeed correspond with what happened in reality.

2.2 Methodology

The use of theories of integration and policy making to study the European Union exposes an ontological difficulty that must be acknowledged in this dissertation. It can be said that the main function of theories is to help produce ordered and structured observations of social phenomena. However, there can be different types of theories. For example, theory is sometimes thought to be about the generation of law-like statements. Others conceive of theory as the instrument with which investigators can test hypotheses or propositions about social phenomena against empirical evidence. For others, there can a normative or value-laden element to theorising (Rosamond, 2000, 8). It is evident that the while each of the theories enumerated in Chapter 1 share a common characteristic of being grounded in a particular set of assumptions about the way in which

the world operates, they cannot all be considered the same types of theories. Historical institutionalism, for example, has been termed a methodology for research rather than a fully blown 'theory' with law-like statements. According to Bulmer and Armstrong, it generates research questions and orientations rather than mapping out a 'scientific' model of integration. (Bulmer and Armstrong, 1998, 50). This could be seen to be problematic for overall purpose of this research if we were not comparing like with like. However, through the demarcation of EU policy making into a number of discrete policy phases, it is possible to derive a number of general propositions from the broad thrust of both liberal intergovernmentalism and supranational governance in order to test them empirically.

Methodology of Analytic Narrative

The methodology employed in this dissertation follows the form of an analytic narrative based on the work of Robert Bates et. al (1998) and insights gained from the work of King, Keohane and Verba (1994). According to Bates et.al, 'analytic narratives offer a method for moving from the context-rich world of events and cases to explanations that are logically rigorous, illuminating and insightful and ...subject to empirical testing' (Bates et.al., 1998, 236). The research approach enables the qualitative testing of the two theories examined in this dissertation in a rigorous and explicit manner. It involves:

1. The generation of propositions[1] from the two explanations for each of the policy making stages;
2. The generation of observable or practical implications of what we would expect to observe if the propositions were correct;
3. The testing of the propositions and observable implications against the empirical evidence.
4. The evaluation of the explanations. Do the propositions correspond with what is known? Do their implications find support in the data? How well do they stand up by comparison with each other within cases and across cases?

According to King, Keohane and Verba, every theory or theory-based construct, to be worthwhile, must have implications about the observations one would expect to find if

[1] i.e. what each theory proposes at each of the stages of policy making.

the theory is correct (King, Keohane and Verba, 1994, 28). Each implication provides a qualitative test of the theoretical framework under consideration, which can be judged a success or failure and be used to evaluate the usefulness and applicability of the theoretical framework as a whole. The methodology enables comparison of evidence across the cases and across the phases of policy making and in so doing allows for the comprehensive qualitative evaluation of the explanatory power of the theoretical frameworks. As mentioned in Chapter 1, without the testing and confirmation of propositions with empirical data, the propositions expounded by the theories continue to remain open to question. This must be addressed.

It is important to explore the methodology and the reasons for its use in greater detail. The key elements of the methodology are as follows:

- The approach is narrative. It involves the tracing of sequences of actions, decisions and responses that generate events and outcomes. It pays close attention to accounts and context.
- The approach is analytic in that it extracts explicit and formal lines of reasoning based on the theories examined. This facilitates exposition, explanation and comparison within and across cases.
- The approach enables the combination of rational actor analysis and narrative with the study of institutions and of their impact upon political and economic behaviour.

This methodology is used in the dissertation as it links the qualitative empirical evidence or data gathered explicitly with the theories of liberal intergovernmentalism and supranational governance at each of the policy stages. In rendering these explanations explicit, we are able to put them to the test in a qualitative manner that moves beyond process tracing to a more formalised and rigorous appraisal. 'By compelling explanations to respond to such challenges, we gain the opportunity to evaluate them' (Bates et.al., 1998, 14).

In developing their methodology, Bates et.al. argued for a detailed and fine-grained knowledge of the precise features of the political and social environment within which individuals make choices and devise political strategies or policies. In this dissertation, contemporary primary documents, secondary sources and interview material form the core of the empirical evidence collected.[2] However, merely exploring such evidence in a narrative manner such as process tracing, while useful, is not sufficient. Process-tracing can be defined as the chronological description and analysis of policy case study evidence. The important exercise of 'soaking and poking' such case study evidence must be accompanied by a greater structural emphasis on theory testing (See also Peterson and Bomberg, 1999, 1). The analytic narrative is an extremely useful methodology, therefore, as it allows the clarification of the policy process and the theories into sequences, where explanations and patterns of interaction can be examined and compared across cases using the wealth of evidence gathered. It enables us to move beyond 'thick' accounts of policy making to the comparison of 'thin' forms of reasoning (Bates et.al., 1998, 14). In this way, the close dialogue between the developments and use of theory with qualitative case evidence enables more powerful comparative conclusions to be drawn across a number of cases than would be the case with process tracing.

2.3 Testing the theories[3]

Clear, testable propositions are now developed from the two competing theoretical approaches that have attempted to account for policy-making in the European Union.

Liberal Intergovernmentalism

At the heart of liberal intergovernmentalism[4] lies the following thesis: member state executives control policy-making processes and outcomes. For Moravcsik, the following

[2] A number of Commission officials from DG Education and Culture (2), DG Health and Consumer Affairs (1) and DG Information Society (6) were interviewed in Brussels in September 2002. Three national officials dealing with these policy areas were also interviewed in Dublin. Interviewees were assured confidentiality.

[3] It is important to bear in mind in the following development of propositions, that these alternative frameworks are not always completely specified by their creators (who can be multiple).

[4] The propositions enumerated here are of a very general and distilled nature in order to facilitate clarity when it comes to comparison.

sequence encompasses virtually all that is important: Rising interdependence > domestic politics and national preference formation > intergovernmental bargaining > delegation to supranational authorities > consolidation (Stone Sweet and Sandholtz, 1997, 302). Policy-making thus consists of the negotiation of a set of bargains among executives of independent-nation states. Domestic interests, normally of a commercial nature, determine preferences. In order to ensure efficient consolidation member state governments delegate powers to the EC organisations, such as the Commission and the Court of Justice, who act as faithful agents of these intergovernmental bargains.

Pre-negotiation

Proposition A: The Commission proposes legislation that conforms with the wishes of the rationally-acting member state executives based on domestic economic interest, cooperating to solve a collective action problem, who wish to ensure credible commitments. Preferences for such policies come from domestic political conflict.

Observable Implications:

If this proposition were to be true, we would expect that the Commission would only propose legislation in response to calls from the member states executives in response to an economically based collective action problem. The legislative proposals of the Commission would then reflect the aggregation of the rational preferences of the larger member state executives of the EU in particular. These preferences would be defined by domestic commercial interest, such as maximising commercial export opportunities, trade liberalisation, in response to commercial interests of powerful economic producers and the macro-economic preferences of ruling governmental coalitions. The European Parliament would have no input into policy formulation.

Negotiation

Proposition A: Policy outcomes are based on the preferences of the dominant member state executives and are the result of lowest-common denominator bargaining between them all.

Proposition B: Member state executives are the only important actors at this stage.

Observable Implications:

If these propositions were to be true, we would expect that the central players would be the national executives of the member states, who bargain with each other to produce policies/legislation. Bargaining would be shaped by the relative powers of the member states, and also by state preferences, which emerge from the pulling and hauling among domestic groups. Decisions would be taken, either formally or informally, on a unanimous basis. Institutions would simply serve as neutral arenas within which political forces are played out among member state executive actors. The policy outcome would result from the convergence of national interests of the central players in the Council of Ministers.

Post-Decision

Proposition A: Implementation – The Commission is delegated implementation of policy outcomes to ensure adherence to commitments but is tightly controlled by member state executives through mechanisms such as comitology, in order to 'lock-in' implementation and enforcement of decisions on which governments might later be tempted to cheat.

Proposition B: Adjudication – The European Court of Justice adjudicates disputes but does not act outside the preferences of the dominant member states.

Observable Implications:

If these propositions were to be true, we would expect that in mechanisms such as the comitology committees, the member states executives, as principals, would monitor and control, where necessary, the agent i.e. the Commission's operation if the Commission deviates in any way from what was agreed in the negotiation stage and attempts to put forward further policy changes. If adjudication of disputes comes into play, the ECJ would be seen as simply an agent of the dominant member states of the EU (particularly France and Germany) whose role is to flesh in the vagueness of the EC Treaty and secondary legislation. In its ruling, the ECJ would thus stay within the preferences of the

powerful member states in important sectors and perhaps only rule against powerful member states when the decision affects an unimportant sector.

Supranational Governance

While bearing in mind Sandholtz and Stone Sweet's caveat that they do not exclude the possibility that intergovernmentalist bargaining exists on the day-to-day level of policy making in the EU, this section draws on a number of their works in order to derive propositions on the second theoretical 'pole', that of supranational governance. The essence of supranational governance lies in the proposition that supranational organisations such as the Commission, the European Parliament, the European Court of Justice and transnational actors generate political processes or outcomes of importance above the nation-state that constrain the behaviour of member state executives behaviour in policy making. The theory privileges the role of transnational exchange (e.g. trade, the development of Euro-groups, networks and associations) in pushing the EC's organisations to construct new policy and new arenas for policy-relevant behaviour.

Pre-negotiation

Proposition A: Rising transnational exchange pushes supranational organisations such as the Commission to propose and construct new policies.

Proposition B: The deepening of one policy-sector can lead to spillover in another.

Observable Implications:

If these propositions were to be true, we would expect that the expansion of transnational exchange, e.g. trade investment, the development of European groups, networks and associations, leads to a push by member state executives to substitute supranational for national rules and generates pressure on the EU's organisations to act. As transnational exchange rises in any specific domain (or cluster of related domains), so do the costs, for governments, of maintaining disparate national rules. The absence of European rules will be seen as an obstacle to the generation of wealth and the achievement of other collective gains. Thus, as these costs rise, so will the incentives for member state executives in the Council of Ministers to adjust their policy positions in ways that favour policy-making at

the supranational level. Supranational organisations such as the Commission will propose policies that capitalise on this desire to push policy-making at the EU level forward.

In addition, once fixed in a given domain, European rules – such as relevant treaty provisions, secondary legislation, and the ECJ's case law as circumstances allow – can generate a self-sustaining dynamic that leads to the gradual deepening of integration in that sector and to spillover into other sectors.[5] This would also lead to member state governments' becoming less and less proactive and more and more reactive to changes in the policy-making environment to which they belong. This reactiveness might not necessarily entail a corresponding shift in loyalty and identification.

Negotiation

Proposition A: Policy outcomes are based on negotiation between member state executives and European Parliament within logic of institutionalisation i.e. bargaining takes place in a mediated context, with different actors having an input into the bargaining outcome depending on institutional prerogatives (such as the decision rule specified by the original treaties and subsequent amendments).[6]

Observable Implications:

If these propositions were to be true, we would expect that policy outcomes do not solely reflect member state executive's preferences and would be more than the sum of lowest common denominator bargaining. Preferences can be endogenously affected by the institutional structure within which negotiation takes place. Depending on the institutional context within which negotiation takes place, e.g. decision making rules, supranational organisations may be able to potentially shape either formally or informally

[5] Spillover can be described as follows: a policy is produced and has impacts on that political and social context (in which it is set), these impacts then lead to other demands for policy or claims for different policy and so on (Wallace, Helen, 2000, 73).

[6] Logic of Institutionalisation: Rules and rule-making are at heart of the logic of institutionalisation. Rules define roles (who is an actor); define the game, establishing for players both the objectives and the range of appropriate tactics or moves. Rules define how disputes are to be resolved. Institutions are systems of rules and negotiation takes place within this logic of institutionalisation (Stone Sweet and Sandholtz, 1998, 17).

both specific policy outcomes and the rules that channel subsequent policy-making behaviour.

Post-Decision

Proposition A: Implementation – The Commission exploits comitology procedures and other institutional obligations, to dominate implementation process and enforcement of legislative outcomes.

Proposition B: Adjudication – The ECJ rules against the preferences of the member states:

1. When it can make use of a constituency of subnational actors (litigants, national courts) that support its decisions independent of the control of national governments;
2. When the Treaty is clear, and/or when there are strong precedents and legal norms it can draw upon to support its reasoning.

Observable Implications:

If these propositions were to be true, we would expect the Commission to reassert its position at this stage of policy implementation and in the comitology committees, for example, to move implementation procedures closer to its original policy proposals. We would expect to see some slippage from the content of the policy outcomes agreed at the negotiation stage as the Commission tries to move the policy making process beyond these outcomes. In line with its institutional function, the Commission will actively monitor the enforcement of legislative acts and will not shirk from bringing disputes before the ECJ. The ECJ would also be expected to systematically over-ride the preferences of the member states when these preferences clash with the pro-integrationist agenda of the ECJ itself, and of the Commission. The ECJ will also interpret the Treaty so as to permit the expansion of supranational policy domains (even where no legislation or treaty base exists).

Table 2.1: Testing the Theories – Reiteration of Propositions

Policy Stage	Liberal Intergovernmentalism	Supranational Governance
Pre-Negotiation	**Proposition A** - Commission proposes legislation that conforms with the wishes of the central member state executives (based on domestic economic interest), cooperating to solve collective action problem, who wish to ensure credible commitments.	**Proposition A** - Rising transnational exchange (trade investment, development of Euro-groups, networks, and associations) push supranational organisations such as Commission to propose and construct new policies. **Proposition B** - Deepening of policy-making in one sector can lead to spillover in another.
Negotiation	**Proposition A** - Policy outcomes are based on the preferences of the member state executives and are the result of lowest common denominator bargaining between them (irrespective of decision rule). **Proposition B** - Member state executives are only important actors at this stage.	**Proposition A** - Policy outcomes are based on negotiation between member state executives and European Parliament within logic of institutionalisation. [7]
Post-Decision	**Proposition A** - Implementation: Commission delegated implementation of policy outcomes to ensure adherence to commitments but is tightly controlled by member state executives through mechanisms such as comitology. **Proposition B** - Adjudication: ECJ does not act outside the preferences of the dominant member states in adjudicating disputes.	**Proposition A** Implementation: Commission exploits comitology procedures and other institutional functions to dominate implementation process and enforcement of legislative outcomes. **Proposition B** - Adjudication: ECJ rules against the preferences of Member states: 1. When it can make use of constituency of subnational actors (litigants, national courts) that support its decisions independent of the control of national governments; 2. When the Treaty is clear, and/or when there are strong precedents and legal norms it can draw upon to support its reasoning.

[7] See footnote 6.

2.4 Case Selection and Analysis

At what levels of analysis are the policy case studies to be examined and the theories tested? This study concentrates on policy-making in the first pillar of the European Union primarily in the 1990s. Each case study is composed of two levels of analysis: macro and micro. The macro analysis centres on examining the broad development of policy making in the specific case study areas selected. The micro-analysis focuses on the negotiation of specific legislative proposals.[8]

What policy areas are to be examined in this dissertation? Practical constraints mean that it is impossible to cover the entire and extended range of European policies. It is thus extremely important that the policy areas examined are selected according to 'specific analytically meaningful problem-types that offer initial clues to policy-field-specific processes' (Héritier, 1999, 3). To put it simply, some systematic way of selecting cases must be used in spite of practical constraints. Cases must be selected in response to an understandable and clear categorisation of policies.

A number of different policy-/decision-making types have been developed and applied to the European Union.[9] A typology of policy outputs is as follows:

1. *Regulatory policies* – these are divided into two sub-types, (a) market-making, in terms of the elimination of trade barriers (such as telecommunications policy) within the single market and where the cost of policy implementation is not borne by the EU

[8] Helen Wallace makes the distinction between the 'macro', 'meso' and 'micro' categories of analysis. Macro explanations seek to explain at the broadest level of analysis, and in aggregate and all-embracing terms. Meso explanations focus rather on specific domains or arenas of activity, and may not be relevant to others, and tend to emphasise factors that are specifically relevant to the domains or arenas under examination. Micro explanations deal with very specific or local political activities (Wallace in Wallace and Wallace, 2000, 70). In this dissertation the term 'macro' is used for the first level of analysis although it corresponds with the 'meso' level Wallace refers to.

[9] Following Theodore Lowi's classification, four different clusters of EU policy-making can be distinguished: *constituent*, in which the basic rules and principles of the system itself are under consideration; *redistributive*, in which the transfer of financial resources from some actors to others is involved; *distributive*, in which Community funds are allocated within sectors; and *regulatory*, in which the member states agree to adopt common regulations on the activities of public and private actors.

institutions), and (b) market-protecting or cushioning including the protection of consumer rights and European-wide environmental, and competition policies.

2. *Distributive policies* – these policies can involve the transfer of resources through the EU budget from one social group or member state to another (redistributive) and policies in which Community funds are allocated within sectors (distributive), and include the Common Agricultural Policy, socioeconomic and regional cohesion policies, and research and development policies, education policies.
3. *Macroeconomic stabilisation policies* – these policies are pursued in Economic and Monetary Union, where the European Central Bank manages the money supply and interest rate policy, while the Council pursues exchange rate policy and cooperation on fiscal and unemployment policies.
4. *Citizen policies* – these are rules to extend and protect the economic, political and social rights of the citizens of the EU member states, and include cooperation in the field of justice and home affairs, common asylum and immigration policies, police and judicial cooperation, and the provisions for 'EU citizenship'.
5. *Global policies* – these are aimed at ensuring that the EU acts with a single voice on the world stage, and include trade policies, external economic relations, the Common Foreign and Security Policy (CFSP), and defence cooperation (Hix, 1999; Héritier, 1999, Lowi 1964).

Héritier, in particular, has made use of this taxonomy of policy types in the EU and has analysed first pillar policy arenas according to two general categories – categories of market-making policies and the internalisation of negative external effects of market activities (or the provision of collective goods) and market-correcting policies with their specific redistributive and distributive effects (Héritier, 1999, 29). In this study, this taxonomy of policies in the first pillar is used as the basis for case study selection. The three policy areas selected also correspond with the three levels of policy competence exercised by the European Union: complementary (or supporting measures), shared and exclusive. Students of the EU do not often examine the first policy area, education. Through its education programmes it is classified as a distributive policy. It is also a policy area that involves a heavy exercise of subsidarity by the member state

governments. It has a market-correcting element with its efforts to facilitate the free movement of workers through the mutual recognition of qualifications. The European Convention Working Group on Complementary Competences defined it as a 'supporting measure' or 'complementary competence' as the member states have not transferred legislative competence to the Union. Education policy allows the Union to assist and supplement national education policies where this is in the common interest. Its legislative output consists primarily of decisions, recommendations, resolutions, guidelines and programmes (Convention Working Group V Report, Brussels, 4 November 2002, CONV 375/1/02). The second case study focuses on consumer policy, which is also a regulatory policy in pillar one but is a market-correcting policy. Consumer protection competence is shared between the Union and the Member States. The third policy area, telecommunications policy, is a market-making policy area and is part of pillar one. The member states have transferred legislative competence to the Union and have authorised the Union to adopt legally binding acts such as directives and regulations. Every member state's telecoms market and every European telecoms operator conducts their business according to rules made at the EU level.

To reiterate, the structured analysis of each of the cases will consist of two elements at each stage of the policy-making process:

An examination of the propositions within a macro account of specific policy development and the investigation of the broad range of roles played by the relevant actors or policy stakeholders at the relevant stage;

The testing of each of the propositions developed at each stage of the bargaining process with the evidence gathered in the micro-case studies of individual legislative proposals.

2.5 The cases in brief

Education:

As mentioned above, education is regarded as a distributive policy area in the categorisation of policies included in this dissertation. It is also classified as a supporting measure by the Convention on the European Union's Draft Constitution published on 6 February 2003. There is no mention of education policy in the Treaty of Rome, although

it does refer to 'training'. Although education remains primarily a national responsibility, over the years the Commission has sought to promote the incorporation of a 'European dimension' into the education systems of member states. The main emphasis of Union 'education policy' is on voluntary cooperation. EU education policy has centred on the promotion of inter-university cooperation programmes (of which there are currently more than 2,500) and the injection of a 'European dimension' into teaching. EU education programmes include: SOCRATES, LEONARDO, LINGUA, COMETT, FORCE, PETRA and EUROTECNET. Substantial progress has been made on the mutual recognition of qualifications. Such policy initiatives led to the espousal in the Treaty on European Union (TEU) of educational objectives for the Union, even though they are qualified by an explicit acknowledgement of member states' responsibility for the content of teaching and the organisation of education systems (Article 149, ex 126). The policy section specifically examined in micro-analysis is that of the decisions that led to the establishment of the second phase of the SOCRATES programme in 2000.

Consumer Policy:

Apart from a mention in the preamble calling for 'constant improvements of ... living and working conditions' in the interests of consumers in the Member States, there was no specific mention of consumer policy in the Treaty of Rome. Although a consumer protection unit within the Directorate-General for Competition was established in 1968, consumer policy remained undeveloped, due primarily to differences in national approaches, technical standards and product regulations. As European integration gathered momentum, the need for a common consumer policy became increasingly obvious. Several factors led to greater emphasis on consumer policy: the growth of the consumer movement in member states; the entry of the UK and Denmark, both of which had strong consumer traditions; and increasing recognition that the free market approach was insufficient to ensure high consumer standards. At the Paris Summit in 1972, the Heads of State and government called out for political action in this area. In 1975, the Council agreed a programme for a consumer protection and information policy, based on five fundamental rights: protection of consumers' health and safety; protection of consumers' economic interests; the right to information and education; the right to

redress; and the right to consumer participation and representation (Official Journal *C 92,* 25.04.1975). It envisaged action to safeguard consumers' interests in foodstuffs, textiles, toys, credit and advertising.

A second programme, launched in 1981, recognised two other objectives: the inclusion of the interests of consumers in all EC policies; and the promotion of dialogue between representatives of consumers, producers and distributors. A third consumer protection programme, launched in 1986 with the Single European Act (SEA), introduced the 'new approach' doctrine, meaning that essential requirements would be specified in general terms, leaving the details to be developed by the standardisation bodies (Jones, 1996, 229-230). According to Schmitt, despite continuous adaptation, consumer protection in Europe was initially slow to get off the ground. All too often, the ambitious plans clashed with powerful economic interests (Schmitt, 1997, 50). The specific legal basis for consumer policy only appeared in 1987 with the adoption of the SEA, which required the Commission to take a high level of protection in the fields of health, safety, environment and consumer protection as a basis for its proposals concerning single market legislation. Title XI of the TEU, which is devoted to consumer protection, reinforced this situation. The TEU states that the Community 'shall contribute to a high level of consumer protection' (Article 129a). However, the principal aim of the Union's consumer policy is to *complement* rather than replace national policies. Thus, the Maastricht Treaty emphasised the principle of subsidiarity within consumer policy whereby the purpose of EU actions is to complement and correct, rather than to replace the efforts of national, regional or local authorities to defend consumers' rights. However, Member States can establish higher national levels than those fixed by the Union, providing that such measures do not act as a barrier to trade. As a reflection of the increasing political importance given to consumer policy in the European Union, the European Commission created, in 1989, an autonomous Consumer Policy Service. This became a fully-fledged Directorate-General in 1995.

The Commission subsequently reformed its consultation procedures with organisations representing consumers. A new 'Consumer Committee' was set up in place of the Consumers' Consultative Council in 1995 and has the responsibility of advising with

European Commission on consumer protection measures and represents consumers' views during the formulation of other EU policies. Its membership is drawn from national representatives of organisations active in each Member State and from five European-wide lobbies structured on a single market basis.

The Treaty of Amsterdam also gave fresh impetus to consumer policy. Under the new Article 129a, the general aim will be to protect the health, safety and economic interests of consumers, and to promote their right both to information and education and to organise themselves in order to safeguard their interests. The same Article goes on to state that consumer protection requirements are to be taken into account in defining and implementing other Community policies and activities. Finally, other provisions of the Treaty, especially in the public health sphere, were designed to give consumers greater protection.

On January 12 2000 the Commissioner for Public Health and Consumer Protection, Mr David Byrne, launched a radical White Paper, whose centrepiece is the establishment of a new European Food Authority (EFA) within two years.[10] The White Paper contained a detailed 80-point action plan on food safety, with a precise timetable for regulation and implementation over three years. Crucially, because of extreme national sensitivities on the issue, the EFA will not replace the national food agencies of member-states, but will conduct its own research, using its own scientists as well as the resources of the member-states.[11]

Again, as the brief account of the market-protecting/correcting policy of consumer policy has shown, this area now covers a very wide range of activities. This means that is necessary to narrow down the micro-element of the case study to focus to a particular decision. One such decision is the consumer goods and associated guarantees directive[12].

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[10] White Paper on Food Safety, Commission, Brussels, 12 January 2000 COM (1999) 719 Final.
[11] *The Irish Times*, 12 January 2000.
[12] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

Telecommunications policy:

A clear example of a policy domain becoming 'Europeanised' despite the absence of a treaty basis is the telecommunications sector. The Treaty of Rome makes no mention of telecommunications. In fact, various Treaty provisions (ex Art.90 (2) and Art.222) had traditionally been interpreted as exempting national telecommunications monopolies from EC competition rules. A series of ECJ rulings in the late 1980s and early 1990s undermined that supposed exemption. The Commission took advantage of the Court's decisions to attack the national telecommunications monopolies with Art.90 directives. After several unsuccessful bids by the Commission to initiate a European policy, which failed due to the divergent interests of member-states, the process 'took off' in the early 1980s and reached a crucial point in 1998 with the full liberalisation of the telecommunications sector. The process was spurred on by the rapid changes in the international environment – liberalisation and deregulation of telecommunications in the US and Japan - and technical advances. Difficulties arose as the EU approached its target date of 1 January 1998 for the liberalisation of the telecommunications sector. At the beginning of 1997, the accompanying regulatory framework was still incomplete and it was not until December that all the necessary directives were agreed. However, the real problem was caused by the growing realisation that half the Member States would not be ready by the target date. Partial derogations of up to three years were given to some member states (Ireland, Portugal, Luxembourg, Spain and Greece), but the Commission also felt it necessary to initiate infringement proceedings against those Member States, which had failed to transpose essential legislation (Belgium, Greece, Luxembourg, Germany, Portugal, Italy and Denmark). The liberalisation of telecommunications services took effect on 1 January 1999 but problems continued, and by the end of the year over 80 infringement procedures had been opened.

The above account gives a little indication of the roles played by supranational actors in EU action on telecommunications policy. Indeed, the story of the liberalisation of the internal market in telecommunications has been well documented in recent years. Telecommunications policy has now become part of Community policy supporting the information society and includes the following areas:

1. Supporting Europe to enter the digital era; for example through policy moves such as an action plan on promoting safer use of the Internet;
2. Promoting increased competition in communication services, monitoring of the execution of the regulatory framework in practice, and supporting the liberalisation process;
3. Strengthening research and technical development (RTD) potential in the area of Information Society technologies in Europe.[13]

The macro element of the case study will examine the broad process of telecommunications policy making in the 1990s in particular, while the micro-element centres on the development of this market-making policy in the second of these areas, specifically the 2000 Regulation on unbundled access to the local loop.[14]

2.6 Conclusion

To conclude, the propositions developed from the two most prominent political science theories on EU policy making in this chapter will be tested upon both the general policy-making relationship/process relating to the case study subject matter over time and upon an in-depth analysis of the three micro-case studies at each of the policy-making stages. An example of an empirical test summary is given below and will be included in the concluding chapter. In addition, in the conclusion of each chapter, the representation of policy-making developed in Chapter 3 will also be examined in relation to the empirical results.

[13] See http://europa.eu.int/comm/information_society/policy/index_en.htm.
[14] Regulation 2887/2000/EC of the European Parliament and of the Council on unbundled access to the local loop.

Table 2.2 Summary of Empirical Tests of Propositions – Pre-negotiation Phase

Theoretical Propositions	Education		Consumer Protection		Telecommunications	
	Macro	Micro	Macro	Micro	Macro	Micro
Liberal Intergovernmentalism						
Commission proposes legislation that conforms with m.s. economic interests						
Supranational Governance						
Rising transnational exchange pushes supranational organisations to propose policies						
Deepening of policy making in one sector leads to spillover						

Key:

+ = very strong level of explanatory power
(+) = strong level of explanatory power
(-) = weak level of explanatory power
- = no explanatory power
n/a = proposition not applicable or effect unable to be investigated in this case
(Adapted from Beach, 2001).

Chapter 3: The Community Policy Making Process

3.1 Introduction

The purpose of this chapter is to enhance the analysis provided in subsequent chapters, where the evidence generated in the case studies will be analysed in accordance with the propositions developed from the theories. This chapter will proceed as follows. First, it will examine and illustrate the formal functions of the actors involved in the policy making process and the processes through which they exercise these functions in the three phases of policy making, i.e. from policy proposal to policy outcome/output. Second, the relationship between function and process in the EU's policy making process will be explored, contributing to the creation of a conceptual representation of EU policy making. This representation will consequently allow us to picture the nature of policy-making in the specific policy sectors examined later in this dissertation, highlighting the role of rules and institutions as well as that of networks of institutional and non-institutional actors

3.2 The main players and rules of the game

The Commission as an institutional organisation – formal functions and structure:

Overview of Structure:

A lack of clarity about the Commission's position in the EU's policy process and its role therein emanates from the conflicting functions that it performs and the roles that it aspires to. The Treaties confer on the Commission functions of legislative initiator, administrator, legal watchdog, mediator, power broker, negotiator, external representative and policy manager in an ever-increasing number of areas – thus the Commission jumps between the three types of functions (Spence, 2000, 2). A popular myth among those less familiar with the European Union system is that the European Commission runs the EU. It is more appropriate, however, to characterise it as a player with a hybrid nature in a network of institutions and actors, which combine to make up the EU's system of governance.

The Commission is composed of two main entities - the College of Commissioners and the Directorates General (DGs or services). There are currently twenty members of the College of Commissioners: two from each of the five largest member states

(France, Germany, Italy, Spain and the UK) and one from each of the other ten member states (Austria, Belgium, Denmark, Finland, Greece, Ireland, Luxembourg, Netherlands, Sweden and Portugal). Commissioners are appointed for five years and the Commission is headed by the President. The Amsterdam Treaty in particular increased the Commission President's scope for influence and leadership - the President is now directly involved in the nomination process of Commissioners and can allocate portfolios. Approval of the college is necessary for all major initiatives and decisions that are taken in the Commission's name. Members of the Commission College hold policy portfolios similar to that of ministers at national level. Each Commissioner has a *cabinet*, which holds a Commissioner's personal staff. The 23 Directorates General constitute the administrative arm of the Commission, held to be relatively small (with approximately 15,000 full-time employees – one fifth of Commission staff work in the translation and interpreting services). The number of Directorates General can vary but normally is between twenty and twenty-five.[1] The Secretariat General is the secretariat of the Commission, especially the College of Commissioners and is headed by the Secretary General (who chairs weekly meetings of *chefs de cabinet*). In this capacity it is charged with ensuring that the Commission as an institution is working efficiently and effectively (Nugent, 2001, 146). It has four main tasks: information agency for the Commission by monitoring events; facilitator of coordination between DG's, promoter of administrative efficiency; manager of relations with other EU institutions (monitor developments in other institutions). The Commission is often portrayed as being a homogenous and monolithic institution (e.g. Moravcsik, 1998), but in fact is composed of many parts and contains within its ranks a wide range of different views and interests. As Cram has put it, the Commission is a complex 'multi-organisation' (Nugent, 2001, 8). Indeed, the Commission is sometimes felt to be more a political system in itself than a single-minded institution (Peterson, 1999b, 60) and the impact of the personalities of the Commission President

[1] Directorates General after the Prodi (1999-2004) reorganisation (D.G. numbers were removed and given titles): Agriculture, Budget, Competition, Development, Economic and Financial Affairs, Education and Culture, Employment and Social Affairs, Energy and Transport, Enlargement, Enterprise, Environment, External Relations, Financial Control, Fisheries, Health and Consumer Protection, Information Society, Internal Market, Justice and Home Affairs, Personnel and Administration, Regional Policy, Research, Taxation and Customs Union, Trade. The following D.Gs were created (out of units in existing D.Gs) - Enterprise, Enlargement, Health and Consumer Protection, Education and Culture. D.Gs vary in size. Largest D.G.s are Personnel and Agriculture. DG's are headed by Directors General and are organised into units which are then grouped into directorates, which are headed by deputy directors.

and the individual Commissioners themselves, as well as the organisational ethos of individual Directorate Generals can also play a role in the production of policy output at EU level.

Functions of the Commission:

The Commission has been assigned and assumed functions and responsibilities that have resulted in it taking on some of the characteristics of a government and some of the characteristics of a secretariat-cum-civil service. In functional terms, it is perhaps best thought of as being somewhere between the two - a hybrid, with powers which are less than those exercised by governments in national settings but which are much greater than those exercised by secretariats of other international organisations (Nugent, 2001, 16). The Commission is extremely resource-poor given its responsibilities, as has been mentioned above.

The Commission's functions are outlined in the Treaties and cross the three boundaries of three legislative, executive and quasi-judicial functions. Article 211 TEC is the key article in regard to the Commission seeking to provide general leadership. The Commission has the right to propose and draft legislation.[2] The EP and Council each have the power to 'request' that the Commission submit proposals on matters they deem appropriate, but they cannot insist upon it.

Types of legislation proposed by Commission:

Directives - binding in the result to be achieved, but leaves to member state to decide the most appropriate form and method of incorporating directives into national law.
Regulations - binding in their entirety and directly applicable in all member states.
Decisions - binding in their entirety and directly applicable but specific to whom they are addressed, be it one or more member states, corporate actors or individuals.

Usually regulations and decisions are concerned with the detailed application of EU law whereas directives are more concerned with the laying down of policy principles that member states must seek to achieve.

The immediate responsibility for preparing a legislative proposal lies with the DG under whose policy remit the proposal falls. When a proposal involves more than one

[2] The exclusive right of initiative is gradually being extended to certain matters falling within the third pillar in the area of freedom, security and justice (free movement of persons – new Article 73(o)/Article 67 of consolidated version) where, after an initial five years of equal rights of initiative with member states, the Commission will enjoy an exclusive right of initiative.

DG, a decision is made as to which DG is to be the lead DG (sometimes this may be disputed) and a Rapporteur is appointed in the leading DG. The choice of legal base is made by the Commission (treaty article or articles on which the proposed legislation is to be based). All draft proposals are referred to the Legal Service for an opinion on their legality. The Council of Ministers and EP can of course, contest the legality. Indeed, legal challenges to the treaty base can result in appeals to the ECJ.

Once the College has adopted legislative proposals in the pre-negotiation phase, they are referred to the Council and the EP. They are also referred to the Economic and Social Committee (ESC) and the Committee of the Regions (CoR) when the contents of proposals fall within the remits of these institutions. The ESC and CoR have advisory powers, whereas the Council and the EP have decision-making powers. It must be remembered that while the Commission has the right to be represented at all formal stages of legislative procedures following the publication of a policy proposal, e.g. in EP committees and plenary sessions; in Council meetings at all levels (working parties, COREPER, ministerial); and at inter-institutional meetings, the Commission is not formally involved in the decision phase of the policy cycle apart from the ability to insist on a unanimous vote from the Council of Ministers if the Council does not agree with its amendments to legislative proposals at each of the stages of the decision phase. While the Maastricht Treaty's introduction of the co-decision procedure was perceived by some commentators to have weakened the Commission by its creation of a new, direct relationship between the Parliament and the Council, the Commission was arguably been compensated for this temporary decline in its institutional role by a specific role of brokerage in the Treaty of Amsterdam. Amended Article 189b(4) provides that 'The Commission shall take part in the Conciliation Committee's proceedings and shall take all the necessary initiatives with a view to reconciling the positions of the EP and the Council' (Spence, 2000, 18). This suggests that the hitherto informal nature of Commission participation in this phase of the policy process could become more formalised.

In the post-decision phase, as an executive function, the Commission has been given responsibility for the implementation and management of EU policies. Yet, in reality, only a few policy areas fall at the end of the spectrum where implementation is undertaken primarily by the Commission. The Commission is mostly dependent on

agencies in the member states for the bulk of direct 'day-to-day' implementation of EU policies and laws (Nugent, 2000, 263). In addition, the implementing power of Commission is said to be controlled by member states through comitology. 'Comitology' introduced greater complexity in the Commission's powers of management of Community affairs and its relations with the administrations of member states (see section on Council). The Commission was also charged with the management of various technical assistance programmes in Central and Eastern Europe and the Mediterranean, which has expanded the Commission's executive role from co-ordinator of development aid to project manager in the restructuring of economies in transition.

Guardian of EU law:

The guardian/quasi-judicial function requires the Commission to act as watchdog in the post-decision phase. The Commission is charged with ensuring that EU law is applied and respected throughout the EU and can investigate infringements of EU law. However, because of lack of resources, the Commission relies on individuals, business firms, or governments who are believe their interests are being damaged to 'whistle blow', especially in environment and competition policy. Infringement proceedings are initiated against member states for not notifying the Commission of measures taken to incorporate directives into national law, for non-incorporation or incorrect incorporation of directives, and for non-application or incorrect application of EU law (Nugent, 2000, 283). Before any action is taken against a state, it is informed by the Commission in a letter of formal notice that it is in possible breach of its legal obligations. It is then usually given a final opportunity to rectify the suspected infringement (Nugent, 2000, 283). If it does not do so, the Commission carries out an investigation and if the breach is confirmed and continued a procedure comes into force, under Article 226 of the TEC, whereby the Commission 'shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice'.[3]

[3] See Annual Reports on Monitoring the Application of Community Law, Official Journal.

Since the Maastricht Treaty, the Commission can now impose financial penalties on errant member states (Article 228, ex-171 TEC). Commission can also exercise sanctions against public and private sector business firms. In addition to Articles 85-94 of the original Treaty of Rome, Regulation 17/1962 gave the Commission extensive powers to investigate, adjudicate, enforce and punish anti-competitive practices of firms e.g. monopolistic mergers. The Commission is also responsible for vetting subsidies paid by national governments to their industries and practices likely to distort competition in the single market. In the case of serious infringements, the Commission can impose fines on the public authorities or companies concerned.

Other functions:

It must always be remembered that, as with each of the institutional organisations of the EU, the Commission's allocation of functions varies between policy domains and between the 'pillars' of the European Union, with a greater allocation of competences in the Community pillar of the EU, compared with the pillars of Justice and Home Affairs and the Common Foreign and Security Policy.[4] However, as a bureaucratic function, the Commission is also the manager of EU finances.[5] With regard to external relations, the Commission has been delegated the role of negotiating trade and cooperation agreements with outside countries and groups of countries on behalf of the Union, e.g the Uruguay round trade liberalisation accord and the creation of the new World Trade Organisation (WTO). With the Amsterdam Treaty, the Commission also received an enhanced role in CFSP, for example with the presence of the Commission in the new Council CFSP planning unit and the establishment of the position of Secretary General for CFSP, Mr CFSP.

The Council of Ministers as an institutional organisation – formal functions and structure:

The Council of Ministers has been described as: the EU institution exhibiting the most direct expression of national interests and power (Lewis, 2000, 261); the most important and probably the most misunderstood of the EU's institutions (Hayes-

[4] First pillar functions of the Commission are more clearly defined and there exists greater scope for independent action than in second and third pillars. For full account of Commission see Nugent, 1999.

[5] For accounts of all the Commission's financial tasks and the EU's budgetary processes see Laffan, 1997b.

Renshaw, 1999, 23). The Council of Ministers is a collective decision-making system with its own rules, norms, and organisational culture (Westlake, 1999). The Council can be said to comprise of the range of formations from the European Council, Council of Ministers sectoral meetings, the Committee of Permanent Representatives to the Council Secretariat, its working groups and national representatives in comitology committees.[6] Its functions encompass legislative, executive and adjudicatory categories.

European Council:

The European Council is composed of Heads of State and Government of each of the member states, assisted by their Foreign Ministers and Finance Ministers and by the President and one other member of the Commission. The President of the European Parliament attends the opening session of each summit to give the EP's perspective on the items of the agenda. The European Council meets at a minimum of four times each year, and extraordinary sessions may be convened as and when the need arises. The European Council is not subject to the decision-making procedures and rules that bind the Council. As a general rule, it does not vote but instead strives to reach consensus. The European Parliament is relatively marginalised from its work and the ECJ does not have jurisdiction over its activities. While the European Council is normally not able to take legally binding decisions, issues that have proved intractable at Council of Minister level are often resolved in this forum. The European Council also can request the Council of Ministers and Commission to look at the possibility of legislation in certain areas in response to pressing problems.

Council of Ministers:

Each sectoral Council consists of a representative of each member state – usually a minister – along with a national delegation in support. If a minister is unable to attend a Council meeting, a member of the delegation, usually the Permanent Representative, may represent him or her. The Commission is allowed representation at every meeting of the Council (unless the Council decides otherwise) but has no formal decision-making functions.

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[6] The following account will be very general in nature. For a comprehensive account and analysis of the Council's activities see Westlake, 1999 and Hayes-Renshaw, 2002.

The TEC states that the role of the Council is to 'ensure coordination of the general economic policies of the member states', and that the Council has 'the power to take decisions' (Article 202, ex Article 145). In the pre-negotiation phase, the Council can formally request the Commission to propose legislation. In the policy negotiation phase, the Council normally 'acts' or decides on a legislative proposal (decision, directive etc.) from the Commission and after consulting, cooperating or co-deciding with the EP (the relevant procedure then determines the method of voting, i.e. by unanimity, simple majority or qualified majority voting). The number of meetings in the Council has increased dramatically in the last fifteen years with three sectoral formations in particularly meeting very regularly – General Affairs Council (Foreign Ministers), Economic and Financial Affairs (ECOFIN), and Agriculture. Different Councils can have different dynamics and relations with other EU institutional organisations (see Westlake, 1999).

COREPER:

The Council's Committee of Permanent Representatives (COREPER) is the main preparatory body for the EU Council of Ministers, meeting weekly in Brussels to discuss the agendas of upcoming ministerial meetings. COREPER is one of the senior preparatory bodies of the Council[7] and is at the heart of 'a highly complex system involving thousands of national officials, hundreds of decisions, and spread across a wide range of issue-areas and policy sectors'. COREPER serves as a process manager in the negotiation stage of decision-making. It has been described as 'the collective bottle-neck through which the work of the Council flows' (Lewis, 2000, 263). COREPER is divided into parts I and II. COREPER I consists of deputy permanent representatives and COREPER II comprises of ambassadors (permanent representatives). COREPER I deals with more technical issues of the Council agenda and COREPER II concentrates on the more sensitive 'political' issues. Although they never formally vote, the permanent representatives take decisions all the time (A points), passing on contentious issues to Ministers to decide (B points). Committee meetings are not public and negotiations are confidential. COREPER itself is supported by the Working Groups, whose individual members act as representatives

[7] Along with the Special Committee on Agriculture, the ECOFIN committee, the 113 Committee responsible for external trade and tariff negotiations and policy and the Political Committee for CFSP and Article 36 Committee for Justice and Home Affairs (pillar 3).

of their national ministries and discuss Commission proposals in great detail. Their aim is to reduce the number of issues to be discussed at the higher and more senior levels of the Council hierarchy. The Secretariat of the Council is responsible for providing logistical and technical support for all bodies within the Council.

The EU Presidency is a manager, promoter of political initiatives, package-broker, representative to and from the other Community institutions, spokesman for the Council and for the Union, and an international actor (in concert with preceding and subsequent presidency – the troika) (Westlake, 1999, 45). In organisational terms, the member state that holds the Presidency chairs meetings at diplomatic and ministerial level in the European Union for six months in rotation.

In intergovernmental terms, the Council of Ministers and COREPER as a whole entity is conceived as a steering apparatus par excellence, it is the place where the preferences of societal actors and domestic constituencies of the member states are translated into national interest and bargaining takes place between these intergovernmental actors over policy proposals. Intergovernmental models of decision-making tend not to allow for the possibility where the socialisation of the actors working within the Council's working groups, COREPER and the Council of Ministers over time may affect bargaining outcomes, e.g. the development of reciprocity, mutual trust and the culture of compromise or esprit de corps which has been found to exist. It also does not accept the possibility for the redefinition of national interests as a result of negotiations.

Post-Decision and Comitology:

According to original article 145 of the Treaty of Rome, the European Commission was to be responsible for implementing decisions adopted by the Council. In reality, much of the implementation of EU policy is carried out by the national administrations of the member states. In fact, the consultation process between the Commission and the national administrations developed on an ad hoc basis until the SEA and the Comitology Decision of 1987 (Decision 87/373/EEC). The 1987 Decision introduced a system of committees that would produce prescriptions of how Commission should adopt measures to implement the legislation in question. Indeed, the Council often provides in its legislation that, in adopting secondary legislation, the

Commission should work together with a committee of national civil servants. The genesis of the *comitology* system in 1987 offers evidence of the intention of the Council to use such committees as means of Council scrutiny and control of the subordinate legislative process, since it based it on article 145 of the Treaty of Rome, which supported a more extensive role for the Council, than the other possible legal basis, article 155, which implied greater discretion for the Commission.

The European Parliament as an institutional organisation – formal functions and structure:

As a governing institution of the European Union, the European Parliament's status has grown dramatically in the last ten to fifteen years. Once characterised as a 'multi-lingual talking shop', the European Parliament has witnessed an expansion of its tasks, particularly in the legislative process, through involvement in procedures such as cooperation and codecision (Scully, 2001, 162). The growth in studies on the EP and its internal workings has been noticeable in recent years and authors have studied the development of the EP within the institutional structure, as well as its legislative and non-legislative powers. It is difficult to explain the development of the EP as a functional response on the part of national governments to problems of intergovernmental bargaining, the EP is perhaps better explained in terms of the response of national governments to domestic pressures for greater democratic accountability in the European Union. In this study and in this section in particular, however, in concentrating on first pillar policies of the EU, examines the functions of the EP in policy areas where it does have legally-defined 'formal' competences as laid down in the successive Treaties.

The European Parliament derives its legitimacy from direct universal suffrage, is elected every five years and at present has 626 members. While debate rages within scholarly circles as to the relative influence of the European Parliament in the legislative process, the fact remains that the European Parliament is now commonly seen as co-legislator with the Council of Ministers in the EU's policy process (e.g. Kreppel, 1999; Maurer, 1999). In fact, the proportion of policy areas where the EP is not at all involved in policy-making ('legislative exclusion') has declined from 72.09% in the original EEC to 37% in the 'post-Amsterdam' EC (Maurer, 1999, 5). The European Parliament was originally seen as an assembly with two major powers:

the power to pass a motion of censure against the High Authority/Commission and the right to be consulted by the Council on selected legislative proposals. The 1987 Single European Act represented a major step forward for the EP as it marked the beginning of a new triangular relationship between the Council, the Commission, and the EP by introducing the cooperation procedure, which gave the EP the first significant function within the legislative process (Neuhold, 2000, 3). Following on from the SEA, the EP's legislative competences were extended by the Treaty on European Union. Through the introduction of the co-decision procedure, MEPs were, for the first time, granted the power of veto in several policy areas. While the co-decision procedure will be discussed in greater detail later in this chapter, it is worth outlining briefly the implications of this procedure for the functioning of the European Parliament.

Following the Maastricht Treaty, the codecision procedure comprised of three readings of legislation and the possibility of convening a conciliation committee in order to reach a compromise between the Council and the EP if deadlock is present at the second stage. The conciliation committee (composed of an equal number of members of the Council or their representatives and representatives from the EP) had to reach an agreement on a compromise text within a short time span – normally six weeks. The Commission was also represented in the conciliation committee where its role was circumscribed, as it could no longer withdraw its proposals. Until the Amsterdam Treaty, the EP and Council were not on completely equal footing in the codecision procedure, however. The Council still had the possibility, if conciliation failed, to confirm its common position by qualified majority. The EP was then left with a 'take it or leave it option'- either it rejected the text by an absolute majority of its members or did not act within six weeks. This put its members in the awkward position of being seen as responsible for the failure of a legislative act if the EP chose not to act as it was forced to put in its veto in the final stage of the procedure. The Treaty of Amsterdam extended co-decision from 15 to 38 Treaty articles[8] and

[8] It now applies to new areas within the fields of transport, environment, energy, development cooperation and certain aspects of social affairs. For certain areas within the third pillar (visa procedures and conditions and visa uniformity rules), it is stipulated that the co-decision procedure should come into effect five years after the entry into force of the Treaty. The EP is still excluded as a legislator, for the most part, from policy fields such as fiscal harmonisation and the conclusion of international agreements (with the exception of association agreements), and the Common Foreign and Security Policy.

streamlined the co-decision procedure. It is now possible for a legislative act to be adopted during the first reading of a legislative proposal, if either the EP proposes no amendments to the Commission proposal or if the Council agrees to the changes put forward by the EP. The third-reading stage has also been abolished. As mentioned above, before Amsterdam, the Council had had the right to adopt its common position after the conciliation procedure had failed, unless the EP could mobilise a majority of its members to put in its veto. With co-decision after Amsterdam, if agreement is not reached in conciliation, the draft legal act is not passed, i.e. fails, and both the Council and the EP are held responsible for this failure.

Structure of the European Parliament:

The main work of the European Parliament is done in its committees. In order to prepare the work of the Parliament's plenary sessions, Members participate in 17 standing committees.[9] In addition to these standing committees, the EP can also set up subcommittees, temporary committees to deal with specific problems, and committees of inquiry.[10] Parliament's work is organised by its secretariat with a staff of approximately 3500 with a Secretary General.

What does the EP do?

Maurer has identified four main functions of the European Parliament (Maurer, 1999, 11):

- **The policy-making (legislative) function**: this refers to the participation of the EP in the policy process in relation to the Council and the Commission. It derives from Parliament's rights and obligations to initiate, scrutinise and (co-) decide on European politics (through the procedures of assent, cooperation and co-decision). Although the EP has no formal power of initiative, it can ask the Commission to submit proposals for legislation (Article 192 TEC).
- **The control function (executive/adjudicatory)**: this refers to Parliament's rights and obligations to call other institutions of the Union to account. In addition to its

[9] 17 Standing committees: Foreign affairs, Human Rights, CFSP; Budgets; Budgetary control; Citizen's Freedoms & Rights, JHA; Economic and Monetary Affairs; Legal Affairs & the Internal Market; Industry, External Trade, Research & Energy; Employment & Social Affairs; Environment, Public Health & Consumer Policy; Agriculture & Rural Development; Fisheries; Regional Policy, Transport & Tourism; Culture, Youth, Education, Media, Sport; Development & Cooperation; Constitutional Affairs; Women's Rights & Equal Opportunities; Petitions.

[10] http://www.europarl.eu.int/presentation/default_en.htm

role in granting the budgetary discharge to the European Commission, the Parliament is involved in other scrutiny activities. It may put oral and written questions to the Commission and the Council, hear Commission officials and national ministers in parliamentary committees, hold public hearings, set up temporary committees of inquiry and discuss the EU's performance with the Council's Presidency.

- **The elective function:** this function relates to the investiture of the European Commission and appointments within other institutions such as the Court of Auditors and the European Central Bank. Since Maastricht, the EP has had the right to give its assent on the Commission as a college. A new Article 138c also gives the EP the right to appoint a European Ombudsman or Mediator.
- **The system-development function**: refers to the participation of the EP in the development of the EU's constitutional system (such as institutional reforms and the division of competencies). Making full use of this function also relies on instruments such as the creation of new budget lines and the use of internal (soft) law such as the Rules of Procedure. Thus, the system-development function refers to the EP's ability to present, promote and defend proposals for institutional reform especially during IGC's and treaty amendments in view of EU enlargement with but also via other methods such as inter-institutional agreements.[11]

[11] For a full account of Parliament's competencies see Neunreither, 1999.

Table 3.1: Decision Rule in the Council of Ministers According to the Treaties

		Percentage of treaty provisions where the Council decision rule is:
	Unanimity	Simple, Qualified or Special Majority
Treaty of Rome (1958-1987)	49.0	51.0
Single European Act (1987-1993)	44.5	55.5
Maastricht Treaty (1993-1999)	35.1	64.9
Amsterdam Treaty (1999-2002)	36.7	63.3

Table 3.2: Role of European Parliament in EU Legislation According to the Treaties

		Percentage of treaty provisions where the European Parliament's role in EU legislation is:	
	Decisional (cooperation, codecision, assent)	Consultative	None
Treaty of Rome (1958-1987)	0.0	27.1	72.9
Single European Act (1987-93)	18.2	27.3	54.5
Maastricht Treaty (1993-1999)	22.9	37.0	40.1
Amsterdam Treaty (1999-2002)	33.1	34.5	32.4

Figures taken from Hooghe and Marks 2001, Hix 1999 (appendix).

Legislative Procedures in the First Pillar:

Consultation procedure – Council is sole decision-maker but must receive the opinion of EP (and possibly CoR, depending on proposal). The Council can make amendments to which the Commission is opposed only by acting unanimously. The Commission can change, and as an extreme measure withdraw a proposal at any time prior to Council adoption. (Only procedure prior to SEA in 1987). Applies to agriculture and limited justice and home affairs topics that fall within first pillar of EU.

Cooperation – Involves two readings, on receipt of EP's opinion, the Council adopts (by qualified majority vote if necessary) a 'common position'. At its second reading the EP can approve, amend, reject or take no action on the common position. If the first or last option is exercised, the Council can adopt the common position as a legislative act. If the EP amends or rejects the proposal by an absolute majority of all MEPs, the Council can only adopt the proposal by unanimity, amendments that are accepted by the Commission can be adopted by QMV but can be amended only by unanimity and amendments that are not accepted by the Commission can be accepted only by unanimity.
The cooperation procedure was first introduced by the SEA and was extended at Maastricht. Most of the policy areas falling within its remit were 'transferred' to the codecision procedure following Amsterdam Treaty and its use is now confined to four aspects of EMU.

Codecision – The Council and EP may both agree a proposal at first reading. If they disagree at second reading, the EP may by an absolute majority reject the proposal, which then falls. Or the EP may amend the Council's common position by an absolute majority, in which case conciliation takes place between the Council and the EP. The results of conciliation must be approved in third reading by both Council (QMV) and EP (majority of votes cast). Proposal falls if not agreed. Applies to over 50% of legislation (unless exempted) since Treaty of Amsterdam.

Assent – a single stage procedure with no provision for the EP to amend Commission proposals. Assent requires unanimity in the Council, whilst in the EP a simple majority is sufficient for some measures but an absolute majority is required for others. Applies to: certain international agreements, enlargement treaties, and framework agreements on the structural funds.

Budget – the European Parliament may try to modify 'compulsory' expenditure, or to amend 'non-compulsory' expenditure. It must approve the budget as a whole, and subsequently 'discharge the accounts of previous years' actual expenditure.

The European Court of Justice as an institutional organisation – formal functions and structure:

In the following section the formal functions and development of the European Court of Justice are discussed, the more technical Court of First Instance (CFI) is not investigated here.[12] The basic rules of the ECJ are set out in the EC Treaty Articles 220-245 EC (ex Articles 164-188 EC). These articles describe the composition of the ECJ and the CFI, along with the basic jurisdiction of the Court. The ECJ's formal function in the EC is to 'ensure that in the interpretation and application of this Treaty the law is observed' (Article 220 EC (ex Article 164 EC), i.e. judicial function. This has been referred to as a 'pregnant formula' for the ECJ has used this provision to extend its review jurisdiction to over bodies, which were not expressly subject to it and to measures that were not listed in the original Treaty. The TEU also enhanced the Court's jurisdiction under Article 228 by giving it power to impose a pecuniary penalty on a Member State where that Member State has failed to comply with an earlier judgement made against it.

The Court of Justice is at present composed of 15 judges (one from each member state) appointed for renewable six-year terms, assisted by eight Advocate Generals. The Court usually sits in chambers of either three or five judges for most cases. Prior to the Treaty of Nice, the Court has sat in plenum in especially important cases (following ToN it will sit in Grand Chamber of 11 judges – to reduce workload). The judges from among their number elect a President for a renewable three-year term. The President's function is to direct the judicial and administrative operation of the Court. As mentioned above, the Court is assisted by Advocate Generals, appointed by the Member States, whose task is to provide independent submissions on cases before the ECJ. The Advocate Generals work separately and independently from the judges, and represent neither the Court nor the Member States.

Actions before the ECJ can be divided into two types: judgements and opinions. While opinions are relatively rare and will not be looked at here, judgements tend to fall under two different categories: *preliminary rulings* requested by national courts

[12] The following account is a description of function and remit of ECJ before the ratification of the Treaty of Nice.

under Article 234 EC (ex Article 177), and *direct actions* by EC institutions, Member States, or individuals. *Preliminary rulings* are requests by national courts regarding either the interpretation of the EC Treaty or secondary EC legislation, and/or questions on the validity of secondary EC legislation. Any court of a Member State may request a ruling if it considers that it is necessary to enable it to give judgement in the case at hand. The ECJ interprets the relevant piece of EC law, and/or rules on the validity of the relevant secondary EC legislation and following the ruling; the national court then decides the matter in the case before it. There are two basic categories of *direct actions*: against EC institutions or against Member States. Actions against EC institutions can be raised in order to review the legality of acts by EC institutions, to challenge a failure to act by EC institutions, to sue for liability for damages caused by EC institutions (Articles 230, 231, 232, 233, 235, 288 (2) – ex Articles 174-178, 215 (2)). Enforcement actions can be brought against Member State for failing to fulfil an obligation under the EC Treaty. These actions can either be brought by the Commission, or by other Member States (Articles 226-228 EC, ex Articles 169-171 EC).[13]

The development of the functions of the ECJ:

The ECJ, in a series of cases since 1963, has transformed the nature of EC law from being within the realm of international public law into a unique legal system with two important doctrines of direct effect and supremacy of EC law. The doctrine of direct effect means that legally valid EC law automatically becomes part of the domestic law of all of the Member States, granting individuals rights that must be upheld by national courts. Direct effect is not contained in the EC Treaty, but the related principle of direct applicability is mentioned as regards certain Treaty articles, regulations and decisions. Direct effect was established in 1963 in the famous *Van Gend & Loos case* (Case 26/62), where a private firm sought to invoke Article 25 EC (ex Article 12 EC) against Dutch customs authorities before a Dutch tribunal. The Court has since 1963 expanded the application of direct effect to encompass all forms of EC law that are sufficiently clearer, unambiguous, and unconditional upon further legislation actions by either Community or national authorities to be able to grant individuals rights enforceable against public authorities or in certain instances vis-à-

[13] For full description of procedure before the ECJ see: D. Beach. 2001. *Between Law and Politics. The relationship between the European Court of Justice and EU Member States*. DJØF: Copenhagen.

vis other individuals. In addition, the Court has strengthened the doctrine by ruling that Member States are liable for costs falling on individuals as a result of their failure to adequately implement directly effective EC law in national legislation (following the *Frankovich* case (Joined cases C-6/90 and C-9/90)).

The doctrine of direct effect was of necessity complemented by the doctrine of supremacy of EC law. Like direct effect, the *doctrine of supremacy* was not included in the Treaty, but is a product of the judicial creativity of the Court. The supremacy doctrine was first established in 1964, where in *Costa v. ENEL* (Case 6/64) the Court ruled that directly effective EC law is also supreme to national law. Since *Costa*, the Court has expanded the application of the supremacy doctrine to the situation at present where directly effective EC law takes precedence over all forms of national law (even national constitutions), and where national courts have a duty to declare national laws in breach of EC law invalid.

In the early years of the Court's activity, it was held that the various Community institutions and the member states would be the main litigants before the ECJ, with the Commission having the facility to use the Court as a means of sanctioning member state governments who have not fully implemented EC law. Indeed, in practice, cases between member states were seen to be politically contentious and were quite rare. However, the increased use of the preliminary ruling procedure (new Art. 234, ex Art 177) has meant that individuals through national courts have become players within the European legal system and have become, as Wincott puts it, 'decentralised monitors of the implementation and enforcement of Community law' (Wincott, 1999, 91). Karen Alter has argued that in respect to national courts the Court has pursued a *strategy of mutual empowerment*, in which both national courts and ECJ have interests in the relationship (Alter, 1998). While preliminary rulings have given the Court an additional channel of fulfilling its main function, the ECJ is dependent on the continuing cooperation of national courts to refer questions to it.

Other actors in the policy process:

While the Council, Commission, European Parliament and Court of Justice are the main actors in the policy process, they are not the only actors. Interest groups are actors who function and are involved in the policy process in a more informal way.

Interest Groups – Transnational, Sub-national, Ad-hoc Coalitions

There is now a dense and mature European interest group system. Some of the groups were formed at the same time as the European institutions were created. Many others were created only when it became clear that the European regulations emanating from these new institutions would directly affect a wide range of societal interests. Interest groups can be transnational, i.e. associations created at the European level to represent a European-wide constituency to European-level policy-makers. Interest groups can also consist of ad hoc coalitions focusing on single-issue politics, commercial firms and interest groups operating at the sub-national level in member states. In February 2000, the Secretary General of the European Commission listed approximately 800 non-profit making interest groups involved in lobbying the European Union, divided into eleven categories as follows: regions, towns, rural life; trade unions and employers federations; political interests; consumer organisations; animal welfare, nature and environmental organisations; conservation and development; welfare and social interests; religion; human rights; small and medium-sized enterprises; miscellaneous.[14]

The incentive structure for the formation of Euro-level lobbying can be said to be two-fold (Mazey and Richardson, 2001). First, the ideas proposed European legislation could have an adverse effect on interests of the groups concerned. Second, the shaping of new European legislation can also be looked on as an *opportunity* to shape policy to the advantage of one group/set of groups. Interest groups have what is termed 'multiple entry points' when lobbying the European Union (Page, 1997,109-110). Groups can target the Commission in particular in the pre-negotiation phase of the EU's policy process, i.e. when broad policy is being framed and legislation is drafted; they become involved in discussion fora, expert committees, are not formally defined and included in the institutional structure but exist as actors nonetheless. Interest groups also target the European Parliament in the negotiation phase of the cycle, although the EP is aware that such targeting can give rise to charges of corruption and has issued guidelines to ensure a more restricted involvement of interest groups at that stage of the policy process.

[14] http://europa.eu.int/comm/secretariat_general/sgc/lobbies/

Figure 3.1 Main Actors in the Community Policy Process

Formal Competences of Main Actors in Policy Process: In Brief

The Commission:

Stage	Formal Competence/Function
Pre-Negotiation	Initiator of Policy ***Legislative*** *Article 11 (ex Article 5a) on behest of Council; Article 308 (ex Article 235); Articles 192, 249, 251, 252 – depending on policy area, Commission right to initiative is specified.*
Negotiation	Limited except when specified in co-decision. *Articles 249-252.* ***Legislative***
Post-Decision	Formal watchdog of implementation and administration of legislation affected by limited resources. *Article 85*[15]*, Article 211 (ex Article 155), Article 226 (ex Art. 169) – referral to ECJ - Article 227 (before one member state brings another before ECJ, matter must be referred to Commission. This procedure seems to be designed for the purpose of promoting the resolution of the dispute without resort to litigation. Article 282 (ex Article 211) Commission represents legal persona of Communities. Also policy specific.*[16] Implementation – Comitology Decision 87/373/EEC; Decision 468/1999 ***Executive and Judicial/Adjudicatory***

The Council of Ministers:

Stage	Formal Competence
Pre-Negotiation	Article 208 (ex Article 152) - Council may request the Commission to undertake any studies the Council considers ***Legislative***
Negotiation	Exercises legislative power, either on its own or with the European Parliament under co-decision. *Articles 202 (ex 145), 192, 249, 251, 251.* *Shares budgetary authority with EP. *Article 272 (ex 203). Sole power of decision in CFSP, JHA.* ***Legislative***
Post-Decision	Actions may be brought by member states (and private parties) to ECJ in respect of infringement by institutions of the Treaties. *Article 230 (ex Article 173).* Implementation – Comitology Decision 87/373/EEC ***Executive***

[15] Commission has authority to deal with special infringements. For example, Article 85 (ex Article 89) authorises the Commission to investigate suspected infringement of Community's rules of competition.

[16] CAP - delegation of wide rule-making powers to Commission under authority of the final provision of Article 211. Also Article 202.

The European Parliament:

Stage	Formal Competence
Pre-Negotiation	Limited initiation *Through Article 192 (ex Article 138b).* ***Legislative***
Negotiation	*Co-negotiator with Council - depending on legislative procedure specified. *Article 249 (ex 189), Article 251 (ex 189b) Codecision, Article 252 (ex 189c).* Budgetary prerogative. *Article 272 (ex. Article 203).* ***Legislative***
Post-Decision	Political Oversight of Commission and Council. *Article 201 (ex Article 144); Article 193 (ex Article 138c) – Committee of Inquiry Investigation.* Function of watchdog as a parliamentary assembly. *Article 197 (ex Article 140) Parliamentary Questions.* ***Adjudicatory***

The Court of Justice:

Stage	Formal competence
Pre-Negotiation	None
Negotiation	None
Post-decision	Enforcer of compliance with EC law. *Article 220 (ex Article 164): 'the Court shall ensure that in the interpretation and application of this Treaty, the law is observed'.* *Article 227 (ex 170 - disputes between member states referred first to Commission), Article 230 (ex 173) – power of annulment and actions may be brought by member states, EC institutions and private parties, Article 239 (ex 182).* *Article 232 (ex 175) - Francovich ruling* ***Judicial***

3.3 Policy making in action

In the EU, each of the institutional actors interact formally and also possibly informally with each other and carry out their functions through various procedures and processes at each of the stages of the policy-making process.

Pre-Negotiation Stage:

During the pre-negotiation/policy development phase ideas for new policies, laws and regulations are developed, discussed, conceptualised, formulated in written form and eventually proposed to those who are in a position to make decisions. At European level, policy development is primarily the responsibility of the Commission. The Commission DGs, however, do not always have the necessary staff or expertise to develop proposals on their own. To counteract this weakness, the Commission calls on the expertise found in the administrations of the Member States and on the scientific and technical know-how in universities, research centres and private and public sector interest groups in the Member States and at Community level. The Commission asks these experts to help in drafting and developing new proposals and the experts meet with Commission officials in what are generally referred to as expert committees. Pre-proposal documents can also be circulated, such as in the form of Green Papers. The European Parliament and the Council of Ministers can also call upon the Commission to initiate policy. In addition, the Commission can endeavour to exploit the ECJ's setting of legal precedents in first pillar areas in a stream of cases to expand tasks. Litigants who because of participation in rising transnational exchange, run up against national rule and practices that hinder their activities and challenge these in the ECJ – using the preliminary ruling procedure, can spark this process.

To reiterate, pre-negotiation is where ideas for policies are developed – policy framing - and proposals for these policies are drafted. This can be termed the agenda setting stage in the policy cycle and the Commission is formally the main actor in this phase. In an immediate sense, therefore, EU legislation can be said to originate with the Commission, in particular in its annual work programme and with the legislative programme that forms part of the work programme. However, to unpack this further, in reality legislation emanates from broader sources than just the Commission. While the Commission may be the formal proposer of laws and agenda setter, it undertakes

this function in concert with other actors borrowing ideas and preferences. Often proposals emerge from the needed adjustment of existing policy (the policy inheritance – developing, adjusting and updating existing and ongoing policy commitments), or emerge as a response to suggestions and requests of other actors or external situations.

Table 3.3: Origins of Commission legislative proposals:

	Percentage
International Obligations	35
Amendment to or codification of existing law	25-30
Required by Treaty	10
Response to requests from other EU institutions, member states or interest groups	20
Pure, 'spontaneous' Commission initiatives	5-10

Source: European Commission; Peterson, 1999, 58.

Indeed, according to both the European Commission and Peterson, no more than 10 per cent of all proposals appear to originate as 'spontaneous Commission initiatives'. Considerably more also emerge from requests by member states, the Council or industry. The Council of Ministers and the EP (by an absolute majority of MEPs which is difficult to achieve) do have the treaty power to request the Commission to propose legislation but they do not have the formal power to determine the content of such proposals or to lay down a timetable for their submission (Nugent, 2000, 239). In addition, although the European Council has no treaty-based power to issue instructions or requests to the Commission, its political position means that the Commission is often obliged to comply with instructions or requests the European Council gives it. Yet, the European Council is not entirely master of its own agenda. A 'rolling agenda' (Westlake, 1999, 30) is said to exist of commitments and measures decided at previous meetings. It also discusses response to important current issues and the Commission has been known to try to harness the European Council to its own agenda. The Presidency does give a Member State the possibility of ensuring that its particular policy proposals are brought to the fore.

Since the EP was given the power to request by the TEU only a handful of requests have been made – six up to March 2000 (Nugent, 2000, 240) – on subjects such as car

insurance, fire safety and environmental liability. Requests are not binding and the Commission has responded to these EP requests in various ways – including taking little action at all, issuing consultation papers and producing one legislative proposal on car insurance in 1997. In its March 2000 resolution on the Commission's annual legislative programme, the EP expressed its regret that the Commission had so far shown so little response to Parliament's calls for specific legislative proposals (Nugent, 2000). In addition, the ECJ can also act as a spur for policy initiation. Rulings by the Court can significantly affect policy contexts and can prompt the Commission into action (indirect effect).

Committee governance features considerably in pre-negotiation. The Commission often sets up consultative forums such as expert or advisory committees consisting of policy stakeholders to frame policy problems. Meetings of consultative bodies can provide an opportunity for meeting some of the most relevant actors in a given policy field. Related informal events such as lunches and receptions are added to the formal programme and help build relations. From the Commission's point of view, 'networking' enables officials to initiate and, even more important, maintain good contacts with interlocutors who may prove useful when concrete policy-proposals are elaborated. The Commission can be selective in using forums' opinion – since these are formally non-binding, the Commission can manipulate their impact. It can use an opinion to legitimise its own views, but can also discard an opinion that contradicts its ideas. These policy groups can best be understood as providing an arena for facilitating discourse, building consensus among Commission officials and member state's administrations, gathering expertise and reacting to emerging problems by initiating new legislation.

Output from this stage often appears in the form of green papers and other preparatory documents. Indeed, there has been a discernible increase in the number of Green Papers since 1990. Prior to that date the Commission appears to have published only four Green Papers, whereas in the following eight years approximately 50 were published. The function of Green Papers is to set out the Commission's ideas, to

present possible measures, and to 'lay the foundations for a framework in which interest groups can present their viewpoints.[17]

The Commission is a rather small administration in view of the varied tasks that have been assigned to it. It has not grown proportionally with the responsibilities that have been conferred upon it during the last 10 years through the SEA, the Maastricht and Amsterdam Treaties. Some 6,000 A-level officials draft some 600 proposals for legal acts and programmes that the Commission submits annually to the Council and the European Parliament. In addition, they manage several hundred programmes in research and development, in regional development and in the social and educational field. They also have to prepare 6,000 to 7,000 Commission decisions and regulations, chair 20 comitology and expert committees daily and defend their proposals in Council working parties, as well as in the Committees of the European Parliament. The Commission cannot possibly have the full spectrum of expertise required to draft all the proposals for new policies. Therefore, the Commission seeks the help of experts from Member State administrations, universities, research centres and from private and public sector interest groups in expert committee groups in drafting proposals (Schäfer, 2000). For example, if the legislative matter to be drafted is complex and/or of a highly technical nature, and where strong interests are confronted each other, the Commission may establish ad hoc expert groups which meet at least until the Commission has assembled all the information needed to draft its proposal. Issues can be discussed from all perspectives, in theory helping the Commission to draft a proposal that would have a good chance of achieving a majority in Council.

Whenever the Commission decides to establish permanent advisory committees, it gives them a clear mandate and takes upon itself the obligation to consult these committees prior to drafting legislation or making important policy decisions. The Commission itself usually holds the chair, prepares the agenda and calls the meetings. There is considerable uncertainty as to how many of these expert committees exist at any given point in time. The Budget lists only about 100, but there are considerably more. Most observers assume that there are probably 700 to 800 active committees

[17] http://222.europa.eu.int/comm/sg/sgc/lobbies/en/approach/apercu_en.htm. Mazey and Richardson, 2001, 85.

(Schäfer, 2000, 11). The expert committee system provides a venue for interest articulation and conflict settlement during the stage of policy development/pre-negotiation. This can possibly facilitate policy decision-making in the Council and the European Parliament. However, the new role of the European Parliament as co-legislator may also pose new problems and more work for the Commission in developing its policy proposals, as it now needs to anticipate the interests of the European Parliament as well as those of the Member states – a delicate balancing act.

Policy Negotiation Stage:

Historically at the European level the negotiation phase was largely the responsibility of the Council, where representatives – in the last analysis the ministers – of the Member State governments decided what was to be binding law. Since the Maastricht, and particularly the Amsterdam, Treaties, the European Parliament, through the introduction of the co-decision procedure and the extension of its field of application, has effectively become co-legislator with the Council. Although the Council now shares its legislation competencies and has to seek a compromise with the EP, it is still perceived as the major actor in the decision phase (the case study evidence will explore if this perception is indeed true). In the Council, committee working parties do much of the work. Composed of civil servants from the Member State administrations, they examine Commission proposals article by article, modify and often rewrite them in preparing the decision of the Ministers. Experts estimate that 70 to 80 per cent of the workload in the decision phase is carried out by these working parties (Schäfer, 2000, 6). The EP also does most of its work in committees, composed of Members of Parliament and supported by professional staff. The Commission has no formal competence at this stage but is allowed a representative at the decision making table. Indeed, in conciliation the Commission can be looked to as an intermediary and has the potential as such, to hold another informal legislative function. The European Court of Justice is not formally involved in this stage.

The same officials from the Member States and the Commission who have met and discussed the subject in an expert group will frequently meet again in Council working groups. However, there is one significant difference, in the expert group officials could argue their personal view point if they so wished and take positions on the basis of their expertise and knowledge on the subject matter. In Council working

groups the officials come with instructions (of either a specific or informal nature) from their governments, they have decided to follow a certain strategy. The Member State official has then to argue this position in the working party. Nevertheless, it cannot be discounted that a certain level of cooperation reflex may develop over time in working groups.

Technically, working groups are supposed to concentrate their discussions on technical matters relating to the policy proposal, political questions are to be solved at a higher level, either COREPER or Minister level. Oftentimes, however, technical and political questions are not easily divided and the tendency is for working parties to try to go as far as possibly in reaching a compromise, leaving only the very hard political decisions to COREPER or the Ministers. The presidency of the EU also plays a role in this stage of policy making. The Presidency determines the agenda, sets the date of meetings and leads the discussions.

The EP Standing Committees have been described as the "legislative backbone" of the EP (Neuhold, 2000). Everything that could conceivably be dealt with by the EP falls under the competence of these committees. In the practical political process, incoming legislative proposals go directly to the responsible committee or committees for consideration. The work of the committees then consists of drawing up reports and opinions on proposals for legislation by an appointed rapporteur of the Committee, which build upon formal consultations of the EP with the Commission and the Council (or on the EP's own initiative). The formal powers and responsibilities of each of the EP's 17 Standing Committees are laid down in an annex of the EP Rules of Procedure. These stipulations are extremely vague, giving rise to competence disputes, i.e. conflicts over which committee should be declared responsible. Individual committees are not necessarily equal in prestige or strength. The committees' size (between 20 and 65 members) and importance also depends increasingly on the powers the EP possesses in particular areas.

In contrast to other institutions, notably the Council and Commission, EP committee meetings can be open to both representatives of other institutions and the general public. By providing a venue for the institutions to interact during the legislative process, the EP has an opportunity to integrate the views of the other actors,

especially that of the Commission, to a greater extent than is the case with the other institutions. Lobbyists increasingly see the EP as an important arena for the representation of interests. Wessels reports that average MEPs have roughly 109 contacts with interest groups from the national and supranational level each year. In total, this amounts to some 67,000 contacts and interest groups annually (Wessels, 1999, 109). The codecision provision also established the principle of direct negotiation between the Council of Ministers and the EP committees. Contacts between the Council of Ministers and the EP committees have intensified, particularly as a result of the possibility of concluding the procedure at first reading. An informal convention has also developed in advance of conciliation where 'trialogues' occur between representatives of the Presidency, the chairman of the responsible EP committee and the Commission rapporteur, thus increasing interaction between representatives of the three institutional organisations.

Although the Commission has no formal decision to take in respect of the final agreement, Commission services participate in trialogues and preparatory meetings and Commissioners themselves participate in conciliation meetings. Their role is to 'facilitate' an agreement, by providing a technical, legal and drafting expertise. In cases where the Commission is proactive and brings constructive proposals to the discussion, the Commission can be invaluable in helping to reach an agreement. According to Garman and Hilditch, it is also the case that where the Commission is passive, compromises are harder to achieve (Garman and Hilditch, 1998, 281).

Post-Decision Stage:

At the European level, the policy implementation phase is a complex matter, even though, fundamentally, implementation is the responsibility of the Commission. In practice, however, the Commission shares this responsibility in an intricate and complex manner with the administrations of the Member States. This sharing of responsibility, the interaction, cooperation and confrontation between Member State and Commission administrations in the process of policy implementation commonly takes place in 'comitology committees'. In most legal acts, these committees are set up by Council, or by Council and the EP to assist the Commission in implementing European law.

It is possible to distinguish between three different types of activities in this phase with regard to comitology:

Policy Implementation rule making: here the framework provisions of a Community legal act will be further specified and detailed in a regulation or decision that will be adopted by the Commission. Before the Commission can adopt implementing rules, it has to consult the comitology committee that has been set up by the original Council regulation.

Policy Application: occurs when steps have to be taken to apply a given programme or carry out a specific activity laid down in a Community legal act. Again, before the Commission can proceed it must consult the committee established in the legal act.

Policy Evaluation and Updating: after a certain policy or programme has been in force for some time, it is necessary to consider whether it has achieved its objectives or whether conditions have changed, requiring a change in policy. In the European Community, where many of the rules (directives, decisions and regulations) have been in force for 20 or 30 years, policy evaluation and updating becomes increasingly important. It is the Commission that has to make proposals about adjusting and updating existing regulations and directives. Again, before it can adopt these measures, it has to consult the committee set up in the original act (Schäfer, 2000).

The European Court of Justice is also involved in this phase of the policy process, as it can enforce compliance with EC law by member states, firms and individuals, and to ensure that EC law is applied in a uniform manner across the Community. The European Parliament can exercise political oversight and control of the Commission and the Council: it can dismiss the Commission as a whole and can ask parliamentary questions to Council of Ministers and Representatives of holders of the EU Presidency who then answer these questions either in written form or orally.

At this stage, the policy formulation process can start again since policy evaluation and updating are oftentimes indistinguishable from policy development. The Commission quite frequently uses comitology committees to discuss new ideas and concrete proposals for updating existing legislation as well as proposing new legislation. By and large, the Member State officials who represent their government in a specific comitology committee would do the same if a separate expert committee were set up. Using comitology committees as expert groups can thus increase

efficiency and save costs. Major updating requires a new proposal by the Commission, which will then have to be decided on by the legislative authorities.

Since the first implementation committees were established in 1962, when it became apparent that the Council itself could not make all the necessary rules to manage the common agricultural policy, the Commission has shared responsibility for policy implementation with the Council of Ministers. In its regulations, the Council transferred the responsibility to execute these general rules to the Commission, but at the same time establishing committees to assist and control the Commission in exercising this delegating responsibility – the so-called comitology system.[18] This comitology system has encouraged the Council to delegate powers to the Commission for the implementation of EC law since it now formally has the ability, with the approval of the Court, to supervise the Commission by way of committee procedures. At the same time, it must also be remembered that the Commission is dependent upon the national administrations of the member states to actually implement policy following the drafting of implementation rules. Of course, the Commission and the Court of Justice can intervene and adjudicate if these rules are not implemented by the member states.

The total number of comitology committees included in the Community budget has increased fivefold from 93 to 244 between 1975 and 2000.[19] Comitology committees are composed of representatives of the Member States, very often the same civil servants who had already advised the Commission in the policy development stage and represented their respective governments in the Council working party. The Commission chairs all the committees[20], sets the agenda, calls the meetings and writes

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[18] For a full account of the development of comitology since the 1960s see: Georg Haibach. 1999. 'Council Decision 1999/468 – A New Comitology Decision for the 21st Century!?' *Eipascope* 99:3.

[19] European Commission. 2001. *Report from the Commission on the working of the committees during 2000.* COM(2001)783 final.

[20] Council Decision 1999/468 simplified the comitology procedures somewhat. The different procedures developed by the comitology decision represent specific combinations of Commission autonomy and control by the member states, which in turn differ in their effects on the efficiency of implementation and on the balance between the collective and individual interests of member states. The advisory committee procedure emphasises efficiency and collective interests by merely requiring the Commission to consult member states. Not surprisingly, only subjects of minor political or economic importance to the member states are dealt with according to this procedure. In the case of the regulatory committee procedure (variant IIIa), more extensive consultation is required in order to gather a supporting qualified majority. This procedure gives great weight to the particular interests of

the protocols. In the words of one of the Commission officials interviewed for this study, this gives it 'significant informal power that cannot be underestimated' (Interview Official 6 DG INFSO, 26 September 2002). From the beginning, the European Parliament was critical of the emergence of the comitology system and has made repeated efforts to be included in the system.[21] Following the negotiation and agreement of Council Decision 1999/468/EC, in February 2000 the European Parliament and the Commission concluded an *Agreement on procedures for implementing Council Decision of 28 June 1999* which provided for the electronic transmission of implementing instruments to the European Parliament. Documents from the various Commission departments are first transmitted to the Secretariat-General, which dispatches them (mainly by electronic means) to a central service at the European Parliament. With Decision 1999/468/EC, the EP has been given the right to adopt a resolution (in plenary session), if it considers that the draft exceeds the implementing powers enshrined in the basic instrument. During 2000, the EP exercised its right of scrutiny on one occasion only.[22]

According to Dogan, with comitology, the Commission's powers of implementation are becoming increasingly subject to interference from national experts. Member states have proved to be particularly anxious to establish comitology in legislation that expends Union funds and in legislation enacted under conditions of majority voting (Dogan, 1997, 46). Yet, comitology committee influence has been found to depend on factors such as: the issue at stake, the type or character of a given policy area (regulatory, redistributive or programmatic), the legal basis (specifying the type of legislation allowed, the Council's voting rules and the decision-making procedures with regard to the European Parliament, the Council, the Economic and Social

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member states. The management procedure (IIIb) is ultimately the strongest form of control the member states can exert on the Commission.

[21] With the introduction of the co-decision procedure in Article 251 by the TEU, Parliament argued that comitology had become a joint responsibility between the Council and Parliament. Since Article 202, 3rd indent states that the Council shall 'confer on the Commission, in the *acts which the Council adopts*, powers for the implementation of the rules which the Council lays down, Parliament concluded that Article 202, 3rd indent and the Comitology Decision, based on it, are not applicable to acts adopted jointly by the Council and Parliament. This view, although convincing, was not shared by the Court, as can be seen from its judgement in *European Parliament v. Council* [European Parliament v. Council, Case No. C-259/95 [1997] ECR I-5303}. In this case, Parliament challenged Council Decision 95/184. The Court held that 'the reference to acts of the Council also embraces those which the Council has adopted jointly with the Parliament' (Türk, 2000, 223).

[22] In respect of the draft decision pursuant to *Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.*

Committee and the Committee of the Regions). According to Schäfer, although one of the most important functions of the committees is to control the Commission implementing activities and decisions, all the evidence assembled suggests that consensual procedures characterise their work. Of the many thousands of decisions that are submitted every year to comitology committees, very few are referred back to the Council for a decision (Schäfer, 2000).[23] For example, only six cases out of a total of 2,838 instruments (of which 1,789 related to DG Agriculture) were referred to the Council during 2000.[24]

3.4 Picturing Community Policy

The level of analysis used in this study encompasses what has been termed 'macro' and 'micro' levels. In other words, the levels of policy making analysed include the negotiation of the Union's legislative agenda between policy stakeholders, be it the European Commission, Parliament, member state executives and interest groups in specific domains or arenas of activity AND the negotiation of the precise details of a proposed policy activities which result in a specific legislative output (Peterson, 1999a, Peterson and Bomberg, 1999, Wallace, 2000, 70). Using both levels of analysis we are able to draw a number of conclusions as to the nature of policy making in each of the areas selected.

The conceptualisation of EU policy making outlined below offers us a visual means with which to portray policy making in the specific areas examined. It combines the insights gained from rationalist and institutionalist explanations of policy making. It is not intended, however, to be perceived as a theoretical approach or even a framework; it is put forward as a tool of representation that provides initial guidelines for the search for explanations of how policy (which can be defined as the intentional action by actors who are most interested in achieving specific outcomes) is developed and produced (Scharpf, 1997, 36-37).

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[23] Josef Falke in Schäfer, p.142 reports that in nearly 12,000 meetings of agricultural management and regulatory committees between 1971 and 1995, which took well over 50,000 decisions, only eight were unfavourable decisions where the committees rejected a Commission proposal by qualified majority.

[24] These six cases concern DG Agriculture (one case), DG Environment (one case) and DG Health and Consumer Protection (four cases). European Commission. 2001. *Report from the Commission on the working of the committees during 2000.* COM (2001) 783 final, 6.

One of the main criticisms of the historical institutionalist approach in portraying EU policy making is that it is too static; it is able to illuminate some of the picture of institutional negotiation but is not able to account for the triggers for policy initiation or change in the first place as it privileges institutions over actors. The actors who negotiate or bargain on specific issues or policy dilemmas primarily determine the policy results achieved. The representation put forward here is actor-centred as it assumes actors are central to the policy making process as they negotiate or bargain to produce policy. We assume that these actors are rational, that is, they have policy preferences and have resources with which they wish or may be able to use in order to achieve their preferred outcome in bargaining. But the actors in the EU's policy process do not bargain in a vacuum. They bargain within an institutionalist context. The decisions they make on policy are affected by European Union decision rules and *acquis communautaire*.[25] The representation of policy making outlined here holds that the process of policy making in specific domains is affected by three interacting mechanisms: first, and most importantly, the actor dynamic, i.e. the behaviour, resources and preferences of the policy actors who negotiate over policy problems or issues and who wish to produce a policy result; second, the institutional structure; and third, the institutional dynamic.[26] The policy result or level of policy making reached is the result of the differentiated interaction between these three factors. Liberal intergovernmentalism holds that the only factor that matters is the agreement between member states. Supranational governance privileges the interaction between certain actors, i.e. supranational institutions and transnational actors based on pressures created by transnational exchange.[27]

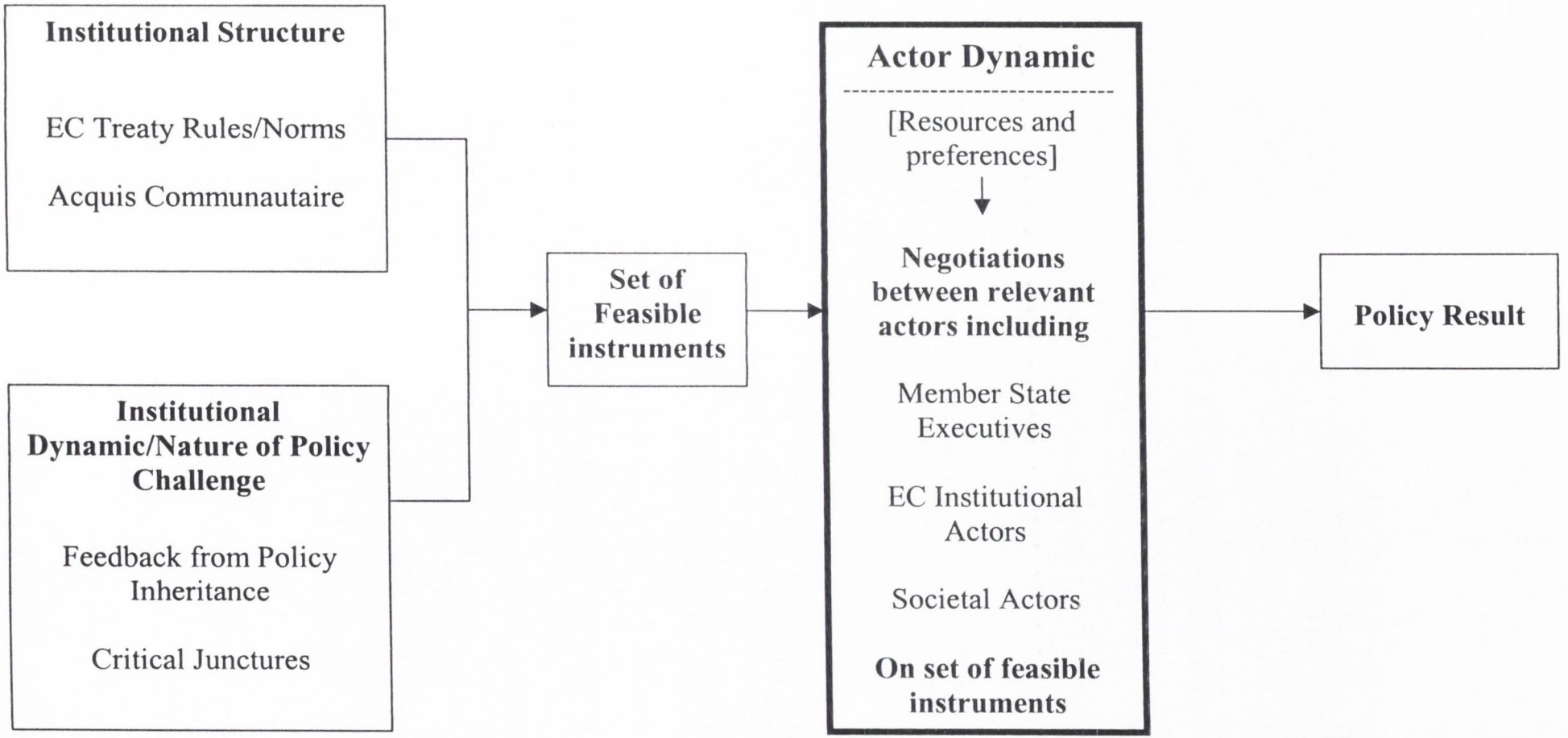
In response to a policy challenge, actors produce policy in any given area through negotiation. The policy actors, who they are, how they negotiate, their resources and preferences (the actor dynamic) are affected by the institutional structure and dynamic of the specific policy area. In other words, actors bargain on policy within a given institutional structure. The institutional structure includes EC treaty rules and norms and existing legislation – the *acquis communautaire*. Norms can be formally and

[25] Scharpf has defined the concept of institution as systems of rules that structure the courses of actions that a set of actors may choose. This definition includes not only formal legal rules that are sanctioned by the legal system but also social norms that actors will generally respect. Scharpf, 1997, 38.
[26] Also based on a representation or policy frame developed by Giorgio Natalicchi. 2001. *Wiring Europe. Reshaping the European Telecommunications Regime.* Rowman & Littlefield: Maryland.

constitutionally defined, such as subsidiarity, or consist of informal codes and procedures between actors. The rules of the Treaties define the basic functions of the policy actors and define the fundamental balances between them. In other words, rules govern the interplay between the institutional actors and within institutional actors, for example voting rules within the Council. Rules can specify how decisions are to be taken in negotiations. The Community *acquis* also structure the policy making arena and specify policy actors. Other non-institutionally specified actors can have either a formal or an informal input into negotiations, again depending on circumstances such as their influence on the national and transnational levels. The institutional dynamics are also important as they affect the nature of the policy challenge itself. These forces can have an acceleration or delaying effect on the need for policy. Depending on the convergence of favourable factors or opportunity structures, they can help move the process of policy making forward, e.g. trigger policy formulation, or they can privilege the status quo and prevent action. Challenges can include exogenous shocks or events, such as 'perceived crises' or important developments that originate inside the policy space of the European Union itself which may combine to produce the perception by actors that action is needed. This may then result in a juncture where critical or significant policy change occurs. The existing policy inheritance can also provide a policy challenge, i.e groups/certain actors may become convinced that the current rules as they are being applied need clarification, or extension to new or novel situations. Existing policy or legislation can also contain inbuilt revision mechanisms.

In sum, it is posited that the process of policy making in the first Community pillar of the EU can be described in the following way. Actors are at the centre of the EU's policy process. They negotiate over a set of policy instruments to achieve policy results. The resources they possess and the salience they attach to issues influence their behaviour in negotiation. However, who the relevant actors are, the feasible set of policy instruments on which they negotiate and the negotiating result itself are also influenced by the institutional structure and dynamic. The nature of policy result can differ depending on the interaction of these factors (see figure 3.2). The application of this tool of representation is one step in exposing the underlying mechanisms of policy making evolution in the cases selected.

Figure 3.2 – Picturing Community Policy



Chapter 4: Education Policy

4.1 Introduction

Education policy has been referred to as the 'poor relation' of EU policies (Interview, National Official, 18 July 2002). This case study examines the development and evolution of education policy at the EU level and will test the propositions outlined and explored in Chapter 2 against the evidence of its policy development. The chapter will proceed as follows. Section 4.2 traces the institutional evolution of EU education policy in broad terms, highlighting the critical junctures where education policy was pushed forward (or not) and the reasons behind this. Section 4.3 looks at the education policy making process in macro terms at each of the three stages, i.e. the making of education policy at each stage of the policy process over time is analysed and measured against the propositions developed by each of the theoretical frameworks in broad terms. Which of the two theories, if at all, comes close to providing the best picture of the process of policy making in education at each stage? Section 4.4 focuses on the micro level of analysis and applies the propositions to the three policy stages of the SOCRATES II programme in order to test their explanatory power. Finally, in the conclusion, the results gleaned from the analyses contained in sections 4.3 and 4.4 are reiterated and general conclusions as to the goodness of fit of the theories are drawn. In this way, the nature of education policy making can be visualised using the representation developed in Chapter 3.

4.2 Institutionalisation of Education Policy

The central aim of this section is to broadly trace the process of institutionalisation of education and training policy in the EU. Has the process led to the formation of a well-established policy competence in education? What constitutional norms frame the scope of education and training policy making? Do the developments in education and training policy simply represent the will of the Member States or is this an area in which the EU institutions have demonstrated an autonomy of action in the development of policy?

The 1957 Treaty of Rome did not refer to education, although it did address training. Since the prime objective of the Communities was economic training, the provisions

relating to education therefore dealt primarily with vocational training activities and even these provisions were weak. According to Field, 'the few phrases in the Treaty of Rome which referred to vocational training were little more than gestures, provoking neither objections nor enthusiasm. Initially, Community policy on education and training was largely symbolic' (Field, 1994, 17-18). Not until 1971 did the Education Ministers of the EEC start to meet as a group, while the first significant policy initiative on educational training came in February 1976. Up until the mid-1980s, the Commission appeared reluctant to encroach upon what was looked on traditionally as a national area of responsibility. Cooperation on education policy was stepped up following the negotiation and signature of the Single European Act and one of the first significant Community actions in the field of education proper was the 1987 Erasmus Decision (O.J. L166 of 25.6.1987). Another more significant qualitative step was taken with the coming into force of the Treaty on European Union in 1993, which accorded education and training a treaty base in the new Articles 126 and 127 (now 149 and 150 after the signature of the Treaty of Amsterdam).[1] Since the ratification of the TEU, education is 'constitutionally' recognised as a Community competence and policy-making has proceeded within the frame of the treaty competence. From this point until early 2000 marked a period of policy consolidation. A critical juncture in education policy occurred with the launch of the Lisbon Agenda in 2000, with its goal of creating the most competitive knowledge-based economy in the world. The Lisbon Agenda highlighted need for action at the European level in order to further support labour mobility and lifelong learning and meant that new modes of governance such as the Open Method of Coordination (OMC) have begun to be used to further the development of education policy in the EU. According to a Commission expert interviewed for this study, 'after the codification of education in the TEU (now articles 149 and 150), the open method of coordination is the next most important political declaration that sets future goals for education' (Interview, Commission Expert, DG EAC, 25 September 2002).

For ease of analysis, it is possible to divide the development of education policy in the EU into five historical phases of change (Shaw, 1999):

- Early days 1958-1971

[1] This new numbering will be used in later discussions in this chapter.

- Beginnings of activism 1971-1985
- Innovation 1985-1993
- Consolidation and emerging policy linkage 1993-2000
- Future evolution of EU policy in education: new modes of governance 2000-

Each of these phases will be reviewed and the general development of education policy institutionalisation will be traced in turn.

Early Days 1958-1971

As stated above, the original EEC Treaty did not refer directly to education; education as a distinct and separate policy area was excluded from Community competence when the EEC was established in 1958. However, training, as a form of education, was mentioned in the context of economic integration and the Treaty referred to the mutual recognition of diplomas in the context of the free movement of persons and the right of establishment (Article 57 EEC) and to the vocational training of workers and farmers in the context of EC social policy (Article 118 EEC). In addition, Article 128 (EEC) empowered the Council to lay down general principles for implementing a common vocational training policy contributing towards the harmonious development of national economies and the common market. It must be said that during this phase legislative output based on these articles was small. In 1963 the Council adopted a decision on the basis of Article 128 establishing general principles for implementing a common vocational training policy. Regulation 1612 of 1968 instrumentalised the right of free movement for workers and their families and guaranteed children of migrant workers the right to be admitted to the host state's general education, apprenticeship and vocational training courses under the same conditions as the nationals of that state. The EURYDICE network was also set up to facilitate an exchange of information. A number of directives addressing access to vocational training followed on from this in the 1970s. In sum, therefore, the treaty established the legal basis for a common policy on vocational training and piecemeal educational measures needed to ensure the free movement of workers but made no explicit provision for a common educational policy (Sprokkereef 1992, 342). It is fair to conclude that during this period, the level of institutionalisation of a European education policy was slight.

Beginnings of activism 1971-1985

From 1971 onwards, the Council adopted a seemingly more proactive approach to education policy, although it must be stressed that discussions on policy were generally not accompanied by concerted action of a deep nature and the level of institutionalisation was again negligible. In 1971 Education Ministers of the EEC met for the first time in a group to discuss policy. They stated in a Resolution that the organised activities concerning the right of establishment and vocational training provided for by the Rome Treaty 'should be supplemented by greater cooperation in the field of education as such' (Resolution of the Ministers of Education meeting within the Council of 16 November 1971 on cooperation in the field of education). This was followed by another resolution in 1974 on 'cooperation in the field of education' (OJ C98 of 20.08.1974) and it is important to stress that both resolutions were of a purely intergovernmental nature (Hermans, 1997, 20). What is significant about this period of early activism is that little by little, discussions on education took place at Council level and the Commission began to turn its attention in a more concerted fashion to the education field. In 1973, a former Belgian Minister of Education, Henri Janne, was invited by the Commission to consider a common education policy. Professor Janne was charged to formulate the first principles of an education policy at Community level.[2] The Janne Report called for a European education policy but stressed the informal norm that was to operate regarding Education policy and continues to operate: 'It is advisable to scrupulously respect national structures and traditions where education is concerned'. The report proposed that an Education Committee would be established to look at initiatives in this policy sphere comprised of representatives of the member states. In essence, for the first time, the document claimed an EC mandate in the field of education. Following the Council Resolution of 1974, the Education Committee Council Working Group was established. In the field of training, in 1975 the Council set up CEDEFOP, the European Centre for the Development of Vocational Training, which was to have a coordinating and supportive role in relation to vocational training policy. The first significant policy initiative on education on behalf of the Council *per se* came in February 1976 with the First Education Action Programme (Council OJ No C 38, 9 February 1976).

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[2] EC Bulletin Supplement 10/1973 *For a Community policy on Education.*

The broad lines of EC interest in education in this period, and indeed for the next thirty years, can be summarised by the six fields of action identified in the Action Programme:

- developing the educational dimension of social policy generally by seeking better facilities for the education and training of nationals and the children of nationals of Member States of the Communities and of non-member countries;
- the promotion of closer relations between educational systems in Europe;
- the compilation of up-to-date documentation and statistics on education;
- increased cooperation specifically in the field of higher education, and especially increased possibilities for the mutual recognition of diplomas and academic qualifications;
- the achievement of equality of opportunity in relation to free access to all forms of education (Council OJ No C 38 1976; Shaw, 1999, 561).

In 1980, the Education Committee reported back to the Council on the outcomes of the first action programme. Action by the Council in solidifying and structuring the 1976 Programme, however, tended to be superficial (apart from measures dealing with recognition of qualifications) and no real desire was evident among the member states to make good their resolutions with concrete legislative proposals. The Action Programme was an example of a 'mixed resolution' (Hermans, 1997, 20), which can be defined as a non-binding act of a political nature, emanating from the Council, and requiring common agreement from the members of the Council. The Action Programme could be seen as a declaration of intent expressing the political will of both the Ministers of Education and the Council as a whole but not in any way binding. However, the Commission and the Court were more proactive in this sphere in terms of policy entrepreneurship and threw their weight behind a more extensive interpretation of the term 'vocational' as a means of spurring action in the education area. The Commission did this by basing its proposals for various types of educational programmes on Article 235 and/or Article 128. The former allowed the Council to take the appropriate legislative measures to attain an EC objective, even if the treaty has not provided the necessary powers. The Court, for its part, ruled in favour of the use of these provisions in a number of landmark decisions (such as *Casagrande* and the *Gravier* case on migrant students – see section 4.3), thus elevating education to one of the EC's informal objectives while at the same time sanctioning a broad interpretation of Article 128 (Sprokkereef, 1992).

Within the Commission itself, education and training as a policy-making area obtained more institutional status in the early 1980s. In 1982 it was moved from Directorate General (DG) XII (Science, Research and Development) – where it was said to have had a Cinderella existence (Field, 1994, 17) to DGV, which became the DG for Employment, Social Affairs and Education. This move also marked an increased emphasis on a more functional approach to European education instead of viewing education in the context of its academic qualities. As will be seen in the period 1985-1993, faced with deep economic crisis and high levels of employment, the employment-related goals of education policy assumed a greater degree of relevance (Moschonas, 1998, 81). Finally, the Commission also gained more practical experience of supporting vocational training as part of the EC's regional and social policies, particularly through the mechanisms offered by the European Social Fund. An initial step in facilitating the mutual recognition of qualifications was also taken with the establishment of the Network of National Academic Recognition Information Centres (NARICs) by the Commission in 1984. These centres provided and continue to provide advice and information on the academic recognition of diplomas and periods of study undertaken abroad.

Innovation 1985-1993

While the Single European Act considerably widened the scope of Community competence in many fields, it made no provision for additional or changed powers or policy making processes in relation to either education or vocational training. However, following its signature a period of innovation occurred in the education sphere. It is important to note that heretofore policy innovation or proposed innovation in the area of education was targeted primarily at one level of education – higher or third level. Any action in the primary and post-primary levels of education was not attempted at this stage of education policy development. The first significant Community action in the field of education was the 1987 Erasmus Decision (OJ L166 of 25.6.1987).

Erasmus 'organised' the mobility of students through the institutionalisation of inter-University cooperation programmes. According to Shaw, it is widely accepted that the direct impetus in the Council leading to the adoption of the Commission's proposal for the Erasmus scheme was to be found in the fear that 'disorganised'

movement on the basis of the rights established by the Court in *Gravier* and subsequent cases could be costly to many member states (with more generously funded educational schemes and more open systems) and would represent an undesirable outcome (Shaw, 1999, 564). In formal terms, the origins of the Erasmus Decision can be found over ten years earlier in the 1976 action programme and a later set of conclusions reached by the Council and Ministers of Education in 1985 when they welcomed the Commission's intention to submit a proposal on interuniversity co-operation. The Commission used Article 128 as the legal basis for the decision. This was changed by the Council which added Article 235 EEC as an additional legal basis, reasoning that some of the activities proposed under the programme went beyond the powers conferred upon the Council under Article 128 and that the subject matter – which included non-vocational subjects and cooperation in relation to research – likewise exceeded the scope of vocational training. The dispute went to the Court of Justice and the Court largely found for the Commission.[3] This decision meant that the Commission was allowed to use Article 128, dealing with vocational training, as a possible means of introducing policy cooperation in the educational sphere – a critical innovation and instance of policy entrepreneurship on behalf of the Commission. Erasmus was followed by a proliferation of new Community programmes (nine in all) cutting across the vocational training/education/youth policy divides. One of the new programmes, LINGUA, on language teaching in schools caused controversy among the member state executives and its proposals were greatly watered down in response to opposition from the UK (Sherrington, 2000). Another programme, TEMPUS, was established in 1990 (renewed subsequently on three occasions) and responded to the needs for Higher Education Reform in Central and Eastern European countries following the fall of the Berlin Wall in 1989.[4] According to MacMahon, however, there was little systematisation among these programmes and most were relatively small in scale (MacMahon, 1995; Shaw, 1999, 567).

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[3] The Court concluded that only the research aspects of the Decision necessitated the addition of Article 235, for the rest it gave a wide interpretation of the scope of Article 128 EEC.

[4] Tempus I 1990-1993. Tempus encourages higher education institutions in EU member states and partner countries to engage in structured cooperation through the establishment of 'consortia' and the implementation of Joint European Projects. Individual mobility grants are also available for those working within higher education institutions. Tempus was extended to western Balkan countries, other partner states in Eastern Europe and Central Asia and Mediterranean states such as Morocco, Algeria and Tunisia.

In terms of creating new institutions to deal with this programme innovation, an independent Task Force for Human Relations, Education, Training and Youth was created in 1988 within DG V (Social Affairs) of the Commission and this became a fully-fledged Directorate General in 1993. The relaunch and growth of structural funds, including increased funds for vocational training through the European Social Fund, together with a steady stream of policy documents and position papers by the Commission on education policy, increased awareness of educational matters at Community level.

The period 1985 to 1993 also saw the Commission and the Community turn to a second issue that was linked to the freedom of movement of workers – the recognition of educational qualifications across borders. Earlier piecemeal approaches to educational and professional recognition focussed explicitly on a number of professions (especially the medical profession) and certain trades. The growth in the number of cases before the European Court of Justice dealing with this issue meant that more concerted and uniform action was necessary. Political will was lacking for the first option originally proposed – the recognition of diplomas through harmonisation. It was recognised that required elements of the study programmes to be harmonised would necessitate major changes in national educational policies and the desire by member state executives for such changes was manifestly absent. With the directive on architects (Council Directive 85/384 of 10 June 1985), a new approach was introduced by the Commission. This approach was based on mutual trust or recognition, rather than the harmonisation of curricula. This led finally to the 1988 directive on a general system for the recognition of higher education diplomas (Council Directive 89/48 of 21 December 1988, OJ L 1989 19/16) and the 1992 directive establishing a second general system for the recognition of professional education and training (Council Decision 92/51/EEC of 24 July 1992, OJ L 1992 209/25). The system established by the first directive in essence *assumed* compatibility of all diplomas obtained after at least three years of study. The second system, which complemented the first by including a wider range of professional activities which cannot be pursued without a certain level of education and training, was based on the same principles and set the same restrictions, such as an aptitude test and an adaptation period (Sprokkereef, 1992, 343).

Other instruments aimed at transparency of qualifications included the European Credit Transfer System (ECTS) introduced by the Commission as a common basis for recognising students' study periods abroad. A pilot ECTS was initially established under the Erasmus programme in 1988 (until 1995) and operated in 145 higher education institutions covering five subject areas: Business Administration, Chemistry, History, Mechanical Engineering and Medicine.[5]

The more activist stance of the European Commission in particular towards education policy, and the obvious misfit between the practice of policy making in both the education and vocational training fields and the available institutional resources in the Treaty (i.e. the absence of specific legal bases) meant that unlike the during the negotiations of the SEA, it was necessary to address the need for a treaty base at the Maastricht Inter-Governmental Conference in 1991. The Treaty on European Union institutionalised the EU's education competence and gave it a treaty base for the first time.

Consolidation and emerging policy linkage 1993-2000

Since the ratification of the TEU, education is 'constitutionally' recognised as a Community competence. Article 3(p) of the original Treaty now mentions 'a contribution to education and training of quality' as one of the tasks of the European Community and title VIII of Chapter 3 (TEU) was devoted to education, vocational training and youth (Articles 126-127; now 149-150 following the consolidation of the Treaties after the signature and ratification of the Treaty of Amsterdam in 1997). Both provisions outline the purposes of Community action in those fields and have been seen by some commentators (Shaw, 1999, 572-3; De Groof and Friess, 1997, 12) as a reassertion of member state control over the policy area. According to Shaw: 'the Member States could hardly have written a more trenchant defence of their national sovereignty in this field without an explicit refutation of any Community competence to act at all' (Shaw, 1999, 572).

[5] In the next phase, the ECTS pilot scheme was broadened to include a wider range of subject areas and participating institutions. In 1997-1998 alone, 772 new institutions applied for the introduction of the ECTS. Source: http://europa.eu.int/comm/education/socrates/ects.html. 6 August 2002.

The containment of Community action imposed by the principle of subsidiarity is repeated explicitly in Article 149 (ex 126) and 150 (ex 127) for the areas of education and training. The Member States remain 'exclusively competent' in these areas and do not confer any task to the Community other than assisting them in facilitating mutual contact and in encouraging cooperation. Article 149(1) (ex 126) lays down the general objective of Community action in the field of education ('to contribute to the development of quality education') and empowers the Community to 'encourage cooperation between Member States' and 'if necessary, by supporting and supplementing their action'. The restrictive and even negative attribution of powers is defined in the second half of the same paragraph where it is stated that the Community is committed to 'fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity'.

Article 149(2) (ex 126) enumerates six specific objectives of Community action:

- developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States;
- encouraging the mobility of students and teachers, inter alia by encouraging the academic recognition of diplomas and periods of study;
- promoting cooperation between educational establishments;
- developing exchanges of information and experience on issues common to the education systems of the Member States;
- encouraging the development of youth exchanges and of exchanges of socio-educational instructors;
- encouraging the development of distance education.

The six objectives of Community action echo the objectives contained in the Action Programme on Education first agreed in 1976. One national official interviewed for this thesis commented that Articles 149 and 150 are legally quite weak and have helped militate against concrete action (Interview National Official, 18 July 2002). Indeed, according to Article 149(4) (ex 126), any explicit 'harmonisation of the laws and regulations of the Member States' is to be excluded and incentive measures to be adopted must be adopted on the basis of Article 251, i.e. codecision with the European Parliament and by qualified majority voting. While the Commission's room for manoeuvre in proposing education provisions that might be harmonising in

intent is tightly circumscribed by the Treaty provisions, the specification of codecision for the adoption of educational measures opened a window of opportunity for the participation of the European Parliament in particular in the limited policy-making and decision-taking that does take place in education.

Article 150 (ex 127) follows the same organisational structure as Article 149. In the first paragraph, the Community is empowered to 'implement a vocational training policy', which is different from the 'incentive measures' mentioned under Article 149. Nevertheless, even if the word 'policy' is used in Article 150, the limitations imposed constitutionally are similar to the ones elaborated under Article 149, in that the vocational training policy 'shall support and supplement the action of the Member States, while fully respecting the responsibility of the Member States for the content and organisation of vocational training'. Article 150(2) enumerates five objectives of Community action. Until the signature of the Treaty of Amsterdam, the decision making procedure to adopt incentive measures in vocational policy was the cooperation procedure, instead of co-decision (ex Article 127(4)), implying a more limited role for the European Parliament in vocational training until the Treaty of Amsterdam.

The protective articles that form the treaty base for policy making in the field of education point to and underline the over-riding norm of subsidiarity in operation. As one national official interviewed for this study commented: 'subsidiarity rules' (Interview, National Official, 18 July 2002). The Community's obligation to fully respect responsibility of the Member States for the content of teaching and the organisation of education systems (Article 149) and the exclusion of any harmonisation of national legislation (Articles 149 and 150, 4) as specified in the treaties make this clear. A second norm that becomes evident in this policy area from 1993 onwards is the utilitarian approach adopted towards education and training conducive to the 'good' functioning of the common market. Member states have perceived a causal relationship between the quality and level of their national education and training provision and the efficiency of their economies. Similarly, therefore, at the European level, measures adopted in education and training have had the primary aim of maximising the performance of the labour force in an integrated labour market (Moschonas, 1998, 77).

The amendments contained within the Treaty on European Union in 1993 marked a new phase of consolidation in education policy at EU level. By 1993, the fields of education and vocational training had acquired the conventional signs and symbols of other EU policies, such as that of the Environment. In terms of the establishment of new institutional structures, the Task Force on Human Resources, Education, Training and Youth attached to DG V was superseded by the creation of a separate Directorate General for Education, Training and Youth (DG XXII).[6] Following the Treaty ratification, two legislative instruments were adopted on the basis of the new Treaty provisions consolidating the existing action programmes and opening up limited new lines of action, under two umbrella frameworks: SOCRATES (in the field of education and incorporating Erasmus) and LEONARDO (in the field of vocational training)[7]. These covered the period 1995-1999 and have been renewed until 2006. SOCRATES in particular will be dealt with in Section 4.4. In 2000, a third framework action was consolidated on the basis of Article 149 (ex 126) – the Youth exchange programme (encompassing the 'Youth for Europe' programme and the European Voluntary Service programme). Overall, these programmes represented the consolidation of existing practice, although within the SOCRATES programme in particular new areas of innovation (albeit it to a small degree) at levels of education other than higher education were included, i.e. open and distance learning and the reinforcement of school cooperation in the Comenius programme. In addition, although the financial amounts allocated to the three programmes were small in terms of the overall EU budget, considerable inter-institutional conflict and wrangling took place in 1995 (and again in 1999-2000) between the Council of the EU and the European Parliament, with the Commission holding the middle ground in terms of the level funding allocated to each of the programmes. This conjunction of this inter-institutional conflict and the increased power for the EP under codecision must be acknowledged.

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[6] Now Directorate General for Education and Culture, DG EAC.

[7] Leonardo da Vinci programme supports the promotion of projects in the context of transnational partnerships, which involve different organisations with an interest in training. The first programme was adopted by the Commission in 1994. The first programme had a total budget of 620 million ECU for the five years and was open to the 15 Member States, the 3 States of the European Economic Space and progressively to Cyprus, the Czech Republic, Estonia, Hungary, Lithuania, Latvia, Romania, Poland and the Slovak Republic. The adoption of the Leonardo da Vinci programme also represented a rationalisation of Community action in the area of vocational training, providing the basis to enhance the value of the acquis. Leonardo da Vinci facilitated the taking forward of initiatives successfully developed under COMETT, PETRA, FORCE, LINGUA and EUROTECNET and added new dimensions.

Given its circumscribed room for action, the Commission has also concentrated its efforts on improving the evaluation of the programmes named above, in particular in light of forthcoming European enlargement to Central and Eastern European countries, Cyprus and Malta (who are now full participants in SOCRATES and Leonardo programmes) for example. Cooperation and consultation with national implementing agencies, the social partners (Union of Industrial and Employers' Confederation of Europe (UNICE) and European Trades Union Confederation (ETUC) in particular) and civil society organisations (NGOs) has been stepped up by the Commission. The European Training Foundation was set up in 1995 to assist and support its partner countries (over 40) in reforming and modernising their vocational education systems. The Training Foundation also provides technical assistance to the Tempus programme. Developments with regard to the global economy and the increasing importance of information and communication technologies (ICT) in maintaining European economic competitiveness have also had an impact on the development of the education policy agenda by the Commission and subsequently the Council, although the degree of impact will be more explicitly assessed in the next section. Education has been increasingly linked with other sectors such as the emerging employment policy, policies on social exclusion, research, industrial policy, and policy on the information society including Trans-European networks. Two key concepts assumed greater importance in the late 1990s: the knowledge society and lifelong learning took over as a key focus for the European Commission in particular with regard to its policy proposals and discussion documents produced.

The 1993 Delors White Paper on Growth, Competitiveness and Employment made a clear link between education and training and maintaining competitiveness.[8] The European Commission seized upon this link and the possibility of moving the agenda forward. In the period 1993-2000, it honed its methods of using Green Papers, White Papers, and other consultation documents to bring new ideas or combinations of concerns to the fore (e.g. the linking of knowledge, competitiveness and education/training) (Shaw, 1999, 590).

[8] *Growth, Competitiveness, Employment. The Challenges and Ways Forward into the 21st Century.* Bulletin. EC Supp. 6-93.

A number of policy documents reflecting the ideas of a European knowledge society and area of lifelong learning were produced by the Commission, including the 1995 White Paper on 'Teaching and Learning: Towards the learning society'[9], the 1996 Green Paper on obstacles to transnational mobility, and the 1997 Communication Towards a Europe of Knowledge. 1996 was designated as the European Year of Lifelong Learning. In the 1997 Communication, the Commission set out guidelines for future Community action in the areas of education, training and youth for the period 2000-20006.[10] In December 1999, the Commission adopted another Communication, '*e*Europe: An information society for all' (COM (1999) 687 final) which contained a number of objectives and guidelines to encourage increased use of the internet as a communication technology in schools and universities to allow young people access to the information society. However, it must be acknowledged that concrete policy actions emanating from the plethora of Commission discussion documents of this nature were small. The actual policy outcomes (or legislative outputs) continued for the most part to be minimal. In fact, it is fair to characterise this period of the development of education policy as being marked by a number of well-meaning resolutions but without real progress being made in terms of tangible legislative proposals, until the Lisbon European Council Summit of 2000. The legislative proposals made and acted upon in this period consisted primarily of decisions (e.g. establishing SOCRATES, LEONARDO and YOUTH Programmes), recommendations, resolutions, communications, objectives and guidelines for future action and not directives.

Future evolution of EU policy in education: new modes of governance 2000-

The Lisbon Agenda, a strategy outlined at the Lisbon European Council Summit of March 2000, represents the response of the member states and Commission to the challenges posed by the knowledge-driven economy, globalisation and the enlargement of the EU and could possibly have the potential to provide a new impetus to the policy making in education. At Lisbon, the European Council acknowledged the EU was confronted with 'a quantum shift resulting from globalisation and the knowledge-driven economy' and agreed a strategic target: to become the most

[9] *Commission White Paper on Education and Training: Teaching and Learning – Towards the Learning Society*, COM (95) 590.

[10] The aim was to build up an open and dynamic 'European education area'.

competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion by 2010. The Education Council received a mandate under the Lisbon Agenda 'to undertake a general reflection on concrete future objectives of education systems, focusing on common concerns and priorities while respecting national diversity with a view to contributing to the Luxembourg and Cardiff processes,[11] and presenting a broader report to the European Council in the Spring of 2001' (Lisbon Presidency Conclusions, No.27). As part of the Lisbon process, the Commission's Synthesis Report forwarded to the Barcelona European Council in March 2002 acknowledged that policy advances in education and training cooperation have a decisive contribution to make to the success of the Lisbon strategy. Policy cooperation in education and training through this process focuses on the following three strategic objectives, which are broken down into 13 associated objectives:

- improving the quality and effectiveness of education and training systems in the EU;
- facilitating the access of all to education and training systems;
- opening-up education and training systems to the wider world.

In order to achieve these objectives by 2010, EU actors must draw on policy cooperation using the Open Method of Coordination, 'in order to enhance the value added of European action' in accordance with Articles 149 and 150 of the Treaty.[12]

The Open Method of Coordination was defined in the Lisbon Council Conclusions as: 'a means of spreading best practice and achieving greater convergence towards the main EU goals and a *fully decentralised approach* using variable forms of *partnerships* and designed *to help Member States to develop their own policies* progressively' (my emphasis). OMC is based on the identification of shared concerns and objectives, the spreading of good practice and the measurement of progress through agreed instruments such as indicators and benchmarks, as well as periodic monitoring, evaluation and peer review with a view to comparing achievements both between European countries and with the rest of the world.

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[11] Other examples of open policy coordination processes in employment and structural policies.

[12] European Commission and Council. *Detailed work programme on the follow-up of the objectives of education and training systems in Europe*. Brussels, 20 February 2002. Following the mandate given by the European Council at its Stockholm meeting in March 2001, the Council and the Commission at the meeting of the Council of 14 February 2002 adopted this detailed work programme for submission to the European Council in Barcelona, 15 and 16 March 2002.

The Report on the concrete future objectives of the education and training systems adopted by the Education Council of 12 February 2001 represented the first attempt to define strategic objectives with regard to education and training. The Stockholm European Council of March 2001 re-emphasised the importance of education and training - 'a knowledge based economy necessitates a strong general education in order to further support labour mobility and lifelong learning' – and subsequently mandated the Council and the Commission to 'present a report to the Spring European Council in 2002 (Barcelona) containing a detailed work programme on the follow-up of the objectives of education and training systems including an assessment of their achievement in the framework of the open method of coordination and in a worldwide perspective'.[13]

An important question that must be answered over time is: does the Lisbon agenda and the use of the open method of coordination in education policy have the potential to herald a new phase of education policy innovation and deeper institutionalisation? Together, the Council and the Commission have requested that the establishment of an Education and Training Area now be explicitly recognised as a key priority domain

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[13] The Detailed Work Programme jointly adopted by the Council and the Commission on 14 February 2002 set out the key issues that needed to be addressed in order to achieve the three key strategic objectives and their 13 associated objectives. It addressed various elements and levels of education and training, from basic skills to vocational and higher education having particular regard to the principle of lifelong learning and set out the way in which progress should be achieved, i.e. by applying the Open Method of Coordination to education and training in accordance with Articles 149 and 150 of the Treaty.

In 2001 the first stage of follow-up work began with the establishment by the Commission of three working groups with the aim of contributing to the implementation of the open method of coordination with respect to three of the associated objectives of the Report:

1. The area of basic skills (objective 1.2)
2. Information and communication technologies (objective 1.3)
3. Mathematics, science and technology (objective 1.4).

One of the central tasks of these three working groups is to determine indicators for measuring progress, i.e. benchmarks. For example, in the area of basic skills, indicators may include literacy attainment levels, numeracy attainment levels, people completing secondary education and percentage of adults with less than upper secondary education who have participated in any form of adult education. The member state representatives within the working groups must also agree upon both qualitative and quantitative measures of these indicators.

According to the Detailed Work Programme, work for all objectives should have started by 2004. In the second stage of the programme, work on 5 areas was scheduled to begin during the first half of 2002: (1) improving education and training for teachers and trainers (objective 1.1); (2) making the best use of resources (objective 1.5); (3) supporting active citizenship, equal opportunities and social cohesion (objective 2.3); (4) increasing mobility and exchange (objective 3.4); (5) strengthening European cooperation (objective 3.5). As part of stage 3, work on the remaining objectives is to begin during 2002 or 2003. By the end of 2002, the first results concerning the indicators and, where appropriate, benchmarks for stage 1 were available. The first results for stage 2 will be available mid-2003 and for stage 3 by the end of 2003. Peer reviews will be launched as requested by Member States. A review of progress achieved will be submitted to the Spring European Council of 2004.

in the Lisbon strategy. However, what concrete action has followed this call? So far, lifelong learning has received a large degree of attention as a horizontal issue necessitating coordination, in the Commission between DG Education and Culture and DG Employment and Social Affairs. The Feira European Council of June 2000 asked the Member States, the Council and the Commission, within their areas of competence, to 'identify coherent strategies and practical measures with a view to fostering lifelong learning for all'. Several actions in progress at the Community level have been identified as part of the process of lifelong learning development. These include the work programme on the future objectives of education systems, the European employment strategy, the European social agenda, the action plan on skills and mobility, and the *e*Learning action plan on speeding up the use of the new information and communication technologies in teaching. These various plans and initiatives supplement the national strategies which will be introduced or developed applying the principles adopted the Commission's Communication of November 2001, 'Making a European Area of Lifelong Learning a Reality.[14]

The Commission Communication highlights the difficulty in conceptualising and getting a fix on OMC as a new mode of governance and points to the conclusion that OMC will not bring with it a deeper institutionalisation of education policy. The use of OMC or variants of OMC in spurring policy action is not unprecedented. Coordination has been present in the Treaty since 1958 where member states promised to coordinate their economic policies (Hodson and Maher, 2001, 720). The 1976 Action Programme can also be viewed as an early manifestation of OMC. The difference now is that a commitment has been made to achieve the objectives within a specified time frame. The question, therefore, is whether the open method may lead to the formal reassignment of policy powers from the national to the EU level or whether it is a long-lasting alternative to the traditional EU model or community method and a means for member state executives to continue steering the process of policy cooperation (as opposed to integration) (Hodson and Maher, 2001, 739)? Is it a transitional mechanism or a stable mode of governance in its own right? Or is it merely a device used by member state executives in order to be seen to be acting in a specific policy area, without actually committing to binding integration?

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[14] Communication from the Commission. *Making a European Area of Lifelong Learning a Reality.* COM (2001) 678 final. November 2001.

With regard to education and lifelong learning in particular, the Council has assumed a key role in relation to coordinating OMC processes, that is to say, in determining the system design, timetabling and policy objectives. The Commission's role in this process is weak, in that it is confined to monitoring and analysing the follow-up of objectives (through the production of an annual synthesis report) and serving as a secretariat to the process by providing intellectual resources. In the words of a Commission expert, 'with OMC, the Commission becomes a permanent observatory and recommendation centre' (Interview, Commission Expert DG EAC, 25 September 2002). Under OMC the Commission can trigger a number of procedures, but, as Hodson and Maher point out, this trigger is a blunt instrument– a recommendation and not a proposal - and hence can be modified by qualified majority voting in Council rather than by unanimity (Hodson and Maher, 2001, 729). In its 2001 Communication on Lifelong Learning, the Commission recognised that the Lisbon process does not imply a new process, nor can it involve the harmonisation of laws and regulations: 'rather, it calls for a more coherent and economical use of existing instruments and resources, including through the use of the open method of coordination' (Communication, 2001, 3). The European Parliament is also marginalised by the OMC method – it currently has no mandate under this process. Even at Council level, progress in the area of education and lifelong learning under OMC has been slow – while agreement has been made on the types of indicators to be used to measure basic skills in education in order to carry out benchmarking,[15] agreement by member state executive representatives on the levels of each of these indicators proved difficult but was reached in November 2002.[16] This leads to the conclusion that OMC is less of a transition mechanism to more deeply institutionalised legislation and policy making (as with the conventional Community method), but more of a means for member state executives to drive, control and even

[15] Foundation skills of reading, writing and mathematics, IT skills, foreign languages.

[16] By 2010, all member states should at least halve the rate of early school leavers, in reference to the rate recorded in the year 2000, in order to achieve an EU-average rate of 9 per cent or less. By 2010, all member states will have at least halved the level of gender imbalance among graduates in mathematics, science and technology, whilst securing an overall significant increase of the total number of graduates compared to the year 2000. By 2010, member states should ensure that the average percentage of 25-59 year olds in the EU with at least upper secondary education reaches 80 per cent or more. By 2010, the percentage of low-achieving 15 year olds in reading, mathematical and scientific literacy will be at least halved in each member state. By 2010, the EU average level of participation in lifelong learning should be at least 15 per cent of the adult working age population (25-64 age group) and in no country should it be lower than 10 per cent.

possibly limit the process of cooperation in newer policy areas such as education, where the national prerogative remains paramount.

The evolution of education policy – the preliminary balance sheet

An EU policy competence in education has been established but as this analysis has shown, it appears to be relatively weak. The language of policy making in this sphere is weak. Policy proposals and legislation are replete with terms such as cooperation (as opposed to integration and harmonisation), resolutions, future objectives, guidelines and communications. The fact that Member State executives control the timing and scope of policy action and supranational institutions such as the Commission and European Parliament are carefully circumscribed in their room for manoeuvre by the institutional provisions of the Treaties and the existing *acquis* lead us to predict that liberal intergovernmentalism might provide a better picture of the policy making process in education. In the period 1985 to 1993, EU institutions, in particular the Commission, endeavoured to carve up some autonomy of action in the development of policy but this entrepreneurship has been curbed and restrained by the Council. The strength of the norm of subsidiarity and the development of education as a cross-cutting issue as part of OMC point to the preliminary conclusion, at this stage of the analysis, that developments in education on the whole represent the will of the Member State executives. The European Commission in particular seems reluctant to push the agenda forward beyond the bounds of the parameters set by the Council. According to a DG EAC official interviewed for this study:

> The Commission itself is limited in what it can achieve. It is mainly there to develop messages that might help national systems, not to change national systems. The role of the education programmes is to send policy messages to the member states. The Commission can't change the world (Interview, DG EAC Official 2, 26 September 2002).

Section 4.3 turns to the more explicit and systematic examination of the theoretical propositions and assumptions alluded to in this section but not yet tackled explicitly.

4.3 Education from pre-negotiation to post-decision

Which of the two theories, if at all, provides the best picture of the process of policy making in education? In this section, the data collected (the policy evidence as it were) with regard to each stage of the process of education policy formulation, e.g. pre-negotiation, negotiation and post-decision, will be examined systematically using the propositions developed. In order to evaluate the relative merits of the respective propositions of liberal intergovernmentalism and supranational governance, we must also turn to the observable implications of these theories.

Pre-negotiation

According to the tenets of liberal intergovernmentalism outlined in Chapters 1 and 2, at this stage of the policy process it is posited that the Commission only proposes legislation that conforms to the wishes of the rationally-acting member state executives, based on domestic economic interest, and who cooperate in order to solve a collective action problem. It follows that in the light of Moravcsik's theory we would expect to see education policy proposals emerging from the Commission solely in response to calls from the member state executives for action, and that these calls are inspired by utilitarian economic motivations. The content of the proposals themselves would mirror the policy preferences of the member state executives (larger member state executives in particular). To put it another way, if member state executives do not push for innovative and deep education policies at the EU level through harmonisation of education systems, these types of proposals will not be made by the Commission as initiator of policy.

Supranational governance, on the other hand, puts forward the proposition that the impetus for policy proposals in the sphere of education emanates from rising transnational exchange and can also be triggered by spill-over from other policy sectors or existing decisions. For this to be true, we would expect to see transnational exchange - in this policy area meaning the development of European groups, networks and associations - pushing member state executives to substitute supranational harmonisation rules for national harmonisation as the cost of maintaining national rules rises. The Commission in particular would propose policies that capitalise on this desire and that reflect the ideas of the European groups to push policy-making at the EU level forward. In addition, we would expect existing

European rules and actions, such as through treaty provisions if applicable, secondary legislation in other areas and the ECJ's case law as circumstances allow – to generate a dynamic for action that leads to possible further action. In this way, proposals are brought forward not in response to member state executive wishes but to the exigencies and changes in the existing policy-making environment.

As can be seen in section 4.2, the early, piecemeal moves by the EC in education in the late 1960s and early 1970s were prompted by the desire to improve academic excellence in Europe, based on cooperation between education systems and the sharing of information among education systems. In the 1973 Janne Report, the Commission's main ideas for initiatives in education were formulated along these lines. However, progress in achieving these objectives was painfully slow, as the limited policy output record shows, due to the reluctance of the member states to cooperate in the sphere of education. The report itself categorically recognised this lack of interest in harmonisation at a European level among the member states when it acknowledged that the national structures and traditions where education is concerned must be scrupulously respected (MacMahon, 1995, 4). Following the 1976 Action Programme, the Commission did not put forward concrete proposals (apart from the mutual recognition of qualifications – see below) but instead set up a scheme grants to support short study visits by teaching, research and administrative staff to other member states in 1977 (MacMahon, 1995, 22). In the next few years the Council made a number of resolutions calling for action in the education sphere, in particular in relation to inter-university cooperation (e.g. in the Stuttgart Declaration of 1983, as well as the Adonnino Report on a People's Europe of 1985). However, such resolutions did not result in specific policy proposals in the form of draft legislation until the Commission was asked by the Council to submit proposals to intensify existing cooperation between higher education institutions in the Community by the end of 1985. It is thus possible to conclude that the liberal intergovernmentalist proposition at this stage of the process holds true, i.e. the type of legislation or policy proposals put forward by the Commission conformed to the wishes of the member state executives at the time. Concrete legislative policy proposals were proposed in 1985 and onwards with the Erasmus decision (the motivations for that decision will be discussed below), when member state executives began to make the link between

educational competence and economic performance and at a time of economic downturn.

Following the Erasmus decision, however, and the establishment of institutional acquis that came with it and the other eight programmes agreed by the member states, the dominance of member states in the pre-negotiation stage lessened to a degree as the Commission in particular gained a certain foothold in the policy making process. As a consequence of these decisions, the European Commission and Parliament were given some competences in the negotiation and implementation of legislation. This also coincided with an upgrading of the standing of education in the Commission itself with the creation of the Task Force for Human Relations, Education, Training and Youth in 1988 in DG V (Social Affairs). The Commission also became more proactive in producing policy proposals that did not necessarily correspond with the lowest common denominator of policy preferences at this point. Indeed, if the Commission was to take the lead from larger member states such as France, no legislation on education would have been proposed, which was patently not the case. In 1987, the French government published a Blue Paper on education policy, which proposed the shelving of any extension of competence or Community-based activity and seeking the limitation of the entire field of Community educational policy to the intergovernmental field. The Blue Paper proposed a pragmatic or 'à la carte' method of cooperation in education and culture.[17] In addition, in the late 1980s the UK government was also systematic in its opposition to the enlargement of the Commission's responsibilities in this sphere. The Federal Republic of Germany, on the other hand, was more sympathetic to the concept of a wider range of responsibilities at Community level but was limited in its room for manoeuvre by the division of responsibility for education policy between the federal government (for vocational training) and the Länder (education).

To repeat, the evidence outlined so far shows that while the liberal governmental propositions for this stage held sway until the mid-1980s with regard to education policy, the increased momentum in the production of policy making proposals that occurred in the late 1980s and early 1990s did not occur solely in response to member

[17] European Integration in Education and Culture. The French Government Blue Paper, Bull. EC 3-1987, part 3.

state executive wishes. In addition and in line with Stone Sweet and Sandholtz's propositions, actors other than the executives of member states had an indirect input into the proposal of education policies. Externally in the late 1980s and onwards, a growing lobby of employers, trade unions and education professionals argued that the Union should place a higher priority on education and training than it had done hitherto (Field, 1998, 54). Internally, such criticisms were frequently articulated within ESC as well as within the European Parliament. Externally, an increasingly influential employers' lobbying body, the European Round Table of Industrialists (ERT) focused on the role education policy could place in enhancing competitiveness and established an Education policy group. One of their first reports on this issue was published in 1989. In 1992 the ERT argued in a joint paper with the European Council of Rectors that the EU's activities in this sphere lacked coherence and were focused narrowly upon young people: 'there is no Europe-wide programme of Lifelong Learning...this will endanger Europe's competitive position' (Otala, 1992). The ERT continued to press for action in the sphere of lifelong learning and the role of education in improving European activity in information and communication technologies in subsequent publications (European Roundtable of Industrialists, 1995).[18]

The Commission, through stipulations in certain decisions, e.g. SOCRATES (see Section 4.4), has also progressively encouraged the participation of the social partners and civil society (the transnational domain of Stone Sweet and Sandholtz) in the pre-negotiation stage of the policy process. However, unlike the one-way relationship specified in supranational governance, this transnational participation appears to be a mutually reinforcing and two-way relationship in terms of policy entrepreneurship. These transnational European groups have pushed the Commission in particular to submit policy proposals in areas of education policy within their interest and the Commission itself has encouraged the participation of European groups at this stage of the policy process. For example, in 2001 ETUC criticised action of member states and called for the allocation of adequate funding for education policies such as

[18] ERT. 1995. Education for Europeans – Towards the Learning Society. In conjunction with Council of Members of ERT that took part in the production of this report included: Austrian Industries, B.A.T. Industries, Bosch, British Steel, Carlsberg, Daimler-Benz, Fiat, Hoechst, HP Foods, Lafarge Coppée, Lyonnaise des Eaux-Dumez, A.P. Moeller, Nestlé, Nokia, Olivetti, Petrofina, Philips, Pirelli, Shell, Siemens, Société Genérale de Belgique, Thomson, Volvo.

lifelong learning pointing out that the level of public expenditure in the field of education continues to be far below the requisite level (COM (2001) 678). Increasingly since 1995 the Commission has organised conferences with education policy stakeholders in order to encourage the sharing of information and the exchange of views and has set up a database of civil society groups with an interest in education matters. A recent example of this was a conference held by the Commission with the EU's social partners and education interest groups on increased cooperation in vocational education and training in Brussels from 10 to 11 June 2002. Transnational educational organisations such as the Association of European Students Unions[19] and the Association of European Universities (formerly known as the Conference of European University Rectors) have also been involved in discussions on education policy in advisory groups and civil society group consultations (See http://europa.eu.int/infonet/civil_en.htm (10 June 2003), Interview, Commission Expert, DG EAC, 25 September 2002). Participation by education civil society groups in policy 'thinking' is officially encouraged by the Commission, and a special call for funding was announced by the Commission in late 2002 where the Commission will give financial support to education organisations.

This desire of the Commission to encourage wider stakeholder participation is also evident in the OMC policy agenda. As part of its preparation of a communication on lifelong learning in 2001 the Commission instigated a consultation process that involved the contribution of over 12,000 citizens on a lifelong learning memorandum. Each member state, the candidate countries and countries within the European Economic Area, along with European networks of social partners and civil society submitted reports on the Commission memorandum.[20] In addition, in 2001 each member state was asked to organise a national conference with its own social partners and civil society actors on the subject of lifelong learning. This offered the

[19] Scandinavian student unions in particular are very attentive to issues of student welfare.

[20] See Communication from the Commission. 2001. *Making a European Area of Lifelong Learning a Reality*. November. Social partners to submit reports included: European Centre of Enterprises with public participation and of enterprises of general economic interest (CEEP), European Trade Union Confederation (ETUC), European Association of Craft, Small and Medium-Sized Enterprises (UEAPME), Union of Industrial and Employers' Confederations of Europe (UNICE). NGOs to submit reports included: Corporate Social Responsibility Europe (CSR Europe), European Association for the Education of Adults (EAEA), European University Association (EUA), European Vocational Training Association (EVTA), European Forum of Vocational Education and Training, Solidar Platform of European Social NGOs, Youth Forum Jeunesse.

Commission the opportunity to gauge not just the views of the member states on this policy issue before it completed the drafting of a Communication on Lifelong Learning (which would set out a game plan on how to proceed in this area), but the views of all other actors with a stake in this policy area. In other words, any policy proposals to emanate from this document and process would echo not just the views of the member state representatives, but also the wider network of stakeholders, more in keeping with the supranational governance proposition. In the area of lifelong learning the Commission paid heed to the warning of social partners such as ETUC who warned that the Council's desire to create a competitive knowledge-based economy through OMC and in this instance through lifelong learning schemes must not create new categories of socially excluded.

In the absence of a treaty base until 1993, Commission action in this stage of the education policy process was spurred on and facilitated by judgements of the European Court of Justice. The catalyst for EC/EU action with regard to the recognition of educational qualifications and for the establishment of the Erasmus programme (now part of SOCRATES) came from developments within the field of free movement of law. For example, the judgement of the Court in *Gravier*[21], its related cases and the Court's ruling on the use of Article 128 (ex EEC) as the legal basis for the Erasmus decision in 1987 opened a window of opportunity the Commission was able to exploit when faced with a lack of treaty basis in order to propose other programmes such as Lingua and SOCRATES. However, this 'window of opportunity' for the Commission was carefully circumscribed by the Court as it made clear that while Article 128 could be applied to include much higher education (and the Court made it clear that it would generally treat higher education as a form of preparation for professional life), it clearly did not include compulsory schooling or general adult education and pre-school education. It also prompted the reassertion of

[21] The plaintiff in *Gravier* [Case 293/83 Gravier v. City of Liege [1985] ECR 593, 1985] 3 CMLR] was a French national who moved to Belgium to study strip cartoon art at the Academie Royale des Beaux-Arts in Liege, and who had no other connection with Belgium. The purpose of her free movement was the pursuit of better educational opportunities. Gravier was charged a fee ('minerval') by the Belgian authorities which is not imposed on Belgian students, and her right of residence was called into question. She challenged both determinations in the Belgian courts, and a series of questions was referred to the ECJ about the Community law relevance of this situation. The Court found that the imposition of the minerval was in breach of Article 7 EEC, read in conjunction with Article 128, which established the relevance of her activity (moving to take advantage of vocational training) to the scope of the Treaty.

member state prerogatives when education was given a treaty base in the Treaty on European Union negotiated at Maastricht.

As part of the effective establishment of a common market in employment, the principle of the freedom of movement for workers made it necessary for each Member State to take into account the qualifications acquired by an individual in his or her Member State of origin. However, member states had tended to favour workers with national qualifications over those obtained abroad. The rising number of cases relating to the failure of member states to take this into account necessitated the creation of a legal framework within which a qualification awarded by another member state would be accepted as equivalent. The Commission chose two approaches. First, a directive was proposed and negotiated establishing a general system for the recognition of higher-education diplomas (awarded on completion of professional education and training of at least three years' duration – Council Directive 89/48/EEC of 21 December 1988). Second, a sectoral approach was also developed aiming to permit the automatic recognition of diplomas following the coordination of training in specific professions, e.g. pharmacists, doctors, architects and lawyers (1998)).[22] The acquis developed in response to this demonstrates the existence of limited spillover in the need for and formulation of policy proposals.

The norm of subsidiarity is also aptly demonstrated in former Commissioner Edith Cresson's answer to an MEP question in 1996. In response to a parliamentary question on the reform of elementary school education, the Commissioner outlined the Commission's ethos on the initiation of education policy proposals:

In accordance with Article 149 of the EC Treaty, the Commission supports actions, which, by encouraging cooperation, aim to improve the quality of education while fully respecting the responsibility of the Member States for the organisation of education and the content of teaching. In addition, by encouraging the exchange of information and experience, the Commission is helping to bring about a situation where the Member States move voluntarily towards a certain convergence of their

[22] Council Directives 77/452/EEC, 77/453/EEC, 78/686/EEC, 78/687/EEC, 78/1026/EEC, 78/1027/EEC, 80/154/EEC, 80/155/EEC, 85/384/EEC, 85/432/EEC, 85/433/EEC and 93/16/EEC concerning the professions of nurse responsible for general care, dental practitioner, veterinary surgeon, midwife, architect, pharmacist and doctor.

education systems. However, Article 149 rules out any legislative initiative on the part of the Commission aimed at harmonising education in general and thus also primary education.[23]

Education and Culture Commissioner for 1999 to 2004, Ms Viviane Reding, echoed this ethos in March 2002 when she commented that education remained a matter for subsidiarity and while the EU could support national strategies, it could not dictate the policy agenda. According to Commissioner Reding, her role was to 'warn and shake up' national education ministries. She described EU developments in education and training as 'an evolution, but a slow one'.[24] Finally, acknowledging the Commission's adherence to the principle of diversity of systems, a Commission official in DG EAC commented:

> 'it is important that the Commission and the EU should not have the power to decide on education policy at the local level. In the mid- to late 1990s the Commission had ideas for further integration but it was always pointed out from member state officials that Article 149 in particular precluded such action. The situation has now changed to where the member state officials now speak about tasks that maybe the Commission could do but Commission officials say they cannot because of the Treaties' (Interview, DG EAC Official 2, 26 September 2002).

To sum up the findings for this stage of the policy process, it has been shown that in the early phase of education policy development, the tenor and content of Commission proposals tended to correspond with the wishes of the member state executives. On the other hand, once policy activity in this sphere was created, the Commission as the institutionally defined policy initiator tried to use this institutional competence to expand the EU's activities in this area. However, the Commission repeatedly found its room for manoeuvre was constrained by member state executives who tightly defined the institutional parameters of the game. At the beginning of education policy development, transnational involvement did not figure in the

[23] Written Q E-2621/96 by Hedwig Keppelhoff-Wiechert (PPE) to the Commission, 14 October 1996.
[24] Commissioner Viviane Reding. 2002. 'Has the EU an effective education and training strategy?' European Policy Centre, 6 March. http://www.epc.be 10 March 2002.

initiation phase. However, this has now changed somewhat and from the late 1990s onwards, especially with the evolution of the Open Method of Coordination, it is clear that the Commission, in framing its proposals, takes not only the views of the member state executives but also transnational actors such as the social partners and NGOs into account. The Commission not only uses these transnational actors as a sounding board for embryonic policy proposals, but also as a source of information and research.

Overall, it is possible to conclude, based on the evidence presented in this section, that liberal intergovernmentalism offers more explanatory power at this stage of the policy process. Proposals made in education policy are, on the whole, prompted by utilitarian economic preferences. As initiator of proposals, the Commission's room for manoeuvre is constrained by the institutional framework of education policy, i.e. its weak legal base, and the norm of subsidiarity. The recognition that the EU must not interfere in national education systems means that legislation proposed by the Commission must be and is sensitive to the wishes of the member state executives above all.

Negotiation

In the negotiation phase of the policy process, the propositions of liberal intergovernmentalism are clear. First, policy outcomes are based on the preferences of the dominant member state executives and tend to be the result of lowest common denominator bargaining between them, on the basis of unanimity even if specified differently. Second, and inherent in this theoretical conceptualisation, member state executives are the only important actors at this stage. If these propositions were to be true, we would expect that in education policy negotiations the central players are the national executives of the member states, who bargain with each other to agree on legislation and consequently on policy outcomes. Bargaining would be shaped by the relative powers of the member states and, of course, by the preferences of these actors and institutions would serve as neutral arenas within which action takes place. In the case of education policy at the macro level, therefore, we would expect member state executives to be the ultimate 'deciders' of policy and policy outcomes in the form of legislation or other instruments would correspond with the alternative favoured by

larger member states in particular that envisages the least amount of policy harmonisation necessary to achieve the objectives identified.

According to supranational governance, at the negotiation stage of the policy process, policy outcomes will be based on negotiation between the member state executives within the logic of institutionalisation, i.e. bargaining will take place in a mediated context, with different actors (such as the European Parliament, the Economic and Social Committee, the Committee of the Regions) possibly having an input into the bargaining outcome depending on institutional prerogatives (e.g. relevant decision rules). It must be borne in mind at this stage that this implication will perhaps be more readily tested in the micro level analysis of the SOCRATES II negotiation as the pulling and hauling between the actors at this stage is examined in greater detail. This section traces the broad trends of education policy at this stage of the policy process. Nevertheless, we may be able to see whether supranational organisations have been able to potentially shape, either formally or informally, policy outcomes and the rules that channel subsequent policy behaviour, depending on the institutional context within which the education policy negotiations have taken place. We may also be able to see, as expected if these propositions were to be true, that past choices influenced subsequent policy action and policy alternatives available.

Section 4.2 traced the evolution of education policy in the EU since the Treaty of Rome and gave a preliminary picture of how education policy appears at the negotiation stage. The limited and weak legal institutional base for education policy privileged the position of the member state executives at this phase of the policy process and meant that every policy proposal negotiated and agreed upon reflected the preferences of the member state executives. Before the signature and ratification of the Treaty on European Union in 1993, the European Parliament had no mandate in the negotiation of education policy proposals, apart from its budgetary prerogatives. It did have certain limited powers over education policy because of its dual budgetary control. This was important for programmes such as Erasmus where success was partly dependent upon the EP agreeing to the allocation of sufficient funding (Sherrington, 2000, 147). Yet with the Treaty on European Union, the EP did gain a seat at the negotiating table through the use of codecision with regard to education policy (Article 149, ex 126) and through consultation with regard to vocation policy

(ex Article 127). At Maastricht, this right of consultation was changed to codecision and negotiation within the Council was on the basis of QMV (Article 150). Therefore, it is possible to conclude that on education policy negotiations since the Maastricht Treaty, the European Parliament is a negotiation partner of the Council of Ministers. According to a DG EAC Official:

> In negotiations on EU education programmes, the EP will always go beyond Commission amounts proposed. For example, the Commission will propose 100 million Euro, the Council 50 million Euro and the EP 150 million. The Commission, while proposing 100 million, will be mindful that it might only win 60 million. The EP is responsible for increases in budgets and holds firm to their requests for increased funding. EP negotiators are very stubborn and always go much further than the Commission (Interview, Official 2, DG EAC, 26 September 2002).

In reality, in terms of inter-institutional relations and negotiations at this phase, it is impossible to verify the veracity of the statement that the European Parliament supports the Commission, not the member states, without extensive analysis of all education policy negotiations. We will be able to investigate this claim more systematically in the micro case study. However, we can conclude that while the EP did gain power in terms of being able to decide with the Council (subject to the stipulations of codecision in Article 251), as we have seen in the pre-negotiation analysis, the areas where this negotiating mandate can be exercised are tightly controlled by the Council.

Finally, decision-making in this area is now ruled by qualified majority voting, which also facilitates agreement. The Commission's role at this stage of the process is also weakened by its lack of formal institutional status, although it can exercise an informal arbitration role due to its presence on the Education Committee, the Education Council of Ministers' working party. The degree of importance ascribed to education policy negotiations by the Council itself can be seen by in the number of Education Councils in a given year. For example, in the year 2001, the Education Council met three times, compared with more important Councils such as ECOFIN,

which met eleven times in 2001 (EU Council Website – http://ue.eu.int. 16 August 2002).

Looking at the preferences of actors within the Council itself on the negotiation of education policy proposals, there is no overwhelming evidence to support the proposition that policy outcomes themselves represent the will of the larger member states in particular (as according to liberal intergovernmentalism). According to documentary analysis and interview evidence, it is not the case that member states divide into separate alignments regarding policy proposals based on size or status as net contributors or net beneficiaries.

With regard to education policy, all member states generally share the same view, i.e. that action at the EU level cannot affect individual national education policies. The room for manoeuvre within negotiations is also influenced by how education policy is dealt with at the national level (Sprokkereef, 1992, 345). In the case of Germany, EU action in education is controversial as in principle it strengthens the position of the central government vis-à-vis the Länder. The latter regard their competence in educational matters as basic to their autonomy and object to any federal government in educational areas other than in vocational policy. Forces of a similar nature can be found in Spain and Belgium. The UK and Denmark have often obstructed Commission proposals with the argument that a common education policy directly interferes with sovereign rights. The first Lingua programme negotiation demonstrates this. Lingua dealt with the promotion of foreign language learning throughout the EU and member state sensitivity to Community intervention in education was particularly evident during its negotiation when Germany and Britain limited the programme to the sphere of post compulsory school education.[25] Both member states stressed that they had not transferred to Brussels part of their sovereignty by acquiescing to Community intervention in their school curricula (Glendenning, 1998, 210).

[25] Exchange programmes would be set up between language-teaching establishments and the EC would finance participants to visit partner institutions for a minimum of two weeks. Both young people and language teachers would be able to take part in the scheme.

It is possible to conclude that the negotiation of decision-making outcomes relating to education policy show evidence of lowest common denominator bargaining among member state executives. The Council as a whole has also proved reluctant to allocate increased funding to the education policy sphere, as EU budgetary figures show. According to Field, the proportion of total EU spending which was allocated to DG XXII (Education) and its programmes actually fell after 1992 (from 0.46 percent of total budget in 1992 to 0.40 percent in 1995) (Field, 1998, 67). Current budgetary spending is still low and has only increased in order to accommodate the candidate countries that are now participants in the EU's education programmes.

Table 4.1: Education policy budgetary allocation

Year	Percentage of total budget
1999	0.46
2000	0.52
2001	0.51
2002	0.53

Source: Annual General Reports of EU, 1999, 2000, 2001.

At this macro level of analysis of the negotiation phase of EU policy making, the central proposition of liberal intergovernmentalism, that policy outcomes are based on the preferences of the member state executives and are the result of lowest common denominator bargaining between them, appears broadly to hold true. However, in line with supranational governance and its emphasis on the logic of institutionalisation, following the Maastricht and Amsterdam Treaties, member state executives are no longer the only important actors at this stage and in negotiations on the educational programmes in particular, the Parliament is managing to move outcomes beyond the common position adopted by member state executives. The more detailed analysis of negotiation in the micro section of this case study will show that on one occasion at least, the policy outcome reached is not simply the result of intergovernmental bargaining but is based on negotiation between a wider range of actors and influenced by previous decisions.

Post-Decision

With regard to the post-decision phase, liberal intergovernmentalism would posit that member state executives tightly control the action of Commission at this stage through mechanisms such as comitology. In education policy, it would follow that for this proposition to be true, we would expect that member state executives as principals in the education comitology committees, would monitor and control, where necessary, the Commission's behaviour if it deviates in any way from what was agreed in the negotiation stage and attempts to put forward further policy changes. With reference to the adjudication of legal disputes within the education arena, liberal intergovernmentalism holds that the European Court of Justice does indeed adjudicate disputes, as it is called upon to do so by the Treaties, but does not act outside the preferences of the dominant member states. If the adjudication of disputes does come into play with education, we would expect the ECJ to stay within the preferences and wishes of the powerful member states in its rulings on important sectors and perhaps only rule against powerful member states when an unimportant issue is perceived to be at stake.

On the other hand, at this stage of the policy process supranational governance puts forward the proposition with regard to implementation that the Commission would exploit the comitology procedures and its other institutional prerogatives to dominate the direction of implementation outcomes and promote actions that would move beyond what was already agreed. If this were the case at the macro level we would expect to see some slippage from the content of the policy outcomes agreed at the negotiation stage as the Commission tries to move the policy making process beyond these outcomes. In line with its institutional function, the Commission will actively monitor the enforcement of legislative acts and will not shirk from bringing disputes before the ECJ. With regard to adjudication, supranational governance posits that the ECJ will rule against the preferences of the member states when the Treaty is clear and when there are strong precedents and legal norms it can draw upon to support its reasoning. In education policy, for this proposition to hold true it would be expected that the ECJ would systematically over-ride the preferences of the member states when these preferences clash with the pro-integrationist agenda of the ECJ and of the Commission. The ECJ would also interpret the Treaty so as to permit the expansion of supranational governance in education.

Even though the level of institutionalisation in education policy is at a lower level than, say, to be found in the area of agriculture with the Common Agricultural Policy, there are a growing number of comitology committees now in place to monitor the implementation of the SOCRATES, LEONARDO and YOUTH programmes.[26] For example, the SOCRATES comitology committee also has two sub-committees: one dealing with school education and the second dealing with higher education. The Leonardo programme also has a comitology committee, as does the Youth Programme. Representatives from the administrations of each of the member states attend the comitology committees, which are chaired by a representative of the Commission. While the Leonardo committee consists of just one committee (unlike SOCRATES), the number of actors who attend this committee is quite large as it includes the representatives of the social partners from each of the member states along with national administration representatives. Representatives from candidate countries also sit on the comitology committees. According to a national official interviewed for this study, in excess of 100 people would attend Leonardo committee meetings, which can last up to two days and take place three times a year. The type of comitology committee is specified by the decision establishing the relevant programme (usually they are mixed committees – advisory and management). Depending on the comitology procedure specified – as outlined in Chapter 3 – the Commission is obliged to obtain an opinion from the relevant comitology committee on implementation instruments. In the event of an unfavourable opinion the Commission is obliged to refer the decision to the Council as an 'appeal body'. According to the Commission Report on the working of the committees during 2000, in respect of a total of 92 dossiers submitted for consultation, the six committees of DG Education and Culture (of those six committees, four deal with specific education programmes: SOCRATES, Leonardo da Vinci, Tempus and Youth programmes) delivered 37 favourable opinions under the management procedure. There were no unfavourable opinions and no instruments were referred to Council. This would support the proposition that although the member states may try to control the Commission at this stage of the policy process,[27] the committees' work is

[26] SOCRATES Committee, Leonardo Da Vinci Committee, Tempus III Committee, Youth Committee. For further details see: European Commission. 2001. Report from the Commission on the Working of the committees during 2000. COM(2001) 783 final. List of the Committees which assist the Commission in the exercise of its implementing powers OJ C 225/2, 8 August 2000.

[27] Commission Report 2001. Ibid.

characterised by a high degree of consensus and the Council has not had to act as an appeal body in the implementation stage of education policy.

The system of sectoral and general mutual recognition of qualification directives also stipulates that committees are set up to monitor implementation across member states. These committees generally meet every six months. However, the evidence points to the conclusion that comitology committees are not the most effective way for member states to control the Commission. As the Commission chairs the relevant committees, it does have some power (Interview, National Official, 18 July 2002). One week in advance of a comitology meeting, large amounts of documentation are sent to national representatives and it is time-consuming for these actors to keep track of all the material. In addition, the large size of the meetings and their infrequency would also lead to the conclusion that they are ineffective in monitoring the activity of supranational actors such as the Commission at this policy stage. However, comitology committees do serve a watchdog function as they force the Commission to explain itself to the member state representatives with regard to implementation of legislation. These committees are also widely used as fora by the Commission where future ideas can and do get mooted: these committee meetings are 'more of an opportunity for the Commission to take soundings from member states' (Interview, Commission Expert, DG EAC, 25 September 2002). The European Parliament also has a limited involvement in this stage. The Commission is obliged to inform the European Parliament about the committees' work and to send it all draft implementing measures pursuant to a basic instrument adopted under Article 251 of the Treaty, so that the European Parliament can exercise its right of scrutiny enshrined in Article 8 of Decision 1999/468/EC. All documents are transmitted electronically to a central service at the European Parliament. The EP did not exercise its right of scrutiny with regard to education policies in 2000. While it could be concluded that the European Parliament's consultative role in comitology is weak, it has not stopped EP Committees monitoring education programmes on their own initiative, as the analysis of the SOCRATES II programme will show. MEPs also use parliamentary questions as an opportunity to probe the Commission in particular on its activities in this phase of policy making.

At this stage of the policy process, the Commission also serves as policy manager of the education programmes. However, because of the size of the Commission and the number of member states the Commission is unable to manage the implementation of the education programmes on its own. Policy implementation is therefore managed by the 120 Commission officials in conjunction with national agencies in each of the member states. In addition, a technical assistance office (TAO) in Brussels assists the European Commission in the technical management of the SOCRATES, Leonardo and Youth Programmes. The TAO on behalf of the EC processes approximately 4,000 contracts per year. It currently employs 120 full time staff (Interview, DG EAC Official 2, 25 September 2002). The TAO is part of the ETAPE Consortium, which assists the European Commission in the technical management of Education, Training and Youth support programmes at the Commission.[28]

As we have seen above, the ECJ court decisions on education and training have mainly been based on the provisions of the Treaties on the free movement of persons, the mobility of labour, the improvement of the living standards of workers and the principle of non-discrimination between nationals of member states of the Community. A system of general and sectoral directives has been put in place to deal with this issue and is in the process of being updated. However, despite the instigation of such systems, compliance by member states in transposing these directives is by no means complete. The Commission, working with the ECJ, has played an important role in highlighting this. For example, on 3 February 2000, the Commission presented a report to the Council and Parliament on the application of Directive 92/51/EEC in accordance with Article 18 which provided for a progress report to be made on its application five years after the implementation deadline.[29] Following the publication of the report, the Commission instituted infringement proceedings against some member states for failure to meet the two-year deadline for transposition: e.g. Spain (one year's delay), Ireland (two years), Portugal and the United Kingdom (two and a half years), Belgium (three years) and Greece (four years). The Commission relied on member state information to compile the report. In other proceedings before the Court, the Court itself, contrary to what would be

[28] In 1999 the TAO was involved in the controversy relating to fraud and unfair appointment practices.
[29] Commission Report of 3 February 2000 to the Council and Parliament on the application of Directive 92/51/EEC in accordance with Article 18 of Directive 92/51/EEC (COM (2000) 17 final. http://europa.eu.int/scadplus/leg/en/cha/c11022c.htm. 17 August 2002.

expected according to liberal intergovernmentalist propositions, was not afraid to rule against more dominant member states such as France, Italy and the UK, e.g. the ECJ ruled against Italy in March 2002 on the failure to implement elements of Directive 85/384 and ruled against Spain in November 2000 also on the failure to implement elements of this directive.[30] Even though some of these directives were negotiated over ten years ago, the fact remains that they have yet to be fully implemented. This has led the Commission to propose a new EP and Council Directive on the recognition of professional qualifications in March 2002 – COM (2002) 119 final – that would rationalise the system for mutual recognition of qualifications and address the apparent anomalies in implementation. In this way, the Commission and the national courts have used the ECJ as an implementation watchdog (through the preliminary ruling procedure and on behalf of individuals).

In line with the supranational governance proposition, the ECJ has not been afraid to interpret the Treaty so as to permit the expansion of policy in education through vocational policy. In the 1980s in particular the Court's expansion of the notion of vocational training, within the limits imposed by the treaties, broadened the Community jurisdiction on education and training (Ryba, 1995, 16). For the purposes of Community law, it became possible to regard university studies preparatory to the exercise of a trade or a profession as being covered by the term 'vocational training'. However, the Court's enthusiasm for expanding the definition of vocational training did not go beyond higher or third level education. In *Humbel* [Case 263/86 *Belgian State v. René-Humbel and Marie-Thérèse Edel*, [1989] 1 CMLR 393] the Court indicated that the definition of vocational education may not cover general schooling. The United Kingdom government intervened in this case in order to argue that ordinary schooling, although containing elements of practical vocational training within it should be considered as a whole and thus not be classified as vocational training. The European Court decided that it was a matter for national courts to assess whether any particular schooling fell within the definition of vocational training. As a result, it became widely accepted that primary and secondary education, at least up to the age of 16, were to remain exclusively within national and not EC competence (Barnard, 1992, 124).

[30] C-298/99 and C-421/98.

In terms of the post-decision phase of the policy process, both theories demonstrate certain explanatory power. Even though the Council of Ministers has delegated responsibility of policy implementation to the European Commission, the comitology system has also been instigated as a means of monitoring the implementation. However, the evidence shows that comitology has neither resulted in the complete control of implementation by the member state representatives, nor has it involved total slippage of control to the European Commission. Instead, it has served as an opportunity for each of the actors involved in implementation to keep track of the process of implementation of education policies and programmes. In addition, the process of peer review and benchmarking within the Open Method of Coordination will make the implementation process even more open as each member state is obliged to provide and release information on the operation of their education systems into the European public domain. The European Court of Justice has indeed ruled against the preferences of member states on occasion and has used the Treaty base and legal precedent to facilitate the expansion of education beyond vocational training to include other elements such as higher-level education. However, the Court has been careful not to exceed its remit in this matter. Thus we can see that at this stage of the policy process, neither theory offers a complete picture. Both offer insights into the implementation process. The next section will build on this macro analysis and look at the negotiation and implementation of a specific piece of education legislation, namely the second SOCRATES programme, 2000-2006.

4.4 SOCRATES II

Background to SOCRATES II

In this section we examine the negotiation of the second phase of the SOCRATES education programme, SOCRATES II (2000-2006), established by Decision No. 253/2000/EC of the European Parliament and the Council of 24 January 2000. It replaced the first SOCRATES programme, which ran for five years from 1995. The adoption of the SOCRATES programme by Decision 819/95/EC of the European Parliament and of the Council (14 March 1995) introduced the implementation of an overall programme in the area of education (for the first time). SOCRATES rationalised existing education programmes (ERASMUS, LINGUA, ARION) and included a new but small-scale programme for schools partnerships (COMENIUS). Its focus on higher education was confirmed by its budget: 55 per cent was allocated

to Chapter One actions (higher education) and 10 per cent to Chapter Two (schools education); 25 per cent was allocated to 'horizontal activities' (LINGUA, open and distance learning). SOCRATES made no reference to early-years education and a line respecting adult education was added at a later stage, following concerted lobbying by the Deutscher Volkshochschul-verband and the Danish government (Field, 1998, 65). According to Field, the proposed scope of SOCRATES I, and the means by which it was to be furthered, were conservative in the extreme (Field, 1998, 65).

However, despite its seemingly modest import, and the fact that SOCRATES represented more of a rationalisation of existing programmes than the establishment of a new innovative education programme that deepened education integration among the member state education systems, negotiating the SOCRATES decision proved contentious. The institutional procedures and legal base in particular marked the first occasion the European Parliament could 'flex its legislative muscles' using co-decision as set out in Articles 126 and 127 (now 149 and 150). The EP and Council were unable to agree on two main issues – financing of the programme and comitology – with the result that the proposal went to the conciliation committee after the EP's second reading decision (in December 1994). In its proposal, the Commission had argued for an amount of 1005.6 million ECU for the five-year period, which was brought down in the common position to 760 million ECU. The fixing of the final amount between the Council and the EP was part of the compromise struck in the Conciliation Committee. The views of the Council and the EP conflicted in that the Council's concern to unilaterally determine the budgetary resources to be made available to SOCRATES could be interpreted as implying a potential reduction of the Parliament's competence as a budgetary authority in that a full freezing of the annual maximum expenses for the five years of the programme could have undermined the Parliament's powers related to non-obligatory expenditure in the European Union. The EP, while understanding the Council's concern to keep expenditure under tight control in the preparation towards EMU, could not accept an encroachment on its budgetary powers. The compromise reached provided for an increase of the budget to 850 million ECU with the possibility for an increase after two years to be judged on the basis of an evaluation report submitted by the Commission before the 1998 budgetary exercise (Hermans, 1997, 28). Early in 1997,

the Commission proposed an increase for the 1998 and 1999 budget of 50 million ECU (COM (97) 99final).

The second controversial issue of the negotiations – comitology – and the decision reached on this issue had important implications for implementation across the policy spectrum. In its proposal, the Commission put forward that the SOCRATES implementing committee be an advisory committee. However, in its common position the Council changed the nature of the committee dramatically in an attempt to increase the power of the member states in the implementation phase. It deleted the word 'advisory' and specified the areas on which the Committee had to express itself. The EP saw this in particular as a significant shift in the power balance through reducing the Commission's right and obligation to implement the EU legislation (Hermans, 1997, 26). In its second reading, the EP demanded to be put on an equal footing with the Council as far as implementation is concerned, as it felt that the new legislative power gained under the codecision procedure became eroded in comitology. It proved impossible to resolve this issue within the SOCRATES negotiation and a general inter-institutional agreement was needed between the EP and Council on this issue. As was referred to in Chapter 3, a temporary agreement was reached in a *modus vivendi* (OJ C 293/1 of 8 November 1995) and the role of the EP in implementation was finally resolved with Decision 1999/468/EC. Within the SOCRATES I negotiation itself, a compromise was reached whereby the comitology committee for SOCRATES I would be a mixed committee – the Commission would be assisted in implementing the programme by a committee which would act as a management or advisory committee, depending on the subject matter.[31] Finally, in a Joint Statement by the EP, the Council and the Commission, the Commission was also charged to present to the EP, Council, Economic and Social Committee and Committee of the Regions by no later than 30 September 1998, an intermediary report on the launch phase of SOCRATES and by 30 September 2000, a final report on the implementation of the SOCRATES I Programme.

Both the establishment of a SOCRATES comitology committee and the call by the three main supranational organisations for programme evaluations in the form of

[31] The committee was to be assisted by two sub-committees: one in the area of higher education and the other in the area of school education.

intermediary and final implementation reports highlighted weaknesses of the Commission in the post-decision phase of policy making. Given the limited resources and over-stretched expertise at the Commission's disposal, the evaluation of the programme was undertaken externally. Four external evaluations were carried out and one overall evaluation was conducted by Wissenshaftliches für Berufs- und Hochschulforschung, Universität GH Kassel in conjunction with the European Education and Social Policy Institute, Paris (Teichler, Gordon, Maiworm, 2000). The Commission relied heavily on these evaluations in the production of its own SOCRATES report, *Final Report from the Commission on the implementation of the SOCRATES programme 1995-1999* (COM (2001) 75 final). The institutional deficiencies of the SOCRATES I programme were highlighted by the external evaluations and the Commission's final report on SOCRATES I. In that report the Commission concluded that the vague definition of the many objectives set in 1995 by the Council and the European Parliament made evaluation of the results achieved difficult. The main criticism of the external evaluation report was of the implementation procedures, the dissemination of results and the policy for following up and evaluating the programme in general. Many procedures were deemed excessively cumbersome and complex in relation to the monetary sums involved, which were sometimes small. Payment schedules were said to be often excessively long. In addition, it was acknowledged that the policy on monitoring and evaluation implemented in the first phase of the programme was inadequate. Finally, although SOCRATES I envisaged regular consultation with European associations and the social partners in the area of education, this consultation was more sporadic than regular.[32]

The most interesting finding of this brief analysis is the impact of the co-decision rule on the negotiation of the proposal. Since the negotiation of SOCRATES I was amongst the first cases to apply this procedure newly introduced by the TEU, it

[32] See COM(98) 329. Recommendations included:

- the need, under the new phase of the programme, to combine consolidation of what was achieved under the first phase with opening up to innovation e.g. new information technologies and lifelong learning policies;
- concentrating Community intervention on a small number of objectives and increased consistency between these objectives;
- strengthening the links between the actions of the programme and between SOCRATES and other programmes, especially Leonardo da Vinci (Teichler, Gordon, Maiworm, 2000).

offered an opportunity to test the inter-institutional balance of power. Because the EP had become a co-legislator, and thus de facto an equal partner to the Council in the decision making process, it appeared that the Council attempted to extend Member States' influence in the implementation phase of the programme, both by granting the SOCRATES Committee rather considerable powers in approving the framework within which the programme was to be carried out and through channelling a substantial share of the SOCRATES budget through the National Agencies (Hermans, 1997, 36).

Pre-negotiation of SOCRATES II

This section proceeds by applying the propositions and observable implications of the two theories to this level of analysis. To reiterate, at this stage of the negotiation of the SOCRATES II decision, according to liberal intergovernmentalism the proposal for SOCRATES II would come specifically from a call by the member states that wish to solve a collective action problem in the sphere of a range of education issues. We would in turn expect the content of the SOCRATES II proposal to reflect the rational preferences of the larger member state executives in particular and not step beyond these. The European Parliament would have no input into policy formulation. According to supranational governance, the proposal for SOCRATES II would result from one of two stimuli – the desire of transnational groups for cooperation and the consequent pushing of the Commission to propose a policy based on this desire or lock-in or path dependence from previous decisions, e.g. SOCRATES I. In other words, as action in the education sphere was fixed through SOCRATES I, we would expect the programme to generate its own dynamic that has lead to a continuation of integration in this policy area. It would also imply that member state executives' are less proactive and more reactive in the policy formulation process.

It is clear that one of the central reasons behind the proposal of SOCRATES II was the desire of the member states to continue the education programme itself. There were no calls for its discontinuation, not even by less enthusiastic member states, such as the UK. The main innovations of SOCRATES II included the attention devoted to

lifelong learning and building up a Europe of knowledge.[33] In addition, in proposing SOCRATES II, the Commission was ever mindful of the need to respect national responsibility in the sphere of education and the lack of will for education policy harmonisation. The measures proposed were recognised as complementary and the division of the proposed budgetary allocation between each of the actions demonstrates this. Over fifty per cent of the budget continued to be allocated to higher education (ERASMUS), 27 per cent to Comenius (school education) and in spite of its prioritisation of ICT and the knowledge society, Grundtvig, the action relating to adult education and other pathways, was allocated a mere 7 per cent of the budget. The Commission's evaluation of the programme, beginning with its interim evaluation of 1997[34], was fully discussed within the SOCRATES comitology committee and the support group set up by it. This ties in with the liberal intergovernmental proposition for this stage of the policy process.

However, the institutional embeddedness of the existing programme and the sunk costs inherent in this also lends credence to the second proposition of supranational governance for this stage as it meant that it was more rational for the member states to agree to the continuation of the model of the existing programme with more piecemeal reforms than to instigate a radical overhaul of the whole programme. The types of reforms incorporated into the new proposal clearly reflected policy details of the original SOCRATES I programme and had the aim of carefully enhancing and streamlining the working of the existing institutional structures. Finally, the exposure of the Commission's weaknesses in implementation through its own process of evaluation in turn fed into the nature and content of the SOCRATES II proposal.

Thus it is possible to conclude, looking at the formulation of this specific policy proposal that, in line with supranational governance, the content of the SOCRATES II proposal was influenced by the structure and content of previous SOCRATES programme. However, in line with liberal intergovernmentalism, in spite of the existence of a well established *acquis*, the Commission was unwilling to propose

[33] New actions – Grundtvig: adult education and other educational pathways and Minerva: information and communication technologies in education.
[34] COM (97) 99 final of 14 March 1997.

radical reforms of the programme and thus to go against the broad indications of the preferences of the member states.

Figure 4.1: Time Schedule of SOCRATES II Negotiation Decision 253/2000/EC of EP and Council

Legal Basis: Articles 149 and 150

Initial Proposal	27.05.1998
EP Report Tabled	13.10.1998
Opinion of Economic and Social Committee	15.10.1998
EP Opinion First Reading	05.11.1998
Opinion of Committee of Regions	18.11.1998
Commission Modified Proposal	02.12.1998
Council Common Position	21.12.1998
Recommendation for Second Reading tabled	17.02.1999
EP Decision 2nd Reading	25.02.1999
Commission Opinion 2nd Reading	16.07.1999
Joint Text – Conciliation	24.11.1999
Recommendation for 3rd Reading Tabled	08.12.1999
EP codecision, 3rd Reading	15.12.1999
Final Act	24.01.2000

Negotiation

In the negotiation or decision-making phase of the policy process, liberal intergovernmentalism posits that member state executives are the only important actors at this stage, the outcome of negotiations will be dictated by their preferences and will be the result of lowest common denominator bargaining. If these propositions were to be true at this stage of the policy process with regard to SOCRATES II, we would expect to see the Council's position on controversial issues to represent the outcome of negotiations, and not the EP's. Or we might find that the outcome of the decisions will lie closer to the preferences of the Council rather than the EP. The Commission would not be involved at this stage. However,

supranational governance puts forward an opposing proposition, namely that the policy outcome of SOCRATES II would be based on negotiation between the member state executives acting within the Council and the European Parliament as the institutional rule of co-decision sets out. Consequently we would expect that the EP and the Commission (perhaps informally) might be able to shape the policy outcome so that it does not solely reflect member state executives' preferences. Similarly, as the Economic and Social Committee and the Committee of the Regions have the right of consultation, their views may also have an effect on the eventual outcome. Finally, the decision-making outcome may also be affected by the provisions of the previous SOCRATES decision, such as the outcome of the comitology issue.

As with SOCRATES I, because of the institutional rule of codecision, the negotiation of SOCRATES II can be characterised as an iterative game between the EP, Council and Commission with each of the actors changing positions and adapting to positions taken by other actors in successive rounds of negotiation. While the Economic and Social Committee and the Committee of the Regions each held consultations on the proposal at the time of the EP's first reading, their opinions of the proposal were of a general nature and were duly acknowledged by the three main institutional bodies. However, their participation in the decision-making process was limited to this. Initially, the Commission proposed that the programme run for five years, in line with the time span of SOCRATES I. However, at the time of the first Council Common position (after the first reading of the EP), the Austrian Presidency proposed that the period of the programme be extended to seven years, in order to achieve uniformity with other proposals that were on the table at the same time: namely the Leonardo and Youth programmes (both seven years). This change was said not to be an issue (Interview Official 2 DG EAC) but it raised the issue of whether the original budget for SOCRATES II should be changed, because this was intended to provide for a five-year programme only. Two controversial issues marked the subsequent negotiations between the EP and the Council, with the Commission acting as informal arbiter and also taking positions on the issues through its modification of proposals at each of the stages (See figure 4.1).

The first controversial issue was the budgetary allocation of the programme. The Council in its common position (but with the objection of the Dutch delegation),

agreed upon an allocation of 1.55bn Euro over seven years, as opposed to Euro 2bn over five years as proposed by the EP. In the Commission's assessment of the common position, it had reservations over the duration of the programme (it preferred a five year programme) but it agreed with the Council's position with regard to the budgetary allocation of 1.55 bn Euro. However, in its second reading and in line with the EP Culture Committee report drafted by Mrs Doris Pack, the EP again voted to increase the funding from EUR 1.55 billion for the seven-year programme as agreed by the Council to EUR 2.5 billion. In its opinion of the EP's second reading, the Commission accepted wholly, partly or in substance 13 out of the 14 amendments made by the Parliament but the one amendment it did not accept was the increase of funds for SOCRATES II. The Commission believed that the amendment approved by the Parliament departed from the inter-institutional declaration on the incorporation of financial provisions into legislative acts (COM (1999) 0293). Because of this deadlock, a conciliation committee was convened in order to hammer out a deal between the EP and Council, specifically over this issue.

Unfortunately for the purposes of this study, procuring information on the positions taken by the member states within the Council proved difficult. According to the editions of Agence Europe, the European Parliament's Legislative Observatory procedure file[35] and on the basis of interviews carried out with DG EAC Commission officials, it appeared that within the Council itself there were some differences between member states on the amount to be allocated. According to one Commission official interviewed for this study, some delegations from the Netherlands, Germany, Austria, Sweden and France were more hostile than other member states' delegations to an increase in the budgetary allocation above 1.55 bn Euro (Interview Official 2 DG EAC). The verification of this statement by other involved policy actors such as Mrs Doris Pack in particular was sought but not achieved by the author due to research constraints. Therefore such statement of the Council positions by the Commission official must be treated with caution. However, the position of the Netherlands was confirmed in Agence Europe reports. The Netherlands in particular demanded zero growth of the budgetary allocation in real terms in relation to

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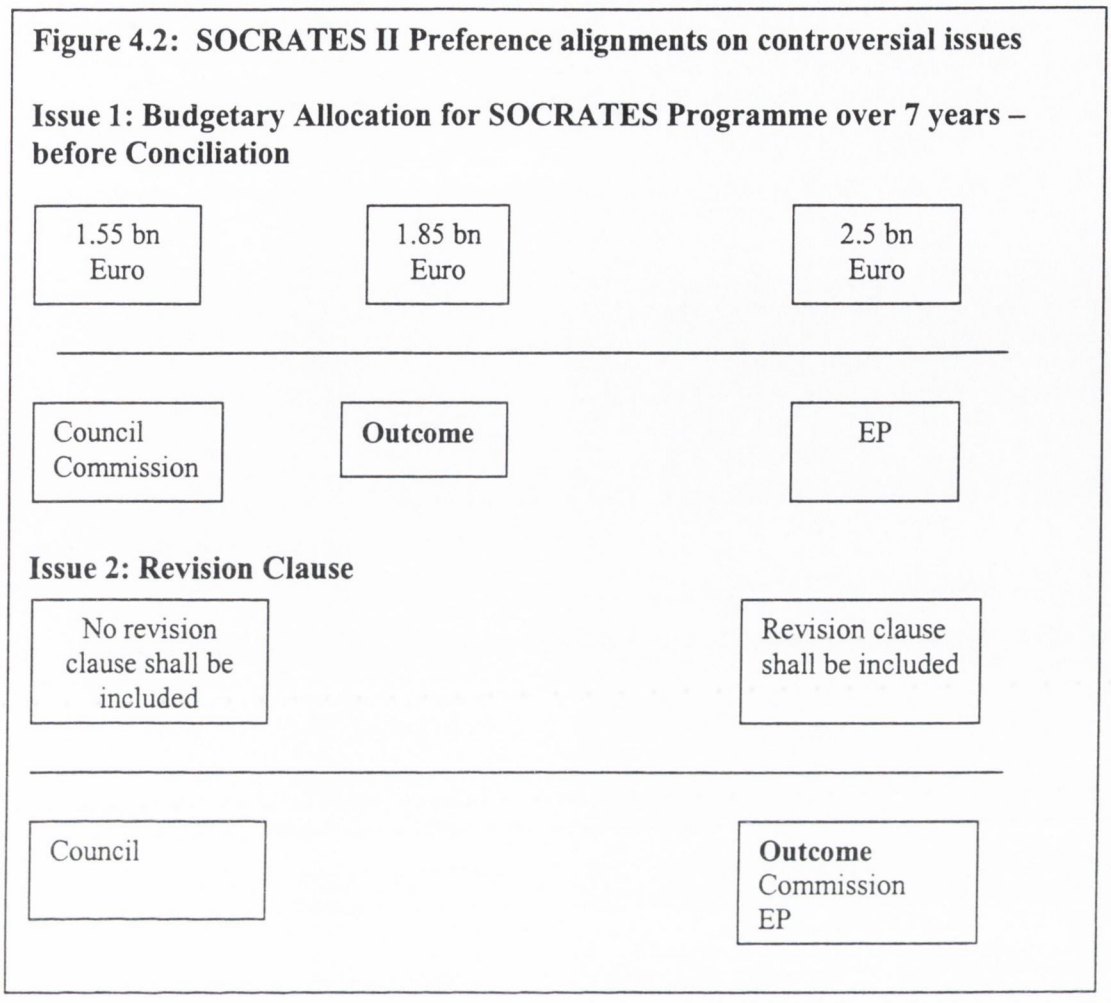
http://wwwdb.europarl.eu.int/oeil/oeil_ViewDNL.ProcViewCTX?lang=2&procid=30458&HighligTyp e=1&Highlight_Text=SOCRATES. 14 August 2002.

expenditure at the time.[36] At the outset of conciliation, the Council proposed a compromise figure of 1.65 bn Euro, which was rejected by the EP (they proposed lowering their position to 2.4bn Euro). Because of the power granted to the EP through co-decision, it was able to successfully issue a threat to turn down the whole package unless agreement was reached on this issue. Agreement was finally reached in conciliation (after an extension of the specified six week period) on a budget of 1.85bn Euro. Although when visually presented as in Figure 4.2, the outcome of the negotiation appears closer to the Council's position than the EP's, the EP did succeed in moving the outcome beyond the lowest common denominator level put forward by the member states delegations of 1.55bn. In addition, the EP managed to move beyond the Council's position on the other controversial issue with regard to this negotiation, the so-called programme revision clause. As part of the compromise package, the EP succeeded in securing a binding review clause, linked to the accession of new member states, which will allow the financial allocation of the programme to be reviewed following enlargement and under codecision. The Commission supported the review clause. In as early as November 1998, Commissioner Edith Cresson had acknowledged that enlargement and the inclusion of the candidate countries as part of the programme could possibly necessitate an increased budgetary allocation beyond five years.[37] On the other hand, all the member states had originally been against a binding review clause.

[36] E.g. Agence Europe, 9 December 1998.
[37] Agence Europe, 7 November 1998.

Figure 4.2: SOCRATES II Preference alignments on controversial issues



On the basis of this evidence, what conclusions can be drawn as to the goodness of fit of the two theoretical conceptualisations at this stage? Unlike in the macro level analysis, the evidence of the SOCRATES II negotiation clearly shows that the member state executives are not the only important decision-making actors. The European Parliament, as co-legislator with codecision, strongly exercised its negotiating prerogative under the institutional rules by bringing the negotiation to conciliation. The expertise and support of the EP Rapporteur, Mrs Doris Pack, informally contributed to the EP's strong role in the negotiation phase. Mrs Pack proved a strong ally of the Commission (Agence Europe, 7, 9 November 1998). Indeed, she was referred to as the Commission's 'guardian angel' in the European Parliament (Interview, DG EAC Official 2, 26 September 2002). Co-decision also gave the Commission an informal arbitration role, which it exercised carefully. With regard to the controversial issues, the outcomes do not reflect the lowest common denominator aggregation of the member states' positions, as figure 4.2 shows.

Therefore, the supranationalist proposition, that decision-making takes place within a logic of institutionalisation, holds strong explanatory purchase at this stage.

Post-Decision

At the time of writing the SOCRATES II programme has been running for over two years. It is therefore possible to test the propositions generated by liberal intergovernmentalism and supranational governance with regard to the Commission and comitology using the limited evidence available. Given the fact that SOCRATES II is an action programme, the role of the ECJ in this phase is minimal. Restating the propositions for this stage of the policy-making process, according to liberal intergovernmentalism, in the implementation of SOCRATES II, although the Commission has been charged with the implementation of the programme, the Council is able to control this function through comitology. Thus if this proposition is to be true, we would expect the type of comitology committee selected to reflect this desire to control the Commission's action and we would expect other possible mechanisms set in place by the Council to monitor Commission action. With regard to supranational governance, it is put forward that the Commission is able to exploit its power of implementation to reorient the direction of implementation of policy outcomes closer to its preferences. In other words, we would expect that the Commission does not see comitology as a brake on its room for manoeuvre.

The record of both SOCRATES I and II points to the difficulties the Council, Commission and EP can encounter in the post-decision phase of policy. The internal Commission and external independent evaluations of SOCRATES I had identified a number of difficulties with the programme in the post decision phase, as outlined above. The SOCRATES II Decision endeavoured to address some of these difficulties in a number of ways, most specifically by trying to strengthen the monitoring and evaluation of the programme as a whole. First, the member states are now charged to submit to the Commission by 31 December 2003 and 30 June 2007, reports on the implementation and impact of this programme. In addition, the Commission itself is obliged to produce an interim evaluation report by 30 June 2004, a communication on the continuation of the programme by 31 December 2006 and an ex post evaluation by 31 December 2007. While the Commission continues to be monitored by the Council through the mixed SOCRATES comitology committee and

its subcommittees, other EU institutions such as the European Parliament have also begun to monitor the performance of the programme on their own initiative and have uncovered serious problems in implementation.

In January 2002, the EP Committee on Culture, Youth, Education, the Media and Sport with Mrs Doris Pack (rapporteur of all EP reports on SOCRATES I and II) as rapporteur, produced a report on the implementation of the SOCRATES programme (A5-0021/2002) and highlighted a number of weaknesses in implementation. The Court of Auditors also produced a special report on the SOCRATES and Youth for Europe Action Programmes in early 2002, again highlighting the ongoing problems of implementation.[38] The resources needed to ensure effective implementation both at the Commission and the member state level are considered inadequate. According to Article 5 of the Decision, the Commission is obliged to ensure the implementation of the Community actions covered by SOCRATES but the majority of the actions will be implemented at the member state level, through national agencies. In fact, the Commission manages around 30 per cent of SOCRATES programmes through the technical assistance office and the Member and other beneficiary states manage the remaining 70 per cent using national agencies (NAs). Controversially, in its examination of the TAO, the Court of Auditors found problems in the principle and form of the delegation of responsibilities by the Commission, possible conflicts of interests, risks to the Communities' assets and a high cost of management. At the member state level, the NAs themselves suffered from the absence of an adequate legal framework setting out the precise division of responsibilities between themselves and the Commission and the Court also found that many NAs were not sufficiently resourced. Indeed, irregularities were found in some of the individual projects audited, some of which raised suspicions of fraud and were accordingly communicated by the Court to OLAF, the EU's Anti Fraud Office.

The Commission has exercised the review clause inserted in the SOCRATES II Decision in order to improve the functioning of the programme. The EP report, a number of MEPs parliamentary questions and exchanges in the SOCRATES sub-committee on schools education highlighted the difficulties encountered by Comenius

[38] European Court of Auditors Special Report no.2/2002 on the SOCRATES and Youth for Europe Community Action Programmes. Information Note ECA/02/07 09/04/2002.

and Grundtvig project participants due to long-delayed payments of funds and cumbersome application procedures (Interview, Commission Expert, DG EAC, September 2002). The Commission took steps to address this with its proposal to amend the SOCRATES II Decision, published in the first half of 2002 (COM (2002) 193).[39] The proposal was passed in the EP on its first reading due to its uncontroversial and technical nature and approved by Council on 14 November 2002 (EP Report A5-0268/2002, rapporteur Michel Rocard).

The experience of implementing the SOCRATES II programme has influenced Commission thinking on the future of the education programmes as a whole. Informal discussions have begun between Commission and member state officials on the next round of programmes to be negotiated by 2006. A public consultation process was instigated on the future direction of the education and training programmes and ran from 4 November 2002 to 28 February 2003.[40]

On paper while the Commission has been delegated responsibility for the implementation of SOCRATES II, the Council has put the comitology measure in place in order to monitor its behaviour. However, in reality, the evidence above points to the practical difficulties inherent in the implementation and monitoring of SOCRATES II and as a consequence the difficulty in confirming or infirming the propositions generated by liberal intergovernmentalism and supranational governance. Despite the fact that it has set up a comitology committee with mixed powers and that seventy per cent of implementation is carried out by the national agencies, member states are not able to monitor effectively and efficiently this phase of the policy process. In contrast, in spite of its formal function at this phase, the Commission is also curbed in its room for manoeuvre, both by the restraining mechanisms put in place by the member states, and by its own lack of resources.

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[39] The EP report on the implementation of SOCRATES expressed concern about the heavy administrative burden on applicants to Comenius I and Grundtvig 2 projects within SOCRATES programme. The bureaucratic burden of cofinancing required by applicants (usually smaller sized schools) was held to be too costly and unwieldy given the small sums of money to be disseminated through these projects. The technical amendment proposed the formal abolition of the cofinancing requirement for small grants. For further information see the explanatory memorandum for COM (2002) 193.

[40] http://europa.eu.int/comm/dgs/education_culture/consult/index_en.html. 23 February 2003.

4.5 Conclusion

The use of the methodology of the analytic narrative in this case study has allowed us to dissect the process of policy making of education policy at a deep level. The macro-level analysis of pre-negotiation phase of education policy shows that liberal intergovernmentalism has held considerable explanatory purchase at the different stages in the history of EU education policy. In the early phase of education policy development, the tenor and content of Commission proposals tended to correspond with Council preferences, in line with liberal intergovernmentalism. However, once policy activity in this area was created, the Commission tried to expand the EU's activities. Given the weak legal base, however, the Commission was and is fundamentally constrained in the depth of integration it can advocate in policy proposals. Liberal intergovernmentalism appears to have greater explanatory power at this phase. This is also evident in the micro-level analysis where the alternatives available to the Commission with regard to the SOCRATES II proposal were also affected by existing policy parameters set by the Council.

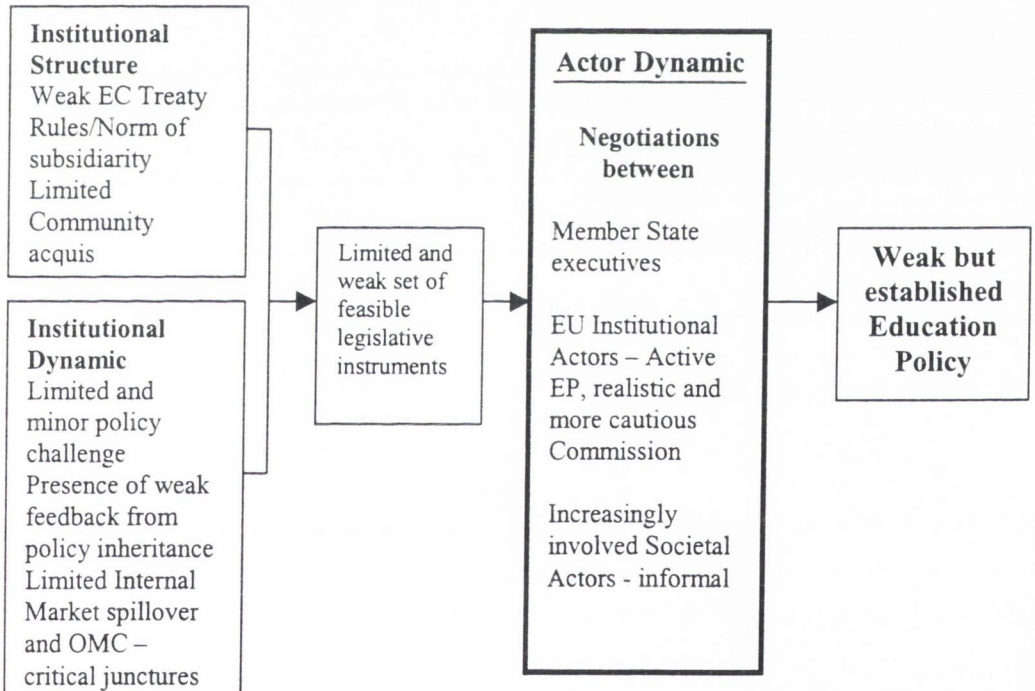
In the negotiation phase, with the onset of institutionalisation, the propositions of supranational governance find more resonance than those of liberal intergovernmentalism. While the Council tightly controls the area of action, as the macro analysis showed, and institutionalisation only occurs when sanctioned by the Council in the first place, the decision-making outcome is a result not only of the preferences and positions taken by the member state executives. The micro-level analysis demonstrates this to greatest effect. As we saw with the negotiation of SOCRATES II, depending on the institutional rule applied, actors other than the Council can substantively influence the decision-making outcome. In fact, the SOCRATES II policy outcome did not represent the lowest common denominator bargain between the delegations of the member states but a compromise between the Council and the EP as negotiated in conciliation.

In the post-decision phase of education policy-making, both theoretical conceptualisations offer insight and demonstrate some explanatory power. Even though the Council delegated implementation responsibility to the Commission, it sought to control this delegation through comitology. Rather than trying to exploit comitology as a means of furthering principal-agent slippage, in the sphere of

education the Commission and Council have worked together on the basis of consensus. This was evident in both the macro and micro analyses. With regard to adjudication, the ECJ has ruled against the preferences of member states, but has been careful only to do so within the remit of the treaties. The European Parliament and transnational society have also increased their formal and informal roles in this phase of the policy process, contrary to what is put forward in the theoretical frameworks.

To reiterate, the use of the methodology of the analytic narrative in this case study has also allowed us to dissect the process of education policy making at an even deeper level than in previous analyses. We now briefly turn to look at education policy with the policy making representation developed in Chapter 3.

Figure 4.3: Education Policy Making



Education policy is a result of the negotiation between multiple actors, who now include the Council and its domestic level, EC institutional actors and societal actors and whose behaviour, resources and preferences are mediated through the established institutional structure of education policy, namely the treaty base and existing acquis and prompted by the institutional dynamic, i.e. either through feedback from the existing policy inheritance or external critical junctures that necessitate action. On the basis of the evidence outlined in Section 4.2 of this case study, it is possible to

conclude that the various instances of policy making in the area of education has led to the formation of an established policy competence at the EU level. In other words, institutionalisation of education policy has occurred. Yet, while it is accurate to say that this institutionalisation exists, we must conclude that the rate of institutionalisation is modest and the scope and depth of education policy is weak rather than strong. It is true that education policy at the EU level has evolved in a deeper direction. It has moved from not even being mentioned in the Treaty of Rome and Single European Act and the realm of intergovernmental resolutions to in some way resembling more recognised and well-established instances of institutionalisation, with established treaty bases, *acquis* and legislative histories and where each of the supranational actors have specific functions. Indeed, in line with the original neofunctionalism, the Community's move into some kind of education policy cooperation was facilitated by the limited spillover in the 1980s in particular with the development of the internal market, the free movement of workers, services and the concomitant need for the common recognition of qualifications. The genesis of the ERASMUS programme at this time had a basis in judgements of the ECJ and its exploitation of existing treaty provisions. However, what is also clear is that the constitutional norm of subsidiarity is a potent brake on any efforts to harmonise education policy at the EU level and the Commission is mindful not to encroach on member states' sovereignty in this field. The evidence of policy making in the 1990s and from the Lisbon Agenda and the Open Method of Coordination point to the conclusion that any further action in the education area will be continue to be carefully navigated and monitored by the member state executives. Given the fact that education policy is recognised as a complementary competence or supporting measure, the feasible set of instruments will most likely always be confined to decisions, resolutions, recommendations, guidelines and programmes.

In the sphere of education policy, it is clear that the Council takes the lead in any action that is proposed. Member state executives in the Council are wary of any attempts to move responsibility for national education to the European level, as OMC shows. The Council does not advocate deep supranational entrepreneurship in this area and limits the possibility of this with a tightly controlled legal base. In the 1980s in particular the Commission was proactive in its attempts to deepen Europeanisation of this policy area and succeeded in pushing the Council to agree on a legal base for

education in the Maastricht Treaty. This must be recognised. However, it concentrated on policy consolidation in the 1990s and with the Lisbon agenda and OMC has been respectful of Council motives and its desire for control in this policy area. In contrast, the European Parliament has assumed a more activist role and interest in education policy negotiations since it gained the right of co-legislation with the Maastricht Treaty (Articles 149 and 150 – codecision). Since the negotiation of the first SOCRATES programme, the EP has pushed for greater involvement in other stages of the policy process, in particular post-decision implementation and has had minor success in this goal. Transnational societal actors must also be considered as education policy stakeholders, with an identifiable and increasing involvement in both the pre-negotiation and post-decision phases of policy-making.

Chapter 5: Consumer Policy

5.1 Introduction

Given its lack of treaty base until the Treaty on European Union and the limited scope and number of binding acts in this policy area[1], the predominant conclusion of policy analysts is that consumer policy has tended to find itself marginalised in the EU's policy process (Weatherill, 1999, 693). In 1997, Greenwood concluded that the driving force behind consumer-focused action at EU level arose more as a by-product of European integration than as a focus in itself (Greenwood, 1997, 194). However, while Pollack acknowledged that EU consumer policy has been referred to as 'an irregular regulatory patchwork', taken as a whole consumer policy at the EU level represents more than simply the lowest common denominator of member state practices (Pollack, 1997, 583). This case study examines the development and evolution of consumer protection policy at the EU level and will test the propositions outlined and explored in Chapter 2 against the evidence of its policy development. Are the above comments, reminiscent of the propositions developed by liberal intergovernmentalists in particular, justifiable when examined against the evidence of the development of consumer policy? Or does Pollack's comment hint at a possible drift of consumer policy away from member state control and the accompanying explanatory purchase supranational governance might bring to the examination of the process of policy making in this area?

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[1] In the 1999 Inventory of Acts relating to consumer affairs and consumer health protection, binding acts relating to transactions comprised: **Council Directive 79/581EEC** of 19.06.1979 on consumer protection in the indication of the prices of foodstuffs (amended by Council Directive 95/58/EC); **Council Directive 88/314/EE** of 07.06.1988 on consumer protection in the indication of the prices of non-food products (amended by EP and Council Directive 95/58/EC); **EP and Council Directive 98/6/EC** of 16.02.1998 on consumer protection in the indication of the prices of products offered to consumer; **Council Directive 85/577/EC** of 20.12.1985 to protect the consumer in respect of contracts negotiated away from business premises (door-to-door selling); **Council Directive 84/450/EEC** of 10.09.1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (amended by Directive 97/55/EC of the EP and Council); **Council Directive 87/102/EEC** of 22.12.1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (amended by Council Directive 90/88/EEC and Council and EP Directive 98/7/EC); **Council Directive 93/13/EEC** of 05.04.1993 on unfair terms in consumer contracts; **Directive 97/7/EC of the EP and Council** of 20.05.97, on the protection of consumers in respect of distance contracts; **Council Directive 90/34/EEC** of 13.06.1990 on package travel, package holidays and package tours; **EP and Council Directive 94/47/EC** of 26.10.1994 on time share property purchase; **EP and Council Directive 98/27/EC** on injunctions for the protection of consumers interests; **EP and Council Directive 99/44/EC** of 25.05.1999 on certain aspects of the sale of consumer goods and associated guarantees.

The chapter proceeds as follows. Section 5.2 maps the general development of EU consumer policy in broad terms, highlighting the critical junctures where consumer policy was pushed forward (or not) and the reasons behind this. Section 5.3 looks at the consumer policy making process in macro terms at each of the three stages, i.e. the making of consumer policy at each stage of the policy process over time is analysed and measured against the propositions developed by each of the theoretical frameworks in broad terms. Which of the two theories comes close to providing the best picture of the process of policy making in consumer policy at each stage? Section 5.4 focuses on the micro level of analysis and applies the propositions to the three stages of the negotiation of the 1999 Consumer Goods and Associated Guarantees Directive[2] in order to test their explanatory power. Finally, in the conclusion, the results gleaned from the analyses contained in sections 5.3 and 5.4 are reiterated and general conclusions as to the goodness of fit of the theories are drawn. In this way, the nature of consumer policy making can also be determined.

5.2 Institutionalisation of Consumer policy

The central aim of this section is to broadly trace the process of institutionalisation of consumer policy in the EU. It must be acknowledged from the outset that this discussion will provide an overview of consumer protection policy development; given the constraints of scope, such an analysis cannot be exhaustive in covering the full range of consumer protection that includes health and food safety policy.[3] Nevertheless, the analysis of this section focuses on a number of questions, most importantly, has the process led to the formation of well-established policy competence in consumer policy? What norms frame the scope of consumer policy making? Do the developments in consumer policy simply represent the will of the Member States or is this an area in which the EU institutions have demonstrated an autonomy of action in the development of policy?

Consumer protection was not considered an objective of the 1957 Treaty of Rome. Consumerism was in its early days at that time and the protection of the consumer was not considered a problem independent from the protection of the competitive

[2] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.
[3] For further information see: http://europa.eu.int/comm/consumers/index_en.html

environment in the market (Goyens, 1994, 7). According to the Brussels Convention on the Jurisdiction and Enforcement of Judgements, a consumer is 'the person who concludes a contract or who buys a product for purposes which can be regarded as being outside his trade or profession' (Quoted in Stuyck, 2000, 376). Consumer policy action first emerged at EC level in the 1970s. Heads of government and state, meeting at the 1972 Paris European Council summit, officially decided that the improvement of living conditions implied the protection of the health and safety of consumers, as well as the protection of their economic interests. Three years afterwards the Commission presented the first action programme on consumer policy in response to the invitation by the European Council (Official Journal C 92, 25.04.1975). This preliminary programme for a consumer protection and information policy laid the foundations for the framework of legislative protection for the consumer at EC/EU level – a general framework that still applies today. The preliminary programme summed up the five basic consumer rights as:

- the right to protection of health and safety
- the right to protection of economic interests
- the right of redress
- the right to information and education
- the right of representation (the right to be heard).

Initially, the Community legislated piecemeal in the fields of cosmetics safety, food labelling, misleading advertising and doorstep selling. However, the real impetus for legislative action in the consumer field took place with the Single European Act, which introduced the notion of the consumer into the Treaty (Article 100a) although it did not provide a specific legal basis for consumer protection. Efforts to complete the internal market highlighted the position of the consumer in EC policy-making – the maximisation of cross-border shopping, a central feature and aim of the internal market, pointed to the need for consumer confidence at a Europe-wide level.

As is clear even from the brief outline above, the level of institutionalisation of consumer policy was relatively low and informal at this stage. Consumer policy had to wait until the signature of the Treaty on European Union to achieve a full legal basis – in Article 129a (now article 153 following the Treaty of Amsterdam). The TEU did make the distinction between consumer protection initiatives linked with the completion of the internal market and other consumer protection measures and thus

had the potential to free consumer policy from internal market policy. Yet the legislative output in the aftermath of the TEU (see footnote 1) showed the reluctance of member state executives and the Commission to move beyond looking at consumer policy through the lens of the single market. During this period measures were taken in the following areas: toy safety and general product safety, cross-border payments, unfair contract terms, distance selling and time-share purchases. Consumer policy was also institutionalised within the EU structures with the creation of an autonomous Consumer Policy Service in 1989, which became a full Directorate General (XXIV) in 1995. The Commission also instigated a number of action programmes, even though they appeared largely aspirational in intent.[4] However, the Bovine Spongiform encephalopathy (BSE) crisis of the late 1990s (which first affected cattle in the United Kingdom) represented a critical juncture in the development of food safety policy at EU level and this had a concomitant institutionalising effect on consumer protection policy.

Owing to the BSE crisis particular, member state executives looked for a Europe-wide solution to ensure food safety and consequently consumer health. Within DG XXIV emphasis was shifted from consumer protection to consumer health and food safety issues and DG XXIV restructured its departments concerned with these issues (taking units from other directorates general) and was renamed DG SANCO in 1999 (Health and Consumer Protection). As a result of the crisis, consumer health and food safety issues in particular were ratcheted up the legislative agenda. Since 1999, the development of consumer policy has proceeded in two main avenues – first through the establishment of a general framework for Community activities in favour of consumers and second, through the development of a future framework directive in consumer protection with ancillary specific legislation which would place existing directive and future legislative proposals in a common framework (announced in the publication of a Green Paper on Consumer Protection in 2001).

[4] An EP Committee Report described the 1996-1998 Consumer Policy Action Plan as 'a melée of conflicting priorities which added up to no real priorities at all. The result was an imprecise Action Plan with all the forward momentum of a rocking horse'. Report on the communication from the Commission on the Consumer Policy Action Plan 1999-2001 (COM (98) 0696. 21 April 1999 A4-0208/99). Rapporteur: Mr Philip Whitehead.

The above section is a preliminary account of institutional developments in the policy area of consumer affairs. Consumer policy as discussed in this chapter comprises product safety, economic and legal issues relevant to consumers in the market place, consumer information and education, the promotion of consumer organisations and their contribution with other stakeholders to consumer policy development. Due to constraints of space, the scope of consumer policy analysed in this chapter does not include food safety issues. Food issues are now dealt with separately to consumer policy and have their own legislative agenda. The White Paper on Food Safety contained proposals for a major programme of legislative reform in this area (COM (1999) 719 final). The overall *acquis* for the chapter on consumer protection is composed of 14 directives covering consumer protection in the field of product liability; unfair contract terms; dangerous imitations; product safety; price indication; misleading and comparative advertising; doorstep and distance selling; consumer credit; package travel; and timeshares. It also includes a Council decision establishing a Community system of information on home and leisure accidents (EHLASS) and three Commission decisions on a consumer committee and scientific committees. Box 5.1 shows the main planks of consumer policy:

Box 5.1: Main Subject Areas of Consumer Policy at EU Level

- Access to justice and injunctions
- Comparative and Misleading advertising
- Consumer Credit
- Consumer education
- Contract Law
- Dangerous imitations
- Distance Selling
- E-commerce and information society
- Environmental, nutritional, health and Ethical claims
- Unfair Contract terms
- Fair Commercial practices
- Door-to-door sale
- Euro
- Financial services
- Guarantees
- Labelling
- Package Travel
- Price Indication
- Product Liability
- Safety of Products and Services
- Services of General Interest
- Time-sharing

The critical juncture of the BSE crisis, in conjunction with the signature of the Treaty of Amsterdam, marked a period of change in the development of EU consumer policy. From the mid-1970s until the signature of the Treaty of European Union, the institutionalisation of consumer policy at the EU level proceeded at a very cautious pace, especially given the lack of treaty base. Institutional procedures and structures

dealing with consumer policy were slowly established and a consumer policy *acquis* was also developed incrementally with member state executives primarily dictating the pace of legislative decision-making due to the institutional prerogative of the Treaty of Rome and SEA. The period from the Maastricht to the Amsterdam Treaties was essentially one of consolidation and habituation to the new legal framework. The reorganisation of DG SANCO in 1999, primarily in reaction to the BSE crisis, was an important stage in the development of consumer policy consumer policy making – consumer protection is now recognised as a legitimate field of activity for the Union outside of the link with the internal market and a more systematic and strategic approach to policy making is being applied by the Commission in response to member state Council resolutions. Given the political importance of ensuring safety of the Union's food supply, a large part of DG SANCO's activities now concentrate on food safety and public health, as opposed to consumer protection as outlined at the beginning of this chapter. At first glance, the institutionalisation of consumer protection policy in economic matters at the EU level appears weak.

Consumer Policy before Maastricht

Consumer protection as a systematic policy goal originated in the 1960s as a result of the rising consumer movement, first in Great Britain, with the publication of the 'Molony Report', and second in the USA, with President Kennedy's famous Message to the Congress of 15 March 1962 spelling out the fundamental consumer rights (the right to safety, the right to information, the right to choose and the right to be heard) (Stuyck, 2000, 368-9). However, the first sign of willingness for explicit Europe-wide action in this sphere by member states did not appear until the 1970s and the capacity of the Community to develop an EU consumer protection policy was hampered by a fundamental constitutional impediment – the Treaty of Rome contained no explicit base for the adoption of legislation in the field of consumer protection. Nevertheless, the notion of 'consumer' appeared in the EC Treaty in several articles, which subsequently informally justified early Community activity:

- Article 39(e), relating to the common agricultural policy, explicitly listed among the aims of the latter to 'ensure that supplies reach consumers at reasonable prices';
- Article 85(3), relating to the competition policy, empowers the Commission to exempt agreements between undertakings subject to four cumulative

conditions, one of which being that the consumers will receive a fair share of the resulting benefit;

- Article 86, also relating to the competition policy, and specifically abuse of dominant positions, identifies as an example of unfair practices 'limiting production, markets or technical development to the prejudice of consumers'.

Even if the need to protect the consumer was not explicitly recognised, several directives adopted during the first decade of the existence of the Community in other policy areas were also indirectly of interest to consumers, notably in the fields of foodstuffs, animal health and nutrition, pharmaceuticals, textiles, detergents and motor vehicles. For example, Directive 79/112 on the labelling of foodstuffs was adopted to facilitate the free movement of goods but was also significant for consumers (Goyens, 1994, 7).

In spite of the absence of a focused reference to a consumer policy, a number of measures in the specific field of consumer protection were adopted in response to the 1972 European Council call for action in this area. Two provisions of the Treaty of Rome were used to serve as the legal basis of specific Community action in the field of consumer protection:

- ex article 100, which states that 'the Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market'.
- ex Article 235.

These provisions were used as a legal basis for a number of legislative measures which included: Directive 84/450 on misleading advertising, Directive 85/374 on product liability, Directive 85/577 on contracts negotiated away from business premises and Directive 87/102 on consumer credit (all in the field of private law). Most of these directives were adopted within the framework of the resolutions of the Council and the action plans of the Commission drawn up as a response to these resolutions. According to Stuyck, however, progress in Community legislation for securing consumer rights following the 1975 programme was disappointing and led the Commission to put forward a Second Action Programme in 1981 (Stuyck, 2000, 377). Yet member state executives continued to pay lip service to the importance of

consumer protection initiatives at the European level and the legislative output was again minimal. The second programme was produced in the context of the difficult economic climate of the late 1970s and a shift in emphasis can be identified, away from the question of the consumer's health and safety and towards his or her economic interests. The measures proposed in both action programmes were primarily studies, the dissemination of information and the setting up of procedures for cooperation. In 1984 the Council decided to establish a Community system of rapid exchange of information on the dangers linked to the use of consumer products (RAPEX).

Another early step in the development of policy was the establishment of institutional structures at Community level to deal with consumer protection. In 1973 a service was installed at the Commission which dealt with problems of environment, nuclear energy, and consumer protection; and in September 1973, the former 'Consumer Contact Committee' (declared as inefficient in its performance by Maier (1993)) was transformed into the 'Consumers Consultative Committee', charged with giving advice on consumer affairs at the request of the Commission. The Consumers Consultative Committee comprised of representatives of the European-level organisations representing consumer interests (oftentimes funded by the Commission) and representatives from member states' administrations. Such organisations included:

- Bureau Européenne des Unions de Consommateurs (BEUC, set up in 1962)
- Confederation of Family Organisations in the EC (COFACE, set up in 1979)
- European Trade Union Confederation (ETUC, set up in 1972)
- European Community of Consumer Cooperatives (Euro Coop, set up in 1962).

The European Parliament's Committee on Environment, Public Health and Consumer Protection, set up in 1976, also took a strong interest in consumer protection matters and was described by Greenwood as a 'forceful promoter of consumer interests, and a consistent critic of the Commission for its failings in the consumer policy field' (Greenwood, 1997, 203).

The fact that consumer policy did not live up to the expectations of the action programmes was acknowledged in a Commission Communication to the Council of

Ministers in 1985. This Communication was designed to give a new impetus to the Community's consumer protection policy and in it the Commission recognised that the achievements of the two previous programmes fell far short of their intentions – only a few proposals had gone through the total legislative process. It also identified the reasons for this inadequacy: the deep economic recession, the discussions on the lack of Community competence, the unanimous voting procedure at Council level, and the practice of vertical harmonisation, prescribing detailed rules for a restricted range of goods or ingredients (COM (85) 314 final of 27 June 1985). To counter these problems a new approach to technical harmonisation was proposed and adopted – detailed specifications of product characteristics were no longer to be dealt with in the directives as their definition paralysed the legislative adoption process and as directives were difficult to adapt to new technical or scientific developments. Instead they were to be left to the European standardisation bodies CEN (Comité européen pour la normalisation – the European Standardisation Committee) and CENELEC (Comité européen de normalisation electro-technique), which were to prepare common standards to satisfy the mandatory requirements set in the directives. In 1986, the Community also decided to set up a pilot project on an information system regarding accidents linked to consumer products (EHLASS – European Home and Leisure Accident Surveillance System) (Goyens, 1994, 21-41). To sum up, in the period before the signature of the Single European Act, the institutional development of consumer policy at the European level could be described as incremental and patchy.

The adoption of the Single European Act in 1986 could have filled in the gap left by the non-inclusion of consumer protection in the Treaty. However, the SEA did not produce a separate Consumer Policy Title. Consumer policy remained an element in other policies, most specifically policies with the aim of completing the internal market. In fact, disagreement on the consumer policy provisions in the SEA negotiations highlighted differences between the member states on consumer policy. In the 1960s and 1970s, several States (primarily Denmark, Germany, the Netherlands, and the United Kingdom) rapidly developed their national consumer legislation. In fact, by the end of the period preceding the onset of the Single Market, the EC Member States were split into three groups in practical terms:

- first, the previously mentioned countries with a high level of consumer protection and organisation;
- second, countries with just a moderate level of consumer protection, such as France, Belgium, Italy and Spain;
- third, countries in which very little or almost no consumer legislation had existed and for which the adoption of EC law was the launching of this field. Such was the case in Greece, Portugal, and Ireland (Maier, 1993, 358).

The non-inclusion of consumer protection as a separate title in the SEA indicated on the one hand the desire of those member states with a high level of consumer protection to avoid a dilution of those rights through EU harmonisation and on the other hand the success of those member states which had very little or almost no consumer legislation in imposing their preferences on negotiations – the lowest common denominator outcome. However, the SEA did move consumer protection at the EC level forward beyond the lowest common denominator action (i.e. none) somewhat.

The SEA introduced two modifications to the Treaty of Rome that had a bearing on consumer policy:

- Article 100a – concerning the adoption of measures for the completion and functioning of the internal market. In paragraph 3, it stated that the Commission, in its proposals concerning consumer protection, will take as a base of high level of protection. The reference to consumer protection in article 100a may be considered to constitute an implicit recognition of the competence of the EC institutions to adopt measures in the field of consumer policy. However, as article 100a was devoted to the completion of the internal market, it was construed to mean that consumer protection measures might only be taken by the EC in so far as they are linked to the functioning of the internal market.
- The SEA introduced QMV – which allowed more flexibility in the carrying out of the legislative work of the Council and in the field of consumer policy, made it possible to adopt legislative measures much more quickly than in the

past[5] and granted the European Parliament a role in the decision-making process.

After the entry into force of the SEA, therefore, further consumer protection directives were adopted under ex Article 100a (now Article 95). The negotiation of many of these directives lasted many years due to intense negotiations within the Council and later between the Council and the European Parliament. Directives negotiated included: Directive (EEC) 87/102 on consumer credit, Directive (EEC) 90/88 amending above, Directive (EEC) 87/357 on dangerous imitation products, Directive (EEC) 88/314 on price indication for non-foodstuffs, Directive (EEC) 88/378 on the safety of toys, Directive (EEC) 90/314 on package holidays and Directive (EEC) 92/59 on general product safety.

While these directives represent a continuation of the ad hoc adoption of legislation in the consumer policy sphere, they contain an important principle that was to find its way into the TEU provisions on consumer protection, namely the minimum harmonisation principle. The principle of minimum harmonisation represents the recognition by member states and the EU institutions of the difficulties faced in the harmonisation process by Member States whose consumers already benefit from advanced protection. In essence, it must not be taken as given that re-regulation of consumer policy at the European level is self-evidently better than regulation at the national level. According to the principle of minimum harmonisation, a Member State may, in areas covered by a Community directive, maintain or introduce more stringent consumer protection measures, as long as they were compatible with the Treaty, and especially articles 30 and 36 if they so wish but are not obliged to do so. In the original *Cassis de Dijon* judgement (see Chapter 3), the Court had considered that consumer protection was one of the imperative requirements implicitly contained in articles 30 and 36 and therefore made it possible for member states to refer to these articles to maintain or adopt consumer protection measures, even if they represent restrictions to trade. This principle was subsequently confirmed by the ECJ in a number of other judgements. For example, in the Directive regulating doorstep selling (85/577) stricter controls are not excluded, although they must conform to Article 30. Accordingly, in *Buet v. Ministère Public*, the Court ruled that an absolute

[5] For example, Directive 85/374 on product liability was adopted after 12 years of discussions.

prohibition on 'doorstep selling' under French law was not excluded by the Directive, nor was it incompatible with Article 30 of the Treaty despite its restrictive effect on cross-border trade. [Case 328/87 [1989] ECR 1235]. According to Micklitz and Weatherill, the minimum harmonisation model may be taken as an expression of unwillingness to surrender national competence unilaterally to improve consumer protection even after the establishment of common Community rules (Micklitz and Weatherill, 1993, 301).

Following the signature of the SEA, the Commission produced a number of action plans and non-binding acts declaring its intent to act in the field of consumer protection. For example, in its 1985 Communication, which was taken over by the Council resolution of 23 June 1986 on the future orientations of the Community consumer policy (OJ C 167 05.07.1986), the need for more systematic consultation of consumer representatives on Community measures that significantly affect their interests was called for. The pattern of Commission action plans following Council resolutions continued with the 1990 to 1992 Consumer Policy Action Plan.[6] The subject matter of this new action plan was largely influenced by the emphasis placed during this period on the completion of the internal market by the end of 1992. It meant that EC consumer policy was not recognised as a specific and independent Community policy, but rather had to justify itself on the grounds of its links with the internal market policy.

In the Action Plan, the Commission also pledged to assist more systematically in the development of consumer organisations, particularly in Southern Europe and Ireland, with the view to promoting the development of balance between producer and consumer representation and to propose a directive on unfair contract terms and distance selling. The Distance Selling Directive negotiations lasted five years from 1992 to 1997 and due to significant pressure from industry at national and EU level, a number of important exemptions were granted which had to be rectified in future amending directives, e.g. financial services. In terms of institutionalisation of structures, the Consumer Policy Service was created in 1989. At this time, the

[6] In November 1989 the Council adopted a resolution on the future priorities for the relaunching of a Community consumer policy, on the basis of which in early 1990 the Commission prepared a three year action plan (OJ C 294 22.11.89 and COM (90) 98 final of 3 May 1990).

Commission considered that the weight of consumer policy had increased so much that it was no longer wise to let it remain within the structure of DG XI (Environment, Nuclear Safety and Civil Protection), where it formed only a small part of other activities. So the consumer department was constituted as an independent authority, although not yet with the status of a Directorate General, but as a 'service' of the Commission (Maier, 1993, 358). In addition, in 1990 a Parliamentary Inter-group on consumer policy was established in the European Parliament, with its coordination activities shared by BEUC and COFACE.

Maastricht to Amsterdam

At Maastricht, the constitutional inhibition on the elaboration of an autonomous EC consumer policy was removed (Weatherill, 1999, 693). During the discussions concerning the TEU the question of a specific provision concerning EC competence in the field of consumer protection was raised at a very early stage. In spite of scepticism expressed in the course of the debates by several Member States on the need to introduce such a provision, the TEU did contain an explicit legal basis for EC action in the field of consumer policy.

This can be found in two provisions:

- Article 3, stating the various actions of the Community to achieve the objectives laid down in article 2, lists, in its point(s): 'a contribution to strengthening of consumer protection'.
- Article 129a stated that:

  '1. The Community shall contribute to the attainment of a high level of consumer protection through:

  (a) measures adopted pursuant to article 100a in the context of the completion of the internal market;

  (b) specific action which supports and supplements the policy pursued by the Member States to protect the health, safety and economic interests of consumers and to provide adequate information to consumers.

  2. The Council, acting in accordance with the procedure referred to in article 189b and after consulting the ESC, shall adopt the specific action referred to in paragraph 1(b).

  3. Action adopted pursuant to paragraph 2 shall not prevent any Member State from maintaining or introducing more stringent protective measures.

Such measures must be compatible with this Treaty. The Commission shall be notified of them.

The TEU put to an end the controversies arising from the lack of explicit legal basis for Community initiatives to promote consumer interests. It also established a distinction between consumer protection initiatives linked with the completion of the internal market and other consumer protection measures, and therefore in theory freed consumer policy from internal market policy. In addition, the application of the codecision procedure provided for in article 189b, which implied much more active participation from the EP, must be considered as an important step towards a more active consumer policy at EC level (Goyens, 1994, 10).

The codification of consumer policy within the treaties brought a new element into the debate on consumer policy among member states and brought a new norm to consumer policy at EU level – the norm of subsidiarity. In the run up to and following the negotiation of the TEU, the principle of subsidiarity was invoked by several member states to oppose Community action, namely in the fields of liability of services, distance-selling and time share property, on the grounds that they went 'into excessive detail in relation to the objective to be pursued' (Commission SEC(92) 1990). According to Goyens, lengthy debates on the lack of a legal basis were, following the signature of the TEU, replaced by debates on the application of the principle of subsidiarity and its implications for consumer policy (Goyens, 1994, 11). Proposals for directives on footwear labelling, comparative advertising and a directive on liability for the supply of defective services are some of the proposals that were withdrawn by the Commission for revision immediately following the signature of the TEU. The fate of the proposal on liability of service supply was in doubt when it was included in a list of drafts presented to the Edinburgh European Council in December 1992 as subject to scrutiny in line with the Commission's commitment to respect the principle of subsidiarity (Weatherill, 1999, 715). In a 1994 Communication from the Commission on new directions on the liability of suppliers and services, the Commission concluded that 'the proposal stands no chance of being adopted without sweeping changes which would risk voiding it of much of its substance' (COM (94)

260)[7]. The Commission therefore withdrew it. Subsidiarity continues to occupy the minds of the Commission in putting forward proposals, even in response to calls from member states for action. In a Consumer Affairs Council of Ministers meeting on April 1999, the Spanish delegation called for adoption at Union level of measures to limit or even ban advertising for and the sale of video games and toys inciting young people to use violence or to adopt socially reprehensible behaviour. Commissioner Bonino immediately stated that such an initiative did not come within the Community's competence, by virtue of the subsidiarity principle (Agence Europe No.7444, 14 April 1999).

The entry of consumer protection into the formal list of Community competences through article 129a offered the opportunity for further policy making in the sphere, and policy making that was not contingent upon complementing the single market. However, in reality, Article 129a generated minimal legislative activity (Weatherill, 1999, 716). The first time it was used, in 1994, it led to the establishment of the useful but by no means radical system of information on home and leisure accidents - EHLASS (Decision 3092/94 OJ L331 1994). According to Weatherill, although the Commission's Action Plan for 1996 to 1998 contained adventurous notions:

> It is marked by a relative dearth of concrete legislative proposals. There seems little doubt that the early years of Article 129a were affected by the general climate of deepening scepticism about pursuit of fresh regulatory initiatives. The Commission expressed a general commitment to focus more heavily on securing the enforcement of agreed laws at the expense of seeking new legislation (Weatherill, 1999, 716).

As with many other policy areas, the enforcement of consumer protection law, even if originating in EC legislation, lies with national enforcement authorities. Evidence has shown that in the 1980s and 1990s in particular, national regulatory provisions did not implement much of the legislation adopted in the consumer policy sphere in a timely or adequate manner. For example, the Product Liability Directive still had not been implemented by France and Spain in 1994, though implementation was due in July

[7] Proposal may be found in COM (90) 482.

1988. The Commission initiated proceedings against the UK for inadequate implementation of the directive. And even where directives were adequately implemented, they gave rise to difficulties when applied to cross-border situations: for example the Misleading Advertising directive was implemented in all member states but the Commission received numerous complaints regarding cross-border misleading advertisements which were not appropriately addressed by the national implementing legislation.[8] In the implementation phase of consumer protection policy, the Commission was dependent on national authorities for full implementation of legislation.

As mentioned earlier, the Consumer Policy Service became a full Directorate General in 1995. Much of its activity focused on producing Consumer Policy Action Plans and associated non-binding acts and documents such as green papers which highlighted potential areas of activity, such as consumer associated rights and guarantees. As before the TEU, the EP's Committee on Environment, Public Health and Consumer Protection prepared the EP's work concerning consumer protection. It also initiated own-initiative opinions (in particular in response to Community action programmes where it criticised the Commission for producing, in its 1996-1998 action programme, a 'magnificent wish list for Europe's consumers') and organised public hearings through the inter-parliamentary group.[9] The Economic and Social Committee, in an Own Initiative Opinion of the Consumer Policy 1993-5 Action Plan, also criticised the performance of the Commission: 'Now is a suitable time to carry out a general study of whether or not the Commission has attained its stated objectives; such a study cannot fail to conclude that it has not' (ESC Own Initiative Opinion, 1996). The EP's own approach to consumer policy appeared at times inconsistent due to its rules of procedure where the Committee on Environment, Public Health and Consumer Protection was not automatically designated to prepare opinions on initiatives directly or indirectly concerning the interests of the consumer (Goyens, 1994, 31). Consumer organisation representation continued with the Consumers' Consultative Council. The role of the Economic and Social Committee has been marginal in consumer policy. While it is formally part of the decision

[8] See Tenth Commission Report on the Application of Community Law, OJ C 233, 30.08.1993.
[9] The EP Report regretted the lack of an assessment of the previous period and the absence of a timetable and concrete proposals to take consumer policy forward. See EP Report on Commission Communication on priorities for consumer policy 1996-1998 C4-0501/95. Rapporteur: Whitehead.

making process, it does not have much impact, apart from encouraging exchange of information and links between organisations. For example, on 15 March 1999, World Consumer Day, the ESC organised a European Consumer Day at its premises in Brussels in collaboration with the European Commission 'to debate future priorities and to deepen the dialogue with representatives of European socio-professional organisations on the completion of the single market, introduction of the Euro, food safety, services, new technology and e-commerce' (Agence Europe, 7417, 4 March 1999). This now occurs every year.

The evolution of consumer policy after Amsterdam

The most recent development in the constitutional framework of EU consumer policy is the amendment of the consumer protection provisions of Article 129a, now renumbered 153, by the Treaty of Amsterdam. According to Stuyck, little is known about the genesis of the amendments, which seem to be a hardly debated compromise between Scandinavian proposals for broader Community powers and, in particular, German and British opposition. Consumer rights were more explicitly recognised in the Treaty of Amsterdam, i.e. the right of consumers to information[10], to education and the right for consumers to organise themselves in order to safeguard their interests. A new provision was also added to the effect that consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities (new paragraph 2 – a formal obligation).

As with the original article 129a, practice has revealed the relatively low significance of the new legal basis for the development of consumer law. Up to 2000, only one directive was based on the basis of Article 153: Directive 98/6 on consumer

[10] The right to information was recognised by the ECJ in its *GB Inno BM v CCL judgement* [Case C-362/88, [1990] ECR I-667]. This judgement showed that the right of consumers to be informed also limits the regulatory powers of the member states. A provision of the Luxembourg Trade Practices Act according to which according to which sales offers involving a temporary price reduction may not state the duration of the offer or refer to previous prices and allegedly intended to protect consumers against confusion was not found to be justified in the general interest, i.e. the protection of the economic interests of consumers. The provision was therefore contrary to Article 28 (ex 30) EC (prohibition of quantitative import restrictions and measures having equivalent effect). The Court considered that: ...under Community law concerning consumer protection the provision of information to the consumer is considered one of the principle requirements. Thus Article 28 (ex 30) cannot be interpreted as meaning that national legislation which denies the consumer access to certain kinds of information may be justified by mandatory requirements concerning consumer protection. The authorisation of comparative advertising by Directive 97/55 may be seen as the legislative consequence of this doctrine (Stuyck, 2000, 384-385).

protection with regard to the indication of prices of products. Several other directives were adopted on the basis of Article 95 (ex 100a) dealing with internal market harmonisation but consisted of the amendment of existing legislation (e.g. those on timesharing, distance selling and consumer credit). The dynamics of consumer policy development took on a sort of regular pattern through the negotiation of these up-dating directives and reinforced the incremental nature of consumer policy making. The production by the Commission of Proposal COM (2002) 443 final on consumer credit illustrates this dynamic.[11]

Directive 87/102/EEC, which established a Community framework for consumer credit with a view to promoting the setting-up of a common market for credit, was amended with minor changes in 1990 and 1998. In 1995 the Commission presented a report on the operation of the 1987 directive, following which it undertook a very broad consultation of the parties involved.[12] In 1996 the Commission presented a report on the operation of Directive 90/88/EEC amending Directive 87/102/EEC, concerning the annual percentage rate of charge (APR).[13] In 1997 the Commission presented a summary report of reactions and comments, which showed that there were enormous differences between the laws of the various Member States in relation to consumer credit. The Commission judged that directive 87/102/EEC no longer accurately reflected the actual situation on the consumer credit market and was in need of revision. The report found that the idea of increasing Community-level harmonisation of provisions governing consumer credit was not unanimously supported by the member states. Further divergence was to be found between consumer groups and representatives of the financial services industry who preferred the need for legislative measures or the introduction of codes of conduct respectively.[14] Rather than immediately putting forward a proposal in light of this disagreement, therefore, the Commission ordered a series of studies on various specific issues dealing with the topic and carried out a detailed and comparative study

[11] Proposal for a Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the member states concerning credit for consumers. COM (2002) 443 final. 11.09.2002.
[12] Ireland was the only country not to have transposed the Directive at the time of the report.
[13] As regards the method of calculating the annual percentage rate of charge for consumer credit, the formula set out in Directive 90/88/EEC (Annex II) was found have been adopted by all the member states except Germany, France and Finland.
[14] COM (97) 465 final. 24 September 1997.

of all the Member States' national transposition legislation.[15] Four years later, on the basis of these studies, the Commission departments concerned presented a discussion paper on 8 June 2001 setting out six guidelines for a revision of Directive 87/102/EEC and in early July 2001 they held consultations with parties representing the Member States as well as the sector and consumers. On the basis of these consultations, a draft directive was finally launched in September 2002.

The BSE crisis provided a much-needed fillip to the new DG XXIV's resources. In 1992 the Consumer Policy Service employed approximately 40 people (Maier, 1993, 360). In 1997 a modest increase of 20 staff was granted to deal with the BSE 'mad cow' crisis (Interview Commission Official DG SANCO, 25 September 2002). This crisis also prompted a transfer of responsibility for the management of all food safety scientific committees and for oversight of national implementation into the hands of DG XXIV and away from other DGs bearing legislative responsibility as DG XXIV became fully responsible for consumer health and food safety policy. Responsibilities within the DG were also separated in relation to the drafting of legislative texts, scientific consultation and inspection and the dissemination of information.[16] These developments were endorsed by the Luxembourg European Council of December 1997, which stressed that the production and supply of safe food must be one of the European Union's policy priorities.

The arrival of the Euro, the development of the internet and e-commerce technologies and the future enlargement of the EU to include the candidate countries of Central and Eastern Europe, Cyprus and Malta and the consequent extension of the internal market have served as justifications for consumer policy activity since 1999. The

[15] Studies included: Lea, M.J., Welter, R. Dubel, A., 'Study on the mortgage credit in the European Economic Area. Structures of the sector and application of the rules in the directives 87/102 and 90/88 Final report on tender no. XXIV/96/U6/21; Seckelmann, R., 'Methods of calculation in the European Economic Area, of the annual percentage rate of charge' Final Report 31 October 1995, Contract no. AO 2600/94/00101; Reifner, U., 'Harmonisation of cost elements of the annual percentage rate of charge, APR', Hamburg 1998, Project no. AO-2600/97/000169.

[16] DG SANCO (renamed in 1999) is now responsible not only for consumer policy but also for health protection. To this end, eight new committees were created, replacing the scientific committees concerned with consumer health protection and now attached to DG SANCO; the multidisciplinary scientific committee was replaced by a scientific steering committee; the Food and Veterinary Office was incorporated into DG SANCO and a unit responsible for the assessment of public health risks was created. A White Paper on Food Safety was published in January 2000 by Commissioner David Byrne which announced the establishment of a new European Food Authority and a detailed 80 point action plan on food safety with a precise timetable for regulation and implementation over three years. See further: http://europa.eu.int/scadplus/leg/en/lvb/132100.htm.

advent of the internet and the Euro in particular marked the removal of an important psychological barrier to consumers shopping in other member states and has potentially made it easier for consumers to shop across borders and to compare prices. However, the results of a number of surveys commissioned by the European Commission showed that consumers in the EU have significantly lower confidence in making purchases cross-border than domestically and that much more work remained to be done. For example, according to in a survey conducted in January 2002, 32 per cent of European consumers feel well protected when in dispute with a business based in another member state compared to 56 per cent when in dispute with a domestic business.[17] The 2002 to 2006 Consumer Policy Action Plan with its informal rolling agenda for action is the Commission's response to these developments.

In the 2002 to 2006 Consumer Policy Strategy, the Commission identified three primary objectives in consumer policy:

1. A high common level of consumer protection
2. Enforcement of consumer protection rules
3. Involvement of consumer organisations in EU policies.[18]

Under the first objective 'a high common level of consumer protection', the chief actions are initiatives on follow-up to commercial practice related legislation, in particular issues addressed by the Green Paper on EU Consumer Protection and on the safety of services. The priority actions, under the second objective 'Effective enforcement of consumer protection rules', are the development of an administrative cooperation framework between member states and of redress mechanisms for consumers. Several Community instruments (e.g. legislation on unfair contract terms, misleading advertisement, distance selling and the sale of goods and guarantees, package travel, time sharing) provide consumers with a set of rights. However, if such rights are to have a practical value, mechanisms must exist to ensure they can be exercised effectively. If consumers are to have sufficient confidence in shopping outside their own Member State and take advantage of the Internal Market, they need assurance that if things go wrong they can seek redress. Therefore, access to justice

[17] Flash BE 117 'Consumer Study' January 2002. This survey was conducted for the Commission by EOS Gallup Europe and its 15 national institutes, who carried out 15,043 interviews between 14 and 31 January 2002. The overall report of the survey is available at: http://europa.eu.int/comm/dgs/health_consumer/events/event42_en.html.

[18] Communication from the Commission to the EP, the Council, the Economic and Social Committee and Committee of the Regions. Consumer Policy Strategy 2002 – 2006. COM (2002) 208. 8.6.2002

was viewed as a vital right for consumers if they were and are to fully participate in the Internal Market. The Commission has responded with a number of initiatives aimed at addressing this issue by promoting access to simple, swift, effective and inexpensive legal channels and updating Directive 98/27/EC on injunctions for the protection of consumers' interests (OJ L 166, 11.06.1998). In 1998 the Commission adopted a Recommendation on the principles applicable to the bodies responsible for the out-of-court settlement of consumer disputes (98/257/EC). It was followed in April 2001 by a Recommendation on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (2001/310/EC). In order to co-ordinate out-of-court-settlement procedures throughout Europe and to facilitate the solution of cross-border disputes, the European extra-judicial network (EEJ-Net) has been set up. The EEJ-Net provides a communication and support structure made up of national contact points (or 'Clearing Houses') and Euroguichets, European consumer information centres. The clearing house will help the consumer with information and support in making a claim to an appropriate out-of-court alternative dispute resolution system and the 2002 – 2006 Strategy sets out a number of options in order to build on this. To achieve the third objective 'involvement of consumer organisations in EU policies', the main actions consist in the review of mechanisms for participation of consumer organisations in EU policy making and in the setting up of education and capacity-building projects.[19]

Apart from the Commission's continuing strategy of producing consumer policy strategies and action plans and its new rolling agenda which is used as a means of measuring policy performance through benchmarking (Interview, Commission Official DG SANCO, 25 September 2002), efforts have also been made to streamline the consumer policy *acquis*. From 1999 onwards, with the agreement on a Decision

[19] To this end, the Community is supporting regional and national initiatives, not only financially, but also by encouraging partnerships between education players (specialists in the various sectors of consumer education) as well as transnational exchanges and transfers of experience and best practices. The European Community is aware that joint measures at national and Community levels should be more structured, in order to achieve maximum effectiveness. It will draw up an action programme with this in mind. As part of this element of consumer policy, the European Young Consumer Competition was created in 1994 to promote consumer education in EU schools and to raise awareness of the environmental impact of their conduct as consumer through informational material on a chosen subject. The competition is aimed at young people between 10 and 14 years of age. In order to encourage exchange and discussions about e-Commerce and e-Confidence, an E-confidence forum and website was launched by the Commission.

establishing a general framework for Community activities in favour of consumers[20], instruments of consumer policy can be now divided into two categories (see SEC (1998) 564). A difference has to be made between instruments of legislative character and other instruments without this specific nature, i.e. actions with budgetary consequences. To reiterate, legislative instruments deal with the protection of economic interests of consumers including the provision of adequate information in order to make sound economic decisions and the protection of their safety. They also deal with product safety, including directives on dangerous imitations and on general product safety. These directives contain an obligation for public authorities to ensure that dangerous products are not marketed and also provide for the exchange of information between member states and the Commission. Given the need for revision of these directives over time and also the desire to simplify and consolidate these legislative measures, the Commission proposed a framework directive in its Green Paper of 2001 that would contain a general clause according to which member states should ensure traders established in a territory should not engage in unfair commercial practices. The Commission proposed that consumer policy would proceed through a mixed approach of a framework directive on commercial practices, complemented as necessary with sectoral measures (See Section 5.3).[21]

The Decision establishing a general framework for Community activities in favour of consumers consolidates the non-legislative instruments in the aftermath of the mad cow crisis, which included the use of funds for the promotion of consumer representation, the costs linked to the preparation of opinions by scientific committees (fees paid to experts and committee members), as well as for information and education projects (such as EHLASS). Until 1996, the European consumer organisations (BEUC, Euro Coop, COFACE, ETUC) received a lump sum paid out on the basis of an annual report of activities. According to the Commission, the Commission included these organisations in the system applicable to other organisations, i.e. subsidies for specific projects, outlined and justified including impact analyses (SEC (1998) 564, 2). The 1999 Decision streamlined this procedure and provided an overall budgetary framework for its operation.

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[20] Decision 283/1999/EC of the European Parliament and of the Council of 25 January 1999 establishing a general framework for Community activities in favour of consumers.
[21] Green Paper on EU Consumer Protection. Brussels, 02.10.2001. COM (2001) 531 final.

The evolution of consumer policy – the preliminary balance sheet

On the basis of the above analysis, it is possible to come to the conclusion that the institutionalisation of consumer policy at the EU level has been weak. EU consumer policy has been looked on by both member state governments and EU institutions such as the Commission as an area where the EU can add value as opposed to replacing regulation at the national level with harmonisation at the EU level (Interview Commission Official DG SANCO, 25 September 2002). The principles of consumer policy are carefully set out in Articles 153 and 95. According to the Commission in the 2002 – 2006 Consumer Policy Strategy, 'consumer policy is a shared responsibility between the EU and national public authorities' (COM (2002) 208). Since its codification in the Treaty of European Union, consumer policy has become a legitimate policy area with an established albeit weak *acquis* compared with other more institutionalised policy areas such as the Common Agricultural Policy. The reluctance of the member states' governments to grant a Treaty base devoted specifically to consumer protection laws until the TEU created a legal and political climate in the Community, which was unfavourable to the promotion of consumer policy at EU level.

The fact that member state executives controlled the timing and scope of policy action and supranational institutions such as the Commission and EP appear constrained in their room for manoeuvre by the institutional provisions of the Treaties and the existing *acquis* lead us to predict that liberal intergovernmentalism might provide a better explanation of the policy making process in consumer policy. There is no doubt that the institutional and legislative legacy of consumer policy is weak. Until the Single European Act's provision for QMV under Article 100a, consumer policy proposals were decided upon on the basis of unanimity. As a result, the Commission had the right of initiative but had to stand by and watch negotiations take years to conclude, controlled as they were by member state executives. Following the SEA, in spite of strong support from the European Parliament for consumer protection issues, the existence of a circle of consumer organisations at the EU level and a number of ECJ judgements recognising certain rights of consumers, the prevalence of the norm of subsidiarity, together with the principle of minimal harmonisation enshrined in specific directives and the explicit link made between consumer policy and the internal market through the use of Article 100a (now 95) continued to fundamentally

affect the capacity of the Community to develop a consumer protection policy that moved beyond the lowest common denominator of agreement. Consumer policy, unlike education policy, is essentially a policy of re-regulation and thus depended on agreement on legislative proposals to move forward. In addition, the Commission's role as policy entrepreneur, hampered from the beginning by a lack of institutional power, was compounded by a weakness of staff and informational resources.

Even so, despite its exclusion from the constitutional structure until 1993, consumer policy's status as a legitimate area for European-level action gained recognition, albeit initially at an informal level. Consumer policy evolved to a large degree on spillover, as activities underpinned by formal Treaty competences (principally the free movement of goods and services and harmonisation policy) impacted on national consumer protection policies. Yet, according to Weatherill, this 'functional creep has deprived EC consumer policy of a planned theoretical underpinning' (Weatherill, 1999, 694; Micklitz and Weatherill, 1993, 291). The linkage of consumer policy with the internal market provided a certain impetus to policy making, and the European Parliament, originally through Article 100a, then through Article 153, was granted a more prominent position in the decision-making process. Still, at this stage of the analysis, until 1999 at least, the Commission seemed reluctant to push the agenda forward beyond the wishes of the member states. In the words of Commissioner David Byrne in late 2001, EU consumer policy now needs a 'more systematic and strategic approach' and links must be strengthened with other EU policies.[22] The results of the analysis so far are by definition drawn on the surface. Disaggregation of the policy process into the three stages of pre-negotiation, negotiation and post-decision and the comparison of the observable implications generated with the empirical evidence collected will enable us to delve deeper in answering the questions posed at the beginning of this section, most especially, which of the two theories, if at all, provides the best picture of the process of policy making in consumer policy? Section 5.3 therefore turns to the more explicit and systematic examination of the theoretical propositions and assumptions alluded to at the beginning of this section but not directly addressed.

[22] David Byrne. 'Consumer Protection – Past and future'. Belgian Presidency Conference 'The Consumer's involvement in the Single Market'. Brussels, 4-6 October 2001.

5.3 Consumer Policy from pre-negotiation to post-decision

Which of the two theories, if at all, provides the best picture of the process of policy making in consumer protection across the three stages? In this section, the data collected with regard to each stage of the process of consumer policy formulation, e.g. pre-negotiation, negotiation and post-decision, will be examined systematically using the propositions developed. In order to evaluate the relative merits of the respective propositions of liberal intergovernmentalism and supranational governance, we must again turn to the observable implications of these theories.

Pre-negotiation

According to the postulates of liberal intergovernmentalism outlined in Chapters 1 and 2, at this stage of the policy process it is posited that the Commission only proposes legislation that conforms to the wishes of the rationally-acting member state executives, based on domestic economic interest, and who cooperate in order to solve a collective action problem. It follows that in the light of Moravcsik's theory we would expect to see consumer policy proposals emerging from the Commission in response to calls from the member state executives for action, and that these calls are inspired by utilitarian economic motivations. The content of the proposals themselves would mirror the policy preferences of the member state executives (larger member state executives in particular). To put it another way, if member state executives do not push for innovative and deep consumer policies at the EU level through harmonisation of regulation protecting consumers, these types of proposals will not be put forward by the Commission as initiator of policy.

Supranational governance, on the other hand, puts forward the proposition that the impetus for policy proposals in the sphere of consumer protection emanates from rising transnational exchange and can also be triggered by spill-over from other policy sectors or existing decisions. For this to be true, we would expect to see transnational exchange - in this policy area meaning the development of European groups, networks and associations and the pressures for action from cross-border trade and exchange within the internal market - pushing member state executives to substitute supranational harmonisation rules for national harmonisation as maintaining national rules prove problematic to the maximisation of trade and indirectly ineffective in protecting consumer rights. The Commission in particular would propose policies

that capitalise on this desire and that reflect the ideas of the European groups to push policy-making at the EU level forward. In addition, we would expect existing European rules and actions, such as through treaty provisions if applicable, secondary legislation in other areas and the ECJ's case law as circumstances allow, to generate a dynamic for action that leads to possible further action. In this way, proposals are brought forward not in response to member state executive wishes but in response to the exigencies and changes in the existing internal and external policy-making environment.

As can be seen in Section 5.2, the early moves by the EC in consumer policy in the 1960s and 1970s were piecemeal and reflected the underlying reluctance of member states to cooperate in this area. Consumerism, or the idea of paying heed to the interests of consumers in policy making, did not gain credence until the 1960s, well after the signature of the Treaty of Rome. As with education policy, a small number of Council resolutions were produced in this period, calling for the acknowledgement of the rights of consumers.[23] However, the underlying assumption was that the consumer was expected to be the passive beneficiary of the restructuring of European markets; integration through common market law was itself a form of consumer policy. The Commission followed up the Council resolutions on consumer policy with two action programmes, one in 1975 and another in 1981 but significant concrete action in order to implement these programmes was fundamentally affected by the lack of legislative competence conferred upon the EC in the consumer field. A small number of directives dealing with the free movement of goods had indirect bearing on consumers and the Council agreed on a limited number of information-sharing networks on product safety. The difficulty of transnational exchange in the form of cross-border trade between consumers had not reached a significant level where market inefficiencies arose because of discrepancies between national consumer protection systems were damaging to trade and transnational and national consumer groups were only beginning to organise themselves at the European level at this time. One of the principal transnational consumer organisations, BEUC, was established in 1962 and the transformation of the 'Consumer Contact Committee' into the 'Consumers' Consultative Committee' in 1973 did mark the beginning of

[23] E.g. Council Resolution of 14 April 1975 on a preliminary programme of the EEC for a consumer protection and information policy. OJ C 092, 25.04.1975.

transnational group activity in consumer policy. However, the attention paid to the committee by the Commission was not sufficient (see Goyens, 1994). At the member state level, consumer protection began to develop as a distinct policy area in a small number of the some of original six member states, primarily West Germany and the Netherlands and later in Denmark, but was less well developed in France and Belgium and non-existent in southern member states such as Italy and later Greece and Ireland. It is fair to conclude that in the early years of the Community, the propositions of liberal intergovernmentalism seem to hold true at this stage of the policy process. The level of activity, i.e. extremely limited, seemed to reflect the lowest common denominator of agreement between member state governments.

From the signature of the Single European Act until the creation of a consumer protection title in the Maastricht Treaty, a link was made by the Commission, consumer organisations and the member states between the completion of the internal market and the needs of consumers and limited policy spillover took place. Consumer policy began to be seen as a corollary of the progressive establishment of the internal market, the primary goal of member states in signing the SEA, and development proceeded in this context. The free circulation of goods and services within the internal market was seen to require the adoption of common, or at the very least, convergent rules to ensure at one and the same time the elimination of regulatory obstacles and competitive distortions (as this would encourage trade) and sufficient protection of consumer interests. For example, the 1992 Report produced by Competition Commissioner Peter Sutherland on the operation of the internal market placed heavy emphasis on the need for intensified co-operation between national and Community institutions in order to ensure the realisation of the internal market and securing consumer confidence in the internal market was an important aim in this process (Weatherill, 1999, 715).

As mentioned above, the limited number of legislative proposals adopted before the SEA, were adopted on the basis of unanimity (Article 100) to ensure the proper functioning of the common market. The application of new internal market Article 100a, which allowed for qualified majority voting and co-operation of the European Parliament, accelerated the outcome of a number of negotiations at that time. The linkage of consumer policy to the internal market allowed the Commission and

Parliament to at least gain a firmer foothold and voice in the policy process but fixed the fate of consumer policy firmly within the context of the internal market. In this way, any proposals made by the Commission relating to consumer protection had to be framed in these terms. Due to the fact that the number of legislative acts adopted increased, the Commission was able to assume a greater role in policy implementation. Yet while a number of judgements by the Court of Justice highlighted the link between consumer protection and the internal market and reinforced the principle of minimal harmonisation, they were not entirely necessary or sufficient to serve as a springboard for policy spillover. In addition, the Commission was hampered in carrying out an agenda setting role by lack of informational and personnel resources – the Consumer Policy Service devoted specifically to consumer issues was set up only in 1989.

Transnational consumer organisations at the European level became more numerous at this stage but cooperation between them was fraught with difficulty. At the European level consumer organisations were federated, rather than consisting of direct membership structures, leading to consumer interest diversity. As a result of the diverse traditions of consumer policy at national level, the relationship between consumer organisations was far from cohesive, hampered as it was by disagreements. At times it bordered on the hostile (Greenwood, 1997, 194; Pollack, 1997, 580). Although the Consumers' Consultative Committee (CCC – the institutionalised forum for consumer organisation cooperation at EC level) was allotted a formal consultative role in the policy process, its impact was peripheral. According to one member of BEUC, the CCC was not consulted enough nor in a timely manner in the pre-negotiation phase by the Commission on major issues that would have a bearing on consumers across the range of EC policies and its opinions were not taken into account or publicised (Goyens, 1993, 380). For example, the 1990-1992 Action Programme which outlined the Commission's consumer policy programme for that period was never submitted to the CCC for consideration and legislative proposals were in general submitted to the CCC by the Commission only after or just before publication. A first evaluation made in late 1992 showed that CCC proposals for changes in drafts were taken on board by the Commission partly or entirely in about 30 per cent of all cases (Greenwood, 1997, 368). In direct contradiction to the observable implication suggested by supranational governance, whatever concertation

that existed at the transnational level did not succeed in generating enough pressure to encourage the Commission in particular to propose a large number of new legislative acts. In 1993, Goyens cited an example of the reluctance of the Commission to act in harmonising insurance contract law:

> Both consumer representatives and representatives of the insurance sector have agreed, for several years, that there is a need to harmonise insurance contract law, but they are systematically confronted with the refusal by Commission officials to initiate any action in this field. One of the arguments advanced by the Commission is the complexity of insurance contract law. There are several other important themes related to consumer protection, such as guarantees and after-sales services, or language requirements, which are considered by national delegations to be enough of a problem for setting Community action in motion. Despite the willingness of national delegations to proceed with initiatives, there is such an opposition by some services within the Commission that action proposed takes a long time to be adopted (Goyens, 1993, 380).

The efficacy of the Commission in carrying out its role as policy initiator was hampered by the inadequate resources it possessed – the lack of a separate department or service dealing with consumer policy until 1989 and the small number of staff allotted to this service when it was established (40 staff in 1992) did not make its task easier. To sum up at this stage, until the codification of consumer policy in the Maastricht Treaty, it is possible to conclude that the propositions of liberal intergovernmentalism hold greater explanatory power than those of supranational governance in the pre-negotiation phase of policy making. However, once consumer policy gained legal recognition, the opportunity for increased pro-action on the part of the Commission in the pre-negotiation phase arose. Are the propositions developed by liberal intergovernmentalism still as resonant in the pre-negotiation phase of consumer policy making following codification?

The rise in the importance attached to the principle of subsidiarity significantly affected the number of proposals put forward by the Commission in the immediate aftermath of codification. A 'hit list' was drawn up by the German Federal Economic

Department and circulated amongst regional economic ministries in the Länder and German trade and consumer organisations of existing or proposed EC legislation, which, in its opinion, merited re-appraisal in the light of the subsidiarity principle. A wide range of consumer protection measures, including draft proposals on services liability, distance selling, timeshare, tobacco and comparative advertising, the recently agreed Directive on Unfair Contract Terms, and the General Product Safety Directive, were all identified as being particularly susceptible to simplification, abandonment or repeal (Gibson, 1993, 326). It became obvious therefore, that proposals on these issues were unlikely to succeed. As was noted in Section 5.2, as a consequence of the introduction of the system to screen draft proposals, a number of proposals on consumer protection were withdrawn by the Commission following the Edinburgh Council Summit of 11 and 12 December 1992. Furthermore, in the 1994 Commission Report to the European Council on the application of the subsidiarity principle, the following draft directives, among others, were amended to take the principle into account:

Comparative advertising (COM (91) 147 final and COM (94) 151 final);

Time sharing (COM(92) 220 and COM (94) 363 final.

Furthermore, the Commission produced a list of over 25 measures to adjust and simplify existing legislation, including directives on food products, pressure equipment and indication of prices (ESC Own Initiative Opinion, 1996, 215).

The European Parliament, hampered in this phase of the policy process by a lack of formal institutional power, criticised the Commission's apparent hesitance to put forward proposals on a number of occasions in the mid-1990s. For example, in its Report on the Commission's 1996-1998 consumer policy priorities, EP Committee rapporteur Philip Whitehead criticised the Commission for failing to concrete action in consumer protection with its 'vapid generalisations'. According to Whitehead:

> This Communication is extremely general. The language that it uses is non-committal, the Communication is littered with phrases like 'will assess the opportunity', 'will be considering' and 'intends to examine further'. In fact, there are only 9 cases in the text where the Commission commits itself to an unqualified 'will'. This does not augur well. Worse... it seems that the Commission is only prepared to make a firm commitment to two pieces of

> legislation. It is therefore difficult to see how the grand sounding priorities will be achieved. Fewer priorities and more action would have been preferable.[24]

Part of the reason for this reluctance to put forward proposals was the limited informational resources possessed by the Commission as mentioned previously. In the aftermath of the TEU, the Commission's Consumer Policy Service, lacking in information on the consumer protection systems of the member states, prepared a fact-finding questionnaire and sent this to each member state in order to 'get a clearer picture of the member states' strategy and organisation and hence determine what specific actions could be undertaken at Community level to support and supplement their policies.[25]

Following the BSE crisis, which resulted in an increase in resources allocated to DG XXIV (now DG SANCO) and under the leadership of more proactive Commissioners (Emma Bonino until 1999 and David Byrne from 1999 to 2004), the Commission's approach to policy formulation seems to have undergone a subtle but discernible change. First, the need for more concerted coordination and inclusion of transnational consumer organisations in the pre-negotiation phase of policy making has been recognised by the Commission with the reform of the CCC. In its Decision 2000/323/EC of 4 May 2000, the Commission set up a newly constituted Consumer Committee (CC) which may be consulted on all matters relating to the protection of consumer interests at Community level. Composed of 20 full members and 20 alternates appointed by the Commission for a 3-year (renewable) mandate (1 per Member State plus 5 representatives from the European consumer associations: Association of European Consumers (AEC), European Association for the Coordination of Consumer Representation in Standardisation (ANEC), BEUC, COFACE, EURO COOP), it meets on average four times a year in Brussels. The Committee's mandate is as follows. It:

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[24] European Parliament Report on the Commission Communication on priorities for consumer policy 1996-1998 (COM (95) 0519 final – C4-0501/95). Committee on the Environment, Public Health and Consumer Protection. Rapporteur: Mr Philip Whitehead. 11 October 1996. A4-03017/96.

[25] Taken from Consumer Policy of the Member States of the European Union, Doc XXIV (97) 1.0 http://europa.eu.int/comm/dgs/health_consumer/library/reports/nat_reports/index_en.html.. 4 October 2002.

- constitutes a forum of general discussions on problems relating to consumer interests;
- gives an opinion on Community matters affecting the protection of consumer interests;
- advises and guides the Commission when it outlines policies and activities having an effect on consumers;
- informs the Commission of developments in consumer policy in the Member States;
- acts as a source of information and soundboard on Community action for the other national organisations.

The secretariat and the presidency of the Committee are held by the Commission. The decision by the Commission to rejuvenate the Consumer Committee was also motivated by the realisation that the DG SANCO needed to use every avenue available to it to gather information on consumer protection issues (Interview with Commission Official, DG SANCO, 25 September 2002). In addition, from 1997 onwards an annual assembly of consumer organisations in Europe has been organised by the Commission 'to facilitate networking and cooperation between consumer organisations' (Interview with Commission Official DG SANCO, 25 September 2002).[26] The 1999 Decision establishing a general framework for Community activities in favour of consumers allocated 112.5 million Euro towards consumer policy actions taken by the Commission and included financial support for the activities of European consumer organisations.

In spite of its renewed mandate, the participation of the newly constituted Consumer Committee in the consumer policy formulation has not been trouble-free. CC members continue to highlight the need for the CC to be informed about Commission work in relevant areas well in advance and the importance of the Commission to devote sufficient energy and resources to the organisation and work of the Committee.[27] BEUC, one of the most prominent members of the CC, stressed 'we

[26] The most recent Assembly, the Fifth Annual Assembly of Consumer Organisations in Europe, took place from 7-9 October 2002 on the theme 'The Internal Market: delivering the promise?' It was chaired by Mr Robert Coleman, Director General, DG SANCO. The question as to whether the annual assembly of consumer organisations is an attempt to widen the network of the CC is an important one. It does represent an attempt to extend participation and consultation on consumer policy issues to organisations outside of the CC network, which with 20 representatives is small in size.

[27] Minutes of CC Meeting, Friday 28 June 2002. CC2002/123.

find DG SANCO very willing to consult, and this is something that we much appreciate. However, our experience with other DGs is variable. Some are good, others are not' (http://europa.eu.int/comm/consumers/policy/committee/cc28_en.pdf. 5 October 2002). In order to ascertain the reasons behind this and ways of improving consultation of consumer organisations across other policy areas, DG SANCO conducted a survey on the participation of consumer organisations set up by other services (in response to the perceived weakness).[28]

DG SANCO has also endeavoured to instigate a more systematic and all-encompassing process of policy formulation in consumer protection. This is especially prevalent given the need to revise and amend existing consumer policy legislation in light of technological developments such as the internet and the impetus of the Euro. Much of the Commission's legislative agenda contained in the rolling programme of the 2002-2006 Consumer Strategy continues to be the repeal and revision of existing legislation, as opposed to the formulation of new proposals. This rolling agenda (a soft form of enforcement) paid careful attention to the preferences of the member states for activity in this area. In the member state responses to the Commission's fact-finding questionnaire on future directions of consumer policy, most member states were opposed to the Commission's involvement in areas not enumerated in Article 153 (Germany, Spain, France, Luxembourg, Netherlands, UK). Only five member states (Austria, Belgium, Denmark, Portugal and Sweden) accepted the idea in principle but did not propose measures outside the domains covered by the Treaty and Greece and Ireland did not respond to the question at all.[29] Fully aware of this, the Commission appears to have adopted a standard method of policy formulation and a good example of this is the proposal for a new framework directive in consumer protection.

The launch of the Green Paper on Consumer Protection and its call for a framework directive in consumer protection is an example of the Commission's modus operandi

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[28] Point 9, Minutes of CC Meeting, Friday 28 June 2002, CC2002/123. http://europa.eu.int/comm/consumers/policy/committee/cc28_en.pdf. 5 October 2002.

[29] Consumer Policy in Germany, as compared with the other Member States of the EU. 4 May 1998. [Taken from Consumer Policy of the Member States of the European Union'. Doc XXIV (97) 1.0], 13. http://europa.eu.int/comm/dgs/health_consumer/library/reports/nat_reports/index_en.html. 4 October 2002.

in the policy formulation stage and shows that although the Commission has formal right of initiation through the treaties, a more inclusive form of policy formulation and agenda setting is used. In essence the process and procedure surrounding the development of the framework directive through the Green Paper and consultation highlights the fact that although the Commission has taken the lead in proposing a framework directive of this nature, Commissioner David Byrne and DG Health and Consumer Protection officials are fully sensitive to the need for member state representatives and other stakeholders' acquiescence and support for such a proposal. They will not proceed unless they have prior backing of policy stakeholders – in the words of a Commission official interviewed for this study, 'this is common sense' (Interview, Commission official DG SANCO, 25 September 2002).

The rationale behind the Green Paper also points to the self-enforcing nature of EU decision-making and its implications for policy formulation in the pre-negotiation phase. As the Commission pointed out in the Green Paper, existing EU rules were not held to be adequate to the challenge of consumer protection. They cover only a limited number of commercial practices, are often out-dated and lagging behind new market developments, and often designed to address one specific problem consumers were confronted with, such as the package travel or time share directives for example. In essence, according to the Commission, 'the potential of the internal market to stimulate competition and benefit consumers has not been achieved'. This conclusion was drawn on the basis of three studies on national and EU legislation on Business to Consumer commercial practices commissioned by the European Commission.[30] On the basis of these studies, the euro, e-commerce and enlargement were reasons cited for forcing the consumer market up the agenda. With the euro, one of the main obstacles to comparing prices and businesses making cross-border offers has been removed. In addition, enlargement without further harmonisation of consumer protection rules would mean a further widening of diversity in national rules.

The Green Paper proposed a choice for further harmonisation: either through a specific approach which would consist of creating additional harmonisation measures

[30] Institüt für Europäisches Wirtschafts- und Verbraucherrecht e.V. *Study on the Feasibility of a General Legislative Framework on Fair Trading*. November 2000; Price Waterhouse Coopers, 'EC Consumer Law and Information Society'. 17 August 2000; Lexi Fori. *Study on Best Practice in the Use of Soft Law*. 2000.

or through a mixed approach of a framework directive on commercial practices, complemented as necessary with sectoral measures. It was clear in the Green Paper that the preferred strategy of the Commission was to put together core principles of consumer protection in the form of a framework directive. The Framework Directive would contain a general clause, according to which member states should ensure traders established in a territory should not engage in unfair commercial practices. The Green Paper also set out ideas for the use of self-regulatory consumer protection codes between businesses and consumers of a voluntary nature. This initiative of simplification tied in with the Commission's White Paper on Governance and its call for greater use of framework directives and co-regulatory mechanisms and for more simple EU-level regulation. The Commission's aim was that this framework directive would be more adaptable and respond to changes in market practices – new unfair or misleading practices could be tackled quickly. On the other hand, it must be acknowledged that framework directives are used as a less blunt instrument of harmonisation and one which also give member state executives a greater degree of manoeuvre than other Community legislation such as directives and regulations (Interview Official DG SANCO, 25 September 2002). The Framework Directive would also exclude potentially controversial and sensitive areas such as rules concerning health and safety (like tobacco or alcohol advertising) or decency, social policy aspects such as shop opening hours and practices regulated by national contract law would not be covered. Agreement and implementation of a framework directive would have consequences for existing sectoral consumer legislation (such as the time-share directive and door-to-door sales directive), which would need to be reviewed in time to ensure consistency with the framework directive.

The next step in the pre-negotiation phase of the framework directive involved the initiation of an intensive consultation process by DG Health and Consumer Protection (DG SANCO) with the relevant policy stakeholders on the Green Paper in the aftermath of its launch. Policy stakeholders were invited to submit their responses to the Green Paper in written form and a public hearing on the Green Paper was held on 7 December 2001. DG SANCO received 169 written responses to the Green Paper (the majority of which came from business organisations) and the public hearing was attended by over 200 participants and included the full range of stakeholders within the consumer policy-making circle, i.e. member state executive

representatives/experts, representatives from European and national consumer associations, European and national business associations, companies (such as Hewlett Packard and Citibank), representatives from lawyers companies and associations, policy and business consultants and a small number of representatives from the European Parliament.[31] It is important to note that the response to the consultation was not geographically balanced or fully wide-spread. Consumer associations and businesses from member states with more strengthened and long established systems of consumer protection, such as the UK, Sweden, the Netherlands and Denmark, responded in greater numbers to the consultation than other member states with less well-developed systems.

According to the written submissions, a clear majority of the consumer organisations agreed with the need for reform, as did the Member States.[32] Twelve member states supported the Commission's idea of a mixed approach as outlined above. However, while the public consultation response gave the Commission clear support for developing a framework directive, according to Commissioner David Byrne:

> There was a general feeling – amongst those for and against the idea of a Directive – that more information, clarification and consultation on the content of any such Framework Directive was needed. We have therefore decided that the best approach would be to embark on a further round of consultation on the substance of a Framework Directive. Our follow-up communication responds to this need for further consultation. ...It sets out an action plan for further consultation. (Commissioner Byrne. Speech on Green Paper to European Parliament's Kangaroo Group, 9 July 2002).

The Commission's Follow-up Communication pointed out that as evinced through the consultation process, support existed among stakeholders for the Commission to proceed with a proposal on enforcement cooperation. In terms of the framework directive, the ideas on codes of conducts provoked most questions with evidence of more limited support. In response to this and as Commissioner Byrne noted in the

[31] http://europa.eu.int/comm/consumers/policy/developments/fair_comm_pract/hearing_greenpap_en.html.

[32] Commission of the European Communities. 2002. Follow-up Communication to the Green Paper on EU Consumer Protection. COM (2002) 289 final. Brussels, 11 June 2002.

quote above, the Commission planned to begin another round of consultation. In one of its annexes, the Follow-up Communication contained the elements of a possible framework directive and invited further responses from stakeholders on this by 30 September 2002 (Commission Follow-up Communication, 5). In addition to this consultation, the Commission planned to undertake a number of surveys in order to help identify internal market barriers that a future framework directive would resolve. The Commission also established an expert group chaired by the Commission and comprised of representatives from the national governments, European Economic Area governments and the Commission to facilitate a more in-depth exchange of views both on the Green Paper process and consumer policy issues in general. Under the title 'Group of National Experts on Fair Commercial Practices', the national experts met twice in 2002[33] to discuss the follow-on from the Green Paper and members were asked to complete a questionnaire on national rules on fair commercial practices for the second meeting of the group on 17 September 2002. An academic expert group was also set up in order to carry out a comprehensive comparative law study with the aim of identifying notions of fairness that are common to legal systems of the member states (Interview Commission Official, DG SANCO, 25 September 2002).

This process of pre-negotiation as outlined above highlights the position of the Commission and other actors in this phase of the policy process in consumer policy and the dynamics existing in this phase. While the Commission may be the formal initiator of legislative proposals and non-binding policy documents, the long and drawn-out process of consultation as described above demonstrates the tentativeness of the Commission as a policy entrepreneur in the area of consumer policy and its reluctance to pursue policy proposals and place formal proposals on the tables of the Council of Ministers and the European Parliament without prior widespread support from stakeholders on the broad outline of the proposal itself. It is clear that in light of reservations from powerful societal organisations such as the Confederation of British Industry on the very idea of consumer policy regulation and in pursuing a framework directive based on a general duty that the Commission was reluctant to proceed with

[33] 12 July 2002 and 16/17 September 2002.

the proposal.[34] Of course, it must be borne in mind that such is the reforming and wide nature of this framework directive, encompassing as it does possibly a large proportion of consumer protection policy at the EU level, such a consultation process is necessary. Yet the same consultative procedures were also put in place for the pre-negotiation of other pieces of legislation, for example the new proposal for a Safety of Services Directive.

The negotiation of a revised General Product Safety Directive concluded in 2001 (Directive 2001/95/EC) is another example of the methodology used by the Commission to put forward consumer policy proposals and generated by the dynamic of existing legislation. In the new General Product Safety Directive, the Council and the European Parliament asked the Commission to 'identify the needs, possibilities and priorities for Community action on the safety of services and to submit to the European Parliament and the Council, before 1 January 2003, a report, accompanied by proposals on the subject as appropriate'. The rationale behind this request was said to lie in the fact that the service sector accounts for a significant share of economic activity in the Community: 70 per cent of Gross Added Value, 69 per cent of total employment and 710 billion Euro of intra-Community trade (Eurostat figures for the year 2000). In response the Commission produced a Consultation Paper on the Safety of Services for Consumers in July 2002, which was intended to stimulate comments and collect opinions as part of the preparatory work for the Commission Report. A number of 'options for action' (such as the identification of problem areas, which should be considered priority areas for Community action) were outlined and responses from policy stakeholders called for within a limited time frame. The Consultation Paper was accompanied by a summary of Community policies and legislation in this area and a summary of policies and legislation in the Member States. The preparation of the annexes had been facilitated by the exchange of information between the Commission and Member States initiated by a questionnaire

[34] In its December 2001 response to the Commission discussion document 'Ideas for a Consumer Policy Strategy', the Confederation of British Industry stated that:
'The CBI is unable to support the proposal in the Green Paper for a framework directive and additional specific measures. In our view, the result would be legal uncertainty and another layer of regulation with which traders would have to contend. This would bear particularly heavily upon SMEs. Our preference is generally for a reform of the present system which would include better integration of existing Directives with one another' (CBI Response, December 2001).
http://europa.eu.int/comm/consumers/policy/developments/fair_comm_pract/responses/business_uk/cbi.pdf.

circulated in September 2001, which came to the conclusion that there is no typical approach or policy in place in the majority of member states with regard to the safety of services. In this preparatory work, the Commission was and is assisted by the Consumer Safety Working Party, composed of representatives of Member States' competent authorities, standardisation bodies and European consumer organisations.

On the basis of the above evidence, it is clear that liberal intergovernmentalist propositions prevail in this phase. In the absence of an institutional base in the treaties, the success of proposals for action in consumer protection depended upon member state agreement. Since the Commission gained the legitimate right of initiation of legislation in the consumer protection sphere with the ratification of the TEU in 1993, it has been very cautious in the pre-negotiation phase of consumer policy making and has been careful to ensure that its proposals are tailored towards member state preferences in order to be successful. Supranational governance does not offer considerable insight in this phase although it is clear on the basis of the evidence above that transnational actors' views are now being taken on board more by the Commission (especially as the more powerful business organisations such as the CBI also influence member state administrations – consumer organisations are still less cohesively organised). In general, new legislative proposals tend to revise and update existing proposals, as opposed to proposing new innovatory regulation. The evidence shows that the Commission is reluctant to act without the 'go-ahead' from the member states, is hampered by a lack of resources and is only beginning to look at its action in the pre-negotiation stage in a strategic way.

Negotiation

In the negotiation phase of the policy process, the propositions of liberal intergovernmentalism are straightforward. First, policy outcomes are based on the preferences of the dominant member state executives and tend to be the result of lowest common denominator bargaining between them.[35] Second, and inherent in this theoretical conceptualisation, member state executives are the only important actors at this stage. If these propositions were to be true, we would expect that in consumer policy negotiations the central players are the national executives of the member states, who bargain with each other to agree on legislation and consequently on policy

[35] And by implication decisions may be taken unanimously at an informal level, even if QMV is the formal decision rule.

outcomes. Bargaining would be shaped by the relative powers of the member states and, of course, by the preferences of these actors and institutions would serve as neutral arenas within which action takes place. In the case of consumer policy at the macro level, therefore, we would expect member state executives to be the ultimate 'deciders' of policy and policy outcomes in the form of legislation or other instruments would correspond with the alternative favoured by larger member states in particular that envisages the least amount of policy harmonisation necessary to achieve the objectives identified.

According to supranational governance, at the negotiation stage of the policy process, policy outcomes will be based on negotiation between the member state executives within the logic of institutionalisation, i.e. bargaining will take place in a mediated context, with different actors (such as the European Parliament, the Economic and Social Committee, the Committee of the Regions) possibly having an input into the bargaining outcome depending on institutional prerogatives e.g. decision rules. If this proposition were to be true, in the consumer policy sphere we would expect that policy outcomes would not solely reflect the lowest common denominator of member state executives' preferences. It must be borne in mind at this stage that this implication will perhaps be more readily tested in the micro level analysis of the Directive on Consumer Goods and Associated Guarantees negotiation as the pulling and hauling between the actors at this stage is examined in greater detail. This section traces the broad trends of consumer policy at this stage of the policy process. Nevertheless, we may be able to see whether supranational organisations have been able to potentially shape, either formally or informally, policy outcomes and the rules that channel subsequent policy behaviour, depending on the institutional context within which the consumer policy negotiations have taken place. We may also be able to see, as expected if these propositions were to be true, that past choices influenced subsequent policy action and policy alternatives available.

The small number of consumer protection directives and decisions agreed by the Council and subsequently the Council and the European Parliament and the length of time for these negotiations to be concluded is the first indication of the primary position held by member state executives in this stage of the policy process, until Maastricht Treaty at least. Section 5.2 in particular referred to a number of examples

of early directives in the field of consumer protection before the Single European Act where negotiations lasted for many years. For example, Directive 85/374 on product liability was adopted after 12 years of discussions in the Council of Ministers. The long-standing difficulty within the Council on finding agreement on consumer policy has been identified as an 'inherent problem' by the Commission. According to a Commission Staff Paper produced in 1998, 'the adoption of consumer policy measures was often blocked due to different political approaches. It was difficult to find sufficient political support for consumer policy acts and a common denominator between these approaches'.[36]

Agreement on directives was affected by the varying traditions of consumer protection among the member states and the fact that decisions had to be taken by unanimity – thereby privileging lowest common denominator decisions. Consumer protection within member states varied dramatically from the form of voluntary codes, regulations or statutes to being enshrined in the Constitutions (Spain) or consisting primarily of the transposition into domestic law of Community and international law (Ireland). This meant that consumers' interests were articulated in different ways reflecting the different local priorities and contingencies and implied that consensus between these diverse traditions would be hard won. While most member states now have programmes that define priorities in the field of consumer policy, the administrative structures responsible for implementing these programmes vary from member state to member state and thus impinge upon negotiation coherence at the EU level. In many countries, several ministries are jointly responsible (e.g. the Economics Ministry and Trade and Industry) for consumer policy in the sectors coming within their remit, e.g. Austria, Belgium, Germany, Greece, Italy, Luxembourg and the UK. According to the Commission, 'it is not conducive to cooperation between member states in drawing up and agreeing a Community-level consumer policy. No member state has a ministry or state secretariat responsible specifically for consumer affairs, as was the case in France until 1993'.[37]

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[36] Commission Staff Paper. Consumer Policy: Past Achievements. April 1998. SEC(1998) 564.
[37] http://europa.eu.int/comm/dgs/health_consumer/library/reports/nat_reports/rappde_en.pdf.

In addition, the level of consumer organisation activity varies from member state to member state and also indirectly affects the importance attached to consumer protection and the pressure put on member state executives on the domestic level in favour of consumers' rights. The number of such organisations varies greatly from one member state to another, ranging from a single national organisation (Ireland, Luxembourg, Netherlands) to 15 (Belgium, Italy) or even 20 (France). In these circumstances, their powers and thus their influence also vary greatly. With the exception of the UK, where consumer associations are funded by the government (except the Consumers' Association which is independent), and apart from a number of subsidies granted by certain member states, the organisations' own resources consist only of membership fees and the voluntary work performed by their members as well as the resources they obtain through the measures they carry out themselves or in response to invitations to tender from national or local bodies or the European Commission. With the exception of Ireland, Sweden and the UK, consumer associations are involved in implementing policy and/or measure adopted by the public authorities.[38] The general consensus is that their political clout is weak.

Following the SEA, the use of Article 100a, with its requirement of a vote by qualified majority and its firm entrenchment in the economic goal of securing an efficient internal market, considerably accelerated negotiation procedures. Final agreement on a series of directives on misleading advertising, product liability, and doorstep selling occurred at this time, all of which had been deadlocked in the Council for over a decade occurred at this time. Agreement was also facilitated by the decision taken by some presidencies to organise Council of Ministers meetings exclusively devoted to consumer affairs, the so-called Consumer Councils, with their own Consumer policy working group. In the 1990s in particular, Consumer Councils met twice a year until 2000. From then on, however, consumer issues were discussed within other Councils, such as the Internal Market Council or ECOFIN, bringing together ministers who do not necessarily have consumer affairs among their responsibilities at national level. The new structure of the Council dealing with consumer affairs has again been changed according to the June 2002 Seville European

[38] Consumer Policy in Germany, as compared with the other Member States of the EU. 4 May 1998. [Taken from Consumer Policy of the Member States of the European Union'. Doc XXIV (97) 1.0]. http://europa.eu.int/comm/dgs/health_consumer/library/reports/nat_reports/rappde_en.pdf.

Council conclusions. Consumer issues are now grouped with Employment, Social Affairs and Public Health.

The European Parliament also gained a position at the negotiating table with the use of co-operation procedure through the new Article 100a. The Parliament's ability to influence policy outcomes at this stage of the process depends largely on its evolving powers under the Treaties. In the area of budgetary policy, for example, the EP was able to foster the development of consumer policies by restoring funds regularly cut by the Council of Ministers in the annual budgetary process. The European budget for consumer affairs in 2001 stood at the 22.5 million Euro mark, including the funding provided to sustain consumer protection. This represents approximately 0.025 per cent of the annual EU budget. The consumer budget experienced a substantial growth in the period from 1990 (6.5 million ECU) to 1992 (19 million ECU), although in 1994 it declined again (15 million ECU) (Greenwood, 1997, 195). According to Maier, fifteen million ECU for 343 million consumers in the European Community meant 0.043 ECU per capita:

> As a comparison, the regional consumer advice centres in Germany received public subventions of 0.56 ECU per capita in 1991 – almost 13 times more than the Community spent in 1993 (Maier, 1993, 361).

Even this level of funding caused controversy with the Council and between the Council and the EP. A general pattern has developed in budgetary negotiations on consumer policy since the 1970s – the Parliament restores funds regularly cut by the Council of Ministers. For example, the increase in funding in 1994 was due to the position taken by the European Parliament. The opposing view had been taken by the Council, which had intended to reduce the package by nearly 40 per cent (ESC Own Initiative Opinion, 1996, 222).

At the SEA negotiations and the 1991 Intergovernmental Conference, member states such as Germany, the Netherlands, and Denmark that had adopted far-reaching national regulations in consumer protection, pressed for the inclusion of provisions facilitating the adoption of EC-level consumer protection regulations. Along with the inclusion of the consumer protection provision, Article 129a of the Maastricht Treaty and the revised Article 100a granted the Parliament power of co-decision. This meant that the Council of Ministers is no longer the sole decider of consumer policy. This

has affected the conduct of individual negotiations – as will be seen more effectively in the micro level analysis of the Consumer Goods and Associated Guarantees Directive in Section 5.4.

At this macro level of analysis of the negotiation phase of EU policy making, the central proposition of liberal intergovernmentalism, that policy outcomes are based on the preferences of the member state executives and are the result of lowest common denominator bargaining between them, appears broadly to hold true. However, in line with supranational governance and its emphasis on the logic of institutionalisation, following the Maastricht and Amsterdam Treaties, member state executives are no longer the only important actors at this stage. Nor do coalitions within the Council divide on the basis of member state size. The more detailed analysis of negotiation in the micro section of this case study will show that policy outcomes are not simply the result of intergovernmental bargaining but are based on formal and informal negotiations between a wider range of actors and are influenced by previous decisions and the institutional structures and dynamics prevailed at the national level for each of the member states.

Post-Decision

With regard to the post-decision phase, liberal intergovernmentalism would posit that member state executives tightly control the action of Commission at this stage through mechanisms such as comitology. In consumer policy, it would follow that for this proposition to be true, we would expect that member state executives as principals in the consumer comitology committees, would monitor and control, where necessary, the Commission's behaviour if it deviates in any way from what was agreed in the negotiation stage and attempts to put forward further policy changes. With reference to the adjudication of legal disputes within the consumer policy arena, liberal intergovernmentalism holds that the European Court of Justice does indeed adjudicate disputes, as it is called upon to do so by the Treaties, but does not act outside the preferences of the dominant member states. If adjudication of disputes does come into play with consumer policy legislation, we would expect the ECJ to stay within the preferences and wishes of the powerful member states in its rulings.

On the other hand, at this stage of the policy process, supranational governance puts forward the proposition with regard to implementation that the Commission would exploit the comitology procedures to put forward actions that would move beyond what was already agreed. If this were the case at the macro level we would expect to see some slippage from the content of the policy outcomes agreed at the negotiation stage as the Commission tries to move the policy making process beyond these outcomes. As manager of the implementation process, the Commission will actively monitor the enforcement of legislative acts and will not shirk from bringing disputes before the ECJ. With regard to adjudication, supranational governance posits that the ECJ will rule against the preferences of the member states when the Treaty is clear and when there are strong precedents and legal norms it can draw upon to support its reasoning. In consumer policy, for this proposition to hold true it would be expected that the ECJ would systematically over-ride the preferences of the member states when these preferences clash with the pro-integrationist agenda of the ECJ and of the Commission. The ECJ would also interpret the Treaty so as to permit the expansion of supranational governance in consumer protection.

In the field of consumer policy, enforcement of policy means correct implementation and effective application of consumer legislation by the member states. Although the Commission is charged with monitoring the implementation of legislation, in reality it is dependent upon the national authorities in each of the member states to actually transpose and implement the binding acts. As the 2000 White Paper on European governance points out, the impact of Community law 'depends on the willingness and capacity of member state authorities to ensure that they are transposed and enforced effectively, fully and on time' (COM (2002) 324 final). In the field of consumer affairs more specifically, while the Commission can manage monitoring national transposition, the monitoring of the practical application is a very complex task, which necessitates strong support and cooperation from the member states (SEC (1998) 527 final). In consumer policy, monitoring implementation is carried out in two steps. The first step relates to the timely communication by the member states of the national measures implementing the Directives. If this is not done on time, the Commission automatically institutes infringement proceedings against the member states (notification of transposal is monitored by the Commission Secretariat General's Asmodée directive database). The second step relates to the proper

implementation of the Directives. The Commission, on its own initiative, evaluates the national measures communicated in order to transpose these directives. The Commission also acts on the basis of complaints for incorrect implementation made by persons or organisations.

The evidence of implementation of consumer policy points to two difficulties encountered by the Commission in this stage of the process. First, as highlighted by the European Parliament, member states often fail to inform the Commission of its transposition of legislation into national law. According to the Commission, the situation as regards the formal notification of implementation measures is not entirely satisfactory. The Product Safety Directive is one example of this. This directive had an implementation date of July 1988. Only two member states (Greece and Italy) transposed it effectively and on schedule. In 1996, eight years after the implementation date, one member state still had to transpose the legislation (1996 EP Report on COM (95) 0519 final – A4-0317/96). By the transposition deadline (30 April 1997), almost three years after the entry into force of the directive, only two member states (UK and Germany) had communicated to the Commission their national measures transposing Directive 94/47/C – timeshare directive. Greece was the last Member State to communicate its transposition measures, on 1 October 1999. Another directive affected by delayed transposition is Directive 97/7/EC (distance contracts). According to the 18th Annual Report on Monitoring the Application of Community Law for the year 2000, this directive, with a deadline for transposal of 4 June 2000 (three years after agreement), had not been transposed in Greece, Spain, France, Ireland, Luxembourg, the Netherlands, Portugal or Finland. In the 19th Annual Report on Monitoring the Application of Community Law for the following year, 2001, all member states had notified except Spain and Portugal. The Commission brought Spain before the ECJ for its failure to notify implementation (Case C-2001/414).

The evidence also shows that monitoring the second step, i.e. the practical application, is also difficult for the Commission because very often, 'it lacks the means to get sufficient information on the practical application of the national laws implementing consumer Directives and to evaluate this information' (SEC (1998) 527 final). In its Working Paper on the Enforcement of European Consumer Legislation, the

Commission admitted that it lacked adequate informational resources in order to effectively monitor implementation and enforcement of consumer policy legislation. The implementation of the legislation by the Member States is often very complex, partly due to the need to integrate the provisions of the directives in the national legal tradition in a coherent form. According to the Commission, 'a proper evaluation of the national measures implementing the directives requires a good knowledge of each national legal system and of each official language of the Union, which does not always correspond to the resources available in the field of consumer protection' (SEC (1998) 527, 4). It also acknowledged that increased assistance from member states and consumer associations would help in implementing and enforcing EU legislation in this sphere:

> The difficulties in evaluating national laws could be overcome more easily with the help of a strong commitment of the national actors, in particular the consumer associations. This is far from being the current situation and problems of enforcement are only very rarely brought to the attention of the Commission by national consumer associations, which are probably insufficiently aware of these questions or lack resources to deal with them (SEC (1998) 527 final, 5).

That being said, since the ratification of the Treaty on European Union the Commission did attempt to strengthen its efforts to monitor implementation. This was done through the informal process of producing implementation reports on legislation, as well as continuing to take member states to the European Court of Justice. As a national official dealing with consumer policy interviewed for this study commented:

> The Commission's system of monitoring implementation has speeded up, partly because there are less legislative proposals now than before. The Commission hasn't as much legislative work to do, so it is coming after people faster with reasoned opinions and with resort to the ECJ. Before, this process would have taken years, now it is taking months (Interview National Official, 29 May 2002).

Even so, cases coming before the Court of Justice relating to consumer policy issues have tended to be small in number (see the various monitoring the application of Community law reports 1996 onwards). For example, in 1999 the Court clarified Community legislation in the field of consumers' legal and economic interests in four cases, only one of which was taken against a member state.[39] Sweden and Italy were also taken to the ECJ by the Commission for the incorrect transposal of Directive 93/13/EC (unfair contract terms) and other infringement proceedings were put in train regarding the non-compliance of national implementing measures for Directive 94/47/EC (timeshare). The ECJ also received a number of requests for preliminary rulings in consumer protection matters. In 2000, two of these cases concerned Directive 93/13/EC (unfair terms), in particular the question of direct applicability in the absence of transposal by a member state (C-21/00) and the jurisdiction of the courts in the member states in actions for injunctions against firms headquartered in another member state (C-167/00). A third case concerned the interpretation of the word 'damage' in Article 5 of Directive 90/314/CEE (C-168/00).

However, apart from initiating proceedings through the ECJ, the Commission also attempted to improve implementation and enforcement through the more informal method of undertaking detailed studies. In order to achieve better and more uniform application, the Commission published a detailed report on the implementation of Directive 93/13/EC on unfair terms in consumer contracts (the subject of litigation in the ECJ as mentioned above). The report pointed to the slowness of several member states in transposing the Directive but did not contain any formal proposal for an amendment to the Directive. Highlighting the Commission's information deficit in the implementation process, the report had been produced based on evidence gleaned by the Commission from an international conference held on the directive in July 1999 attended by European specialists, representatives of member states and consumer associations and based on the CLAB project database. The CLAB project (unfair terms) was launched by the Commission immediately after the adoption of Directive 93/13/EC and was an instrument designed to monitor the practical enforcement of the directive in the form of a database on 'national jurisprudence'

[39] Case C-144/99 Commission v. Netherlands regarding certain aspects of Council Directive 93/13/EC on unfair terms in consumer contracts.

governing unfair terms.[40] Other reports on the implementation of directives include the Report from the Commission to the Council and the European Parliament on Consumer complaints in respect of distance selling and comparative advertising (Article 17 of Directive 97/7/EC on distance contracts and Article 2 of Directive 97/55/EC on comparative advertising) (COM/2000/0127 final).

Recognising its need for information on consumer policy development among member states and implementation of legislation, the Commission also contracted a number of studies both on existing pieces of legislation and on future policy developments from external sources, e.g. in 1999 the Institut für Europäisches Wirtschafts- und Verbraucherrecht e.V. produced a study on the implementation of the Doorstep Selling Directive (85/577/EC) into national law as well as the way in which member states deal with multi-level marketing and PriceWaterhouse Cooper N.V, in association with the University of Utrecht and Tilburg University produced a report on Consumer Law and the Information Society in August 2000 (Project number 487.986.01).

DG SANCO, as the DG responsible for health and consumer protection, must service twenty-two comitology committees. Of these twenty-two committees, two related to consumer protection: the Committee on Product Safety Emergencies (regulatory committee, procedure IIIb) and the Committee on implementation of the general framework for Community activities in favour of consumers (1999-2003 – advisory committee, procedure I).[41] The Commission Report on the working of the Committees does not record statistical details on the activities of these individual committees, although comitology committees dealing with food safety and public health are the third most active comitology committees in the first pillar. While the Commission is charged with the implementation of the general framework for Community activities in favour of consumers, it shares responsibility for the selection and evaluation of actions with the advisory committee of the representatives of the Member States (Article 2 (b) and (c) of the decision) – its autonomy in the selection and evaluation process is thus reduced by the comitology provisions.

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[40] http://europa.eu.int/clab/index.htm.

[41] Commission. 2001. Report from the Commission on the working of the committees during 2000. COM (2001) 783 final.

In terms of the post-decision phase of the consumer policy process, liberal intergovernmentalism once again demonstrates more explanatory power than supranational governance. Unlike in education policy, the Commission is unable to exploit either judgements from the ECJ or any informational advantage to push its agenda forward in this phase. The evidence clearly shows that the threat of sanction from the European Court of Justice is a blunt instrument and is, indeed, not over-used by the Commission. While the Commission is able to keep track of the notification of transposition of EU consumer legislation into national law, it does not possess enough resources to monitor practical application effectively. The implementation of EU consumer legislation is primarily dependent upon the willingness and ability of member state administrations to correctly transpose it into national law. The next section will build on this macro analysis and look at the negotiation and implementation of a specific piece of consumer protection legislation, namely the 1999 Consumer goods and associated guarantees directive, to see if the conclusions arrived at continue to hold.

5.4 Consumer Goods and Associated Guarantees

Background to the Directive

In this section we examine the negotiation of Directive 1999/44/EC on Consumer Goods and Associated Guarantees. The draft proposal of the Directive (COM (1995) 520 final) was presented by Commissioner Emma Bonino to the Consumer Affairs Council of Ministers Meeting on 25 November 1996 and was finally agreed upon over two and a half years later, in May 1999. The purpose of the Directive was to approximate the laws, regulations and administrative provisions of the Member States on certain aspects of the sale and associated guarantees of consumer goods, with the view to ensuring a minimal uniform protection of consumers in the internal market framework. By consumer good guarantees the proposal meant the legal guarantee (the traditional protection which derives directly from the law and is present in all national legal orders and according to which the vendor (or some other person) is held liable vis-à-vis the buyer for defects in the products sold) and the commercial guarantee (the additional features which are offered, optionally, by the producer, vendor or any other person in the product distribution chain). The original proposal had two aims:

1. To assure the consumer would have a legal guarantee for consumer goods for two years counting from the time the good is supplied, whatever the member state in which the purchase has made. During this time, it was proposed that the consumer who makes a defective purchase may freely choose between the right to repair the good or to have a price reduction. During the first year, consumers, may, even if they so wished, ask for the sales contract to be rescinded or have the goods replaced. Whatever the case, they would have to point out the defects to the salesman within one month following identification of these same defects.
2. To ensure transparency and information principles in matters of the commercial guarantee of consumer goods. All such guarantees must feature in a written document setting out clearly the essential particulars necessary for making claims under the guarantee, notably the duration and territorial scope of the guarantee and the name and address of the guarantor.

In areas covered by the proposal, member states remained free to adopt or retain stricter rules designed to offer consumers a higher level of protection. It should be noted that after-sales services, e.g. services in connection with the use, maintenance and repair of goods, were not covered by the original proposal in spite of being included early talks on the proposal (Agence Europe 6751, 19 June 1996). Finally, according to the Commission's proposal, the legal basis for the Directive was to be Article 100a (now Article 95), which allowed for negotiation to proceed by co-decision. The proposal was the culmination of consultations that the Commission set in train in 1993 through its Green Paper on the guarantees for consumer goods and after-sales services. According to Commissioner Bonino, 'it will put an end to the disparities observed in national legislations in member states and constitutes a milestone in the completion of the internal market in the interests of consumers and healthy competition' (Agence Europe 6751, 19 June 1996).

Figure 5.1: Time Schedule of Directive 99/44/EC

Legal Basis: Article 95 (ex 100a)

Initial Proposal COM (1995) 0520	18 June 1996
Presented to Council	25 November 1996
ESC Opinion	27 November 1996
EP Report Tabled	21 January 1998
EP Opinion First Reading	10 March 1998
Commission Modified Proposal COM (1998) 0217	31 March 1998
Consumer Affairs Council	23 April 1998
Council Common Position	24 September 1998
Commission Assessment	25 September 1998
Recommendation for 2nd Reading Tabled	26 November 1998
EP Decision Second Reading	17 December 1998
Commission Opinion Second Reading	20 January 1999
Conciliation Joint Text	8 April 1999
EP Codecision Third Reading	5 May 1999
Final Act Directive 99/44/EC	25 May 1999

Pre-negotiation

This section proceeds by applying the propositions and observable implications of the two theories to this level of analysis. To reiterate, at this stage of the negotiation of Directive 99/44/EC, according to liberal intergovernmentalism the proposal for the Directive would come specifically from a call by the member states that wish to solve a collective action problem relating to consumer protection issues that had detrimental economic effects. We would in turn expect the content of the proposal to reflect the preferences of the larger member state executives in particular. The European Parliament or other EU institutions would have no input into policy formulation. According to supranational governance, the proposal for Directive 99/44/EC would result from one of two stimuli – the desire of transnational groups for cooperation and the consequent pushing of the Commission to propose a policy capitalising on this desire or lock-in or path dependence from previous decisions. In other words, we

would expect previous legislation to have generated its own dynamic that has led to a continuation of integration in this policy area. It would also imply that member state executives' are less proactive and more reactive in the policy formulation process.

The birth of the proposal was a long and painstaking one. The idea for the proposal originated most specifically in the Green Paper on Guarantees for Consumer Goods and After-Sales Services produced by the Consumer Policy Service in 1993 (COM (93) 509 final, November 1993). This Green Paper itself was a response to a series of formal requests from the Council, the European Parliament and the Economic and Social Committee who all invited the Commission to take measures in regard to guarantees and after-sales services. The genesis of the Green Paper and any possible measure the Commission might take in this domain is to be found in the very first Council Resolution on Consumer Policy in 1975. In 1981, the second EEC programme for a consumer protection and information policy reaffirmed the need for protection of economic interests in respect of defective products on the one hand and the existence of a satisfactory after-sales service on the other. The Council requested the Commission to study the necessary means and to take 'appropriate steps with a view to improving conditions of warranty on the part of the producer and/or supplier and after-sales service, either by legislation or, where appropriate, by agreements between the parties concerned for *inter alia* the improvement of contract terms' (Council Resolution of 19 May 1981, OJ C 133 of 3 June 1981). Subsequent Council Resolutions in 1986 and 1989 again invited the Commission to study the possibility of taking initiatives in the field of guarantees and after-sales services (OJ C 167 of 5 July 1986 and OJ C 294 of 22 November 1989). The 1990-1992 Commission Consumer Policy Action Plan also stressed the need for a Community approach to the question of guarantees with a view to the smooth functioning of the internal market. The European Parliament and the Economic and Social Committee, on several occasions, emphasised the need for Community action in this domain, 'in the light of certain inconsistencies where the reality experienced by consumers does not correspond to the official discourse, notably in the domain of guarantees relating to transfrontier

purchases' (OJ C No. 339 of 31 December 1991 (ESC); OJ C 94 of 13 April 1992 (EP)).[42]

Lock-in from previous decisions was not an impetus for the decision to propose the actual Directive. Previous legislation had touched on but not tackled the issue of consumer guarantees head on. Three directives were linked to but were not specifically devoted to law on guarantees: Directive 85/374/EEC concerning liability for defective products, Directive 93/95/EC on unfair terms in consumer contracts and Directive 84/450/EEC on misleading advertising. Two judgements of the European Court of Justice also related to national legislation pertaining to the legal guarantee. Both cases concerned France and both cases highlighted the problems posed by the diversity of national laws in this area. The first looked at the presumption of bad faith on the part of the person selling goods by way of trade (case C-339/89) and the second the principle of the manufacturer's liability for a guarantee vis-à-vis the subsequent purchaser (Case C-26/91) but did not give rise to spillover pressures or provide the Commission with an adequate justification for action. The most immediate and strong external impetus for action was the trigger of the completion of the Single European Market and the granting of a treaty base with Article 100a. The lack of redress for defective products had already been recognised as an economic problem at national level in member states such as the UK, as a consequence of the number of complaints brought to consumer organisations such as BEUC. Every year thousands of consumers encountered difficulties regarding claims relating to defective products (see annex to 1993 Green Paper for list of complaints). The advent of the Single European Market compounded the realisation among member state executives that in order for the internal market to work properly, there was a need for guarantees concerning products purchased by consumers in another country to be honoured without discrimination in the consumer's country of residence. With the signature of the TEU, the Commission was able to propose a directive on guarantees under Article 100a and which did not rely on qualified majority voting.

The Commission, however, was very cautious in producing the proposal in response to requests. Preparatory consultation hearings with member states and with business

[42] Resolution on consumer protection and public health requirements to be taken into account in the completion of the internal market (Albert Report).

circles were organised in advance of the Green Paper and the Commission had bilateral contacts with the social actors who expressed an interest in the subject of consumer goods guarantees. The Green Paper itself analysed the situation existing at the time, the problems facing consumers and outlined certain possible solutions at Community level but did not put forward its own solution. It was seen that agreement would be potentially difficult to reach as it became clear that a huge diversity existed between member states. For example, with regard to the guarantee periods and time limits for action, the solutions chosen by member states were found to be quite complex and varying in degree. Belgium, France, Luxembourg and the Netherlands had not specified any time limit, Ireland and the United Kingdom had a time limit of six months from the date of sale, Denmark and Italy had a time limit of one year from delivery and Germany, Spain, Greece and Portugal's time limit was six months (COM (93) 509 final, 42). The Commission's strategy, therefore, was to promote the widest possible consultation in advance of preparing the new initiative in order to maximise support for the eventual proposal:

> The Green Paper makes it clear that the Commission does not claim to present either pat solutions or even to come out in favour of one or the other at this stage. Our aim is merely to indicate a number of avenues which will be explored in the course of future work and to trigger a public discussion that may generate new insights and cast fresh light on the problems addressed. Hence the Green Paper simply presents a number of options which seem appropriate (COM (93) 509 final, 7).

Interested parties were again invited to respond to the Green Paper and more specifically its question to stakeholders as to whether it was desirable to harmonise national legislation relating to the legal guarantee by 30 April 1994. The EP, in its Resolution on the Commission Green Paper (OJ C 205 25.7.1994) again called on the Commission to harmonise laws on retail sales in the EU.

The Commission, in its proposal to harmonise guarantees for consumer goods, did move beyond the lowest level of guarantee offered by some of the member states, although it chose not to deal with after-sales services. The proposal was based on the principle that goods must be in conformity with the contract and made the seller liable

for any shortcomings. It provided consumers with a legal guarantee of the conformity of consumer goods for a two-year period as from the date of supply, regardless of the Member State in which the purchase was made. It included a mandatory notification stipulation – consumers must inform the seller of the fault within one month of its identification or else forfeit their rights. Finally, it laid down principles of transparency and information in connection with commercial guarantees for consumer goods.

Thus it is possible to conclude, looking at the formulation of this specific policy proposal that, liberal intergovernmentalism offers far more insights into the process of pre-negotiation than supranational governance. The idea to propose the Directive had its origins in calls by the member states and to a lesser extent the other EU institutions, i.e. the EP and Economic and Social Committee. However, the immediate impetus for the directive was the establishment of the Single European Market and the realisation, by member state executives, that lack of consumer guarantees across borders would dissuade consumers from making full use of the internal market. The Commission set in train a long and thorough procedure of proposal drafting that highlighted its sensitivity to member state and to a lesser extent other stakeholders' preferences. The institutional policy inheritance was very weak and did not trigger or play a part in the pre-negotiation process. That being said, the content of the proposal itself did move to put in place guarantees that went beyond that of some of the less consumer-minded member states although, in line with the norm of minimal harmonisation, what was proposed was well behind the more well-established rights accorded to consumers in the form of guarantees. Member States were again given the option of harmonising further should they so wish.

Negotiation

In the negotiation or decision-making phase of the policy process, liberal intergovernmentalism posits that member state executives are the only important actors at this stage, the outcome of negotiations will be dictated by their preferences and will be the result of lowest common denominator bargaining. If these propositions were to be true at this stage of the policy process with regard to Directive 1999/44/EC, we would expect to see the Council's position on controversial issues to represent the outcome of negotiations, and not the EP's. Or we may find that the

outcome of the decisions will lie closer to the preferences of the Council (and closer to the preferences of the more conservative minded member states) rather than the EP. The Commission would not be involved at this stage. However, supranational governance puts forward an opposing proposition, namely that the policy outcome of Directive 1999/44/EC would be based on negotiation between the member state executives acting within the Council and the European Parliament as the institutional rule of co-decision sets out. Consequently we would expect that the EP and the Commission (perhaps informally) and even stakeholders such as consumer organisations and lobby groups may be able to influence the policy outcome so that it does not solely reflect member state executives' preferences. Similarly, as the Economic and Social Committee and the Committee of the Regions have the right of consultation, their views may also have an effect on the eventual outcome.

Because of the decision making rule of codecision, the negotiation of Directive 1999/44/EC can be characterised as an iterative game between the EP, Council and Commission with each of the actors changing positions and adapting to positions taken by other actors in successive rounds of negotiation based on their institutionally specified roles. While the Economic and Social Committee held consultations on the proposal at the time of the EP's first reading, its opinion of the proposal was of a general nature and was duly acknowledged by the three main institutional bodies. However, its participation in the decision-making process was limited to this. The EP Committee on the Environment, Consumers and Public Health's first report on the Commission proposal was transmitted to the Commission in January 1998 (with Rapporteur Mrs Annemarie Kuhn (German Socialist)). In its report, the Committee actually pulled back from the Commission's proposal by agreeing that the consumer rights in place in the proposal (i.e. two years in which to complain of a defect) could be waived in the case of second-hand goods. In other words, the Committee did not have a problem restricting the scope of the Directive. On the other hand, it also highlighted what it saw as 'lacunae' in the proposal. For example, the EP moved beyond the Commission's specification of the duration of the guarantee. Article 3 of the proposal differentiated between the types of redress available to consumers and the time limit for this redress. It specified that when a lack of conformity is notified to the seller, the consumer should be entitled to ask the seller either to repair the goods free of charge within a reasonable period, or to replace the goods, when this is

possible, or to demand an appropriate price reduction or rescission of the contract. Exercise of the right of rescission or replacement of the good, however, would be limited to one year, whereas the right to repair or reduction in price was granted for two years. Yet once the negotiations proceeded, it became clear that both the EP and the Council did not have a problem with a uniform 24-month period applying to the guarantee as a whole. However, the question as to who would make the decision as to what course of action should be taken provoked disagreement in the negotiations and shall be discussed below. The EP also inserted a provision on the need for the consumer to be given information on after-sales service (which had been omitted from the original proposal). Further amendments included the requirement that instruction leaflets enclosed by the manufacturer with goods shall list at least one address in each of the Member States concerned which consumers may notify of a lack of contractual conformity (in light of shopping across borders). The EP Committee report itself caused controversy in the plenary session on the First Reading (March 1998) where by 320 votes to 128 with 59 abstentions (Socialists supported the proposal in greater numbers than Christian Democrats), the EP amended the Kuhn report and rejected a number of amendments tabled by the Rapporteur and the Committee. For example, the EP rejected the amendment which reinstated the obligation of the consumer to notify the seller of any lack of conformity within a period of one month from the date on which he/she detected it; charged the Commission to report to the EP and the Council on the application of the Directive two years after the deadline for transposition and as regards the legal basis, Parliament whished the Directive to be based on Articles 100a and 129a of the EC Treaty, as opposed to just Article 100a.

In the eventual outcome of negotiations, Parliament lost ground to the Council on two of these issues: the date for reporting on results of application was set at 7 July 2006, four years after the transposition deadline. However, the Directive itself did stipulate that the Commission was to prepare a report on the use made by member states of the compromise agreed regarding consumer notification (see below) to the seller of lack of conformity no later than 7 January 2003 (Article 5). The EP did not succeed in changing the legal basis of the Directive, on which both the Commission and the Council were in agreement.

Two controversial issues marked the subsequent negotiations between the EP and the Council (and within the Council), with the Commission acting as informal arbiter and also taking positions on the issues through its modification of proposals at each of the stages (See time schedule). The first controversial issue concerned the free choice of remedy left to the consumer, i.e. whether the consumer or the producer should have the right to decide what course of action should be taken once a defect is detected, e.g. replace, repair, rescind or price reduction. Germany, in particular, and to a lesser extent the Nordic countries and the UK came under pressure from industry not to agree to this element of the proposal (Agence Europe, 7142, 21 January 1998). Opposition to the proposal resulted in the different levels of influence of industry in different countries. At the European level, UNICE (representing industry) and EuroCommerce (representing trade) and the EU Committee of the American Chamber of Commerce in Belgium called the proposal to be amended in favour of producers and sellers. They felt that the proposal, unless this issue was amended, would lead to tremendous costs for industry (Agence Europe, 7144, 23 January 1998). According to UNICE, it would lead the consumer to systematically ask the manufacturer to replace the product, even if it can be easily and promptly repaired. For its part, EuroCommerce observed that the proposal would 'encourage dishonest consumers at the expense of others', would have serious consequences on employment, particularly for repair services and would place a heavy burden on small and medium sized enterprises who may be less equipped to deal with cross-border retailing. The EP Committee, in its own reports, was sensitive to this fear on the part of industry. The Consumer organisation BEUC, on the other hand, argued that the injured party (notably the consumer) must have the right to decide what remedy suits him best between the four options originally proposed by the Commission. Jim Murray, Director of BEUC, pressed the Parliament not to accept the smallest common denominator on this issue (Agence Europe, 7174, 6 February 1998).

The second controversial issue related to the notification period required for the defect. This issue was contested again by member states that came under pressure from industry to incorporate a short notification period within the directive, i.e. that after the consumer becomes aware of the fault, he/she must notify the seller of the fault within a specified period (of one month). While the Commission originally proposed a notification period of one month, together with the EP, it moved further

away from this to the idea of having no notification period within the two years of the guarantee. However, both the EP and the Commission attached less importance to this issue than to the fundamental right of the consumer to take the decision on what action should be taken (Agence Europe, 7179, 13 March 1998) and agreed to the compromise that it was left to the member states to introduce a notification period if they see fit.

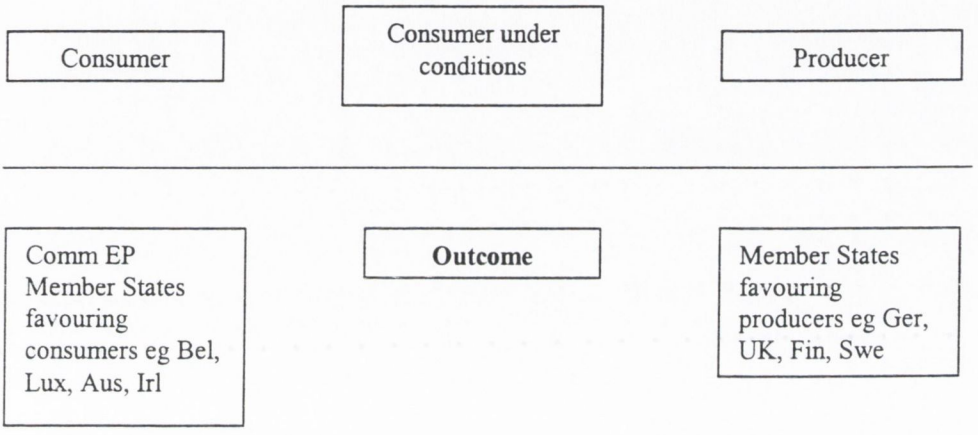
A compromise solution to both issues was possible on the one hand because a vote by qualified majority and not unanimity was required within the Council. Thus the German and Danish votes against the Council's common position on 23 April 1998 did not stop negotiations from proceeding to the next phase. The final agreement on the proposal was taken not by the Council alone, however, but by the Council and the EP in conciliation because of the right to an EP second reading through co-decision. If the EP had not adopted the proposal in its third reading the proposal would have fallen. However, the compromises agreed upon in conciliation meant that approval by the EP Plenary were not viewed as problematic but necessary to secure agreement. Both the EP and the Council, through QMV, agreed to the hierarchy of formulae suggested by the Luxembourg presidency in late 1997. As far as the EP was concerned, rapporteur of the Environment, Consumer and Public Health Protection Committee, Mrs Kuhn, came down in favour of the hierarchy of appeals in return for the provision that the directive apply to second hand goods for one year and the recognition in the directive of the obligation to provide information on after-sales services. British Labour Party member, Philip Whitehead, reckoned the report 'offers a reasonable compromise between the interests of the consumer and of industry' and Green Party member Hiltrud Breyer highlighted the fact that a two-year guarantee is an improvement for 'the bad pupils of the Community class, such as Germany' (Agence Europe, 7179, 13 March 1998).

On the basis of this evidence, what conclusions can be drawn as to the goodness of fit of the two theoretical conceptualisations at this stage? Unlike in the macro level analysis, the evidence of the Directive 99/44/EC negotiation clearly shows that the member state executives are not the only important decision-making actors. The European Parliament, as co-legislator with codecision, exercised its negotiating prerogative under the institutional rules by bringing the negotiation to conciliation.

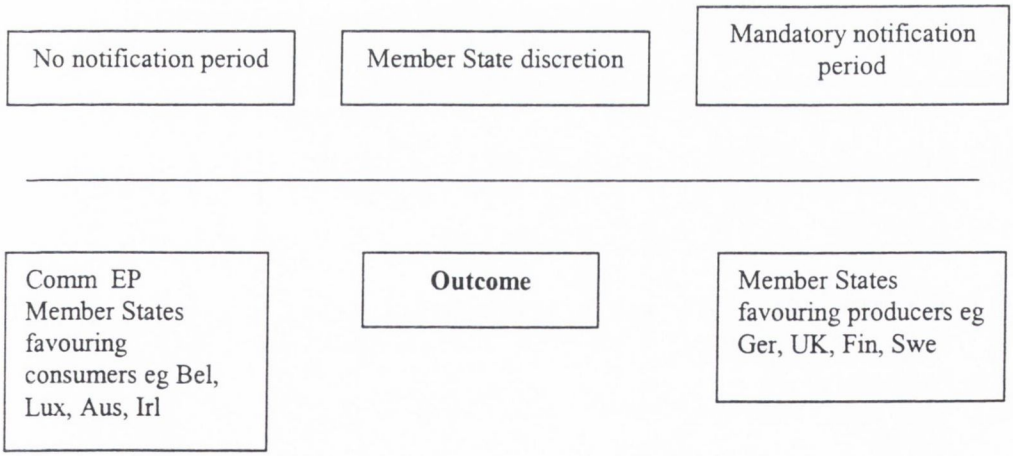
Co-decision also gave the Commission an informal and arbitration role, which it exercised carefully. Transnational organisations were informally involved in this stage of the process, lobbying the EP in particular and industry at the national level in member states such as Germany also wielded a considerable degree of influence on national preference formation. With regard to the controversial issues, the outcomes do not reflect the lowest common denominator aggregation of the member states' positions, as figure 5.2 shows, but compromise outcomes arrived at taking the preferences of all actors into account. In this negotiation, the EP appeared less willing or prepared to take the Council on in conciliation and was ready to accept the compromise on the second issue in particular and the hierarchy of formulae proposed by the Presidency in order that the consumer would retain the right to decide as originally included in the proposal. Therefore, it is possible to say that the supranationalist proposition, that decision-making takes place within a logic of institutionalisation, holds some explanatory purchase at this stage of policy making. The outcome arrived at while adhering to the principle of minimal harmonisation, was achieved in spite of opposition from some member states, such as Germany.

Figure 5.2: Consumer Goods and Associated Guarantees original preference alignments on controversial issues

Issue 1: Who will decided whether to replace/repair



Issue 2: Notification Period



Taken from: Agence Europe 7142, 21 January 1998; Agence Europe 7144, 23 January 1998; Agence Europe 7179, 13 March 1998.

Post Decision

The deadline for transposition of Directive 1999/44/EC was 1 January 2002. There is not enough evidence to properly test the propositions generated by liberal intergovernmentalism and supranational governance with regard to this phase of policy making. However, at the time of writing eight member states (Belgium,

France, Ireland, Luxembourg, the Netherlands, Portugal, Spain and the UK) had yet to notify the Commission of the measures taken under their national law to implement the Directive (Press Release IP/03/3, 6 January 2003). In addition, the Directive itself did stipulate that the Commission is to prepare a report on the use made by member states of the compromise agreed regarding consumer notification to the seller of lack of conformity (Article 5). A review provision was also included. Article 12 of the Directive called for the Commission to review the application of the Directive and submit a report on its application by 7 July 2006. According to Article 12, 'the report shall examine, *inter alia*, the case for introducing the producer's direct liability and, if appropriate, shall be accompanied by proposals'. But as Section 5.3 showed, in this phase the implementation, i.e. the transposal, application and enforcement of the Directive will be dependent upon the efficacy of the national administrative systems of the member states in ensuring this.

5.5 Conclusion

Greenwood, in 1997, saw the commitment of the Community to a consumer policy as largely symbolic (Greenwood, 1997, 195). Yet this chapter has shown that the formation of an established but shared competence at the EU level has indeed occurred in the area of consumer policy. From having no base in the founding Treaty of Rome, consumer policy is now enshrined as a fully-fledged policy area in the EU, with its own legislative *acquis*, rules and norms. All EC institutional actors, to a greater or lesser degree, are involved in the process of consumer policy making. In essence, therefore, the institutionalisation of consumer policy has occurred. However, consumer policy is weak in depth and scope and its development was and is facilitated primarily by the limited spillover from the internal market. Both the Council and the Commission have tended to place EU consumer policy primarily in the context of the single market. The norms of minimal harmonisation and subsidiarity have also been prevalent and particularly noticeable since the early 1990s.

In terms of overall theoretical explanation and through the use of the methodology of the analytic narrative, liberal intergovernmentalism offers more explanatory purchase in this policy area than supranational governance. This is clear from the analysis at each of the stages of policy making, i.e. pre-negotiation, negotiation and post-decision and to a large extent at both levels of analysis examined. The member state

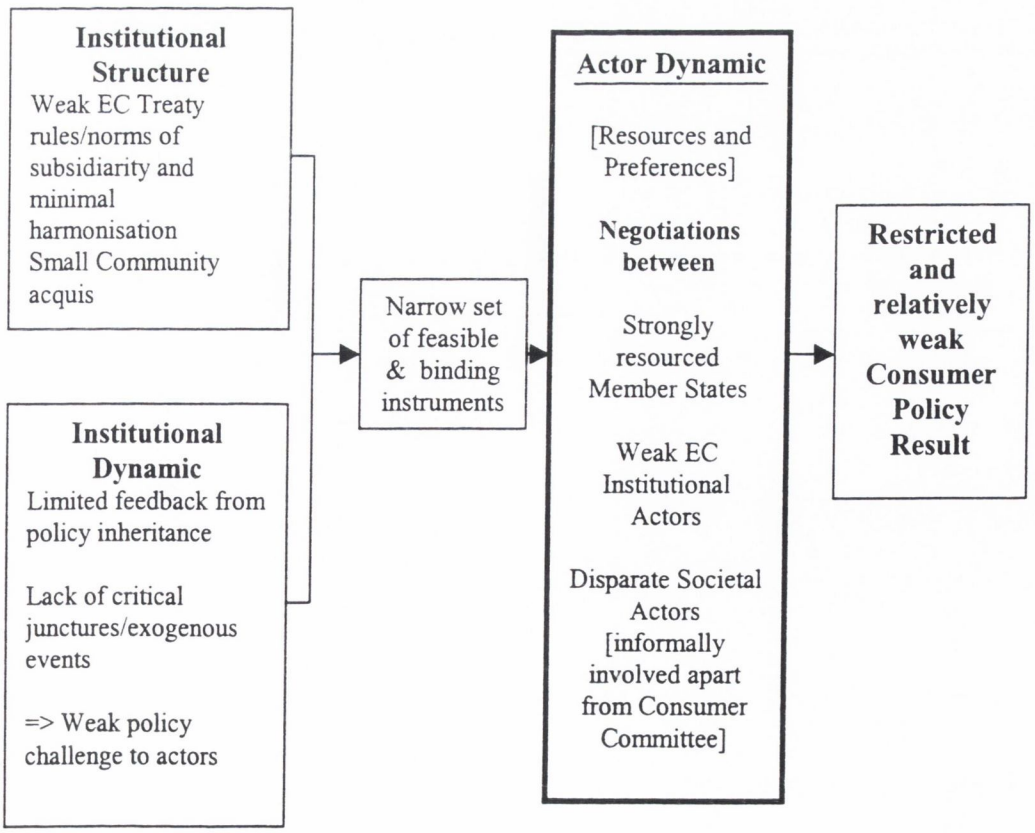
executives, acting within the Council of Ministers, have influenced in an overall fashion the degree and pace of consumer policy development. The European Commission, and in particular DG SANCO, has exercised its right of initiative in this policy sphere but has been careful to pay heed to the preferences of the member states for task expansion and has only really begun to harness the circle of consumer policy actors that exist at the transnational level. The Commission itself is mindful of its limited resources in this policy area but has stepped up its strategic approach and is endeavouring to bring coherence to it. The Commission is very careful to recognise that consumer policy is situated within the logic of completing the internal market. The Council configuration and thus the formation of coalitions within the Council is very much contingent upon the degree of consumer policy legislation at domestic level. Complex differences between member states' legislative frameworks have, in the past, militated against action being taken beyond the minimum level of harmonisation. The European Court of Justice has been called upon to adjudicate disputes in the post-decision phase but its judgements have not been of the nature to form a source of pressure for member state executives or a springboard for entrepreneurship on the part of the Commission, in part as a result of its recognition of the principle of minimal harmonisation (see Section 5.2). At the post-decision phase, the Commission, in carrying out its role as monitor of the implementation process, is ultimately reliant upon national systems of administration of the member states to implement consumer policy. Its powers of sanction are weak and it lacks enough informational resources to be able to carry out its functions effectively.

However, in line with supranational governance, at the negotiation stage in particular after the signature of the Maastricht Treaty, the logic of institutionalisation does matter. At the negotiation phase, other actors than the Council, i.e. the European Parliament, are becoming more important and influence the outcome of negotiations, as does the institutional rule of qualified majority voting within the Council. This is most clearly shown in the micro level analysis of Directive 1999/44/EC where the compromises negotiated represented more than the lowest common denominator.

The policy characterisation outlined in Chapter 3 helps us picture consumer policy making as a shared competence (see figure 5.3 below). To recap, three elements interact in policy making: the actor dynamic, the institutional structure and the

institutional dynamic. The nature of the institutional structure and institutional dynamic has meant that negotiations and agreements between member state governments have been the primary element affecting the development and depth of EU consumer policy. Liberal intergovernmentalism holds that the only mechanism that matters in policy making is the agreement between member states. Supranational governance begs to differ. This chapter shows that there are a number of competing mechanisms operating independent of the resources and preferences of the member states that have affected the development of consumer policy making but to a much lesser degree. The mechanisms and interaction between the institutional structure and dynamic of consumer policy, i.e. weak EC treaty rules and acquis communautaire, the norms of subsidiarity and minimal harmonisation, the limited policy inheritance feedback and the lack of critical junctures, have combined to reinforce the position where the member states are the primary drivers of the evolution of consumer policy, in line with the central tenet of liberal intergovernmentalism.

Figure 5.3: Consumer Policy Making



Chapter 6: Telecommunications Policy

6.1 Introduction

In this chapter, the development and evolution of telecommunications policy at the EU level will be examined and the propositions outlined and explored in Chapter 2 will be tested against the evidence of its policy development at the macro and micro levels. At first glance, based on the evidence of previous analyses of this policy area, the outcome of the tests and conclusions of this chapter seem predetermined. The history of the development of EU telecommunications policy points to a more supranational-oriented policy. After a number of abortive bids by the Commission to initiate a European policy, its efforts to instigate a European telecommunications policy were successful in the early 1980s, mainly as a result of rapid changes in the international environment which prompted a shift in member state preferences, e.g. the liberalisation and deregulation of telecommunications markets in the United States and Japan, and as a result of the convergence of telecommunications and computer technologies (Héritier, 1999, 38-9). A common regulatory framework for European telecommunications was established with the Commission playing a leading role in policy formulation, and within less than a decade the sector's national policies had been drastically transformed and a European policy established with tangible economic benefits in evidence.[1]

The core objective of this European policy is the creation of a single market for telecommunications services and equipment, providing users with choice, quality and value for money. This objective has been pursued through two primary mechanisms: (i) liberalisation measures to remove barriers to competition and (ii) harmonisation or re-regulatory measures to prevent unnecessary differences between member states

[1] The European telecommunications market has shown consistent growth in recent years, as the figures in table 6.1 demonstrate. However, the market is somewhat fragile following the bursting of the dotcom bubble, the global economic slowdown.

Table 6.1 Size of EU Telecommunications market (€bn)

Year	Size of Market (€bn)	Percentage Increase on previous year
1998	160	10.5
1999	177	10.4
2000	199	12.5
2001	218	9.5

Source: http://europa.eu.int/information_society/topics/telecoms/implementation/annual_report/8threport/index_en.htm. 23 January 2003.

telecoms markets and systems (Interview Commission Official 2, Directorate General Information Society (DG INFSO), 23 September 2002). As a result member states have progressively harmonised their telecommunications policies, and national industry and market structures have changed dramatically.

In the past EU policy specialists have focused on telecommunications as it has important implications for theories of European integration. Telecommunications has been cited as an exemplar of the Commission imposing its choices on unwilling member states (Dang-Nguyen et al, 1993; Sandholtz, 1993; and Thatcher, 2001, 558). In line with neofunctionalism and supranational governance, policy analysts have argued that the mediation of the Commission produced mid-point rather than lowest common denominator outcomes. Once the sector was included in the EU agenda (it is acknowledged that this came at the behest of member states), supranational institutions (most notably the European Commission) then set the policy agenda and the expansion of this agenda was facilitated by spillover mechanisms (See Natalicchi, 1996). In 1997, Schmidt referred to European telecommunications policy as 'a supranational success story' (Schmidt, 1997, 235). According to Sandholtz:

> The evidence is clear: the EU has created a supranational policy domain in telecommunications, and the initiative came primarily from the Commission, armed with legal precedents from the ECJ and acting in alliance with societal groups that had a stake in efficient pan-European telecommunications (Sandholtz, 1998, 135).

These estimates of the role of the Commission in particular as a supranational policy entrepreneur, forcing member state executives to act against their own wishes, must not be carried too far. As the analysis below will show, EC telecommunications regulation expanded incrementally and developed through a partnership between the Commission, national governments and industry stakeholders, but was pushed at the beginning by the Commission and facilitated in particular in the late 1980s and 1990s by certain exogenous mechanisms (Thatcher, 2001, 561; Peterson and Sharp, 1998, 4-5).

The chapter will proceed as follows. Section 6.2 outlines the EU telecommunications regulatory framework and maps the general development of policy in broad terms from the creation of the EEC, highlighting the critical junctures where policy was pushed forward significantly and the reasons and mechanisms behind this. Section 6.3 looks at the telecommunications policy making process in macro terms at each of the three stages, that is, the making of telecommunications policy at each stage of the policy process over time is analysed and measured against the propositions developed by each of the theoretical frameworks in broad terms. Which of the two theories comes close to providing the best picture of the process of policy making at each stage? Section 6.4 focuses on the micro level of analysis and applies the propositions to the three stages of the negotiation of the 2000 Parliament and Council Regulation on Unbundled Access to the Local Loop[2] in order to test their explanatory power. Finally, in the conclusion, the results gleaned from the analyses contained in sections 6.3 and 6.4 are reiterated and general conclusions as to the goodness of fit of the theories are drawn. In this way, the nature of the institutionalisation of telecommunications policy can also be determined.

6.2 Institutionalisation of Telecommunications Policy

The central aim of this section is to broadly trace the institutionalisation of telecommunications policy in the EU. It must be acknowledged from the outset that this discussion will provide an overview of telecommunications policy development; given the constraints of scope, such an analysis cannot be exhaustive in covering the full technical detail of legislation and standards adopted. Nevertheless, the analysis of this section focuses on answering a number of questions: most importantly, has the process led to the formation of well-established policy competence? What norms frame the scope of policy making? Is this an area in which the EU institutions have demonstrated an autonomy of action in the development of policy?

This section will first outline the structure and basic content of the EU telecommunications regulatory framework. The development of the policy framework is then traced and can be divided into four historical phases:

1. First steps – towards EC intervention (1979-1987)

[2] Regulation 2887/2000/EC of the European Parliament and of the Council on unbundled access to the local loop.

2. EC entrepreneurship, innovation and limited liberalisation (1987-1992)
3. Extension of the regulatory framework across the entire sector (1993-1998)
4. Adaptation and consolidation of established regulatory framework (1999-) (Adapted from Thatcher, 2001, 561).[3]

In 1987, the Commission outlined the structure of the EU's regulatory package in its Green Paper on telecommunications. At that time, the telecommunications market was still characterised by the presence of monopolistic public administrations in all Member States (with the exception of the United Kingdom), shielded from any competition in the major aspects of their activities. In order to create a more competitive environment for telecommunications services and equipment, the Green Paper proposed a three-pronged approach: (i) liberalisation of services and equipment; (ii) the establishment of harmonised and open access conditions to telecommunications networks, and (iii) the application of competition rules to incumbent telecommunications operators.[4] Liberalisation, harmonisation and the application of competition rules became the three pillars of the telecommunications regulatory framework (Interview DG INFSO Commission Official 2, September 2002; Garzaniti, 2000, 3). The legal basis for telecommunications policy is to be found in Article 95 (Internal Market Harmonisation – which allows for co-decision and qualified majority voting in the Council), Articles 81 and 82 (competition) as well as Articles 47 and 55 (right of establishment and services) of the TEC. It also includes the promotion of trans-European networks (TENS) in the transport, energy and telecommunications sectors, as stipulated in Articles 154, 155 and 156 of the TEC.

The objective of liberalisation is to break down monopolies and remove legal barriers to entry for new players, in other words to stimulate competition. To achieve that

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[3] The division of policy development into these four phases was confirmed in interviews with Commission Officials, DG INFSO, September 2002.

[4] 'Equipment' includes telephones, modems, faxes, local branch exchanges that connect users to the telecommunications network. 'Services' refers to the various types of communication offered on a network (voice telephony, data communications, mobile communications, forwarding, paging, voice mail, databases, and so on). 'Infrastructure' refers to the network itself, including the tasks of maintenance and management. The basic infrastructure historically consisted of the network of lines with copper wires running to each house or business. Today, there are parallel and linked infrastructures: such as satellites, microwave transmission, cellular networks, and cable television networks (which can be used for telecommunications).

objective, the Commission adopted a number of liberalisation directives under Article 86(3) of the EC Treaty (ex Article 90(3)), which empowered the Commission to adopt general legislative measures to ensure that Member States comply with the EC Treaty, in particular competition rules). Article 86(3) was a supranational legislative tool since it permitted the Commission to adopt measures relatively rapidly without the involvement of the Council and the Parliament.

The process of liberalisation began gradually, starting with the liberalisation of telecommunications equipment in 1988 and value-added telecommunications services in 1990.[5] The process was then extended through successive amendments of the Services Directive, to satellite networks in 1994, cable networks in 1995, mobile telephony and alternative infrastructure in 1996 and finally public voice telephony services and networks as of January 1, 1998 (with limited deferments for some Member States). According to Garzaniti, the step-by-step approach adopted, in particular the temporary maintenance of incumbent operators' monopoly rights on public voice telephony services and networks, was justified by the concern to preserve the financial stability of incumbents and their capacity to provide universal service,[6] which, arguably, could have been threatened by a sudden opening of the market (Garzaniti, 2000, 4). Until full liberalisation of telecommunications markets in 1998, there was thus a distinction between 'reserved services', i.e. services such as public voice telephony, which continued to be provided by incumbent operators under monopoly rights, and 'non-reserved' services, i.e. the liberalised services. This distinction became irrelevant following the full liberalisation of the telecommunications sector as of January 1, 1998.

One significant impact of the liberalisation process has been the separation of the regulatory and operational functions, which had been undertaken by incumbent telecommunications operators. Maintenance of regulatory functions with the

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[5] Services other than those under monopoly may be offered by other service suppliers, which use national network as the basic transmission medium but 'add value' to the basic transmission facility. What is exactly included in the notion depends on the regulatory situation of each country. [All definitions are taken from DGINFSO website: http://europa.eu.int/information_society/services/glossary/index_en.htm#t].

[6] The principle of Universal Service stipulates that a limited number of services, e.g. low-speed fixed public telephone lines and emergency services, are to be available to all users irrespective of location 'at an affordable cost'. National regulatory authorities have powers over the financing and provision of universal service.

incumbent was considered as a main obstacle to the introduction of competition as it entailed the inherent risk of discrimination against new entrants in favour of the incumbent's operations. Accordingly, the liberalisation directives prescribed the creation of independent national regulatory authorities (NRAs) responsible for matters such as licensing, allocation of frequencies and granting of type-approval to terminal equipment.

Liberalisation was accompanied by re-regulation or harmonisation, which is its necessary complement. Harmonisation aims at setting out equivalent trading terms in all Member States to ensure that businesses can compete on equal terms and benefit fully from the liberalisation of the market. Harmonisation has been achieved through a series of directives adopted under Article 95 of the EC Treaty (ex Article 100a), which enabled the Council and the Parliament, on the basis of proposals from the Commission, to adopt legislative measures aiming at the establishment and functioning of the internal market by harmonising the various laws of the Member States. The adoption of directives under Article 95 requires the co-decision procedure, involving not only the Commission and the Council but also the Parliament. The voting rule in the Council of Ministers is qualified majority voting. Harmonisation started with the adoption in 1990 of the Open Network Provision (ONP) Framework Directive, which set out common rules for open access to, and use of, public services and networks and the fixing of tariff prices for such services and networks (the 'Open Network Principles').[7] This framework directive was then supplemented by a series of harmonisation directives implementing ONP principles in specific areas, including leased lines in 1992, voice telephony in 1995, licences and interconnection in 1997.

Effective application of competition rules is essential to achieve the full benefits of the liberalisation mandated by sector-specific regulation. In particular, these rules ensure that the liberalisation process is not undermined, through market conduct and reorganisations, which may protect market players from competition. General competition law became a significant part of EC regulation of telecommunications

[7] ONP is the principle of non-discriminatory opening of telecommunication networks to all telecom operators and service providers on the basis of the harmonisation of access and usage conditions of telecommunications infrastructures with the view to developing a trans-European information market.

during the 1990s. The most important applications concerned the joint ventures, cooperation agreements and takeovers by national champion Public Telecoms Operators (PTOs) who were the original national postal, telephone and telegraph administrations (PTTs) before the liberalisation of the telecommunications markets. These incumbent PTOs included British Telecom (BT), France Télécom and Deutsche Telekom. Significant competition concerns were raised since they held dominant positions in national markets, and rival PTOs (new entrants on the market) made complaints to the Commission. DG IV (Competition) investigated the agreements and bids under general competition law. Nonetheless, the Commission approved alliances and internationalisation by the national champion PTOs and imposed few conditions (Thatcher, 2001, 569).

Box 6.1: EU Telecommunications Policy 1987-1998

The Goal

- A single market for telecommunication services and equipment, providing users with choice, quality and value for money

The Mechanisms

- Liberalisation measures to remove barriers to competition
- Harmonisation measures to prevent unnecessary differences between member states

Liberalisation in the EU

1987 Green Paper
1988 Terminal Equipment
1990 Value added services
1993 Switched data services
1994 Satellite communications
1995 Cable television networks
1996 Mobile communications
1998 Voice and infrastructure

Harmonisation in the EU

- Frequency allocation (1987-91)
- Terminal equipment (1991 + 1999)
- Leased Lines (1992 + 1997)
- Voice Telephony (1995 + 1998)
- Licensing (1997)
- Interconnection and Universal Service (1997)
- Data Protection (1997)
- Number portability/carrier pre-selection (1998)
- Local Loop Unbundling Regulation (2001)

Phases of institutionalisation of telecommunications policy

Since they were first developed in the mid-1800s, telecommunications networks in practically every European state – with the exception of Sweden - were operated and regulated by the national postal, telephone and telegraph administrations. These PTTs formed part of the governmental administration, were administered directly by ministries and staffed by civil servants. The PTTs held a de facto monopoly over the national telecommunications infrastructures, and had a dual role of both regulator and supplier. According to Eliassen, Mason and Sjøvaag,

> 'these monolithic creatures completely dominated the telecommunications industry, even extending to 'cosy' patent-sharing agreements with the manufacturers of customer premises equipment (CPE), the physical terminals necessary for the operation of the networks. Contracts were awarded in a political manner – i.e. there existed a deliberate policy of backing 'national champions' in each Member State. These were companies such as GEC/Plessey in Britain and Siemens in Germany. Each PTO had its own arrangement with the relevant company, thus obstructing open competition among CPE manufacturers' (Eliassen, Mason and Sjøvaag, 1998, 24).

In the late 1950s, the six founding members of the EEC debated whether to undertake cooperation in the postal and telecommunications sectors within the EEC or to establish an organisation outside the EEC. The latter and more pan-European option was chosen; telecommunications were not mentioned in the Treaty of Rome and in 1959 the CEPT (Conférence Européenne des Administrations des Postes et des Télécommunications) was established with a wider European membership. The CEPT was an intergovernmental organisation, with few powers over PTOs (Schneider and Werle, 1990, 77). Until the 1980s, the governments of the four largest member states and telecoms powers (the UK, France, Germany and Italy), irrespective of their political affiliation, shared the view that telecoms were a public service to be supplied by the state in the form of a monopoly. Cooperation at a regional level was limited to the minimum of technical coordination necessary to allow inter-state communications. Cross-border services were costly and inefficient, but because demand was limited and competition absent, it seemed that governments had no reason to improve coordination at the regional level beyond what was already provided by the CEPT and

the other international telecommunications organisation, the International Telecommunications Union (ITU) (Natalicchi, 2001, 5-6,8).[8] Between 1959 and 1977 the EC's PTT (posts, telecommunications and telegraph) ministers met only twice (Thatcher, 2001, 562).

Early Steps – Towards EC Intervention 1979-1987

From the 1970s onwards, radical changes (sparked off initially in the US) transformed telecoms into a viable and potentially extremely profitable commercial sector. The demand for faster and cheaper communications was matched by the convergence of computer and communications technologies that, in turn, created opportunities for non-traditional equipment manufacturers and independent suppliers (Natalicchi, 2001, 6). The emergence and development of digital technology changed the technological basis of telecommunications radically as it linked telecoms with the computer or information technology. As the basic technology for different sectors converged, it became difficult to preserve sectoral barriers and the traditional institutional differentiation between telecommunications (highly regulated) and the computer domain (unregulated) (Schneider, 1992, 49). In the early 1980s in particular it became clear that the increasing dependence of European telecoms on foreign computer technology had eroded Europe's trade surplus in telecoms equipment. A 1979 Commission report on the status of telematics[9] in Europe highlighted weak position of the European computer industry in contrast to that of the US and the growing dependence of European telecommunications on foreign-based (particularly US) technology (Natalicchi, 2001, 33). In 1979, Industry Commissioner Etienne Davignon convened a series of meetings with the chief executive officers of the twelve largest European information technology firms to develop a programme for cooperation in computer technology.[10]

Another key development was the deregulation and liberalisation of telecommunications markets in the US, Japan and UK. After the divestiture of the US

[8] The ITU, headquartered in Geneva, Switzerland, is an international organisation within which governments and the private sector coordinate global telecom networks and services.

[9] The application of information and communications technologies and services, usually in direct combination.

[10] Bull, Thomson, and CGE from France; Siemens, Nixdorf and AEG from Germany; Olivetti and STET from Italy; Philips from the Netherlands; and GEC, ICL and Plessey from Great Britain. (See Natalicchi, 2001 and Peterson and Sharp, 1998, 5-7).

telephone giant AT&T and the liberalisation of the remaining core in US telecommunications, AT&T entered the European markets through joint ventures with Philips and Olivetti. At the same time, as the US market opened up a few large European telecoms equipment firms (e.g. Germany's Siemens and France's Alcatel) tried to enter the US market, which provoked US firms to request the reciprocal opening of European markets to competition. In the same period the UK privatised its monopoly, BT, and Japan also liberalised its markets by 1985. Based on the success of these moves, independent suppliers and large users in other European countries started to demand similar reforms at the national and European level.

Member state executives began to express concern about these developments (such as at the Stuttgart summit of June 1983) (Shearman, 1986, 155-6) and in response the Commission, under the steerage of Industry Commissioner Davignon, undertook a series of studies and commissioned independent studies by experts. A number of Commission Communications based on these studies urged immediate action to close the technological and trade gap with the US and Japan through the establishment of a common telecoms policy, common standards, and a common telecoms infrastructure.

The Council invited the Commission to set up a team of experts to formulate an action programme, including officials from the ministries of industry, from the PTTs and representatives from the telecoms industry. In 1983, the SOG-T (Senior Officials Group on Telecommunications) was set up and included Commission and national telecoms experts (See Natalicchi 2001 for an in-depth account of this institutional process; Interview DG INFSO Official 5, 24 September 2002). In May 1984 the SOG-T forwarded an action programme to the Council that recommended that the US and Japanese challenge be met not through individual actions by member states or protectionist measures by the Community but through a common European effort to open markets and simultaneously make extensive investments (COM (84) 277 final, 18 May 1984). In 1984, the Commission created a special telecommunications task force within DGIII (Internal Market), which marked the official inclusion of telecoms into the EEC policy agenda. In 1986, the Task Force was integrated into Directorate General XIII (Industry), which became the DG for Telecommunications, Information

Industries and Innovation.[11] According to Thatcher, EC action between 1979 and 1987 was modest, with little binding legislation produced (Thatcher, 2001, 563). Research and development activities in information and communication technologies were initiated in 1984 with the ESPRIT Programme (information technology), which was closely followed in 1986 by specialised telematic application programmes (transport, health and distance training) and the RACE Programme (advanced telecommunications technologies) (See Peterson and Sharp, 1998). In 1983 the Commission had put forward six 'lines of action' that included modest market opening aims. These lines of action were discussed by national officials in the SOG-T and led to a telecommunications action programme that was approved by the Council of Industry Ministers in December 1984 (Shearman, 1986, 155). However, little concrete action followed these proposals until the publication of the 1987 Green Paper on telecommunications.

EC Entrepreneurship, Innovation and Limited Liberalisation 1987-1992

The publication of the Green Paper on Telecommunications was identified by Commission DG Information Society officials interviewed for this study as a critical juncture in the development of an EU regulatory policy in telecommunications and fundamental to its subsequent evolution. From this point onwards, it is correct to speak of an EU telecoms policy (albeit weak in form in its early stages). Spurred on by the institutional changes of the Single European Act, the Commission (both DG XIII and DG IV (Competition)) used the target of the completion of the internal market as a springboard for the liberalisation of telecoms and at the same time used telecoms as an instrument to achieve the single market (Natalicchi, 2001, 49). The external pressures faced by member states in the telecommunications sector from 1979-1987 had facilitated the acceptance of the EC as a legitimate actor in this policy sphere, despite the absence of a direct mandate in the Treaty of Rome.[12] The Commission produced a Green Paper on the future of telecommunications in Europe and conducted a broad public consultation on the document, with approximately forty-five organisations, including telecoms administrations, user groups, manufacturers, service providers and trade unions in order to achieve consensus

[11] DG XIII was renamed DG Information Society in 1999 (DG INFSO).

[12] It must be acknowledged that the SEA incorporated cooperation in telecoms technology. Title VI was added to the Treaty to improve European industry's competitiveness through the development of transnational Research and Development programmes.

(Ungerer, Berben and Costello, 1989).[13] The Green Paper did not foresee a complete market liberalisation (the Commission recognised that this would not have been agreed to by the member states due to diverging member state preferences - while the UK and the Netherlands pushed for more substantive liberalisation, West Germany, France, Italy and the other smaller member states such as Greece and Ireland still wished to protect national PTTs - Interview DG INFSO Official 3, 23 September 2002). Policy was to proceed in phases and the Green Paper laid the foundations for the future common market in telecommunications services and equipment. Indeed, it set the main general policy categories that continue to be used in plans and legislation (Natalicchi, 2001, 40).

On the basis of the general consensus achieved in the Green Paper, and under the impetus of the Internal Market plan, the Commission submitted an implementation plan to the Council in 1988. Most objectives presented in the Green Paper were included in the plan, with the exception of those where a consensus was not achieved (e.g. satellite and mobile telecoms), and some controversial areas were included as objects of further negotiation (e.g. tariff principles). As mentioned above, the 1988 Terminals Directive obliged member states to end special or exclusive rights over the supply of terminal equipment. The 1990 Services Directive prohibited monopolies over advanced services, such as email, fax services. At the same time the ONP Framework Directive set out the principles governing access to the telecommunications infrastructure. The liberalisation and re-regulatory directives

[13] Aeronautical Radio, Inc., French Telecommunications User association, American Chamber of Commerce, Amsterdam Informatics and Telecommunications Council, Belgian Telecommunications User Group, BEUC, British Telecom, CEN/CENELEC, Council of Netherlands Industrial Federations, Club Informatique des Grandes Entreprises Françaises, Digital Equipment Corporation, Confederation of German Industry and Trade, Dutch Business Telecommunications Users Association, Economic and Social Committee, European Computing Services Association, European Conference of Associations of Telecoms Industry, European Council of Telecommunications Users Associations, European Engineers Association, EFTA, European Space Agency, European Service Industries Forum, ESPRIT Industrial Round Table, Eurochambres, European Federation of Public Servants, European Association of Information Services, French ICC Committee, Forum Telematico Italiano, German Postal Services Users Association, IBM, International Chamber of Commerce, International Data Exchange Association, Institute of Satellite Applications, International Telecommunications Users Group, National Communications Union, National Council of French Management, Plessey, Post, Telegraph and Telephone International, Réseau Associés pour la Recherche Européenne, Round Table of European Industrialists, Shell, SOG-T, Televerket, TEMA (UK), UNICE, Unilever, US Government, US Council for International Business, German Machinery and Equipment Manufacturers.

ensured that regulator functions within member states (such as the issuing of licences or policing standards) had to be handed over to independent bodies (the NRAs).

A key directive, which can be cited as an example of supranational entrepreneurship where the member states were forced to act by the Commission, is the Terminal Equipment Directive, issued by the Commission in 1988. By 1988, new technology had created a large market for telecoms terminal equipment, but PTTs still insisted that telecoms users connect PTT sponsored equipment to their network, at the expense of equipment marketed by other manufacturers. The Commission took action to correct the situation. In 1988, it accused the PTTs of infringing the Treaty competition rules by abusing their dominant position in the market for terminal equipment. By virtue of the powers granted to it by ex-article 90(3) of the Treaty, the Commission issued a directive on competition in the market for telecoms terminal equipment (Commission Directive 88/301/EEC, 16 May 1988). The Directive eliminated all special and exclusive PTT rights to import, market and maintain terminal equipment. This applied to all types of terminal equipment including mobile and satellite receive-only earth stations. Thus, to all effects, the directive liberalised the market for terminal equipment. At an informal Council meeting in Berlin in 1988, the postal ministers had warned against such a decision. France, the UK and West Germany in particular insisted that all Directives must be proposed to the Council of Ministers (Schneider and Werle, 1990, 101). France, together with three other member states – Belgium, Spain and Germany – subsequently challenged the directive before the ECJ. In the final judgement in 1991, the ECJ upheld most of the directive, thus implicitly reaffirming the capacity of the Commission to apply Treaty competition law in the area of telecoms terminals by the use of ex-art. 90(3) (Natalicchi, 2001, 53).[14] However, it is important not to conflate disagreements over ex-article 90(3) (now 86) between the Commission and these member states with positions over the substance of EC telecommunications regulation. According to Thatcher, the central issue for the member states was the constitutional implications of

[14] French Republic v. Commission, Case C-202/88 (decided in 1991). France (with Belgium, Spain and Germany) appealed on the grounds that the Commission acted outside the law-making powers granted by ex-Art 90(3) of the Treaty and that the Commission had incorrectly assumed that member states violated ex-arts. 30, 37, and 86 of the Treaty in granting and maintaining exclusive rights in terminal equipment markets.

the legal status of the directive and not the substance of the legislation itself (Thatcher, 2001, 567).

Finally, during this phase, the Commission was also active in developing a framework for common standards for equipment and services. The European structure for standards development made up of the CEPT and the CEN-Cenelec (Comité Européen de Normalisation Electronique) standards was deemed insufficient. In addition, the CEPT and CEN-Cenelec were organised along national lines and composed of national incumbents and the standards adopted privileged these national incumbents. The Commission proposed the creation of the European Telecommunication Standards Institute (ETSI), which would be organised along sectoral rather than national lines and would include private industry and user groups in addition to the telecoms administrations representatives (Commission 1987, COM (87) 290 final: 110-3). This was a deliberate strategy employed by the Commission to include these private industry and user group actors in the telecommunications policy process and weaken the dominant position of incumbent PTTs in policy making (Interviews DG INFSO Officials 3 and 6, 23 and 26 September 2002).

The period 1987-92 saw the European Commission and in particular DG XIII and DG IV consolidate their position as important actors within the telecommunications policy process. DG XIII continued to consult industry on a regular basis in its policy deliberations. The ECJ's support of the Commission in upholding the Terminal Equipment Directive was a crucial factor in legitimising the Commission's role as central agenda-setter in telecommunications policy in this phase. However, the Commission was careful to proceed in a gradual manner, taking into account the continuing divergences in member state preferences on telecommunications when formulating its proposals for agenda expansion.

Extension of EC's regulatory framework across the entire sector 1993-1999

After 1993 the EC's regulatory framework was greatly extended across the telecommunications sector. The application of general competition law was added to sectoral liberalisation and re-regulatory measures (the third pillar of telecommunications policy) and DG IV (Competition) played a more prominent role in ensuring a level playing field for new entrants into the telecoms market under its

Commissioners Sir Leon Brittan and subsequently Karel Van Miert (Peterson and Sharp, 1998, 176-7). Technological developments (i.e. spillover) prompted further liberalisation, such as the liberalisation of mobile[15] and satellite communications. As new mobile systems – based on digital[16] rather than analogue technology – developed rapidly, the EC coordinated the introduction of those systems in the European market, most particularly the introduction of GSM (Global System for Mobile Communications) and subsequently UMTS (Universal Mobile Telecommunications System). In April 1994 the Commission produced a Green Paper on mobile telecoms with a view to extending the EC regulatory framework to that market (COM (94) 145 final, 27 April 1994). All interested policy stakeholders were given the opportunity to offer their own opinions on the development of this plan and a number of scientific and commercial studies were commissioned (e.g. from Coopers & Lybrand, PA Consulting Group, Eutelis Consulting). According to Natalicchi, the Commission's approach to mobile telecoms was largely based on the result of these consultations and analyses: 'the plan would eliminate the remaining exclusive and special rights of national administrations in the mobile telecoms sector, with the exception of licensing' (Natalicchi, 2001, 63). In terms of re-regulation, directives were negotiated on universal service, inter-connection and licensing, numbering. Standards for voice telephony were laid down. These rules were aimed at incumbent PTOs, who were deemed to have 'significant market power' (more than 25 per cent of the national market share).

Global competition and pressures from new market entrants continued to exert an influence on member states preferences, in particular in the more recalcitrant member states. However, EC activities in related sectors also affected the development of the regulatory framework. A significant impetus to the development of the regulatory framework came with the Maastricht Treaty and the Commission's 1993 White Paper on Growth, Competitiveness and Employment. As part of the TEU, member states

[15] A system of mobile telephony whereby a country is divided into thousands of small areas (cells), each of which is served by its own 'base station' for low-powered radio transmissions. This allows a user in one cell to transmit on the same frequency as another user in another cell without interfering in each other's conversation. Cellular networks may employ analogue or digital transmission. Original networks were largely analogue, while newer networks use the European GSM digital standard.

[16] In a digital telecommunication service, the original source is transformed into and transmitted as a series of digits in binary code (i.e. 0s or 1s). Voice, text, image or data are all equally capable of being coded as a digital signal, so that a single network can handle all four forms of transmission (multimedia).

agreed on a plan to enhance transport, energy and telecoms infrastructures (the so called Trans-European Networks). In addition, in response to Commission President Jacques Delors' call for the improvement of competitiveness and employment in Europe, and the role information society had to play in this, a High Level Group of National Representatives was set up and chaired by Industry and Telecommunications Commissioner Martin Bangemann. The High Level Group submitted a plan to the Heads of Government in Corfu in June 1994 to improve the information and telecoms industries in Europe (Commission, *European and the Global Information Society: Recommendations to the European Council*, 26 May 1994). On foot of the report and with the support of the EU Heads of State and government, the Commission moved ahead with its plans to liberalise voice services and network infrastructures, the remaining elements of the telecommunications sector that needed to be liberalised (Natalicchi, 2001, 64).

Negotiation and agreement on the final leg of liberalisation was long and painstaking and the final plan to instigate full liberalisation of infrastructures by 1998 represented a compromise between the Commission and member states such as Germany and Britain who pressed for more rapid deadlines, whereas other member states such as France, Italy, Greece, Portugal and Ireland pushed for longer transition periods. In December 1995, after three years of negotiations, the Council and the Parliament endorsed the Voice Directive, which extended ONP principles to voice telephony and thus extended the rights of all users, including service suppliers, to access the fixed public telephone network infrastructure. In 1996, the Commission issued the Full Competition Directive, which directed the member states to remove all barriers to competition in all telecoms services markets by January 1998. The introduction of full competition in the markets for services created the need for further legislative action to harmonise national policies with regard to licensing and interconnection. In 1997 the Council and the Parliament issued the Licensing Directive, which set general principles for the licensing of service operators by National Regulatory Authorities. The directive was designed to facilitate the access of new operators to the liberalised services markets (Natalicchi, 2001, 67).

Consolidation and Adaptation of Regulatory Framework 1999-

A revision clause was built within the 1995 ONP Voice Telephony directive which

stipulated that the Commission should submit a report to the EP and the Council on the functioning of the directive (and hence the fully liberalised regulatory framework) and where necessary, propose further measures in the report for full implementation of the aims of the Directive (Article 32(2), Directive 95/62/EC of the European Parliament and of the Council December 1995 on the application of open network provision to voice telephony). Following the full liberalisation of telecommunications in 1998, technological change and the need to deal with this technological change added an additional reason for reform of the regulatory framework.

The development of advanced digital technologies, which allow the transmission of data, sound and images over the same type of network, has had significant effect on the telecommunications market. The enhanced technological capacity that comes with digital technology has generated new services and devices, which are not easily separable into traditional categories of information, telecommunications and broadcasting. For example, internet services can now be delivered via television sets, the Internet can be used as a substitute for phone calls and electronic mail services and the web can be accessed through TV digital decoders and mobile telecommunication sets.[17] This technological convergence was also at the base of what became the new regulatory puzzle post 1998 – should the rules applied to more well-established telecoms products and services be applied to the new generation of products and services, or should a new set of regulations be developed? (Natalicchi, 2001, 70).

The convergence of these two factors, i.e. technological change and the inbuilt review mechanism of existing legislation, prompted the Commission to instigate a substantial review of the telecommunications regulatory framework in 1999 – known as the 1999 Review. According to a number of Commission officials interviewed, the 1999 Review represents the second critical juncture in the development of EU telecommunications policy as it resulted in the negotiation and

[17] In terms of internet and other access, the distinction is now made between narrowband access (internet access via telephone or ISDN – Integrated Services Digital Network – lines) and broadband access (access via Digital Subscriber Lines (DSL) and Asymmetric DSL (ADSL) and TV cable). Broadband technology lets different networks coexist on a single piece of heavy-duty wiring. It isolates signal as a radio does; each one vibrates at a different frequency as it moves down the line.

agreement of what is known as the New Regulatory Framework – a regulatory framework that is designed for the newly liberalised market. The norms developed under the existing regulatory package were designed for a newly liberalised market, not one moving to a fully competitive market without sector specific rules. As competition emerged and markets and technologies changed, the Commission felt that this framework was not flexible enough to cope. In addition, there was not enough consistency in how rules are applied in the Member States. The aims of the Review were thus threefold:

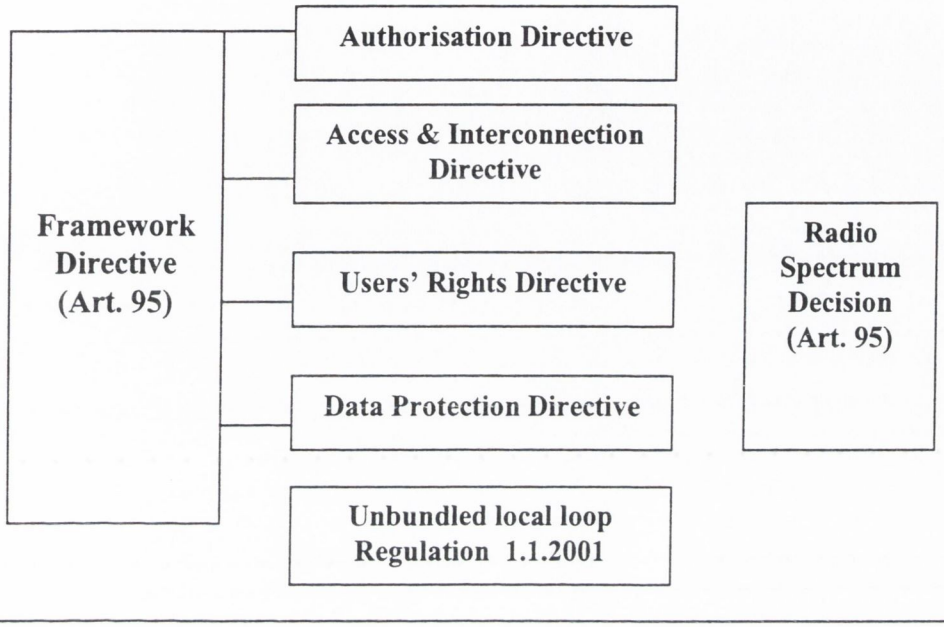
1. to cover all converging networks and services for electronic communications;
2. to create more flexibility for sector specific regulation and
3. to ensure a coherent regulatory environment (Interviews DG INFSO Officials 2 and 4, 23 September 2002).

The 1999 Review examined the existing regulatory framework for the telecommunications sector, and made a series of policy proposals for a new framework to cover all communications infrastructure and associated services. These proposals covered eight key areas of regulatory policy: licensing and authorisations; access and interconnection; management of radio spectrum; universal service; user and consumer rights; numbering, naming and addressing; specific competition issues; and institutional issues. Interest parties were invited to comment on the proposals by 15 February 2000. The Commission received over 200 responses, representing a wide range of interests. In addition, over 550 people attended a two-day Public Hearing held by the Commission on 25 and 26 January 2000 (COM (2000) 239).

In July 2000, based on the results of the 1999 Review and in response to the conclusions of the special Lisbon European Council of 23-24 March 2000, the Commission proposed a package of measures for a new regulatory framework for electronic communications networks and services. The package consisted of five proposed EP and Council directives under Article 95, one Commission directive to be adopted under Article 86 and one proposed Commission Decision on a regulatory framework for radio spectrum. In addition, the Commission proposed an EP and Council Regulation for unbundled access to the local loop, which was adopted in December 2000 and entered into force on 2 January 2001(see section 6.4). The new

regulatory directives were published in the Official Journal on 24 April 2002 and have a 'big bang' transposition deadline of 25 July 2003.

Box 6.2: The New Regulatory Package



The new regulatory package aimed to provide a coherent, reliable and flexible approach to the regulation of electronic communication networks and services in fast moving markets. According to a Commission official interviewed for this study, the legislation provides a lighter regulatory touch where markets have become more competitive yet ensure that a minimum of services are available to all users at an affordable price and that the basic rights of consumers continue to be protected (Interview DG INFSO Official 2, 23 September 2002). The proposal for the Framework Directive itself sought to respond to the convergence of telecommunications technologies by covering all electronic communications networks and services within its scope. It set out a number of principles and objectives for regulators (NRAs) to follow, as well as certain procedures to which they would be subject, such as consultation and the publication of information. The proposal also established a series of tasks in respect of management of scarce resources such as radio spectrum and numbering. It also contained a number of horizontal provisions common to more than one measure in the package. These included the definitions of significant market power, the procedure to be used for market analysis, harmonisation measures, as well as provisions for the resolution of disputes between undertakings.

The procedure to be used for market analysis caused considerable controversy between the Council on the one hand and the Parliament and Commission on the other during negotiations. Under the 1998 regulatory framework, the market areas of the telecommunications sector that were subject to ex-ante regulation were laid down in the relevant directives, but were not markets defined in accordance with the principles of competition law. In these areas defined under the 1998 regulatory framework, NRAs had the power to designate undertakings as having Significant Market Power when they possessed 25 per cent market share, with the possibility to deviate from this threshold taking into account the undertaking's ability to influence the market, its turnover relative to the size of the market, its control of the means of access to end-users, its access to financial resources and its experience in providing products and services in the market.

Under the new regulatory framework, the markets to be regulated are defined in accordance with the principles of European competition law. NRAs will intervene to impose obligations on undertakings only where the markets are considered not to be effectively competitive[18] as a result of such undertakings being in a position equivalent to dominance within the meaning of Article 82 of the EC Treaty. The Commission was also granted the limited power to require the withdrawal of NRA's draft measures.[19] The notion of dominance has been defined in the case law of the Court of Justice as a position of economic strength affording an undertaking the power to behave to an appreciable extent independently of competitors, customers,

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[18] Except where the new regulatory framework expressly permits obligations to be imposed independently of the competitive state of the market.

[19] Under the terms of Article 7(4) of the Framework Directive, there are two specific situations where the Commission has the possibility to require an NRA to withdraw a draft measures which falls within the scope of Article 7(3):

- the draft measure concerns the definition of a relevant market which differs from that identified in the Recommendation; or
- the draft measure concerns a decision as to whether to designate, or not to designate, an undertaking as having SMP, either individually or jointly with others.

In respect of the above two situations, where the Commission has indicated to the NRA in the course of the consultation process that it considers that the draft measure would create a barrier to the single European market or where the Commission has serious doubts as to the compatibility of the draft measure with Community law, the adoption of the measure must be delayed by a maximum of an additional two months. During this two-month period, the Commission may, after consulting the Communications committee following the advisory procedure[19], take a decision requiring the NRA to withdraw the draft measure. The Commission's decision will be accompanied by a detailed and objective analysis of why it considers that the draft measure should not be adopted together with specific proposals for amending the draft measure. If the Commission does not take a decision within that period, the NRA may adopt the draft measure.

and ultimately consumers. Therefore, under the new regulatory framework, in contrast with the 1998 framework, the Commission and the NRAs will rely on competition law principles and methodologies to define the markets to be regulated ex ante and to assess whether undertakings have Significant Market Power (SMP) on those markets.

At the same time as the new regulatory package was finalised, a European Regulators Group for Electronic Communications Networks and Services (ERG) was established by the Commission on 29 July 2002 to provide an interface for advising and assisting the Commission in the electronic communications field (Decision 2002/627/EC). According to the Decision,

> 'The Group should provide an interface between the national regulatory authorities and the Commission in such a way as to contribute to the development of the internal market'.

The 1999 Review document had put forward the idea of a European Regulatory Authority (ultimately to replace national regulatory authorities in the telecommunications sector) but this suggestion had been widely rejected by participants in the 1999 Review Consultation. The decision was taken to establish the ERG to facilitate the interaction of national regulatory authorities in particular in the process of drawing up Significant Market Power guidelines, as specified in the New Regulatory Package's Framework Directive.

The evolution of consumer policy – the preliminary balance sheet

On the basis of the above analysis, it is possible to come to the conclusion that the institutionalisation of telecommunications policy at the EU level has been much stronger than that of education and consumer policy. An EU regulatory regime in the telecommunications field has been established consisting of three pillars – liberalisation, harmonisation and adherence to general competition principles. The Commission has emerged as a central actor in the process. Its role as policy entrepreneur was greatly facilitated particularly in the late 1980s from the convergence of two main factors: the impetus of technological change and globalising pressures based on liberalisation in the US, UK and Japanese market. Commission activism and innovation in agenda setting was particularly evident in the late 1980s when officials particularly in DG XIII (Industry) and DG IV were prepared to take the

risk and use the institutional weaponry of ex-Article 90(3) to open up the sector to competition (first in terminal equipment). The support of the ECJ for such action had a significant effect on legitimising subsequent Commission action. Finally, the Commission also actively sought to involve industry stakeholders in policy consultation.

Nevertheless, the evidence gathered so far does not wholly confirm the thesis that the Commission managed to forge ahead with policy action in spite of the opposition of the member states. Cooperation at the EU level indeed became the most suitable means for member states executives to solve the collective action problem posed by the challenge of globalisation in telecommunications and technological advancement but this cooperation and task expansion took place in an incremental and gradual fashion. Indeed, a senior Commission official interviewed for this study described EU telecoms policy as 'a comfortable umbrella for the member states to do things in a harmonised manner' (Interview DG INFSO Official 5, 24 September 2002). The Commission did employ strategies to make sure that the agenda moved forward beyond the lowest common denominator and in spite of divergences between member states. For example, following the 1987 Green Paper, the Commission was careful not to put forward a grand 'masterplan' to liberalise and re-regulate the entire sector that could have attracted significant opposition from the member state executives (Thatcher, 2001, 562). Instead, it put forward limited legislative changes that garnered support from the member states. Public consultations were also held, as well as extensive consultations with national officials within the SOG-T before legislation was proposed. The pace of change did increase in the 1990s, again spurred on by globalising and technological pressures but it continued to take place on a step-by-step basis. Indeed, ideas of possible changes were discussed for long periods. As Natalicchi points out, the dynamics of policy development took on a regular pattern. In very broad terms,

> Commission study-planning documents (e.g. Green Papers) were followed by consultations with the societal actors and hearings of the member states administrations, and the results, with policy options and a suggested action plan, were sent to the Council and the Parliament. Reactions followed in the forms of resolutions or recommendations for the Commission to proceed with

> proposals for legislation in selected areas. Legislation sometimes called for a review of its effects within a period of time. The review sometimes led to new policy action to improve on the results so far achieved or addressing related policy areas (Natalicchi, 2001, 38).

Even so, it is clear that the Commission in particular plays a much stronger role in the policy process in telecommunications policy than in education or consumer policy and has its own distinct power interests, which have developed out of the regime.

Finally, a number of key norms are also evident in EU telecoms policy. The key formal norm of the telecommunications field is that of ensuring a level-playing field in the telecoms market (Interview DG INFSO Official 5, 24 September 2002). This formal norm is inbuilt in every piece of legislation negotiated. Informal norms include the consultation of governments and other policy stakeholders before legislation is formally proposed, gradualism and the desire for consensus and compromise among member states (Thatcher, 2001, 576). Indeed, according to a senior Commission official interviewed for this study, there exists an informal norm that the Commission, in revising existing legislation, will try to take on board those member states' views that were in the minority when the original decision was taken (Interview DG INFSO Official 5, 24 September 2002).

The results of the analysis so far have pointed to both supranational and intergovernmental elements in the EU's telecommunications policy. Supranational governance seems to provide more purchase, however, in explaining how the agenda was set. Any conclusions drawn on the basis of the analysis above are, by their very nature, superficial. Disaggregation of the policy process into the three stages of pre-negotiation, negotiation and post-decision and the comparison of the observable implications generated with the empirical evidence collected will enable us to delve deeper in answering the questions posed at the beginning of this section, most especially, whether supranational governance provides the best picture of the process of policy making in telecoms policy in negotiation and post-decision, as it seems to do in pre-negotiation. Section 6.3 therefore turns to the more explicit and systematic examination of the theoretical propositions and assumptions alluded to at the beginning of this section but not directly addressed.

6.3 Telecommunications from pre-negotiation to post-decision

Which of the two theories, if at all, provides the best picture of the process of policy making in telecommunications? In this section, the empirical policy evidence with regard to each stage of the process of telecoms policy formation, e.g. pre-negotiation, negotiation and post-decision, will be examined systematically using the propositions developed. In order to evaluate the relative merits of the respective propositions of liberal intergovernmentalism and supranational governance, we must again turn to the observable implications of these theories.

Pre-negotiation

According to the postulates of liberal intergovernmentalism outlined in Chapters 1 and 2, at this stage of the policy process it is posited that the Commission only proposes legislation that conforms to the wishes of the rationally-acting member state executives, based on domestic economic interest, and who cooperate in order to solve a collective action problem. It follows that in the light of Moravcsik's theory we would expect to see telecoms policy proposals emerging from the Commission in response to calls from the member state executives for action, and that these calls are inspired by utilitarian economic motivations. The content of the proposals themselves would mirror the policy preferences of the member state executives (larger member state executives in particular). To put it another way, if member state executives do not push for innovative and deep telecommunications policies at the EU level through harmonisation of regulation, the Commission as initiator of policy will not put these types of proposals forward.

Supranational governance, on the other hand, puts forward the proposition that the impetus for policy proposals in the sphere of telecommunications emanates from rising transnational exchange and can also be triggered by spill-over from other policy sectors or existing decisions. For this to be true, we would expect to see transnational exchange - in this policy area meaning the development of European groups, networks and associations and the pressures for action by firms involved in cross-border trade and exchange within the internal market and even beyond the EU market - pushing member state executives to substitute supranational harmonisation rules for national harmonisation as maintaining national rules prove problematic to the maximisation of trade. The Commission in particular would propose policies that capitalise on this

desire and that reflect the ideas of the transnational and domestic industrial groups to push policy-making at the EU level forward. In addition, we would expect existing European rules and actions, such as through treaty provisions if applicable, secondary legislation in other areas and the ECJ's case law as circumstances allow – to generate a dynamic for action that leads to possible further action. In this way, proposals are brought forward not in response to member state executive wishes but in response to the exigencies and changes in the existing internal and external policy-making environment.

The Treaty of Rome did not grant competence in telecommunications to EC actors. As was mentioned in Section 6.2, in 1959 the CEPT became the central organisation of European cooperation in the field of telecommunications, even though proposals to include a telecommunications union within the EEC had been discussed at several meetings between 1956 and 1958. According to Schneider and Werle, a more pan-European telecommunications organisation was the preferred option for two reasons: the increasing resistance of French President de Gaulle to further supranational competences and it was felt that Britain should not be excluded from any cooperation because of its important position within the international telecommunications sector (Schneider and Werle, 1990, 85). PTT ministers met on two occasions between 1957 and 1977, the first occasion in 1964 (to look at the harmonisation of postal tariffs) and the second time in September 1977. The low number of meetings would indicate the low priority attached to this area by ministers and governments. Even so, the Commission still tried to push an agenda forward in this area. In October 1968 it proposed to create a postal and telecommunications committee in which matters such as the harmonisation of technical norms and administrative roles and public procurement decisions could be discussed. However, it was unable to convince the Council of the need for such a committee and in June 1973 it withdrew the proposal after several years of unsuccessful discussions (Schneider and Werle, 1990, 87). In the mid to late 1970s, however, telecommunications began to be increasingly seen as relevant for successful industrial policy and the changes in the international political economy began to be discerned by both the Commission and the member states.

In December 1977, three months after the PTT ministers had met informally, a formal meeting of the 'responsible' Council of Ministers was held to look at the issues posed

by a European telecommunications policy as well as the possibility of cooperation between the Commission and the CEPT. This was followed in 1979 by Industry Commissioner Etienne Davignon's report, which emphasised the industrial policy dimension of information and communication technologies and their closer interconnections. In September 1980, the Commission submitted three recommendations to the Council (COM(80)422 final) which called for efforts to harmonise the telecommunications sector, to create a common market within the EC for terminal equipment and to open public procurement telecommunications markets. These proposals were accepted by the Council of Ministers as recommendations. The European Parliament also presented a telecommunications resolution in May 1981, which called on the Commission to use directives and not just recommendations in its efforts in the telecommunications sector (Schneider and Werle, 1990, 91). By the spring of 1981, despite the impetus of these early initiatives, the Commission was unable to convince the Council to take concrete legislative action. The preferences of the member state executives continued to converge around the need to maintain and protect the national PTT monopolies. It is possible to conclude, therefore, that liberal intergovernmentalism holds more explanatory power at this time. The Commission's proposals for action were not taken up the member state executives as their preferences diverged substantially from what the Commission was proposing and the transnational pressures were not enough to change these preferences.

However, the convergence of a number of factors altered this situation from the mid-1980s, caused the member state preferences to change and enabled the Commission to play an important, if not central role, in setting the telecommunications policy agenda from this period onwards. These factors include:

- Commission activism
- Technological change in telecommunications
- Globalising pressures which in turn led to increased transnational activity
- Legitimation of Commission action by ECJ.

These factors have been examined in Section 6.2 but are worth touching upon again. In the early 1980s, the Industry Commissioner Davignon and his Directorate General were fully aware of the external developments in telecommunications and the potential for concerted European action in this policy area. The production of the Six

Lines of Action in 1983 show this. However, the proposal of legislative action was proving difficult in the absence of member state support. To move beyond this impasse, the Commission set up the SOG-T, a group of national and Commission telecommunications experts and industry representatives whose task was to develop a common strategy on telecommunications. The Commission also beefed up its administrative capacity in this area with the establishment of the Task Force on Information and Telecommunications Technologies in 1984 and which became an autonomous Directorate General XIII in 1986 (which subsequently became DG Information Society – DG INFSO – in 1999). According to one Commission expert interviewed for this study (as such, the source of this assertion must be taken into account), the Director General of this new DG, Michel Carpentier, played an important role in Commission policy entrepreneurship as he waged an administrative battle within the Commission itself for resources and staff (in the early 1980s there were approximately 200 staff dealing with telecoms, in 2001 the staff of DG INFSO was approximately 1,200). The Commission official also claimed that Carpentier had close relations with Commission President Jacques Delors and was successful in alerting Delors to the role telecommunications policy could play in the achievement of the internal market (Interview Commission DG INFSO Official 1, 23 September 2002). Finally, DG XIII Director Generals and DG staff also cooperated on an informal basis with members of the EP and generated additional support for their activities (Interview DG INFSO Officials 1 and 5, 23 and 24 September 2002). While the veracity of such statements must be viewed carefully, they do point to a proactive role played by the Commission in agenda setting.

The Commission's success in achieving action from the 1980s and onwards was greatly facilitated by the combination of technological developments (i.e. the convergence of IT and telecommunications) and global market pressures (arising from transnational exchange) which must be seen as significant contextual variables that shifted the preferences of the member states towards liberalisation and harmonisation. Digitalised telecommunications with huge capacity for transmission meant that a new and widening range of highly specialised data and value-added services could be provided for telecoms users. This technological change fed into a globalisation process. In telecommunications, the IT revolution facilitated globalisation with the development of high capacity global networks able to supply sophisticated global

services (Bartle, 1999, 371).[20] Globalising pressures became apparent in three ways. First, the development of global networks and services has given rise to the growth of global user demand, which began to increase in the early 1970s and continued from then on. Given the increasing internationalisation of production and the integration of financial markets, industrial and business users increasingly demanded more sophisticated and cost-effective telecommunications services (Bartle, 1999, 371). Second, liberalisation and growing international competition gave rise to global pressures as firms internationalised to compensate for competition at home. Direct pressure was brought to bear within West European countries, particularly by American companies eager to invest (Dyson and Humphries, 1990, 5). Pressure was also exerted through the General Agreement on Tariffs and Trade (GATT) and subsequently the World Trade Organisation negotiations on freeing international trade in information services, for example with the 1997 WTO talks on telecommunications services and the regulation of network access. Finally, international investment and commercial alliances in telecoms added to this pressure, particularly in the 1990s. For example, in 1996, three global alliances, Concert (BT and MCI), GlobalOne (France Télécom, Deutsche Telekom and Sprint) and WorldPartners (AT&T and Unisource) controlled 50 per cent of international traffic (Bartle, 1999, 372).

These domestic actors who operated in the global telecoms market increasingly looked on the Commission as an important ally in the policy process and in particular as the formal initiator of policy. The Commission in turn was proactive in involving these actors in policy consultation. Firms such as France Télécom and British Telecom set up offices in Brussels in 1990 in order to increase their contacts with European institutions. According to Bartle, in the mid-1990s, the Commission became the focal point of the development of liberalisation and a magnet for new entrant interests. Many new entrants became commercially active and increasingly lobbied the Commission. For example, faced with the likely prospect of liberalisation in cable communications, the Cable TV industry organised itself into the European Cable Communications Association in 1993 and focused its activities on the European Commission (Bartle, 1999, 367). Nevertheless, it must be recognised that domestic actors such as user associations and firms have been more active and effective in

[20] The intensification of global interconnectedness.

accessing and influencing the European Commission and Parliament in telecommunications than European-level federated associations. European interest groups' resources are smaller and less effective lobbyists than those of domestic and international firms (Knill, 2001, 230 and Interview DG INFSO Official 6, September 2002).

The fourth significant factor that legitimised the Commission's position in the pre-negotiation phase of telecommunications was a number of favourable ECJ judgements. The Commission received an indication early in the 1980s that the ECJ might indeed uphold action in order to break up national telecoms monopolies with its judgement on the Telespeed Case.[21] In the first case involving telecommunications brought before the European Court of Justice, Italy instituted proceedings for a declaration that a decision of the Commission, relating to a proceeding against BT (when BT was a public monopoly) under Article 86 of the EC Treaty, was void. In its decision, the Commission held that the schemes adopted by BT, under which private message-forwarding agencies in the UK were prohibited from retransmitting to destinations outside the UK, constituted infringements of Article 86. The Court upheld the decision of the Commission. In doing so, it held that the statutory monopoly enjoyed by BT did not extend to message-forwarding services. As to the jurisdiction of the Commission, the Court ruled that the behaviour of telecommunications operators such as BT could be challenged under Article 86 because they are 'undertakings' within the meaning of that Article insofar as they are conducting 'business activities'. The application of Article 86 against BT in the circumstances was widely interpreted as indicating that reserved monopoly rights will be interpreted narrowly both by the Commission and the Court, particularly in light of new technological developments which give rise to a variety of value-added services (Long, 1995, 272-3).

The most significant ECJ judgement was its judgement on the 1988 Terminal Equipment Directive (see section 6.2). A number of member states, including France and Germany, challenged the Commission's use of ex-Article 90(3) to end the monopoly by member states' PTOs of terminal equipment which by-passed the

[21] [1982] OJ L 360/36; on appeal, Italy v. Commission [1985] ECR 873.

Council, even though they claimed to sympathise with the basic aims of the Directive. Despite the controversy this caused and even before the ECJ judgement was given, the Commission again invoked these powers in June 1989 when it restricted the PTTs' monopoly of services. However, when it came to the area of procurement of switching equipment, the Commission proposed a directive on the basis of ex-Article 100a (now 95), which required member state support (Holmes, 1990, 26). The overwhelming majority of proposals continue to be put forward on the basis of Article 95, which requires co-decision and QMV.

However, even given these favourable circumstances, the Commission was careful not to proceed in putting forward proposals without backing from the member states. As mentioned above, from 1983 onwards the Commission consulted governments and transnational and sub-national firms informally and through the SOG-T. For example, the ONP Proposal was put on the Council table following a long consultation process with all relevant actors. The concept of ONP was introduced in the 1987 Green Paper. The first proposal for ONP was produced by the Analysis and Forecasting Group of the SOG-T (GAP – Groupe d'Analyse et de Prévision) in January 1988, after a study period which started with a detailed analysis of ONA, the US concept of Open Network Architecture which aimed at opening up the market of value-added services on the basis of fair and equal access of all competitors to the telecommunications infrastructure. In February 1988 the Commission issued a Communication (COM (88) 48) on the Implementation of the Green Paper proposals and – in line with the proposals by GAP – made an action programme which included the development of ONP for three priority areas: Leased Lines, Public Data Networks, ISDN. The action programme was endorsed by the Council of Ministers meeting of June 30 1988 and in December 1988, the Commission published a Communication on the progress of work on ONP (Telecommunications, Progress on the definition of Open Network Provision – short status report – COM (88) 718 final) which proposed to create a stable framework for the progressive establishment of ONP by means of a Council Framework Directive. The proposal for a Council Framework Directive was approved by the Commission on December 15 1988 and was submitted to the Council (Berben, 1989, 68-9).

Even at this stage of the development of telecoms policy, when the Commission's activism was at its height, such a process of consultation confirms Thatcher's thesis that the development of EC telecommunications regulation has occurred through cooperation and partnership between the Commission, national governments and other stakeholders, rather than the thesis that the Commission extracted powers from national governments using its power under Article 86 [90] in particular and backed by the ECJ (Thatcher, 2001, 559). The Commission did manage to successfully harness the pressure of rising transnational exchange in order to construct a new policy in telecoms in the late 1980s and this strengthened its hand in setting the policy agenda and putting forward policy proposals from then on. The Commission supplied the ideas as to how the sector should be organised in Europe. Nevertheless, it was clear that the Commission could not successfully achieve its objectives until member state preferences changed. In the 1990s and onwards the policy agenda continued to move forward, as Section 6.2 showed. The Commission continued to put proposals on the table to strengthen and deepen the EC telecommunications regulatory regime. It was able to do this primarily as a result of spillover pressures based on technological development of telecommunications and information technology and because of ongoing pressure from European and national industries that were affected by these technological developments, especially new market entrants.

But while the Commission continues to set the parameters for policy development, it continues to look for consensus from the policy stakeholders before proposing legislation. Policy stakeholders are consulted in public consultations and the Commission has set up a number of advisory policy groups in order to discuss future policy developments. In late 2002, the advisory policy groups include the Digital Broadcasting Expert Group[22], the Internet Action Plan Group, the Nokia 9210 Evaluation Panel, the Radio Spectrum Policy Group and the Spectrum Interservice Group. The Commission also commissions outside studies, which it can use to persuade policy stakeholders of the merits of future policy actions.

[22] The ONP Committee established the Digital Broadcasting Expert Group on 4 October 2000. Its aim is to share good practice regarding the transposition of the TV Standards Directive 95/47 and to advise on technical, market and regulatory issues related to digital broadcasting, including digital radio with a view to promoting best practice.

Outside studies are commissioned by DG INFSO's various directorates on a regular basis.[23] Studies are undertaken on new developments in telecommunications technology and analyses of the effects of existing EU telecommunications legislation and policy. These studies are put to tender in line with Commission guidelines[24] and form a large source of policy expertise for Commission officials as well as a mechanism for officials to flag new technological developments (Interview Official 5 DG INFSO, 24 September 2002). In other words, these studies can be and are used by Commission officials to highlight future areas for action in the Telecommunications Council Working Group, the advisory groups and comitology committees. The budget for these studies would be quite high compared to the budgets for studies commissioned by DG SANCO and DG EAC as we saw in earlier chapters. For example, according to a DG INFSO official interviewed for this study, one third of the Sixth Framework research funding will go to information society research, which includes telecommunications developments (Interview DG INFSO Official 6, 26 September 2002). Individual studies can cost from 100,000 to 300,000 Euro each. In the 2002 EU budget, research and technological development allocation was €3.92 billion compared to €22.5 million for consumer policy and health protection (General Report on EU Budget, 2001).

Examples of studies include:

- 08 March 2002. Digital Switch-over – Analogue Turn-off in the Member States. Bureau d'Informations et de Prévisions Economiques (BIPE);
- April 2001. Final Report of the Study of the development of competition for electronic Conditional Access networks and services, together with an Inventory of EU 'Must Carry' regulations, prepared by OVUM in association with Squire Sanders and Dempsey LLP;

[23] Directorate A – Communication Services: Policy and Regulatory Framework; Directorate B – Information Society Technologies: Systems and Services for the Citizen; Directorate C – Information Society Technologies: New Working Methods and Electronic Commerce; Directorate D – Information Society Technology: Content, Multimedia Tools and Markets; Directorate E – Essential Information Society Technologies and Infrastructures; Directorate F – Information Society Technologies: Integration and Implementation – Networks and Future Technologies.

[24] The process of launching the tender process and deciding on a tender proposal would take approximately one year and the research and production of the study itself would take another year.

- October 2000. Study on the Future Regulation of Digital TV, undertaken by OVUM/Squire, Saunders and Dempsey. Public workshop held on this study on 17 October 2000;
- August 2000. Study on Market Entry Issues in EU Telecommunications Markets after 1st January 1998 by Teligen Limited;
- February 2000. Final Report on the Study 'Assessment of the leased line market in the EU and the consequences on adaptation of the ONP Leased Line Directive', prepared by Logica Consulting (previously DDV consulting);
- 22 December 1999. Final Report on the study 'The possible added value of a European Regulatory Authority for telecommunications' prepared by Eurostrategies/Cullen International for the Commission, in response to a request from the EP. A previous draft was presented at a public workshop on 14 September 1999.[25]

The Commission also continuously launches public consultations with policy stakeholders and discusses the results of the studies in the comitology committees, e.g. the Licensing and ONP committees. For example, the Commission invited comments on the study on Digital Switchover in Broadcasting until 1 July 2002 in order to serve 'as an input to the Commission's future work in this area' (Interview, Official 5 DG INFSO, September 2002). In the comitology committees, Commission officials would present the results of the studies commissioned and would present proposals to take action based on these studies (Interview, Official 5 DG INFSO, 24 September 2002). According to a high ranked Commission official interviewed for this study:

> With regard to formulation of policy proposals, the Commission would work with and would take soundings from the member states. The nature of the comitology committee (e.g. advisory, regulatory) would determine the degree of sounding taken. The process of policy formulation is a very balanced and long-winding process, which takes due account of all positions (Interview, Official 5 DG INFSO, 24 September 2002).

[25] See DG INFSO's Studies and Reports' Webpage for further information and lists of studies: http://europa.eu.int/ISPO/infosoc/telecompolicy/en/Study-en.htm.

The evidence gathered that looks at the pre-negotiation phase strongly supports supranational governance explanations. The impetus for policy proposals in the sphere of telecommunications emanated from rising transnational exchange and was also triggered by ongoing technological developments and the need to update existing decisions. The pressures for action by firms involved in cross-border trade and exchange within the internal market and even beyond the EU market, pushed member state executives to substitute supranational harmonisation rules for national harmonisation as maintaining national rules was detrimental to the maximisation of trade. From the 1987 Green Paper onwards, the Commission in particular proposed policies that capitalised on this desire and these proposals formed the basis of the regulatory framework that currently exists. Proposals were clearly brought forward in response to the exigencies and changes in the existing internal and external policy-making environment. The Commission's influence in the pre-negotiation phase of telecommunications policy is important. Its role as a central actor in this phase cannot be denied. However, its task is quite specific. As a Commission expert interviewed for this study commented:

> The Commission's task is to carry out exploratory work – to identify where there is a specific area of interest for the EU to pursue in regulation. The power of the Commission lies more in using the dynamics and resources it has to make a proposal. The Commission discusses policy development with stakeholders, i.e. all interested parties, from the very beginning (Interview, DG INFSO Official 5, 24 September 2002).

Negotiation

In the negotiation phase of the policy process, the propositions of liberal intergovernmentalism are twofold. First, policy outcomes are based on the preferences of the dominant member state executives and tend to be the result of lowest common denominator bargaining between them. Second, and inherent in this theoretical conceptualisation, member state executives are the only important actors at this stage. If these propositions were to be true, we would expect that in telecommunications policy negotiations the central players are the national executives of the member states, who bargain with each other to agree on legislation and consequently on policy outcomes. Bargaining would be shaped by the relative powers

of the member states and, of course, by the preferences of these actors and institutions would serve as neutral arenas within which action takes place. In the case of telecommunications policy at the macro level, therefore, we would expect member state executives to be the ultimate 'deciders' of policy and policy outcomes in the form of legislation or other instruments would correspond with the alternative favoured by larger member states in particular that envisages the least amount of policy harmonisation necessary to achieve the objectives identified.

According to supranational governance, at the negotiation stage of the policy process, policy outcomes will be based on negotiation between the member state executives within the logic of institutionalisation, i.e. bargaining will take place in a mediated context, with different actors (such as the European Parliament, the Economic and Social Committee, the Committee of the Regions) possibly having an input into the bargaining outcome depending on institutional prerogatives. Thus, in the telecommunications sphere we would expect that policy outcomes would not solely reflect the lowest common denominator aggregation of member state executives' preferences. It must be borne in mind at this stage that this implication will perhaps be more readily tested in the micro level analysis local loop unbundling negotiation as bargaining between the actors at this stage is examined in greater detail. This section traces the broad trends of telecoms policy at this stage of the policy process. Nevertheless, we may see whether supranational organisations have been able to potentially shape, either formally or informally, policy outcomes and the rules that channel subsequent policy behaviour, depending on the institutional context within which negotiations have taken place. We may also be able to see, as expected if these propositions were to be true, that past choices influenced subsequent policy action and policy alternatives available.

Section 6.2 painted a preliminary picture of telecommunications policy negotiations until the conclusion of the new regulatory framework negotiations. Negotiations primarily took place on the basis of consensus. According to Thatcher, national governments have accepted the expansion of the EC's role in telecommunications as it solves an economic collective action problem (Thatcher, 2001, 564). While conflicts on the substance of specific EC measures did occur, they were limited and were resolved through compromises, with the Commission acting as an informal

honest broker.[26] At the Council level, telecommunications negotiations take place in the Transport and Telecommunications Council and telecommunications working party. In 2001, the Telecommunications or Telecommunications and Transport Council met four times. However, telecommunications is also discussed in the Energy and Industry Council. Following the Seville Summit of June 2002, this Council was amalgamated into the Transport, Telecommunications and Energy Council (as part of the streamlining of the Council structure). The alteration to the legal institutional base following the Single European Act and the Maastricht Treaty has meant that member state executives acting within the Council of Ministers are no longer the only actors in the negotiating arena. The European Parliament is now a legitimate decision making partner – sitting as a plenary body and through its parliamentary committee that deals with telecoms matters – the Committee on Industry, External Trade, Research and Energy (ITRE). In addition, decisions within the Council are agreed on the basis of qualified majority voting.

Because of the overall preference of member state executives to maintain national telecoms monopolies, the EC telecoms policy was stuck in pre-negotiation mode until the signature of the Single European Act. However, Section 6.2 traced how all member state preferences shifted in varying degrees from then on as a result of the exogenous pressures of technological change, globalisation and pressure from domestic actors in the telecoms markets. The Commission's units were able to seize on the convergence of these factors to promote policy action. Yet member states did react to these pressures in varying ways. Some member states, such as the UK and the Netherlands, pushed for more extensive and faster EC liberalisation (for example to cover public voice telephony). This 'liberal' group was later joined by Germany. Other member states such as France, Greece, Portugal and Italy, were more concerned to regulate competition and make standards compulsory (Thatcher, 2001, 566). It is important to acknowledge, therefore, that the division of member states into two groups was not on the basis of size, but based on the preference for speedy or gradual liberalisation of the sector and the desire for minimal or maximalist re-regulation, which was in turn influenced by domestic pressures and constraints. Member states liberalised their telecoms markets at different paces and with different intensities and

[26] The Interinstitutional Unit (Unit 2) of DGINFSO monitors and administers the Telecommunications Working Group. Directorate A's units are heavily involved at this stage of the process.

this influenced the positions they took in negotiations. For example, the difference between the UK, France, Germany and Italy's preferences on telecommunications policy can be explained in this way. The UK led the field in promoting liberalisation under Conservative Prime Minister Margaret Thatcher. Thatcher pledged to 'roll back the state' and wished to foster an enterprise culture through deregulation and privatisation. Telecommunications was first detached from the Post Office as British Telecom and BT was subsequently privatised (Dyson and Humphries, 1990, 7). France, Germany and Italy preserved the state monopoly tradition throughout most of the 1980s. From the late 1970s, French governments made France's high-tech industry and the expansion of its telecommunications firms in Europe a priority but at the same time wished to continue its tradition of strong public service. German governments sought to reform Germany's telecommunications system by allowing some competition among national firms, but maintained very restrictive national standards and followed a strategy of limited liberalisation of services. In Italy, the strong presence of the state and politics in the telecoms sector mitigated against serious regulatory reform until the mid-1990s (Natalicchi, 2001, 117-118).

A culture of consensus among actors was promoted as a result of Commission activity in the pre-negotiation phase of policy making. In the pre-negotiation phase, the Commission took care to ensure broad agreement on policy proposals particularly in the SOG-T before laying them on the decision-making table, what one senior Commission official referred to as a 'process of persuasion' (Interview DG INFSO Official 5, 24 September 2002). This meant that a great deal of consensus was achieved before proposals even came to Council. Analysts such as Héritier and Thatcher point to negotiating tactics and strategic devices used by the Commission as a broker between the actors in the negotiation phase itself to achieve agreement when divergences existed. This meant that policy outcomes were not of the lowest common denominator. Policy sequencing was undertaken, i.e. the liberalisation of telecoms services was suggested first in areas which met with less political resistance (such as terminal equipment which counted for less than 10 per cent of telecoms market – Interview DG INFSO Official 5, 24 September 2002) and then moved to more contentious areas of the telecoms market (Héritier, 1999, 44; Thatcher, 2001, 566). Long implementation deadlines and the granting of derogations for certain member states also facilitated agreement on proposals. For example, while the legal deadline

for full liberalisation was fixed at 1 January 1998, Ireland, Greece and Portugal were given an extra two years to achieve this goal.

Looking at the preferences of actors within the Council itself on the negotiation of telecommunications policy proposals, there is no overwhelming evidence to support the proposition that policy outcomes themselves represent the will of the larger member states in particular (as according to liberal intergovernmentalism). Policy outcomes are more the result of agreement between the Council, Parliament and the Commission. While the Commission lacks formal power as such in the negotiation phase (apart from the right to withdraw a proposal)[27], it takes an active part in the informal process of negotiation in telecoms policy. Since the Treaty of Maastricht in particular, officials in DG INFSO have worked closely with members of the European Parliament in negotiations. According to a Commission Official interviewed for this study, Commission officials have good contacts with members of the ITRE EP Committee such as Mrs Imelda Read (UK Labour).[28] In negotiations, MEPs receive information from both the Commission and lobbies but tend to use the Commission as a relatively unbiased source of information on proposals, particularly their technical aspects. In turn, the Commission is happy to take EP amendments on board if at all possible (Interview, DG INFSO Official 5, 24 September 2002). The Commission also participates in the conciliation process and actively participates in trialogues with the Council Presidency and the Parliament. Since the Treaty of Amsterdam, the trialogue is increasingly convened at an informal level from the EP's First Reading of a proposal and the Commission is an active participant in this forum as an informal mediator between the Presidency and the EP. This has also reinforced the 'culture of cooperation' and has speeded up the negotiation process[29], as the negotiation schedule of the new regulatory package shows. As a consequence, the need for conciliation was considerably reduced in the negotiation of the new regulatory framework (Interview DG INFSO Official 1, 23 September 2002).

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[27] This institutional weapon has never been used by the Commission in telecoms negotiations.

[28] Mrs Read has acted as Committee rapporteur on a number of proposals such as the ONP Voice Telephony negotiations. Within the EP itself, political divisions follow political lines, i.e. liberals prefer less regulation whereas socialists prefer more.

[29] The average speed of negotiations on proposals is currently 17 months. Interview, DG INFSO Official 1, 23 September 2002.

Table 6.2: Negotiation Schedule of New Regulatory Framework for electronic communications infrastructure and associated services

Stage	Framework	Access & Interconnection	Authorisation	Universal Service	Data Protection
Commission Initial Proposal	COM (2000) 393 12.07.00	COM (2000) 384 12.07.00	COM (2000) 12.07.00	COM (2000) 392 12.07.00	COM (2000) 385 12.07.00
EP First Reading	01.03.01 Paasilinna Report	01.03.01 Brunetta Report	01.03.01 Niebler Report	13.06.01 Harbour Report	13.11.01 Cappato Report
Commission position on EP First Reading Opinion (and where appropriate modified proposal)	COM (2001) 380 04.07.01	COM (2001) 369 04.07.01	COM (2001) 372 04.07.01	COM (2001) 503 14.09.01	
Council Common Position	17.09.01	17.09.01	17.09.01	17.09.01	21.01.02
Commission Position on Council Common Position	SEC (2001) 1365 18.09.01	SEC (2001) 1409 18.09.01	SEC (2001) 1411 18.09.01	SEC (2001) 1407 18.09.01	SEC (2002) 124 final 30.01.02
EP Second Reading	12.12.01	12.12.01	12.12.01	12.12.01	30.05.02
Commission Position on EP Second Reading (and where appropriate modified proposal)	07.02.02	07.02.02	07.02.02	07.02.02	17.06.02
Final Adopted Text	07.03.02	07.03.02	07.03.02	07.03.02	12.07.02

In formal terms, the Economic and Social Committee and the Research Committee find themselves in a much weaker position than the European Parliament in the negotiation phase with the right merely to be consulted on legislation. In reality, their position is even weaker again:

> The Committee of the Regions and the Economic and Social Committee's impact on policy negotiation has been very slight in this area. The Commission may change a word or two in response to their reports. It is not obligatory for the Commission to take their suggestions on board. They play a

marginal role in this sector (Interview DG INFSO Official 5, 24 September 2002).

While there has been a high degree of compromise between the policy stakeholders in telecommunications negotiations (Thatcher, 2001), disputes have arisen. These disputes have tended to be on implementation issues. Disagreement on comitology is generally credited with responsibility for the first failure of the codecision procedure between the EP and Council, concerning the application of the open network provision to voice telephony (Bradley, 1997, 239). In its common position, the Council favoured a regulatory committee for the implementation of a number of significant aspects of proposed directive; the European Parliament replaced this with an obligation on the Commission to consult the representatives of various interested parties, such as the telecommunications organisations, consumers and trade unions (OJ C 44/93). In the absence of an agreement on a joint text in conciliation, the Council decided to confirm its common position in accordance with ex-Article 189b(6), although it did delay the formal decision for nearly two months until the end of June 1994 in order to enable the newly elected Parliament to take a position within the Treaty deadline. However, the first legislative act of the new Parliament was to reject the reconfirmed common position by an overwhelming margin (373 to 45 with 12 abstentions - Agence Europe No.6277, 19 July 1994). Because of the failure of the negotiations, the Commission had to submit a new draft directive. According to Bradley, the ONP dispute had an effect in persuading the Council to look more favourably on the idea of an inter-institutional agreement on comitology within codecison (Bradley, 1997, 240). Negotiations were conducted throughout the autumn between the Council, the Commission and Parliament to break the deadlock, and in December 1994 agreement was reached on the text of a *modus vivendi* (see Chapter 3). In the 2001 negotiations on the new regulatory package, the Commission pushed for the right to define significant market power and decide by what procedures companies should be selected to operate in a market. The Commission had EP support on this issue on its first reading but a compromise solution proposed by the

Belgian Presidency was accepted by the EP in trialogue as it became clear that the Council would not give in to the Commission's demand.[30]

At this macro level of analysis of the negotiation phase of EU policy making, the central proposition of supranational governance holds true, i.e. that negotiation takes place in a mediated context, and with different actors having an input into the bargaining outcome depending on institutional rights. Following the Maastricht and Amsterdam Treaties in particular, member state executives are no longer the only important actors at this stage and policy outcomes are based on co-decision negotiations between member state executives and the European Parliament with the Commission acting as an informal mediator. A number of informal devices have been used to move bargaining beyond lowest common denominator outcomes. Actors have become involved in a process of negotiation where the broad aims of liberalisation and re-regulation are accepted but differences are accommodated by use of policy sequencing and implementation derogations, for example. The more detailed analysis of negotiation in the micro section of this case study will shed more light on the second supranationalist proposition, i.e. that previous decisions may affect options available to actors in negotiations.

Post-Decision

With regard to the post-decision phase, liberal intergovernmentalism would posit that the action of Commission at this stage is tightly controlled by member state executives through mechanisms such as comitology. In telecoms policy, it would follow that for this proposition to be true, we would expect that member state executives, as the principals in the telecoms comitology committees, would monitor and control, where necessary, the Commission's behaviour if it deviates in any way from what was agreed in the negotiation stage and attempts to put forward further policy changes. With reference to the adjudication of legal disputes within the telecoms arena, liberal intergovernmentalism holds that the European Court of Justice does indeed adjudicate disputes, as it is called upon to do so by the Treaties, but does not act outside the preferences of the dominant member states. If adjudication of disputes does come into play with telecoms, we would expect the ECJ to stay within

[30] The compromise solution adopted was that the Commission may delay the implementation of an NRA measure whilst it issues a detailed opinion. It cannot stop the NRA measure however.

the preferences and wishes of the powerful member states in its rulings on important sectors and perhaps only rule against powerful member states when an unimportant issue is perceived to be at stake.

On the other hand, at this stage of the policy process, supranational governance puts forward the proposition with regard to implementation that the Commission would exploit the comitology procedures and its other institutional prerogatives to dominate the direction of implementation outcomes and put forward actions that would move beyond what was already agreed. If this were the case at the macro level we would expect to see some slippage from the content of the policy outcomes agreed at the negotiation stage as the Commission tries to move the policy making process beyond these outcomes. In line with its institutional function, the Commission will actively monitor the enforcement of legislative acts and will not shirk from bringing disputes before the ECJ. With regard to adjudication, supranational governance posits that the ECJ will rule against the preferences of the member states when the Treaty is clear and when there are strong precedents and legal norms it can draw upon to support its reasoning. In telecoms policy, for this proposition to hold true it would be expected that the ECJ would systematically over-ride the preferences of the member states when these preferences clash with the pro-integrationist agenda of the ECJ and of the Commission. The ECJ would also interpret the Treaty so as to permit the expansion of supranational governance in telecommunications. It is also important to point out that when confirming or infirming hypotheses and observable implications in an analytic narrative, faced with the actual empirical evidence itself, certain elements of these theoretical devices may have no bearing or applicability at this, or any, stage of the process.

The evidence outlined below shows that the processes of implementation and adjudication in telecoms policy are quite particular and differ considerably from post decision processes and procedures that may be evident in other Community pillar policy outcomes. Implementation of the telecoms regulatory framework has been delegated to member state administrations and independent national regulatory authorities. According to a senior Commission official interviewed for this study, in the post-decision phase of telecommunications policy, 'the Commission works in concertation with the member states but depends on the member states for actual

implementation' (Interview DG INFSO Official 5, 24 September 2002). Telecommunications legislative output is primarily that of directives. Directives, by their very nature, are binding in the result to be achieved, but leave to each member state to decide the most appropriate form and method of incorporating directives into national law. In addition, directives are interpreted and implemented by member state government departments and national independent/semi-independent national regulators (national regulatory authorities). The Commission is fully aware of its reliance on NRAs for full and effective implementation of EU telecoms policy. As was pointed out in the Commission's Fifth Report on the Implementation of the Telecommunications Regulatory Package (COM (1999) 537),

> The NRAs are the rock on which full and uniform implementation of the regulatory package is built. They need a strongly supportive national framework to enable them to function effectively (COM (1999) 537).

The Commission's Seventh Report on the Implementation of the Telecommunications Regulatory Package spoke of NRAs being at the heart of the regulatory process, and which provide the necessary interface for implementing Community principles in line with national legal frameworks and market conditions (COM (2001) 760, 4). In addition, member states retain great freedom over the form of NRAs and over their decision-making procedures and processes. As has been alluded to in other sections, EC legislation has left considerable discretion to NRAs, including important matters such as licensing, interconnection and universal service (Thatcher, 2001, 572).

At the EU level, Unit A2 Implementation of Regulatory Framework of DG INFSO monitors the implementation of the telecoms regulatory framework. The Unit carries out a horizontal screening exercise of implementation. Officials sit at country desks and theme desks. A desk covers each member state and candidate country. The Unit has a three pillar approach towards implementation. The three pillars are:

- Infringement procedures;
- Reporting; and
- Comitology.

Three types of infringement exist and occur in sequence when a piece of legislation or regulatory framework package is agreed upon:

1. Non-notification of transposition measures;
2. Non-conformity of transposition measures; and
3. Incorrect application of transposition measures.

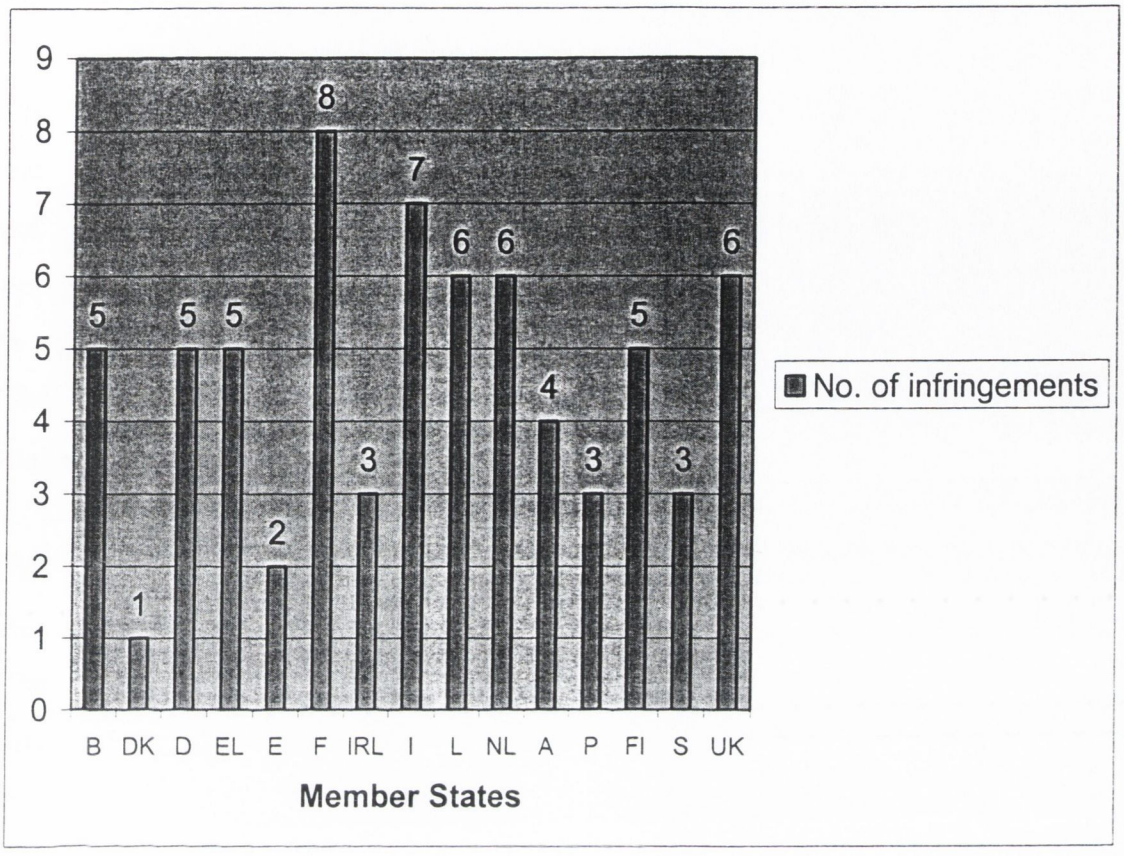
The Commission's Secretariat General monitors the notification of transposition and reasoned opinions are first used at this stage as a means of getting information from member states on monitoring. DG INFSO's Implementation Unit then undertakes more proactive screening to ensure conformity of transposition measures with the original legislation agreed and may decide to take member states to the ECJ if member states have failed to transpose legislation, or have transposed it incorrectly. According to a Commission official interviewed for this study, DG INFSO deals with approximately 70 cases per year and originate through the Commission's own initiative or as a result of complaints from telecom stakeholders or consumers.[31] The ECJ has tended to uphold these complaints if it is clearly seen that the regulatory framework has not been adhered to and general competition rules have not been adequately complied with, irrespective of member state size.[32] However, the same official commented:

> Infringements are used to threaten member states, to use political pressure to get them to apply rules correctly and on time. ...The telecoms sector moves too fast for the Commission to be able to rely on taking member states to the Court of Justice (Interview DG INFSO Official 2, 23 September 2002).

The Implementation Unit also makes use of Press Releases to notify recalcitrant member states of potential infringements and impending action.

[31] DGINFSO has the third highest number of own-initiative infringements and one per cent of infringements originate from complaints (Interview DG INFSO Official 2, 23 September 2002).
[32] See Guide to the Case Law of the ECJ in the field of Telecommunications. DG INFSO July 2001. http://europa.eu.int/comm/dgs/information_soc/index_en.htm.

Figure 6.1 69 Cases under examination Information Society sector (as of 31 December 2001)



Source: Commission DG INFSO Official Interview 2, 23 September 2002.

Key: B=Belgium, DK=Denmark, D=Germany, EL=Greece, E=Spain, F=France, IRL=Ireland, I=Italy, L=Luxembourg, NL=Netherlands, A=Austria, P=Portugal, Fl=Finland, S=Sweden, UK=United Kingdom.

The second pillar of implementation – the production of implementation reports by the Commission – dates from 1997. The obligation to produce such reports is specified in legislation. At the beginning of this process the Commission asked external consultants to undertake reviews but the Commission now undertakes these reviews itself as it has enough expertise to do so (Interview DG INFSO Official 2, 23 September 2002). Since 2000 Commission representatives have gone to member state capitals in the Spring to meet market players and discuss issues of implementation (preparatory meetings). In the Autumn of each year, member state hearings are then organised in Brussels where each of the member state market players hold internal hearings with the Commission. Pan European associations also attend these hearings. The reports are then produced on the basis of these hearings and Commission

research. Oftentimes, solutions to implementation problems are negotiated in these hearings in a more timely manner than referral to the ECJ (Interview DG INFSO Official 2, 23 September 2002).

The Implementation Reports are also discussed in the EP's ITRE committee and in the Council. This normally takes place in December when the annual report is published. Under comitology, the Commission has to send the agenda and draft opinions of meetings to the EP. After each meeting, the Commission is then obliged to produce a summary report of the meeting and send this to the EP within two weeks. The EP's Petition Committee is sometimes asked to report on telecommunications matters and MEPs also send in parliamentary questions.

The third pillar of telecommunication policy at the EU level is comitology. The 1998 Regulatory Framework included the ONP Committee and the Licensing Committee. The new regulatory framework adds the Communications Committee and Radio Spectrum Committee to this list. See Box 6.3 below. The tempo of comitology committee meetings is as follows:

> With the old framework there were in general five meetings of comitology committees in the first half of the year and four meetings in the second. With the new framework the Commission representatives may have to hold more committee meetings. Commission representatives, national representatives as well as representatives from the EEA and candidate countries attend meetings. The old committees were also used as a forum of exchange of views (Interview DG INFSO Official 2, 23 September 2002).

Given the number of participants listed above, committee meetings tend to be quite large, with over 100 people attending. The Commission sees telecommunications comitology committee meetings as an opportunity for the discussion of general implementation issues among Commission and national officials. The Commission also uses these meetings as an opportunity to gather information on implementation, by using benchmarking and questionnaires. The Commission then uses this information, along with information provided by lobby groups and industry stakeholders, to assess implementation (Interview, DG INFSO Official 3, 23

September 2002). Along with the advisory committees, the discussion of future policy initiatives takes place in comitology committees.

Box 6.3: Implementation of Telecommunications Regulatory Framework – Comitology Committees

ONP Committee

The ONP Committee was originally established in 1990 under the ONP Framework Directive 90/387/EC, but deals with all issues arising from the other ONP Directives (e.g. on leased lines, voice telephony and interconnection). Representatives of the Member States and the EEA countries as well as the candidate countries, including the independent national regulatory authorities, attend the ONP Committee meetings. The Committee exercises both advisory and regulatory functions. In practice, the Committee plays a key role in encouraging co-operation between Member States at a working level. It enables Member States to seek guidance and clarification from the Commission on particular issues, which arise in implementing the Directives. The Committee is closely involved in the preparation of important elements of market regulation such as the Commission Recommendations on Interconnection, the annual Leased Line Report and the implementation of the Regulation on Local Loop Unbundling.

Licensing Committee

The Licensing Committee was established in 1997 under the Licensing Directive 97/13/EC, but is referred to also by the UMTS Decision. The Committee meetings are attended by representatives of the Member States and the EEA countries, including the independent national regulatory authorities. The Licensing Committee exercises both advisory and regulatory functions. The Committee is involved principally in the harmonisation of conditions for licensing and in the establishment of a one-stop shopping procedure as well as in discussing the need for harmonisation of spectrum. It is consulted (as an advisory committee) on the mandates which the Commission submits to the CEPT, and gives a formal opinion as a regulatory committee on final proposals for decisions on harmonised conditions to be applied in Member States.

Communications Committee

The Communications Committee was established under the new regulatory framework for electronic communications which entered into force on 24 April 2002, with a view to replace the ONP Committee and the Licensing Committee which are instituted under the 1998 regulatory package for telecommunications. The committee assists the Commission in carrying out its executive powers under the new regulatory framework and the Regulation on the .eu Top Level Domain. The committee exercises its function through advisory and regulatory procedures in accordance with the Council Comitology Decision (see Chapter 3). The committee furthermore provides a platform for an exchange of information on market developments and regulatory activities.

Radio Spectrum Committee

The Radio Spectrum Committee (RSC) has been established under the Radio Spectrum Decision 676/2002/EC as part of the new regulatory framework for electronic communications which entered into force on 24 April 2002. The RSC assists the Commission in the development and adoption of technical implementing measures aimed at ensuring harmonised conditions for the availability and efficient use of radio spectrum, as well as the availability of information related to the use of radio spectrum. The committee exercises its function through advisory and regulatory procedures in accordance with the Council Comitology Decision.

Source: http://forum.europa.eu.int/Public/irc/infso/Home/main

Finally at the EU level, DG Competition monitors general competition in the Telecoms Sector, as was mentioned in Section 6.2, which can includes monitoring mergers and buy-outs between PTOs and individual actions of PTOs, (particularly incumbents). An example of such monitoring occurred when the Commission took steps to prevent Deutsche Telekom in particular from charging fees to customers who switch operators while keeping their same phone number.[33]

The implementation reports highlight the difficulties facing the Commission and member state administrations and the NRAs in implementing EU telecoms legislation. In 1999, the Fifth Implementation Report pointed out that:

> Experience of the implementation of the current regulatory framework shows that even where the directives are drafted relatively tightly there are considerable divergences in the way in which the principles are applied in the member states (COM (1999) 537).

According to the Commission's Seventh Implementation Report of 2001, a number of regulatory bottlenecks existed. These included: competition in local access in particular for broadband, call termination charges in mobile networks, flat rat interconnection for internet access, the pricing and provisioning of leased lines, general tariff an cost accounting principles, and the roll-out of third generation mobile networks. Concerns also existed as to the organisation of the national regulatory authorities and their effectiveness in regulating market actors. Many NRAs considered themselves to be under-resourced (COM (2001) 706). Enforcement appears to be hampered by lengthy and cumbersome procedures in France, Italy, Austria and Portugal and by low penalties in Ireland and Germany in particular. Indeed, it appeared to the Commission that incumbents, as a matter of strategy,

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[33] In January 1998, the Commission informed the German Economy Ministry that it intended to open an investigation after learning that Deutsche Telekom intended to charge fees to customers who wished to drop its services and switch to another telephone operator, while keeping their same phone number. A copy of the letter sent to the Ministry was forwarded to the Bundeskartellamt and the independent German authority that monitors market liberalisation. The Commission had not received any complaints about the former German monopoly's intentions, but based its action on press reports, which also indicated that the amount Deutsche Telekom was planning to charge would be between DM 85 and 100. Karel van Miert, Competition Commissioner, declared that such practices were unacceptable and incompatible with competition rules. *Agence Europe* Saturday 10 January 1998 No.7135.

appealed systematically against NRA decisions (e.g. in Germany, Greece, Spain, Italy, Ireland, Austria, Finland and Sweden) and appeal procedures were often quite lengthy (e.g. in Belgium, Germany, the Netherlands, Austria and Finland) (COM (2001) 706, 15). By 2002, while the national regulatory authorities had made large numbers of determinations to clarify the regulatory framework for local loop unbundling, significant problems remained in particular with regard to pricing and non-discriminatory access to facilities (Eight Implementation Report, COM (2002) 695 final). Thus, in spite of well-established structures to monitor implementation of the telecommunications regulatory framework at both national and European levels, regulatory divergences still exist in member states.

To sum up, neither theory appears to be of use in helping us explain the process of policy implementation in the post-decision phase. The mode of governance in telecommunications is primarily regulation and implementation of the telecoms regulatory framework is the responsibility of the member state administrations and the National Regulatory Authorities in particular. This implementation also depends on the compliance of market actors with regulation. At the European level, the Commission monitors enforcement in three ways: through the detection of infringements, reporting and comitology. DG Competition also monitors general competition in the telecommunications market. Both DGs have not been reluctant to subject either member states or industry actors to judicial control. However, the length of time this involves on the one hand and the speed of technological developments on the other has meant that the less formal process of 'monitoring by reporting' instigated by the DG INFSO's Implementation Unit is more effective in monitoring implementation (Interview DG INFSO Official 2, 23 September 2002). In addition, comitology is not used by member state executives to claw back control from the Commission or used as a means for the Commission to wrest control of implementation away from NRAs in particular. Comitology committees serve as loci of information exchange, in particular for the Commission's implementation unit whose officials issue questionnaires to comitology committee and advisory group members in order to gather market and regulatory data. Thus we can see that at this stage, neither theory offers an accurate and convincing picture of post-decision implementation. The next section will build on this macro analysis and look at the

negotiation and implementation of a specific piece of telecommunications legislation, namely the 2000 Regulation on unbundling the local loop.

6.4 Unbundling the Local Loop

Background to the Regulation

In this section we examine the negotiation of Regulation 2887/2000/EC on unbundled access to the local loop. The local loop is the physical circuit between the customer's premises and the telecommunications operators' local switch or equivalent facility. In other words, it is the part of the telecommunications network which links the end-user to the network, what is known as the 'last mile'. Traditionally, the local loop has taken the form of pairs of copper wires (one pair per normal telephone line), and is the key infrastructure for providing access services to end-users. Despite full liberalisation of the telecoms sector in 1998, local loops still remained within the incumbent's control. In addition, although fibre-optic cables are increasingly being deployed to connect large customers and other technologies such as wireless local loops and cable TV networks have been developed as alternative local infrastructures, these alternatives are still, broadly speaking, at an early stage of development and are not able to serve as wholesale replacements for the existing copper wire local loop. Local loop unbundling (or the opening of access to the local loop for other telecoms actors other than incumbents) was mandated in order to connect those customers for which the deployment of optical fibre was not an economically viable alternative, such as small and medium-sized enterprises and residential customers and would allow advanced services to emerge in a competitive environment (Commission Communication 2000/C 272/10).

The option to use a Regulation as the legal instrument to be negotiated was decided on the basis of two factors: speed and the need for technical consistency. In order to meet the political commitment made at the Lisbon European Council that local loop unbundling should be implemented by the beginning of 2001 (see below), it was felt that a regulation to unbundled the local loop would be more effective than a directive given the fact that the implementation of a directive depends on its transposition into national legislation and this inevitably delays implementation. It was also felt that the advantages of local loop unbundling on a European scale would only occur if all European incumbents equally and transparently respected the specific technical

criteria governing unbundling. In this context, a regulation would be more effective in reducing regulatory divergence (EP Report A5-0298/2000). Thus, the Commission adopted Local Loop Proposal COM (2000) 394 on 12 July 2000. The proposal was then transmitted to the EP and Council for decision on 23 August 2000. The purpose of the proposal was to provide a legal base to enforce unbundled access to local loops of operators having significant market power by 31 December 2000. Negotiations concluded in early December 2000 and the regulation entered into force on 18 December 2000 (see box 6.4 below).

Box 6.4: Regulation 2887/2000/EC of the European Parliament and of the Council on unbundled access to the local loop

Commission Proposal:	COM (2000) 394
Procedure:	Codecision
Legal Basis:	Article 95 (QMV)
Adoption by Commission	12 July 2000
Transmission to EP and Council	23 August 2000
Council Consideration Approval of proposal in principle	3 October 2000
EP Committee Report First Reading	12 October 2000
ESC Opinion	19 October 2000
EP Opinion Approval with amendments	26 October 2000
Common Position EP amendments First Reading agreement	26 October 2000
Adoption amended proposal	22 November 2000
Council Approval First Reading ('A'Point)	05 December 2000
Signature by EP and Council	18 December 2000

To reiterate, the aim of the proposed regulation was to intensify competition and stimulate technological innovation in the local access market, through the setting of harmonised conditions for unbundled access to the local loop, to foster the

competitive provision of a wide range of electronic communications services. According to the regulation itself, notified operators (incumbents) were to make available to third parties unbundled access to the local loop under transparent, fair and non-discriminatory conditions. Notified operators were obliged to publish from 31 December 2000, and keep updated, a reference offer for unbundled access to their local loops and related facilities. This reference offer must ensure that the beneficiary (new entrant) does not have to pay for network elements or facilities which are not necessary for the supply of its services. The National Regulatory Authorities were given the task of ensuring fair and sustainable competition and were given the power to:

- impose changes on the reference offer for unbundled access to the local loop and related facilities, including prices, where such changes are justified;
- require notified operators to supply information relevant for the implementation of this regulation
- the national authority may, were justified, intervene on its own initiative in order to ensure non-discrimination, fair competition, economic efficiency and maximum benefit for users;
- disputes between undertakings concerning issues included in this regulation shall be subject to the national dispute resolution procedures.

Pre-negotiation

This section proceeds by applying the propositions and observable implications of the two theories to this level of analysis. To reiterate, at this stage of the negotiation of Regulation 2887/2000/EC, according to liberal intergovernmentalism the proposal for the Regulation would come specifically from a call by the member states that wish to solve a collective action problem relating to telecommunications liberalisation that had detrimental economic effects. We would in turn expect the content of the proposal to reflect the preferences of the larger member state executives in particular. The European Parliament or other EU institutions would have no input into policy formulation. According to supranational governance, the proposal for Regulation 2887/2000/EC would result from one of two stimuli – the desire of transnational groups for cooperation and the consequent pushing of the Commission to propose a policy capitalising on this desire or lock-in or path dependence from previous decisions. In other words, we would expect previous legislation to have generated its

own dynamic that has lead to a continuation of integration in this policy area. It would also imply that member state executives' are less proactive and more reactive in the policy formulation process.

The primary motivation for the proposed regulation was economic. In spite of the liberalisation of voice telephony on 1 January 1998, by early 2000 in most member states, the incumbent's market power remained unchallenged on a significant part of telecommunications markets. The incumbents' hold on the local loop-related markets in particular mitigated against full competition, in particular in new emerging markets for high bandwith/broadband services. The Commission and in particular DG INFSO had highlighted this regulatory bottleneck on a number of occasions in 1999 and early 2000, first in its report on the 1999 Review, second in its Fifth Implementation Report and third in its April 2000 Communication on unbundled access to the local loop (2000/C272/10). In fact, the 1999 Review process was critical in bringing the issue of local loop unbundling to the Commission's attention. The Commission in its original review Communication did not explicitly propose unbundled access to the local loop. It emerged through the review process that the majority of operators and manufacturers, user and consumer interests and regulatory authorities were in favour of including an obligation in the negotiation of the new regulatory framework on incumbent fixed network operators to unbundle their copper local access network, to drive forward the development of broadband internet services in Europe (Results of 1999 Review COM (2000) 239 final). The Fifth Implementation Report reiterated the need for local loop unbundling in order to introduce competition at local level, as did the Commission's 2000 Communication:

> It appears that the control of the incumbent's nationwide local loop gives them a considerable leverage for maintaining their dominant positions on existing voice telephony retail markets, in spite of their liberalisation, or for establishing similar positions on new emerging markets for high bandwith services. Given the size of investments required, the absolute cost of nationwide duplication of the incumbents' network with a similar population coverage is likely to be a barrier to entry for any competitor (2000/C272/10, 58).

On the basis of the 1999 Review, the Commission intended to include a proposal on local loop unbundling within the new regulatory package proposal (Interview, DG INFSO Official 3, September 2002). However, in March 2000, the Lisbon European Council requested greater competition in local access networks and the unbundling of the local loop as a means to relieve this bottle-neck situation. The call to unbundle the local loop formed part of the European Council's objective for Europe to become the most competitive and dynamic economy in the world by 2010. Given this direct and urgent mandate from the European Council, the negotiation of the local loop regulation was decoupled from the new regulatory framework negotiations.

At this stage of the policy process, supranational governance holds provides more insights into the explanation of how the regulation was proposed than liberal intergovernmentalism. Policy stakeholders in the 1999 Review process brought the need for further action in order to remove the regulatory bottleneck that existed as a result of incumbents' control of the local loop to the Commission's attention. The previous decisions opening up telecommunications markets to new entrants brought new actors to the policy making arena who pushed for further action in this area. It was also clear that the existing provisions of the ONP directives, which ostensibly allowed shared access to the local loop, were insufficient in minimising this bottleneck and new legislation was required.[34] While the heads of the member states also called for direct policy action in Lisbon in March 2000, the Commission had already decided to include a proposal on local loop unbundling in the new regulatory framework package (Interview, DG INFSO Official 3, 23 September 2002).

Negotiation

In the negotiation or decision-making phase of the policy process, liberal intergovernmentalism posits that member state executives are the only important actors at this stage, the outcome of negotiations will be dictated by their preferences and will be the result of lowest common denominator bargaining. If these propositions were to be true at this stage of the policy process with regard to the local loop regulation, we would expect to see the Council's position on controversial issues

[34] Article 16 of the Voice Telephony Directive and Article 4 of the Interconnection Directive covered shared access to the high frequency spectrum of the local loop. High bitstream access services were covered by Article 16 if the Voice Telephony Directive and the provision of associated trans mission capacity by Article 10 of the Leased Lines Directive.

to represent the outcome of negotiations, and not the EP's. Or we may find that the outcome of the decisions will lie closer to the preferences of the Council rather than the EP. The Commission would not be involved at this stage. However, supranational governance puts forward an opposing proposition, namely that the policy outcome of Regulation 2887/2000/EC would be based on negotiation between the member state executives acting within the Council and the European Parliament as the institutional rule of co-decision sets out. Consequently we would expect that the EP and the Commission (perhaps informally) might be able to shape the policy outcome so that it does not solely reflect the aggregation of member state executives' preferences. Similarly, as the Economic and Social Committee and the Committee of the Regions have the right of consultation, their views may also have an effect on the eventual outcome.

The negotiation of the Commission proposal on local loop unbundling was marked by a high degree of consensus among the actors involved as to the objective to be achieved. The actors involved in the negotiations principally consisted of the Council, the European Parliament and the Commission. The proposal was not a controversial one within the Telecommunications Council of Ministers, especially in light of the consensus on this issue at the Lisbon European Council meeting earlier that year. In fact, at the Telecommunications Council meeting of 3 October 2000, member states were unanimous in their approval of the broad thrust of the proposal (Interview DG INFSO Official 3, 23 September 2002) and instructed COREPER to 'make every effort, through dialogue with the European Parliament, to allow the Regulation to be adopted at first reading before the end of the year' (Press Release 11712/00). As a result, the main negotiations took place in the form of ongoing dialogue between the Council Presidency (French), European Commission representatives and the EP's ITRE committee, with Nicholas Clegg MEP ELDR) as rapporteur. The ITRE Committee considered the Commission proposal and draft report (A5-0298/2000) at its meetings of 13 and 19 September and 11 and 12 October 2000. At the latter it adopted the draft legislative resolution by 38 votes in favour, 8 votes against and no abstentions. The report, with 18 amendments, was then tabled on 17 October 2000 and was passed in plenary session by 378 to 21, with 41 abstentions. In the ongoing dialogue that followed the Council and Commission accepted the EP's specific additions, which aimed to ensure that the technical aspects of the proposal

were sufficiently detailed to be commensurate with the binding nature of a Regulation. These included the enhanced intervention powers for national regulatory authorities, confirmation of the date of 31 December 2000 as the deadline for the regulation to enter into force, confirmation of the possibility of shared unbundling and inclusion of a technical annex detailing the obligations of the incumbent operator. The regulation formally approved without debate in the Industry and Energy Council on 5 December 2000 and formally signed by the EP and Council on 18 December 2000.

On the basis of this evidence, what conclusions can be drawn as to the goodness of fit of the two theoretical conceptualisations at this stage? In line with the first supranational governance proposition, the evidence of the Access to the Local Loop negotiation clearly shows that the member state executives are not the only important decision-making actors. The successful and speedy outcome of the negotiations was to a large degree due to the cooperation between the Council, Parliament and the Commission. The Council was by no means the only important actor in the negotiations. The EP's ITRE Committee succeeded in refining and enhancing the technical details of the regulation in order to ensure that it could be rapidly and effectively implemented. The speedy and uncontroversial nature of the negotiation was also facilitated by the Commission's efforts in formulating its proposals, i.e. by the degree of soundings it had undertaken in the regulatory review. Thus the first proposition of supranational governance, i.e. that policy outcomes are based on negotiation between member state executives and the EP within the logic of institutionalisation, appears broadly to be true. However, given the fact that the negotiation was uncontroversial and very little 'hard' bargaining took place (unlike in the micro level case studies in Chapters 4 and 5), elements of both propositions and their observable implications are inapplicable in this micro case study.

Post-Decision

At the time of writing the Regulation on unbundling the local loop has been in force since December 2000. It is therefore possible to test the propositions generated by liberal intergovernmentalism and supranational governance with regard to comitology using the limited evidence available. However, even though a number of infringements have been referred to the ECJ, decisions have not yet been made on

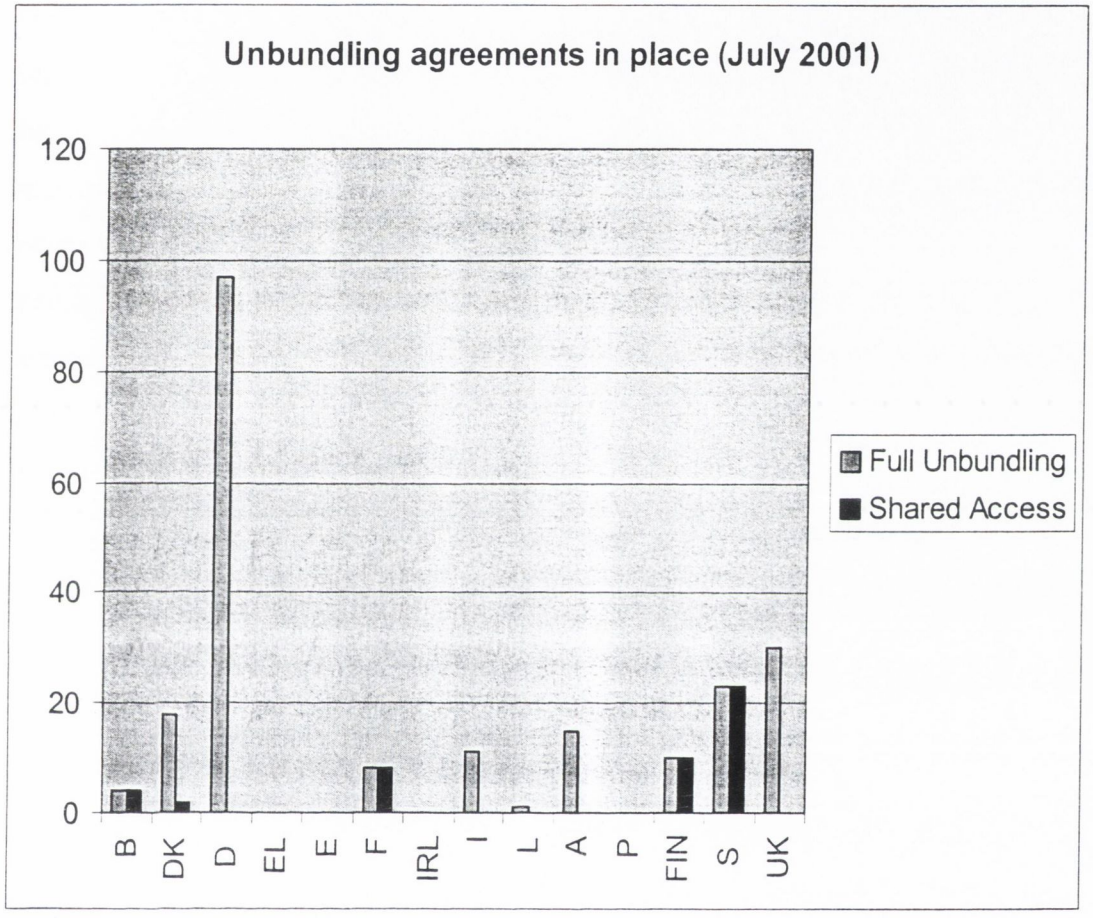
these cases. Therefore it is not possible to fully test the propositions relating to adjudication at the micro level. Restating the proposition with regard to implementation for this stage of the policy-making process, according to liberal intergovernmentalism, in the implementation of Regulation 2887, although the Commission is formally charged with the implementation of the programme, the Council is able to control this function through comitology. Thus if this proposition is to be true, we would expect the type of comitology committee selected to reflect this desire to control the Commission's action and we would expect other possible mechanisms set in place by the Council to monitor Commission action. With regard to supranational governance, it is put forward that the Commission is able to exploit its power of implementation to reorient the direction of implementation of policy outcomes. In other words, we would expect that the Commission does not see comitology as a brake on its room for manoeuvre.

The record of the Regulation on unbundling the local loop demonstrates certain difficulties in testing both sets of propositions and observable implications at the post-decision phase. In fact, the evidence shows that these propositions are not useful in explaining the implementation of provisions that help re-regulate networks and enhance competition in the telecommunications markets. In the implementation of the local loop regulation since December 2000, the evidence shows that the Council, Commission and the National Regulatory Authorities have not been successful in persuading notified operators, i.e. the telecoms incumbents, to fully unbundle their local loops.

Indeed, the implementation record for this regulation has been described as very disappointing (Seventh Implementation Report, COM (2000) 706). From early 2001, the Commission concentrated its efforts on gathering information on unbundling. This was done in two ways: through the ONP comitology committee (the advisory and regulatory Committee delegated with monitoring implementation of the regulation) and through public sector hearings. The implementation of the regulation involves primarily incumbent operators (notified operators designated by NRAS) issuing reference offers to new entrants and unbundling the copper wires. The NRAs monitor this process. In the ONP Committee meeting on 24 January 2001, Unit A2 of DG INFSO issued DOC ONPCOM 01-02, which contained a questionnaire regarding

the implementation of the Regulation to which delegations were requested to respond by 1 March 2001. In the wake of this enquiry, the Commission opened two formal proceedings: one against Wanadoo, France Télécom's Internet Subsidiary[35] and one against Deutsche Telekom.[36]

Figure 6.2:



Source: Commission DG INFSO Official Interview 2, September 2002.
Key: B=Belgium, DK=Denmark, D=Germany, EL=Greece, E=Spain, F=France, IRL=Ireland, I=Italy, L=Luxembourg, NL=Netherlands, A=Austria, P=Portugal, Fl=Finland, S=Sweden, UK=United Kingdom.

In the Seventh Implementation Report, the Commission found that implementation (mandatory since 1 January 2001) was very disappointing. Unbundling reference offers involve the offer of both unbundling and collocation (the provision of physical space and technical facilities necessary to accommodate and connect the new entrant's equipment). By the end of 2001, the Commission found that while reference offers had been published in all member states, they did not cover shared access in

[35] Concerning a possible predatory pricing strategy for new entrants.
[36] Related to problems of local access.

Germany, Greece, Italy, Luxembourg or Portugal. In addition, the number of lines actually unbundled faired greatly, from a handful to a substantial quality. No lines had been unbundled in Ireland or Luxembourg. The Report also found that complaints were made by new entrants against incumbents relating to tariff principles and cost accounting requirements. Unbundled local loop and shared access tariffs were seen to be set too high to allow entrants a margin on their own retail offerings.[37] This, in conjunction with the global downturn in the telecoms market following 11th September, militated against new entrants even attempting to establish a foothold in the market. On the basis of these results, in 20 December 2001, the Commission opened proceedings against three member states which had failed to ensure that the incumbent operator had issued a reference offer regarding shared access and five member states on the availability of sub-loop unbundling.[38] Most of these member states subsequently took steps to remedy these failings (see Table 6.3 below). There is now a reference offer in all Member States covering both full unbundling and shared access. However, the Commission then (March 2002) took action against four Member States where the reference offer was not sufficiently detailed, specifically insofar as there was no possibility to access the local sup-loop, the street cabinet near to a customer's premises necessary for the possible provision of digital subscriber line services. Again, action was taken in the Member States to remedy this failing.

Nevertheless, progress in regard to unbundling in 2002 continued at a slow pace, and has clearly been affected by the downturn in the telecommunications market and the difficulty for operators in attaining capital financing for investment purposes. By 1 October 2002, there were just over 1 million unbundled lines in the EU (out of a total of nearly 187 million subscriber lines), mostly fully unbundled lines (1 050 740) and a small number of shared access lines (27 000). Given that there were 600 000 unbundled lines at October 2001, the pace of unbundling is slowly picking up (COM (2002) 695 final).

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[37] In the case of Ireland, for example, the Office of the Director of Telecommunications Regulation, had, in a Decision notice, set what it deemed fair prices for access to the incumbent *eircom*'s reference access offer. This decision was challenged by *eircom* and was subjected to judicial review. ODTR Annual Report 2000-2001. http://www.odtr.ie/docs/annual_report/00_-1.pdf.

[38] Shared access, whereby a new entrant can offer high-speed internet access while the incumbent continues to offer voice telephony over the same line. Full Unbundled access means that the new entrant obtains full control of the twisted metallic pair for both voice telephony services and for data-transmission services.

Table 6.3 Availability of unbundled and shared loops and bitstream access in Europe

		Availability of wholesale access			
	Incumbent's PSTN activated main lines (millions)	*Unbundled lines*		*Wholesale DSL lines*	
		Fully unbundled lines	Shared access lines	Bitstream access	Simple resale
B	4.69	1 556	1 039	140	69.044
DK	3.32	44 061	6 960	250	
D	39.00	855 404	13	0	530 000
EL	5.54	93	0	0	0
E	17.43	1 181	0	166 413	
F	34.00	1 043	61	8 000	192 000
IRL	1.70	26	62	0	0
I	27.33	82 100	19	105 217	
L	N/a	N/a	N/a	N/a	N/a
NL	8.21	18 629	10 478	0	0
A	3.14	7 300	0	22 100	0
P	4.27	20	0	5 633	
FIN	2.85	35 000	7 500	2 000	
S	6.50	2 818	1 568	2 000	80 000
UK	28.70	1 509	0	165 820	0
Tot. EU	**186.68**	**1 050 740**	**27 700**	**477 573**	**871 044**

Commission. 2002. *Eighth Report from the Commission on the Implementation of the Telecommunications Regulatory Package.* COM (2002) 695 final. Brussels, 3.12.2002.

The Seventh Implementation Report also highlighted important technical difficulties, not originally envisaged by the Commission, that mitigated against successful unbundling (even if the desire to unbundle was there on the part of the incumbents) (Interview DG INFSO Official 3, 23 September 2002). The collocation of new entrants' equipment at incumbents' premises or under arrangements allowing 'virtual' or 'distant' collocation proved technically complex and difficult, as a scientific study commissioned by the Commission found.[39]

In July 2002, another public hearing on local loop unbundling involving all relevant stakeholders was held by DG Competition and DG Information Society in order to ameliorate the weak implementation of the Regulation. At the launch of the sector enquiry, Commissioner Mario Monti commented:

[39] For further information see: Operational Implications of Local Loop Unbundling and the need for technical coordination. Contractor: Political Intelligence/Gilbert and Tobin. Starting Date: 22.12.2000, End Date: 21.09.2001. http://europa.eu.int/information_society/topics/telecoms/regulatory/studies/overview/text_en.htm#(2).

> Despite the efforts deployed by public authorities at the EU and national level, the results of the local loop unbundling throughout Europe are extremely disappointing at this point in time. Fewer than 900,000 lines are unbundled. Even in those countries where figures would seem encouraging, we have received strong signs of discontent on the conditions offered by the incumbent. In many countries unbundling has not gone beyond a merely experimental stage. The overall picture is still bleak, and the weight of the past 18 months considerable (Speech/02/323).[40]

The analysis of this phase highlights the difficulties both national and EU actors have encountered in ensuring the implementation of the Local Loop Regulation. In the post decision phase, the Commission in particular has concentrated its efforts on gathering information from the NRAs and national administrations on the state of play. Technical difficulties and the anti-competitive actions of telecoms incumbents have led to a situation where the implementation of the regulation has been disappointing. The propositions developed for this phase on the basis of the two theoretical frameworks do not bring added value in explaining how this situation has arisen.

6.5 Conclusion

This chapter has traced and analysed the evolution of the EU's common regulatory framework in telecommunications. As a result of the fusion of external and internal political and economic factors, the development of a common EU telecoms policy has forged ahead since the late 1980s. Every member state's telecoms market and every European telecoms operator conduct their business according to rules made at the EU level. In contrast to the education and consumer policy case studies in this dissertation, the evidence produced in this chapter does indeed point to a 'supranational success story' (Schmidt, 1997, 235). The use of the methodology of the analytic narrative in this case study has allowed us to dissect the process of policy making and institutionalisation of EU telecoms policy at a deeper level than in previous analyses. It has also enabled us to see that the propositions developed in

[40] Speech by Mr Mario Monti, European Commissioner for Competition Policy. 'Getting competition in local access'. Public Hearing Sector Enquiry Local Loop Unbundling. Brussels, 8 July 2002.

order to test the two theories in Chapter 2 can be of limited applicability when examining the nuts and bolts of how policy is produced. Nonetheless, the use of the methodology at two different levels of analysis does enable the derivation of important insights into the policy process that might not have otherwise been made.

The results of the analyses at both the macro and micro levels show that supranational governance holds considerably more explanatory power than liberal intergovernmentalism in explaining the formulation of policy in the pre-negotiation phase. While it must be acknowledged that the original concrete policy action in telecoms occurred only when sanction was given by the Council, the European Commission, and more specifically DG Information Society has played an important and proactive role in telecommunications policy formulation. DG INFSO is one of the larger Directorate Generals; while it was established relatively recently, it has continued to expand to over 1000 staff. Commission officials have been consistently effective in putting forward policy proposals that expanded the regulatory framework piece by piece. However, the success of this activism was influenced by the combination of a number of factors: technological change in telecommunications, developments in the global economy which in turn led to increased transnational activity and spillover pressures and the legitimation of early Commission action by the European Court of Justice. The economic importance of the telecommunications market and the need to cope with the increasing globalisation of this market also meant that the Commission became a target for a large number of influential industrial stakeholders. The Commission was careful to work in partnership with all policy stakeholders, including member state executives, and an extensive consultation process preceded each policy proposal.

In the negotiation phase, with the onset of institutionalisation, the propositions of supranational governance again find more resonance than those of liberal intergovernmentalism. This is evident in both the macro and micro level analyses. Given the institutional setting of telecoms policy, negotiations take place in a mediated context. Following the Treaty of Amsterdam in particular (and the micro case demonstrates this to greatest effect), policy outcomes are based on cooperative negotiations between the member state executives and the European Parliament with the Commission acting as an informal mediator right from the minute the proposal is

laid on the decision making table. A culture of gradualism and compromise is to be found in telecommunications negotiations. This is not to deny the fact that hard-fought battles can take place in negotiations over specific issues, such as the rights of NRAs in the negotiation on the new regulatory framework package. However, the use of consensus-building devices such as the granting of derogations and long implementation phases facilitate agreement between member states in particular on contentious issues.

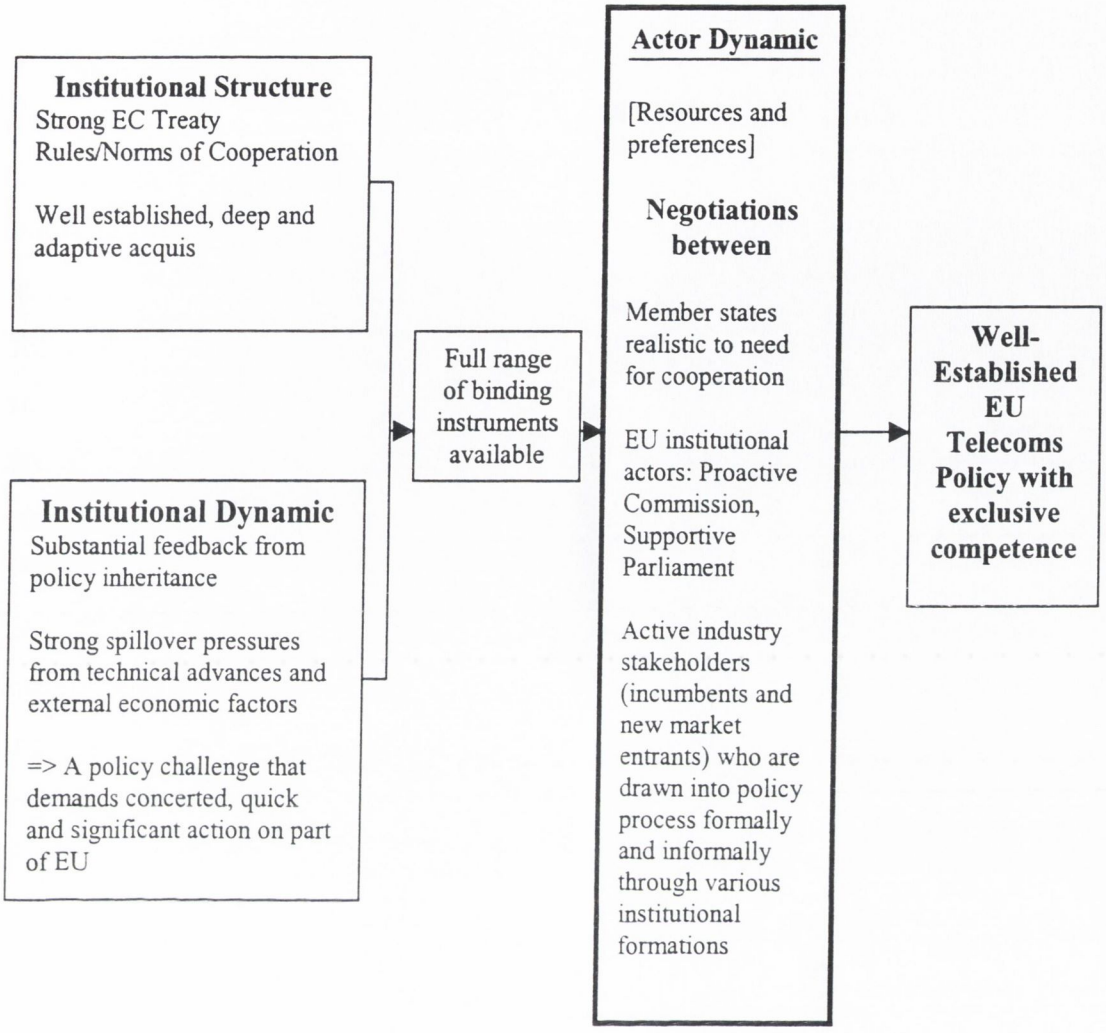
In the post-decision phase of telecommunications policy-making and at both macro and micro levels of analysis, based on the propositions and observable implications generated in Chapter 2, both theoretical conceptualisations offer limited insight and demonstrate weak applicability. Telecoms policy, by its very nature, is implemented by both member state administrations and the national regulatory authorities and involves strong industrial actors, i.e. former incumbents. Given the important economic issues at stake and the speed of market and technological developments, the traditional methods used by the Commission and the NRAs to monitor implementation are not always effective, as this chapter has shown. Telecommunications comitology committees, for example, are used by the Commission and other policy stakeholders as important venues for information exchange and policy learning rather than opportunities for either the Commission or member state delegations to 'claw back control'. With regard to adjudication, while 70 cases relating to telecoms infringements are referred to the ECJ each year, the informal method of 'monitoring by reporting' appears more effective in bringing implementation deficits to the relevant actors attention.

To reiterate, the use of the methodology of the analytic narrative in this case study has also allowed us to dissect the process of telecommunications policy making at a deeper level than in previous analyses. We now briefly turn to look at telecommunications policy as a whole. The EU's telecommunications policy can be portrayed using conceptual representation outlined in Chapter 3 (see figure 6.3). Telecoms policy is a result of the negotiations between multiple actors, who now include the Council and its domestic level, EC institutional actors and industry actors and whose behaviour, resources and preferences have been and continue to be affected by the well-established established institutional structure of the treaty base

and existing *acquis* and spurred on by a strong institutional dynamic and policy challenge, i.e. through the strong feedback effects from the existing policy inheritance and the important external critical junctures that necessitated action. On the basis of the evidence outlined in Section 6.2 of this case study, it is possible to conclude that the various instances of policy making in telecoms has led to the formation of a well-established and strong policy competence at the EU level which is indeed exclusive in nature. Indeed, as a Commission official interviewed for this study commented: 'the EU's telecommunications policy is of course supranational!' (Interview DG INFSO Official 1, 23 September 2002).

The EU telecommunications regulatory framework has expanded steadily and incrementally and is the result of partnership between the Commission, national governments and industry stakeholders. At the critical juncture of 1987, faced with rapid technological change and the external arena dynamic of globalisation, member state executives, the original national telecoms monopolies, realised that cooperation in telecommunications liberalisation and regulation at the EU level was in their best economic interests. The process of liberalisation and re-regulation has brought new actors, the new market entrants, into the policy arena. These actors have, in turn, lobbied hard for action at both national and EU level. At the same time, the Commission was and continues to be active in promoting action at the EU level. It has displayed its characteristic of 'purposeful opportunism' to the full (Cram, 1997). DG Information Society has also carefully cultivated the support of the European Parliament, most notably members of the ITRE Committee. The constant need to update existing legislation in light of technological and regulatory developments has contributed significantly to the institutional dynamic in instigating strong feedback effects. Pro-action on the part of the Commission tied in with other important developments at the EU level: the achievement of the Single European Market in the late 1980s and the efforts to enhance European economic growth and competitiveness from the 1990s onwards. The existence of formal and informal norms among actors, such as the desire for a level playing field (at the heart of the Single European Market) and the culture of consensus, compromise and gradualism, made difficult policy negotiations easier. Nevertheless, it is important to reiterate, at the close of this chapter, that the EU's telecommunications policy has brought with it significant economic benefits and this has been crucial to its successful development.

Figure 6.3: Telecommunications Policy



Conclusion

7.1 Introduction

Since its inception as the European Economic Community, the European Union has continuously grown in size and competence. It has been transformed from a customs union to an economic union with its own currency, it has developed a foreign and security policy and cooperated in the justice and home affairs sphere. It has expanded from six to fifteen member states and will enlarge again in 2004. This dissertation makes a contribution to our understanding of this evolving entity by examining its process of policy making. A number of theories have been developed by political scientists to try to explain how policy, the principal output of the EU, is produced. However, heretofore their explanatory capacity had not been sufficiently evaluated or compared using empirical policy evidence in a methodologically structured and rigorous way. In this research, a systematic link is made between such theorising and the empirical evidence of concrete policy making in the EU. Two of the dominant explanations have been put to the test in three first pillar or Community policies in the European Union: education, consumer policy and telecommunications.

The intention of this final chapter is to summarise and draw together the main insights gained by this research. In section 7.2, the focus of the research and the way in which it was designed, are restated briefly. Section 7.3 reviews the main findings, both in terms of testing the two theories and looking at the reality of policy making in education, consumer policy and telecommunications. The final section of this chapter concludes by identifying a number of issues that have become particularly pertinent for future analysis in the light of this research.

7.2 Focus of Research

This research evaluated the degree to which two theoretical frameworks – liberal intergovernmentalism and supranational governance – explain how policy is produced in the EU in each of the three policy domains selected. This was done using the methodology of an analytic narrative. Propositions and observable implications of each of the explanations were generated for the three stages of policy making – pre-negotiation, negotiation and post-decision. The three stages correspond with the

formulation, negotiation and implementation of policy. The propositions and observable implications were then tested systematically against the case study material at two levels of analysis to see whether either offered a best 'fit' or closest picture as to what the process of policy making in policy areas selected actually looks like in reality.

The brief outline above highlights two key innovations of this research. First, the use of the analytic narrative methodology allowed us to test and compare the validity of these theoretical frameworks in Community pillar policy making in a qualitative, structured and replicable manner for the first time. Heretofore, liberal intergovernmentalism and supranational governance had not been compared and evaluated in a systematic way. While Moravcsik had attempted this for grand bargain negotiations, he had not done so for more 'routine' policy making (Moravcsik, 1998; see also Chapter 1). Similarly, while Sandholtz and Stone Sweet had tested their theoretical framework on certain policies, this was done in a less formalised way, i.e. without the explicit testing of hypotheses. They also did not compare the performance of supranational governance with that of liberal intergovernmentalism in explaining policy results in the same policy areas (Sandholtz and Stone Sweet, 1998). By evaluating the reliability of the propositions derived from both theories against the same empirical policy evidence, this research was able to explicitly put the two theories that have dominated integration studies to the test. In addition, the use of two levels of analysis in this research - macro and micro - enabled a more comprehensive testing of the theoretical propositions and thus increased leverage in evaluating the explanations. The macro level analysis enabled the examination of the validity of the propositions within a broad account of policy development at each stage. The micro level analysis provided an additional test of the theories, as each of the propositions were additionally evaluated against the evidence gathered in the negotiations of the individual legislative proposals. This two-level analysis thus maximised the opportunities available to put the two theories to the test and increased the depth of the results gained from the analyses.

The division of the policy process into its component parts was the second innovation of this research. As we saw in Chapter 1, previous research into the European Union has taken a number of forms. For example, proponents of liberal

intergovernmentalism and supranational governance focused on explaining the broad process of integration and how task expansion occurs. Adherents of the comparative politics approach to the study of the EU either concentrated on analysing the development of the EU from an historical institutionalist perspective or focused on specific roles of EU actors, for example the agenda-setting role of the European Commission. However, none of these studies had clearly divided and examined the EU's policy process in its distinct phases. In addition, while liberal intergovernmentalism and supranational governance both implicitly put forward propositions regarding actors' behaviour at each of the stages of policy process, they had not been explicitly isolated or tested. As we will see below, the separation of the policy process into its component parts highlighted the ability and/or inability of both theories to explain certain stages of policy making and also enabled the derivation of important insights into policy formulation, negotiation and implementation in the EU.

Finally, the empirical data gathered for each of the policy areas was also distilled using the policy making representation developed in Chapter 3. This representation allowed us to picture the overall shape of education, consumer and telecommunications policy making in terms of the behaviour, preferences and resources of relevant policy actors bargaining within the institutional setting of the EU and affected by differential institutional dynamics. As we will see below, it enabled us to identify how different institutional dynamics and structures can influence the evolution of policy making in specific sectors. The interaction of the institutional dynamics and structures of a policy area can have a significant impact on the level of integration reached.

7.3 The Main Findings

The goodness of fit of each of the theories is dealt with in this section in the three phases of policy making. To recap on the propositions, see table 7.1 below.

Table 7.1: Testing the Theories – Reiteration of Propositions

Policy Stage	Liberal Intergovernmentalism	Supranational Governance
Pre-Negotiation	**Proposition A** - Commission proposes legislation that conforms with the wishes of the central member state executives (based on domestic economic interest), cooperating to solve collective action problem, who wish to ensure credible commitments.	**Proposition A** - Rising transnational exchange (trade investment, development of Euro-groups, networks, and associations) push supranational organisations such as Commission to propose and construct new policies. **Proposition B** - Deepening of policy-making in one sector can lead to spill-over in another.
Negotiation	**Proposition A** - Policy outcomes are based on the preferences of the member state executives and are the result of lowest common denominator bargaining between them. **Proposition B** - Member state executives are only important actors at this stage.	**Proposition A** - Policy outcomes are based on negotiation between member state executives and European Parliament within logic of institutionalisation .[1]
Post-Decision	**Proposition A** - Implementation: Commission delegated implementation of policy outcomes to ensure adherence to commitments but is tightly controlled by member state executives through mechanisms such as comitology. **Proposition B** - Adjudication: ECJ does not act outside the preferences of the dominant member states in adjudicating disputes.	**Proposition A** Implementation: Commission exploits comitology procedures and other institutional functions to dominate implementation process and enforcement of legislative outcomes. **Proposition B** - Adjudication: ECJ rules against the preferences of Member states: When it can make use of constituency of subnational actors (litigants, national courts) that support its decisions independent of the control of national governments; when the Treaty is clear, and/or when there are strong precedents and legal norms it can draw upon to support its reasoning.

[1] Logic of Institutionalisation: Rules and rule-making are at heart of the logic of institutionalisation. Rules define roles (who is an actor), define the game, establishing for players both the objectives and the range of appropriate tactics or moves. Rules define how disputes are to be resolved. Institutions are systems of rules and negotiation takes place within this logic of institutionalisation (Stone Sweet and Sandholtz, 1998, 17).

Pre-negotiation

According to the Community method, in the first pillar, the Commission is formally the main actor in pre-negotiation as it has the right to propose policy. Stubb, Wallace and Peterson have suggested that most power lies with the EU's supranational institutions when the Community method is used (Stubb, Wallace and Peterson, 2003, 148). Intuitively, therefore, we would expect supranational actors and the Commission in particular to play a significant role in this phase, given its institutional powers.

Table 7.2 Summary of Empirical Tests of Propositions – Pre-negotiation Phase

Theoretical Propositions	**Education**		**Consumer Protection**		**Telecommunications**	
	Macro	Micro	Macro	Micro	Macro	Micro
Liberal Intergovernmentalism						
Commission proposes legislation that conforms with m.s. economic interests	(+)	(+)	(+)	(+)	(-)	(-)
Supranational Governance						
Rising transnational exchange push supranational organisations to propose policies	(-)	(-)	(-)	(-)	+	+
Deepening of policy making in one sector can lead to spill-over in another	(-)	(-)	(-)	(-)	+	+

Key:
+ = very high level of explanatory power
(+) = strong level of explanatory power
(-) = weak level of explanatory power
- = no explanatory power
n/a = proposition not applicable or effect unable to be investigated in this case
(Adapted from Beach, 2001).

Overall, liberal intergovernmentalism proved a better explanation of policy formulation in the pre-negotiation phase than supranational governance. This was the case in the macro and micro level analyses of education and consumer policy. In the macro analysis of education, it was clear that the content of Commission proposals

tended to correspond with the wishes of the member state executives. Yet it must be recognised that the Commission had tried to use its institutional competence to expand the EU's activities in this area. However, it repeatedly found itself constrained by member state executives who succeeded in tightly specifying the institutional parameters and limits for education policy at the EU level. The formal norm of subsidiarity is also very prevalent in this stage of policy making. In proposing SOCRATES II the Commission was sensitive to the need to respect national responsibility in the sphere of education and the limited desire by member state executives for education policy harmonisation. This also ties in with the liberal intergovernmental proposition for this stage of the policy process.

The results of the consumer policy micro and macro analysis again pointed to the better fit of liberal intergovernmentalism in explaining policy formulation in the pre-negotiation phase. Since the Commission gained the legitimate right of initiation of legislation in this sphere with the ratification of the Maastricht Treaty in 1993, it has been careful to ensure that its proposals are tailored towards member state preferences in order to be successful. Supranational governance ran into difficulties in this phase although it is clear on the basis of the evidence gathered that transnational actors' views are now being taken on board more by the Commission. In addition, new legislative proposals tend to revise and update existing proposals, as opposed to proposing new forms of regulation. The micro level analysis of the Consumer Guarantees Directive showed how the Commission (in particular DG SANCO) was reluctant to act without the 'go-ahead' from member states. The idea to propose the Directive had its origins in calls by the member states and to a lesser degree other EU institutions, i.e. the European Parliament and the Economic and Social Committee. However, the immediate impetus for the directive was the aim to complete the Single Market and the realisation, by member state executives, that a lack of consumer guarantees across borders would dissuade consumers from maximising use of the internal market.

Unlike the education and consumer policy cases, the evidence gathered in the telecommunications policy area strongly supported supranational governance explanations in this phase of policy making. The macro analysis showed that the motivations for policy proposals in the sphere of telecommunications stemmed from

rising transnational exchange and were also triggered by ongoing technological developments and the need to update existing decisions. The Commission was a central actor in harnessing this process. However, its task has been quite specific - to carry out exploratory work and identify where there is a specific area of interest for the EU to pursue in telecoms regulation. The greater explanatory purchase supranational governance propositions hold was also evident in the macro analysis of the Regulation on unbundling the local loop. Previous decisions opening up telecommunications markets to new entrants brought new actors to the policy making arena who pushed for further action in liberalisation and harmonisation. These stakeholders used the 1999 Review process to bring the need for further action on control of the local loop to the Commission's attention. It was also clear that the existing provisions of the ONP directives, which ostensibly allowed shared access to the local loop, were insufficient in minimising this bottleneck and new legislation was required.

According to the evidence gathered in this research, liberal intergovernmentalism proves more effective in explaining agenda setting and the preparation of policy proposals in the pre-negotiation phase than supranational governance. In the early stages of the development of education, consumer and telecommunications policy, the Commission, as the formal agenda-setter, was careful to take its cue from member state executives when deciding on the introduction of specific proposals. The Commission has worked in tandem with the member state executives and the other policy stakeholders where possible in formulating policy proposals and is careful not to proceed and place proposals before the Council and Parliament without member state executive support. The analyses also indicated that of all the EU's institutional organisations, the Commission is the most active but not the most powerful actor in this phase of the policy process. Its task is to harness member state preferences on policy options and mould them into coherent proposals for subsequent negotiation. As the reach and depth of the EU evolves, however, there is a recurring need for the updating of existing policy. The EU's *acquis communautaire* has developed an in-built revision mechanism with many directives stipulating that they be revised and updated within a particular time period. This mechanism was evident in all three policy areas analysed in this thesis. As telecommunications policy showed, a further impetus for policy formulation is the need to update legislation to take technological

developments into account. We have also seen how judgements of the European Court of Justice can trigger policy action, as we saw in Chapter 4 with the *Gravier* case acting as an impetus for the ERASMUS programme. The analyses also showed that the Commission does not have a monopoly on information sources available and often relies on member state experts in advisory groups, transnational organisations, interest groups and research bodies for information on policy developments and options. Finally, the results showed that the European Parliament is quite limited in its involvement in this phase of the policy process, in line with its formal institutional competences.

However, the analyses have shown that liberal intergovernmentalism does not offer exclusive explanatory power in this phase of policy making. Supranational governance held greater explanatory power at both macro and micro levels in telecommunications policy. How can we account for these diverging results? Drawing across the three policy domains, it is apparent that one of the Commission's roles is to carry out exploratory work and identify where there is a specific area of interest for the EU to pursue. Yet its position as an agenda-setter of this type is considerably strengthened when there is a clear and strong economic imperative for EU action, often in response to global economic and/or technological pressures, as we saw in telecommunications policy. This is an important difference between each of the cases examined as such a significant economic imperative was not present with regard to consumer and education policy. The Commission was able to successfully press for telecommunications harmonisation and liberalisation at the European level as member states realised that such action was needed in order to maintain competitiveness in the world telecoms market. It is also true that the Commission's role is enhanced in areas where the Union possesses exclusive competence, that is, where its formal competence as stipulated by the treaties is clear and strong. Be that as it may, even if the Commission has more room for manoeuvre in areas where the EU holds exclusive competence, it is still careful not to proceed without the full consultation of member state governments and other policy stakeholders.

Table 7.3 Summary of empirical tests of propositions – Negotiation Phase

Theoretical Propositions	Education		Consumer Protection		Telecommunications	
	Macro	Micro	Macro	Micro	Macro	Micro
Liberal Intergovernmentalism						
Outcomes based on m.s. preferences and as result of lowest common denominator bargaining	(+)	(-)	(+)	(-)	(-)	(-)
Member state executives are only important actors at this stage	(+)	(-)	(+)	(-)	(-)	(-)
Supranational Governance						
Outcomes based on negotiation between m.s. and EP within logic of institutionalisation	(-)	(+)	(-)	(+)	+	+

Key:
+ = very high level of explanatory power
(+) = strong level of explanatory power
(-) = weak level of explanatory power
- = no explanatory power
n/a = proposition not applicable or effect unable to be investigated in this case
(Adapted from Beach, 2001).

In the negotiation phase, the results of the analyses were mixed: both theories demonstrated explanatory power. However, this power was differentiated between the macro and micro levels of analysis. While liberal intergovernmentalism was relevant as a theoretical explanation in the macro level analyses of education policy and consumer policy in particular, at the micro level, supranational governance proved stronger in each of the cases examined. The evidence of the micro analysis clearly showed that member state executives are not the only decision-making actors that matter. The European Parliament, as co-legislator with co-decision, strongly exercised its negotiating prerogative under the institutional rules by bringing the negotiation of SOCRATES II to conciliation. The expertise and support of the EP Rapporteur, Mrs Doris Pack, informally contributed to the EP's strong role in the negotiation phase. Co-decision also gave the Commission an informal arbitration role, which it exercised carefully (Interview, DG AC Official 2, 26 September 2002).

The supranationalist proposition, that decision making takes place within a logic of institutionalisation, held strong explanatory purchase at the micro level analysis of consumer policy. The European Parliament, as co-legislator with codecision, again exercised its negotiating prerogative under the institutional rules by bringing the negotiation to conciliation. Co-decision also gave the Commission an informal role as mediator. Transnational organisations and national firms were informally involved in this stage of the process, lobbying the EP in particular and industry at the national level and in member states such as Germany they also wielded a considerable degree of influence on national preference formation. With regard to the controversial issues, the outcomes did not reflect the lowest common denominator aggregation of the member states' positions, as figure 5.2 demonstrated, but compromise outcomes arrived at taking the preferences of all actors into account. In this negotiation, the EP appeared less willing or prepared to take the Council on in conciliation and was ready to accept compromise.

At the macro level analysis in telecommunications, liberal intergovernmentalism again ran into difficulties in explanation. Following the Maastricht and Amsterdam Treaties in particular, member state executives are no longer the only important actors at this stage in telecoms and policy outcomes are based on co-decision negotiations between member state executives and the European Parliament with the Commission acting as an informal mediator. A number of informal devices have been used to move bargaining beyond lowest common denominator outcomes. Actors have become involved in a process of negotiation where the broad aims of liberalisation and re-regulation are accepted but differences are accommodated by use of policy sequencing and implementation derogations. The testing of propositions was a little more difficult in the micro level case study in that there was a high degree of consensus within the Council of Ministers and between the Council of Ministers and the EP on the regulation. It was clear, however, that both institutions cooperated in order to bring about a speedy negotiation. The EP's ITRE Committee, with its rapporteur, worked together with the Commission representatives and the Council Presidency and Secretariat in trialogue to refine and enhance the technical details of the regulation in order to ensure that it could be rapidly and effectively implemented. The high degree of consensus was also as a result of the extensive process of arbitration undertaken prior to the introduction of the Commission proposal.

Overall, therefore, the results of this stage of the policy process showed that neither liberal intergovernmentalism nor supranational governance exclusively explain the policy process in the negotiation phase. However, the results of the micro analyses in particular showed beyond doubt that member state executives do not control EU bargaining when co-decision is used. Co-decision has considerably strengthened the position of the European Parliament in legislative negotiations. The Council must take the position of the European Parliament on board in negotiations under co-decision. While this conclusion is not new (see for example Neunreither, 1999, Peterson and Bomberg, 1999), the micro analyses in Chapters 4, 5 and 6 clearly demonstrate the enhanced position of the EP in legislative negotiations. The micro analyses of the Consumer Guarantees Directive and the Regulation on Unbundling the Local Loop showed the degree of cooperation that can exist between the Council and Parliament. They also showed the informal role played by the Commission in conciliation. Formally, the position of the Commission at this stage of the policy process is weak. Informally, however, if the need arises, the Commission can adopt a mediatory role in facilitating a positive outcome in negotiations. This was particularly evident in negotiations on the new regulatory framework in telecommunications. The Commission, as informal arbiter, put forward devices such as policy sequencing and implementation derogation in order to break deadlock in conciliation. On the other hand, the micro analysis of SOCRATES II is an illuminating example of a negotiation where the Parliament was not afraid to flex its institutional muscles in order to bring the outcome of negotiations closer to its preferences. In sum, therefore, co-decision means that the Council as a whole ignores the position and stance of the European Parliament at its peril.

The results of the analyses of this phase of the policy process also point to an important insight into the analysis of first pillar policy making in general. Macro and micro analyses allow for the dissection of the negotiation process to differing degrees. The macro level analysis, because it is broad in nature, focuses on the overall contours of policy setting. In education and consumer policy in particular, the balance of explanation lies firmly in the liberal intergovernmentalist camp at the macro level. This is unsurprising given the circumscribed institutional setting within which these policies have been allowed to develop. Member state governments set policy in broad terms over time. However, at the micro level, the degree of policy negotiation

analysis is cut more deeply. The pulling and hauling that takes place between the institutions within the codecision process is revealed more clearly in analyses of negotiations on the shape of specific pieces of legislation. Supranational governance is more effective in mapping and explaining the shaping of these individual policy results under codecision as it taps into the institutional context within which negotiations take place. The level of analysis adopted evidently matters when testing the theories in the negotiation stage.

Post-Decision

Both theories ran into significant difficulties in explaining the policy process at the post-decision or implementation stage. It was clear at both at the macro and micro levels that the propositions put forward by supranational governance and liberal intergovernmentalism bore little resemblance to the reality of EU policy implementation, as table 7.4 shows.

Table 7.4: Summary of Empirical Tests of Propositions – Post-Decision Phase

Theoretical Propositions	Education		Consumer Protection		Telecommunications	
	Macro	Micro	Macro	Micro	Macro	Micro
Liberal Intergovernmentalism						
Commission delegated implementation but tightly controlled by m.s. through mechanisms such as comitology	(-)	(-)	(+)	n/a	(-)	(-)
In adjudication, ECJ does not act outside preferences of dominant member states	(-)	n/a	n/a	n/a	(-)	n/a
Supranational Governance						
Commission exploits comitology and other institutional functions to dominate implementation	(-)	(-)	(-)	n/a	(-)	(-)
In adjudication, ECJ rules against preferences of all member states under certain conditions	(-)	n/a	n/a	n/a	(+)	n/a

Key:
+ = very high level of explanatory power
(+) = strong level of explanatory power
(-) = weak level of explanatory power
- = no explanatory power
n/a = proposition not applicable or effect unable to be fully investigated in this case
(Adapted from Beach, 2001).

For example, in education policy at the macro level, the evidence showed that comitology has neither resulted in the complete control of implementation by the member state representatives, nor has it involved total slippage of control to the European Commission. Instead, it has served as an opportunity for each of the actors involved in implementation to keep track of the process of implementation of education policies and programmes. The European Court of Justice has indeed ruled against the preferences of member states on occasion and has used the Treaty base and legal precedent to facilitate the expansion of education beyond vocational training to include other elements such as higher-level education. However, the Court has been careful not to exceed its remit in this matter.

The micro analysis of SOCRATES II showed the practical difficulties inherent in the implementation and monitoring of a policy programme of this nature. Despite the fact that a comitology committee has been set up with mixed powers and that seventy per cent of implementation is carried out by the national agencies, member states are not able to monitor this phase of the policy process effectively and efficiently. In contrast, in spite of its formal function at this phase, the Commission is also curbed in its room for manoeuvre, both by the restraining mechanisms put in place by the member states, and by its own lack of resources.

The consumer policy case study again pointed to the difficulties encountered by both theories. In the macro analysis we saw that the Commission is unable to exploit either judgements from the ECJ or any informational advantage to push its agenda forward in this phase. The evidence clearly demonstrated that the threat of sanction from the European Court of Justice is a blunt instrument and is, indeed, not over-used by the Commission. While the Commission is able to keep track of the notification of transposition of EU consumer legislation into national law, it does not possess enough resources to monitor practical application effectively. The implementation of EU consumer legislation is primarily dependent upon the willingness and ability of member state administrations to correctly transpose it into national law. We were unable to properly test the propositions in the micro level analysis.

In the telecommunications case study, again neither theory appeared able to explain the process of policy implementation in the post-decision phase, based on the propositions generated. The mode of governance in telecommunications is primarily regulation and implementation of the telecoms regulatory framework is the responsibility of the member state administrations and the National Regulatory Authorities. This implementation also depends on the compliance of market actors with regulation. At the European level, the Commission monitors enforcement in three ways: through the detection of infringements, reporting and comitology. DG Competition also monitors general competition in the telecommunications market. Both DG's have not been reluctant to subject either member states or industry actors to judicial control. However, the length of time this involves on the one hand and the speed of technological developments on the other has meant that the less formal process of 'monitoring by reporting' instigated by the DG INFSO's Implementation

Unit is more effective in monitoring implementation (Interview DG INFSO Official 2, 23 September 2002). Comitology committees serve as arenas of information exchange, in particular for the Commission's implementation unit whose officials issue questionnaires to comitology committee and advisory group members in order to gather market and regulatory data.

The micro analysis of the Local Loop Regulation also highlighted the difficulties both national and EU actors have encountered in ensuring implementation. In the post decision phase, the Commission in particular has concentrated its efforts on gathering information from the NRAs and national administrations on the state of play. Technical difficulties and the anti-competitive actions of telecoms incumbents have led to a situation where the implementation of the regulation has been disappointing. The propositions developed for this phase on the basis of the two theoretical frameworks did not bring added value in explaining how this situation has arisen.

The overall conclusion at the end of this research must be that the two theories offered little insight into post-decision implementation of policy. Why is this exactly? Implementation is about more than monitoring compliance with EU legislation. Both theories ignore a key variable in this stage of the policy process – the ability of member states' own systems of policy making to adopt and adapt to EU policies. Not only must member states be willing to transpose EU legislation effectively, fully and on time, they must also have the capacity to do so. The capacity to adapt varies between each of the member states based on their own national systems. EU policies may require the reallocation of administrative competencies, the creation of new administrative structures or the adaptation of existing procedures and rules at the national level (Knill and Lenschow, 2000, 13). In other words, member states' domestic institutions 'matter' when it comes to the implementation of EU policies and as the configuration of each member state's domestic institutions is somewhat different, implementation will also be differential. According to Knill and Lenschow, 'implementation is likely to be ineffective if the institutional fit between existing institutional arrangements and the institutional implications of EU policies contradict strongly entrenched patterns of already existing institutions' (Knill and Lenschow, 2000, 30). The propositions generated by supranational governance and liberal intergovernmentalism on post-decision implied that implementation is primarily a

top-down process. Thus they do not pay heed to the essential element that is the fit between the EU policy agreed and the existing national policy – the 'bottom-up' element of implementation. Other theoretical frameworks are more suited to the analysis of this stage of the policy process, more specifically historical institutionalism. With its emphasis on tracing processes of change and adaptation over time, historical institutionalism would enable us to study the adaptive capacity of each of the member states' domestic systems across policy sectors in the longer term.

The results of the analyses from this stage of the policy process also shed light on the comitology mechanism that has existed since 1987. As shown in Chapter 3, the number of 'comitology committees' operating at the EU level is large. In education, consumer policy and telecommunications, we have seen that member state executives do not use comitology committees and procedures as a means to 'claw back' control of implementation for the Commission. Nor does the Commission use comitology as a means to change the contours of policy decisions taken in the negotiation phase. As stated above, comitology committees serve as venues for the exchange of information between the Commission and representatives of the member state administrations. For the Commission, they represent an opportunity to gather further information on implementation at the national level. For member state executives they offer a chance to meet with the Commission to discuss implementation problems and issues. The analyses also showed that although documents produced in comitology committees must be placed before the European Parliament for discussion, the Parliament's involvement at this stage of the process is considerably less than in the negotiation phase.

Policy Making in the Community Pillar

This dissertation also offered a representation with which to portray the shape of policy making in each of the three areas examined. This framework combined the insights gained from rationalist and institutionalist explanations of policy making but was put forward as a conceptual scheme, not a theoretical approach. Actors are at the centre of the EU's policy process. They negotiate over a set of policy instruments to achieve policy results. The resources they possess and the salience they attach to issues influence their behaviour in negotiation. However, who the relevant actors are, the feasible set of policy instruments on which they negotiate and the negotiating

result itself are also influenced by the institutional structure and dynamic. Actors bargain within a given institutional structure, which includes EC Treaty rules and norms and existing legislation. Institutional dynamics, such as exogenous events or crises, or the need to update the existing policy inheritance can also have an acceleration or delaying effect on policy making. The nature of policy result can differ depending on the interaction of these factors (see figure 3.2). The application of this tool of representation to the empirical evidence gathered gives us another opportunity to identify and expose underlying mechanisms of policy making uncovered in this research.

The representation is useful in order to put the pieces of the education policy jigsaw together. As we saw in Chapter 4, the scope and depth of education policy is very modest. It is true that education policy at the EU level has evolved in a deeper direction. It has moved from not even being mentioned in the Treaty of Rome and Single European Act and the realm of intergovernmental resolutions to in some way resembling more recognised and well-established instances of institutionalisation, with established treaty bases, *acquis* and legislative histories and where each of the supranational actors have specific functions. Looking at the institutional dynamic, the EC's move into some kind of education policy cooperation was facilitated by the limited spillover in the 1980s in particular with the development of the internal market, the free movement of workers, services and the concomitant need for the common recognition of qualifications. The genesis of the ERASMUS programme at this time had a basis in judgements of the ECJ and its exploitation of existing treaty provisions. However, in terms of the institutional structure, the constitutional norm of subsidiarity has served as a potent brake on any efforts to harmonise education policy at the EU level and the Commission is mindful not to encroach on member states' sovereignty in this field. The evidence of policy making in the 1990s and from the Lisbon Agenda and the Open Method of Coordination point to the conclusion that any further action in the education area will be continue to be carefully navigated and monitored by the member state executives.

In terms of the actor dynamics, it is also clear that the Council takes the lead in any action that is proposed or decided in education policy. Member state executives in the Council are wary of any attempts to move responsibility for national education to the

European level, as OMC shows. The Council as a whole does not advocate deep supranational entrepreneurship in this area and limits the possibility of this with a tightly controlled legal base. In the 1980s in particular the Commission was proactive in its attempts to deepen Europeanisation of this policy area and succeeded in pushing the Council to agree on a legal base for education in the Maastricht Treaty. This must be recognised. However, it concentrated on policy consolidation in the 1990s and with the Lisbon agenda and OMC has been respectful of Council motives and its desire for control in this policy area. In contrast the European Parliament has assumed a more activist role and interest in education policy since it gained the right of co-legislation with the Maastricht Treaty (Articles 149 and 150 – codecision). Since the negotiation of the first SOCRATES programme, the EP has pushed for greater involvement in other stages of the policy process, in particular post-decision implementation and has had minor success in this goal. Transnational societal actors must also be considered as education policy stakeholders, with identifiable but weak involvement in both the pre-negotiation and post-decision phases of policy-making. Thus we must conclude that while an EU policy competence in education has been established, it appears to be relatively weak.

The institutionalisation of consumer policy at the EU level has also been weak. In terms of the actor dynamic, member state executives have controlled the timing and scope of consumer policy action in negotiations and supranational institutions such as the Commission and the EP appear constrained in their room for manoeuvre by the institutional provisions of the Treaties and the existing *acquis*. Until the Single European Act's provision for QMV under Article 100a, consumer policy proposals were negotiated by unanimity. As a result, the Commission had the right of initiative but had to stand by and watch negotiations take years to conclude, controlled as they were by member state executives. Still, until 1999 at least, the Commission seemed reluctant to push the agenda forward beyond the wishes of the member states. Following the SEA, the European Parliament began to strongly support consumer protection issues. The circle of consumer organisations widened and the number of ECJ judgements recognising certain rights of consumers grew. Yet, in spite of these developments, the member state governments' preference for the norm of subsidiarity, together with the principle of minimal harmonisation enshrined in specific directives and the explicit link made between consumer policy and the internal market through

the use of Article 100a (now 95) continued to affect the capacity to develop a consumer protection policy that moved beyond the lowest common denominator of agreement. In addition, the Commission's role as policy entrepreneur, hampered from the beginning by a lack of institutional power, was compounded by weakness of staff and informational resources.

In consumer policy, therefore, the specific configuration of the institutional structure and dynamic has meant that negotiations and agreements between member state governments have been the primary element affecting the development of consumer policy. The mechanisms and interaction between the institutional structure and dymamic of consumer policy, i.e. weak EC treaty rules and *acquis communautaire*, the norms of subsidiarity and minimal harmonisation, the limited policy inheritance feedback and the lack of critical junctures, have combined to reinforce the position where the member states are the primary drivers of the evolution of consumer policy.

The development and institutionalisation of telecommunications policy at the EU level has been much stronger and more supranational than that of education and consumer policy and it is important to concentrate on this difference. An EU regulatory regime in the telecommunications field has been established consisting of three pillars – liberalisation, harmonisation and adherence to general competition principles. In terms of the actor dynamic, the Commission has emerged as a central actor in the process. Its role as policy entrepreneur was greatly facilitated particularly in the late 1980s from the convergence of two main factors: the impetus of technological change and globalising pressures based on liberalisation in the US, UK and Japanese market. In other words, these factors provided a much stronger opportunity structure for both supranational and transnational actors to influence policy making. Commission activism and innovation in agenda setting was particularly evident in the late 1980s when officials particularly in DG XIII (Industry) and DG IV were prepared to take the risk and use the institutional weaponry of ex-Article 90(3) to open up the sector to competition (first in terminal equipment). The support of the ECJ for such action had a significant effect on legitimising subsequent Commission action. Finally, the Commission also actively sought to involve industry stakeholders in policy consultation.

We have learned an important lesson from the use of the conceptual tool explored above. The opportunity structure within the institutional dynamic matters and can have a substantial effect on the evolution of policy making and policy results achieved in a particular sector. What is meant by this? The institutional dynamics of globalising economic pressures and technological change have pushed and continue to push policy making forward in telecommunications, both in terms of critical junctures and in necessitating the updating of the existing regulatory framework (policy inheritance). Cooperation through regulation at the EU level became the most suitable means for member states executives to solve what was seen as a crucial economic collective action problem posed by the challenge of globalisation in telecommunications and technological advancement. Transnational actors such as global communications companies pushed strongly for action at the EU level. The absence of such economic imperatives and a strong constituency of transnational actors pushing member states and the Commission and Parliament to act meant that cooperation in education and consumer policy was much less urgent. This has had important consequences for the type and results of policy making in both cases. It also highlights the significance of the preferences of member state executives in determining the EU's policy agenda. Despite the continued efforts of the Commission to move integration forward and set the agenda in education and consumer policy, progress was only made when the member state executives agreed to act in these areas. They controlled the scope and pace of policy integration achieved.

7.4 Further issues and questions

This section concludes by identifying important issues for future consideration based on the findings of this research. As we saw in Section 7.3, both theories have little to offer in accounting for the implementation of EU policies. This was clearly evident in the analysis of the post-decision phase and a way of overcoming this problem was suggested using historical institutionalism. Another pathology of the theories concerns their treatment of member state governments. It became clear that by concentrating on the inter-institutional dynamics of policy making, both liberal intergovernmentalism and supranational governance fail to differentiate between member states and their varying capabilities in the negotiation phase. While Moravcsik does distinguish between the larger and smaller member states, this

distinction did not prove to be accurate in the case studies. The analyses showed that member states negotiate on the basis of their preferences over specific issues. These preferences were influenced by the existing institutional structures at the national level of each member state and domestic political and economic interests. It is not the case of 'big' versus 'small' member states in negotiations. The coalitions formed between member states varied depending on the policy issue under consideration.

The challenge for current research is to push the analysis of policy negotiation beyond the Council-EP-Commission triangle analysed in this dissertation. In reality, the Council is not the monolith it is portrayed to be by supranational governance and liberal intergovernmentalism. Tanja Börzel has pushed the boundaries of analysis between the national and the European further with her categorisation of state strategies in environmental policy negotiations. She has made a link between the way in which member state governments both shape European policy outcomes and adapt to them. Börzel argues that in EU negotiations, member state responses are shaped firstly by their policy preferences and secondly by their action capacity. In negotiations, national executives will strive to minimise the costs, which the implementation of European norms and rules may impose on their home constituencies. On the basis of this proposition and looking at environmental policy negotiations, Börzel proposed a triptych of strategies member states can pursue in negotiations. These are: pace-making, foot-dragging and fence-sitting. Pace-setters actively push policies at the European level, which reflect a member state's policy preference and minimise implementation costs. Foot-draggers block or delay costly policies in order to prevent them altogether or to achieve at least some compensation for implementation costs. Fence-sitters neither systematically push policies nor try to block them at the European level but build tactical coalitions with both pace-setters and foot-draggers. What kind of strategy a member state is likely to pursue depends largely on its level of economic development, which largely influences the degree of domestic regulation and the action capacities of a member state, particularly in the area of regulatory policy (Börzel, 2002, 194). Börzel found that smaller countries can also effectively shape European policies, as Denmark and the Netherlands did in the environment policy area. Future research must build on this work and delve deeper into the relationship between negotiation at the EU level and policy making at the national level.

The time period most appropriate for the testing of the theories using this methodology is that of the 1990s and early 2000s. Two significant events on the horizon will change the nature of the EU beast in a fundamental way and point to the need to move integration theorising forward beyond current paradigms. Enlargement and fundamental reform of the EU will mark a critical juncture in the EU's historical development and will necessitate new ways of explaining how the EU works and will work in the future. The old paradigms will need to be adapted at the very least or else abandoned completely. From 2004 onwards, the European Union will no longer consist of 15 member states but could number up to 25 members. The consequences of this enlargement for the politics, policy and polity of the EU are huge. The sheer increase in actors involved in decision making could radically affect the process and speed of policy making. The reform of the EU through the Convention process and the Intergovernmental Conference of 2004 will also radically affect how EU policy is made as the institutional setting itself is restructured.

Finally, new modes of governance have emerged since the late 1990s that require new theoretical explanations, most specifically the open method of coordination. In recent years, non-legislative modes of policy making and modes of governance have increased in European policy making. The Commission views these new modes as offering the possibility to expand European policies in the face of member state executive opposition, while member state governments prefer them to legislation because they give member states continued control in shaping policy in new areas. The use of these less formal modes of governance may become increasingly prevalent in a Union of 25 members in order to avoid deadlock. Political scientists must move beyond looking at the EU as an entity that produces policy output in the form of concrete legislation. The metamorphosis of the EU is currently underway and political science must rise to the challenge this presents.

Bibliography

Adamantopoulos, Konstantinos. 1996. 'Access to Justice in the European Courts for Consumers'. In Hans-W. Micklitz/Norbert Reich. Eds. *Public Interest Litigation before European Courts.* Nomos Verlagsgesellschaft: Baden-Baden.

Agence Europe. Brussels. Various Issues.

Alter, Karen. 1998. 'Who are the Masters of the Treaty? European Governments and the European Court of Justice.' *International Organisation* 52:1.

Armstrong, Kenneth A. and Simon J. Bulmer. 1998. *The Governance of the Single European Market.* Manchester University Press: Manchester.

Barnard, Catherine. 1992. 'The Maastricht agreement and education: one step forward, two steps back?' *Education and the Law.* 4:3.

Bartle, Ian. 1999. 'Transnational Interests in the European Union: Globalisation and Changing Organisation in Telecommunications and Electricity'. *Journal of Common Market Studies.* 37:3. pp.363-83.

Bates, R.H., A. Greif, M. Levi, J. Rosenthal and B.R. Weingast. 1998. *Analytic Narratives.* Princeton University Press: Princeton.

Beach, Derek. 2001. *Between Law and Politics. The relationship between the European Court of Justice and EU Member States.* DJØF Publishing: Copenhagen.

Berben, Cor. 1989. 'Open network provision: a concept for provision and usage of networks in Europe'. European Telecommunications Policy: Proceedings of the conference held in Brussels, April 1989. Blenheim Online Publications: Middlesex.

Beukel, Eric. 1994. 'Reconstructing Integration Theory: The Case of Educational Policy in the EC'. *Cooperation and Conflict* 29:1, pp.33-54.

Börzel, Tanja A. 1998. 'Rediscovering Policy Networks as a Form of Modern Governance'. Review article. In *Journal of European Public Policy* 5:2, pp.354-9.

Börzel, Tanja. 2002. 'Pace-Setting, Foot-Dragging, and Fence-Sitting: Member State Responses to Europeanisation'. *Journal of Common Market Studies* 40:2, pp.193-214.

Bourgoignie, Thierry. Ed. 1992. *Group actions and consumer protection.* Centre de droit de la consommation, Story Scientia: Brussels.

Bradley, Kieran St C. 1997. 'The European Parliament and Comitology: On the Road to Nowhere?' In *European Law Journal* 3:3.

Branch, Ann P. and Jakob C. Øhrgaard. 1999. 'Trapped in the supranational-intergovernmental dichotomy: a response to Stone Sweet and Sandholtz'. *Journal of European Public Policy* 6:1, pp.123-43.

Bulmer, Simon J. 1998. 'New institutionalism and the governance of the Single European Market'. *Journal of European Public Policy* 5:3.

Burley, Anne-Marie and Walter Mattli. 1993. 'Europe before the Court: a political theory of legal integration.' *International Organisation* 47:1.

Caporaso, James A. 1998. 'Integration Theory, Past and Future.' In Wayne Sandholtz and Alec Stone Sweet. Eds. *European Integration and Supranational Governance*. Oxford University Press: Oxford.

Christiansen, Thomas and Emil Kirchner. Eds. 2000. *Committee Governance in the European Union*. Manchester University Press: Manchester.

Cini, Michelle. 2000. 'From Soft Law to Hard Law? Discretion and Rule-making in the Commission's State Aid Regime.' *EUI Working Papers, Robert Schuman Centre for Advanced Studies* 35.

Collier, R.B. and D. Collier. 1991. *Shaping the Political Arena: Critical Junctures, the Labor Movement, and Regime Dynamics in Latin America*. Princeton University Press: Princeton NJ.

Cram, Laura. 1997. *Policy-Making in the European Union. Conceptual lenses and the integration process*. Routledge: London.

Crombez, C., B. Steunenberg and R. Corbett. 2000. 'Forum Section. Understanding the EU Legislative Process.' *European Union Politics* 1:3.

Dang-Nguyen, Godefroy, Schneider, Volker and Raymund Werle. 1994. 'Corporate Actor Networks in European Policy-Making: Harmonising Telecommunications Policy'. *Journal of Common Market Studies*. 32:4.

De Groof, Jan and Bernhard Friess (European Commission). 1997. 'Opportunities and limitations for a European education policy'. *European Journal for Education Law and Policy* 1:9-17.

Dickie, John. 1998. 'Consumer Confidence and the EC Directive on Distance Contracts'. *Journal of Consumer Policy*. 21: 217-229.

Diez, Thomas. 1999. 'Riding the AM-track through Europe; or the Pitfalls of a Rationalist Journey through European Integration.' *Millennium* 28:2.

Dogan, Rhys. 1997. 'Comitology: Little Procedures with Big Implications'. *West European Politics* 20:3.

Dyson, Kenneth and Peter Humphreys. 1990. 'Introduction: politics, markets and communication policies'. In Dyson and Humphreys. Eds. *The Political Economy of Communications. International and European Dimensions*. Routledge: London.

Elgström, Ole and Michael Smith. 2001. 'Introduction: Negotiation and policy-making in the European Union – processes, system and order.' *Journal of European Public* Policy 7:5.

Eliassen, Kjell A., Toby Mason and Marit Sjøvaag. 1998. 'European telecommunications policies – deregulation, re-regulation or real liberalisation?' In Eliassen and Sjøvaag. Eds. *European Telecommunications Liberalisation.* Routledge: London.

European Roundtable of Industrialists. 1995. Education for Europeans – Towards the Learning Society. In conjunction with Council of European Rectors. CRE-ERT. Action Report. 1998. *To Lifelong Learning. Trends in industry practices and industry-university cooperation in adult education and training.*

Field, John. 1994. *Educational and Vocational Training.* Spicers European Union Policy Briefings. Longman: Harlow.

Field, John. 1998. *European Dimensions. Education, Training and the European Union.* Jessica Kingsley Publishers: London.

Fuchs, Gerhard. 1994, 'Policy-Making in a system of multi-level governance - the Commission of the European Community and the restructuring of the telecommunications sector.' *Journal of European Public Policy* 1:2.

Garman, Julie and Louise Hilditch. 1998. 'Behind the scenes: an examination of the importance of the informal processes at work in conciliation.' *Journal of European Public Policy* 5:2.

Garrett, Geoffrey. 1992. 'International cooperation and institutional choice: the European Community's Internal Market.' *International Organisation* 46: 2.

Garzaniti, Laurent. 2000. *Telecommunications, Broadcasting and the Internet. EU Competition Law and Regulation.* Sweet & Maxwell: London.

Gibson, Leigh. 1993. 'Subsidiarity: The Implications for Consumer Policy'. *Journal of Consumer Policy* 16: 323-344.

Glendenning, D. 1998. *Education and the Law.* Butterworths: Dublin.

Goyens, Monique. 1993. 'Where There's a Will, There's a Way! A Practitioner's View'. *Journal of Consumer Policy.* 16: 375-386.

Goyens, Monique. 1994. 'Development of EC Consumer Protection'. In Tony Askham, and Anne Stoneham. 1994. *EC Consumer Safety.* Butterworths: London.

Greenwood, Justin. 1997. *Representing Interests in the European Union.* Macmillan: Hampshire.

Haas, E.B. 1968. *The Uniting of Europe: Political, Social and Economic Forces 1950-1957.* Stanford University Press: California.

Haibach, Georg. 1999. 'Council Decision 1999/468 – A New Comitology Decision for the 21st Century!?' *Eipascope* 99:3.

Hayes-Renshaw, Fiona. 1999. 'The European Council and the Council of Ministers'. In Cram, Dinan and Nugent. Eds. *Developments in the European Union.* Macmillan: Hampshire.

Hayes-Renshaw, Fiona. 2002. 'The Council of Ministers'. In John Peterson and Michael Shackleton. Eds. *The Institutions of the European Union.* Oxford University Press: Oxford.

Héritier, Adrienne. 1999. *Policy-Making and Diversity in Europe. Escape from Deadlock.* Cambridge University Press: Cambridge.

Héritier, Adrienne. 2001a. 'New Modes of Governance in Europe: Policy-Making without Legislating?' Max Planck Project Group Common Goods: Law, Politics and Economics, Bonn, Paper Presented at the ECPR 4th Pan-European International Relations Conference, University of Kent, Canterbury, September.

Héritier, Adrienne. 2001b. 'New Modes of Governance in Europe: Policy-Making without Legislating?' Max Planck Project Group, Bonn, Preprint No.14.

Hermans, Stefaan. 1997. 'The Socrates programme: from negotiation to implementation'. *European Journal for Education Law and Policy* Vol.1: 19-39.

Hix, Simon. 1994. 'The Study of the European Community: The Challenge to Comparative Politics.' *West European Politics.* 17:1.

Hix, Simon. 1999. *The Political System of the European Union.* Macmillan: Hampshire.

Hodson, Dermot and Imelda Maher. 2001. 'The Open Method as a New Mode of Governance: The Case of Soft Economic Policy Coordination'. *Journal of Common Market Studies.* 39:4, pp.719-46.

Hoffmann, Stanley. 1996. 'Obstinate or obsolete? The fate of the nation-state and the case of Western Europe.' In Michael O'Neill. *The Politics of European Integration. A Reader.* Routledge: London.

Holmes, Peter. 1990. 'Telecommunications in the great game of integration'. In Gareth Locksley. Ed. *The Single European Market and the Information and Communication Technologies.* Belhaven Press: London.

Hooghe, Liesbet and Gary Marks. 2001. *Multi-Level Governance and European Integration.* Rowman & Littlefield: Oxford.

Jachtenfuchs, Markus. 1995. 'Theoretical Perspectives on European Governance.' *European Law Journal* 1:2.

Jones, Robert A. 1996. *The Politics and Economics of the European Union. An Introductory Text.* Edward Elgar: Cheltenham.

King, Gary, Robert O. Keohane and Sidney Verba. 1994. *Designing Social Inquiry. Scientific Inference in Qualitative Research.* Princeton University Press: New Jersey.

Knill, Christoph and Andrea Lenschow. 2000. *Implementing EU environmental policy. New directions and old problems.* Manchester University Press: Manchester.

Knill, Christoph. 2001. 'Private governance across multiple arenas: European interest associations as interface actors'. *Journal of European Public Policy* 8:2, pp.227-246.

Kreppel, Amie. 1999. 'What Affects the European Parliament's Legislative Influence? An Analysis of the Success of EP Amendments'. *Journal of Common Market Studies* 37:3.

Laffan, Brigid. 1997a. 'From policy entrepreneur to policy manager: the challenge facing the European Commission.' *Journal of European Public Policy* 4:3.

Laffan, Brigid. 1997b. *The Finances of the European Union.* Macmillan: Basingstoke.

Laffan, Brigid, Rory O'Donnell and Michael Smith. 2000. *Europe's Experimental Union. Rethinking Integration.* Routledge: London.

Lewis, Jeffrey. 2000. 'The methods of community in EU decision-making and administrative rivalry in the Council's infrastructure'. *Journal of European Public Policy* 7:2, pp.261-89.

Long, Colin D. 1995. *Telecommunications Law and Practice.* Sweet and Maxwell: London.

Lowi, Theodore. 1964. 'American business, public policy, case studies and political theory'. *World Politics.* 15: 677-715.

Maier, Lothar. 1993. 'Institutional Consumer Representation in the European Community'. *Journal of Consumer Policy.* 16: 355-374.

March, James and Olsen, Johan. 1984. 'The New Institutionalism: Organisational Factors in Political Life.' *American Journal of Political Research* 78.

Marks, Gary, Liesbet Hooghe, Kermit Blank. 1996. 'European Integration from the 1980s: State-Centric v. Multi-Level Governance'. *Journal of Common Market Studies,* 34:3.

Mattli, Walter. 1999. 'Explaining regional integration outcomes'. *Journal of European Public Policy* 6:1.

Maurer, Andreas. 1999. '(Co-) Governing after Maastricht: The European Parliament's institutional performance 1994-1999.' Study submitted under Contract No.IV/99/23, European Parliament Directorate General for Research Working Paper.

Maurer, Andreas, Jürgen Mittag, Wolfgang, Wessels. 2000. 'Theoretical perspectives on administrative interaction in the European Union.' In Thomas Christiansen and Emil Kirchner. Eds. *Committee Governance in the European Union*. Manchester University Press: Manchester.

Mazey, Sonia and Jeremy Richardson. 2001. 'Institutionalising Promiscuity: Commission-Interest Group Relations in the European Union.' In Stone Sweet, Sandholtz and Fligstein. Eds. *The Institutionalisation of Europe.* Oxford University Press: Oxford.

McMahon, Joseph A. 1995. *Education and Culture in European Community Law.* The Athlone Press: London.

Micklitz, Hans-W. and Stephen Weatherill. 1993. 'Consumer Policy in the European Community: Before and After Maastricht.' *Journal of Consumer Policy* 16: 3-4, pp.285-321.

Moravcsik, Andrew. 1993. 'Preferences and power in the European Community: a liberal intergovernmentalist approach.' *Journal of Common Market Studies* 31.

Moravcsik, Andrew. 1998. *The Choice for Europe.* UCL Press Ltd: London.

Moravcsik, Andrew. 1999a. '*The Choice for Europe*: Current Commentary and Future Research: A Response to James Caporaso, Fritz Scharpf, and Helen Wallace'. In *Journal of European Public Policy* 6:1, pp.155-79.

Moravcsik, Andrew. 1999b. 'A New Statecraft? Supranational Entrepreneurs and International Cooperation.' *International Organisation* 53:2.

Moschonas, Andreas. 1998. *Education and Training in the European Union.* Ashgate: Aldershot.

Natalicchi, Giorgio. 1996. *Telecommunications Policy and Integration Processes in the European Union.* Thesis dissertation: UMI, Ann Arbor.

Natalicchi, Giorgio. 2001. *Wiring Europe. Reshaping the European Telecommunications Regime.* Rowman & Littlefield: Maryland.

Nelsen, Brent F. and Alexander C.-G. Stubb. Eds. 1998. *The European Union Readings on the Theory and Practice of European Integration, Second Edition.* Lynne Rienner/Macmillan: London.

Neuhold, Christine. 2000. 'The Standing Committees in the European Parliament'. In State of the Art Report, Contract Number: HPSE-CT-1999-00019, Title: Governance by Committee, the Role of Committees in European Policy-Making and Policy Implementation, Maastricht.

Neunreither, Karlheinz. 1999. 'The European Parliament' in Cram, Dinan and Nugent. Eds. *Developments in the European Union.* Macmillan: Hampshire.

Nugent, Neill. 2001. *The European Commission.* Palgrave: London.

Otala, L. 1992. European Approaches to Lifelong Learning. Council of European Rectors/European Round Table of Industrialists: Geneva/Brussels.

Page, Edward, C. 1997. *People Who Run Europe.* Clarendon Press: Oxford.

Peters, B. Guy. 1999. *Institutional Theory in Political Science: The 'New Institutionalism'.* Pinter: London.

Peterson, John. 1999a. 'The choice for EU theorists: Establishing a common framework for analysis.' *European Journal of Political Research* 39: 289-318.

Peterson, John. 1999b. 'The Santer era: the European Commission in normative, historical and theoretical perspective.' *Journal of European Public Policy* 6: 1.

Peterson, John and Elizabeth Bomberg. 1999. *Decision-making in the European Union.* Macmillan: Hampshire.

Peterson, John and Margaret Sharp. 1998. *Technology Policy in the European Union.* Macmillan: Hampshire.

Pierson, Paul. 1996. 'The Path to European Integration: A Historical Institutionalist Analysis'. *Comparative Political Studies* 29:2.

Pierson, Paul. 2000a. 'The Limits of Design: Explaining Institutional Origins and Change'. *Governance* 13:4, pp.475-499.

Pierson, Paul. 2000b. 'Increasing Returns, Path Dependence, and the Study of Politics'. *American Political Science Review* 94:2.

Pollack, Mark A. 1996. 'The New Institutionalism and EC Governance: The Promise and Limits of Institutional Analysis.' *Governance* 9: 4.

Pollack, Mark A. 1997. 'Representing diffuse interests in EC policy-making'. *Journal of European Public Policy.* 4:4.

Pollack, Mark A. 1998. 'The Engines of Integration? Supranational Autonomy and Influence in the European Union.' In Stone Sweet and Sandholtz eds. *European Integration and Supranational Governance.* Oxford University Press: Oxford.

Pollack, Mark A. 2000. 'The End of Creeping Competence? EU Policy-Making Since Maastricht.' *Journal of Common Market Studies.* 38: 519-538.

Puchala, Donald. 1999. 'Institutionalism, Intergovernmentalism and European Integration: A Review Article'. *Journal of Common Market Studies* 37:2.

Rhodes, R.A.W. 1986. *European Policy-Making, Implementation and Subcentral Governments: A Survey.* European Institute of Public Administration: Maastricht.

Rittberger, Berthold. 2001. 'Which institutions for post-war Europe? Explaining the institutional design of Europe's first community.' *Journal of European Public Policy*, 8:5, pp.673-708.

Rosamond, Ben. 2000. *Theories of European Integration.* Macmillan: Hampshire.

Ryba, Raymond. 1995. 'Unity in Diversity: the enigma of the European dimension in education'. *Oxford Review of Education.* 21:1.

Sandholtz, Wayne. 1993. 'Institutions and Collective Action. The New Telecommunications in Western Europe'. *World Politics* 45:2.

Sandholtz, Wayne. 1998. 'The Emergence of a Supranational Telecommunications Regime'. In Sandholtz and Stone Sweet. Eds. 1998. *European Integration and Supranational Governance.* Oxford University Press: Oxford.

Sandholtz, Wayne and John Zysman. 1998. 'Recasting the European Bargain.' In Nelsen, Brent F. and Alexander C.-G. Stubb. Eds. *The European Union Readings on the Theory and Practice of European Integration, Second Edition.* Lynne Rienner/Macmillan: London.

Sandholtz, Wayne and Alec Stone Sweet. Eds. 1998. *European Integration and Supranational Governance.* Oxford University Press: Oxford.

Sandholtz, Wayne and Alec Stone Sweet. 1999. 'European integration and supranational governance revisited: rejoinder to Branch and Øhrgaard'. *Journal of European Public Policy* 6:1, pp.144-54.

Sbragia, Alberta. 2000. 'The European Union as Coxswain: Governance by Steering'. In Jon Pierre. Ed. *Debating Governance. Authority, Steering and Democracy.* Oxford University Press: Oxford.

Schäfer, Gunther. 2000. 'Linking Member State and European Administrations – the Role of Committees and Comitology.' In M. Andenas, A. Türk. Eds. *Delegated Legislation and the Role of Committees in the EC.* Kluwer Law International: The Hague.

Scharpf, Fritz. 1997. *Games Real Actors Play. Actor-Centred Institutionalism in Policy Research.* Westview Press: Boulder, Co.

Scharpf, Fritz. 1999. 'Review section symposium: The choice for Europe: Social purpose and state power from Messina to Maastricht'. In *Journal of European Public Policy* 6:1, pp.155-79.

Scharpf, Fritz. 2000. 'Notes Toward a Theory of Multilevel Governing in Europe.' MPIfG Discussion Paper 00/5, http://www.mpi-fg-koeln.mpg.de.

Shearman, Claire. 1986. 'European Collaboration in Computing and Telecommunications: A Policy Approach'. *West European Politics*. 9:4.

Schmidt, Suzanne K. 1997. 'Sterile Debates and Dubious Generalisations: European Integration Theory Tested by Telecommunications and Electricity'. *Journal of Public Policy* 16:3, pp.233-71.

Schmidt, Susanne K. 1998. 'Commission Activism. Subsuming Telecommunications and Electricity under European Competition Law.' *Journal of European Public Policy* 5:169-184.

Schmitt, Ralf in Wolfgang Wessels, 1997. *Europe from A to Z: guide to European Integration*. OOPEC: Luxembourg.

Schneider, Volker and Raymund Werle. 1990. 'International regime or corporate actor? The European Community in telecommunications policy.' In Dyson and Humphreys. Eds. *The Political Economy of Communications. International and European Dimensions.* Routledge: London.

Schneider, Volker. 1992. 'Organised Interests in the European Telecommunications Sector.' In Justin Greenwood, Jürgen R. Grote and Karsten Ronit. Eds. *Organised Interests and the European Community*. Sage: London.

Schneider, Gerald and Mark Aspinwall. 2001. 'Institutional research on the European Union: mapping the field'. In Schneider and Aspinwall. Eds. *The rules of integration. Institutionalist approaches to the study of Europe.* Manchester University Press: Manchester.

Scott, W. Richard. 2001. *Institutions and Organisations Second Edition*. Sage: Thousand Oaks, California.

Scully, Roger. 2001. 'The European Parliament as a Non-Legislative Actor'. *Journal of European Public Policy* 8:1.

Shaw, Jo. 1999. 'From the Margins to the Centre: Education and Training Law and Policy'. In Paul Craig and Gráinne de Burca. *From the Margins to the Centre: Education and Training Law and Policy*. Oxford University Press: Oxford.

Sherrington, Philippa. 2000. *The Council of Ministers – Political Authority in the European Union.* Pinter: London.

Smyrl, Marc E. 1998. 'When (and How) Do the Commission's Preferences Matter?' *Journal of Common Market Studies* 36:1.

Snyder, Francis. 1993. *Soft Law and Institutional Practice in the European Community*. EUI Working Paper LAW, No.93/5

Spence, David. 2000 'Plus ça change, plus c'est la même chose? Attempting to reform the European Commission'. *Journal of European Public Policy* 7:1.

Sprokkereef, Annemarie. 1992. 'Developments in European Community Education Policy'. In Juliet Lodge. Ed. *The European Community and the Challenge of the Future*. Second Edition. Pinter: London.

Stone Sweet, Alec and Wayne Sandholtz. 1997. 'European integration and supranational governance'. *Journal of European Public Policy* 4:3.

Stone Sweet, Alec, Wayne Sandholtz and Neil Fligstein. Eds. 2001. *The Institutionalisation of Europe*. Oxford University Press: Oxford.

Stubb, Alexander, Helen Wallace and John Peterson. 2003. 'The Policy-Making Process.' In Elizabeth Bomberg and Alexander Stubb. Eds. *The European Union: How Does it Work?* Oxford University Press: Oxford.

Stuyck, Jules. 2000. 'European Consumer Law After the Treaty of Amsterdam: Consumer Policy In or Beyond the Internal Market'. *Common Market Law Review*. 37:367-400.

Tallberg, Jonas. 2000. 'Supranational influence in EU enforcement: the ECJ and the principle of state liability.' *Journal of European Public Policy*. 7:1.

Teichler, Ulrich. 1996. 'Student Mobility in the Framework of ERASMUS: findings of an evaluation study'. *European Journal of Education*. 31:2.

Teichler, Ulrich, Jean Gordon, Friedhelm Maiworm. Eds. 2000. *SOCRATES 2000 Evaluation Study*. Study for the European Commission Contract No. 1999 – 0979/001 – 001 SOC 335BEV.

Thatcher, Mark. 1997. 'The Development of European Regulatory Frameworks: The Expansion of European Community Policy-Making in Telecommunications.' In Stelios Stavridis et.al. Eds. *New Challenges to the European Union: Policies and Policy-making*. Ashgate: Aldershot.

Thatcher, Mark. 1999. 'The Europeanisation of Regulation. The Case of Telecommunications'. European University Institute. *Working Paper* RSC No.99/22.

Thatcher, Mark. 2001. 'The Commission and national governments as partners: EC regulatory expansion in telecommunications 1979-2000'. *Journal of European Public Policy* 8:4, pp.558-584.

Thatcher, Mark. 2002. 'The Causes and Consequences of Regulation by Networks: Telecommunications in Europe'. In Claus-Dieter Ehlermann and Isabela Atanasiu. Eds. *European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities.* Hart Publishing: Oxford/Portland Oregon.

Thomson, Robert, Jovanka Boerefijn and Frans Stokman. 2002. 'The European Political Space: Measuring Preferences of Actors in European Decision Making'. Unpublished Manuscript.

Tsebelis, G. and Garrett, G. 2001. 'The Institutional Foundations of Intergovernmentalism and Supranationalism in the European Union'. *International Organisation,* 55:2.

Ungerer, Berben and Costello. 1989. *Telecoms for Europe 1992. The CEC Sources.* IOS: Amsterdam.

Wallace, Helen. 2000. 'Analysing and Explaining Policies'. In Wallace and Wallace Eds. *Policy Making in the European Union.* Fourth Edition. Oxford University Press: Oxford.

Wallace, Helen. 2001. 'The Changing Politics of the European Union: An Overview'. *Journal of Common Market Studies* 39:4.

Weatherill, Stephen. 1999. 'Consumer Policy.' In Paul Craig and Gráinne de Burca. Eds. *The Evolution of EU Law.* Oxford University Press: Oxford.

Wessels, B. 1999. 'European Parliament and Interest Groups.' In Katz, R., Wessels, B. Eds. *The European Parliament, the National Parliaments, and European Integration.* Oxford University Press: Oxford.

Westlake, Martin. 1999. *The Council of the European Union.* Revised edition. John Harper Publishing: London.

Wincott, Daniel. 1999. 'The Court of Justice and the Legal System'. In Cram, Dinan and Nugent. Eds. *Developments in the European Union.* Macmillan: Hampshire.

General EU Primary Documents

87/373/EEC Council Decision of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission.

1999/468/EC Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission.

Commission. 1993. *Growth, Competitiveness, Employment. The Challenges and Ways Forward into the 21st century.* Bulletin EC Supplement 6-93.

Modus Vivendi Agreement between Council and European Parliament regarding Comitology. OJ C 293/1. 8 November 1995.

List of the Committees which assist the Commission in the exercise of its implementing powers. OJ C 225/2. August 8, 2000.

Commission. 2000. *White Paper on European Governance.* COM (2000) 324 final.

Commission. 2001. *Report from the Commission on the working of the committees during 2000.* COM (2001) 783 final.

European Convention Working Group V. 2002. *Report on Complementary Competences. Brussels, 4 November.* CONV 375/1/02.

Case Law

Van Gend en Loos. Case 26/62.

Costa v. ENEL. Case 6/64.

Italy v. Commission. [1982] OJ L 360/36.

Gravier v. City of Liège. Case 293/83. [1985] ECR 593 3 CMLR.

Belgian State v. René-Humbel and Marie-Thérèse Edel. Case 263/86. [1989] I CMLR 393.

French Republic v. Commission. Case C-202/88.

Frankovich. Joined Cases C-6/90 and C-9/90

Buet v. Ministère Public. Case 328/87 [1989] ECR 1235.

GB Inno BM v. CCL Judgement. Case C-362/88 [1990] ECR I – 667.

European Parliament v. Council. Case No. C-259/95 [1997] ECR I – 5303.

Commission v. Netherlands. Case C-144/99 regarding certain aspects of Council Directive 93/13/EC on unfair terms in consumer contracts.

Education Policy Primary Documents

Commission. 1973. EC Bulletin Supplement 10/1973. For a Community Policy on Education (Janne Report).

Commission. 1976. First Education Action Programme. OJ C 38. 9 February 1976.

Commission. EC Bulletin 3-1987. European Integration in Education and Culture. The French Government Blue Paper.

Commission. White Paper on Education and Training: Teaching and Learning – Towards the Learning Society. COM (95) 590.

Commission. 1999. Communication *e*Europe: An Information Society for all. COM (1999) 687 final.

Commission. 2001. Communication Making a European Area of Lifelong Learning a Reality. COM (2001) 678 final.

Commission. Proposal for a European Parliament and Council Directive on the recognition of professional qualifications. March 1992. COM (2002) 119 final.

Commission and Council. Detailed work programme on the follow-up of the objectives of education and training systems in Europe. Brussels. 20 February 2002.

Council. Resolution on Education. Official Journal C 92 25.04.1975.

Council. Erasmus Decision. Official Journal L 166 25.06.1987.

OJ C 98 of 20.08.1974

Council Directives:
77/452/EEC
77/453/EEC
78/1028/EEC
80/154/EEC
85/384/EEC
85/432/EEC
93/16/EEC
concerning the professions of nurse responsible for general care, dental practitioner, veterinary surgeon, midwife, architect, pharmacist and doctor.

Council Directive (Architects Qualifications) 1985/384 of 10 June 1985.

Council. General System for the recognition of higher diplomas. Council Directive 89/48 of 21 December 1988 OJ L 1989 19116.

Council. Decision 92/51/EEC of 24 July 1992. OJ L 1992 209/25.

Council. 2000. Lisbon European Council Presidency Conclusions.

Written Question E-2621/96 by Hedwig Keppelhoff-Wiechert (PPE) to the Commission. 14 October 1996.

Socrates Decision:

Decision 819/95/EC of the European Parliament and Council. SOCRATES I. 14 March 1995.

Commission Proposal to Increase Socrates I Budget. COM (1997) 99 final.

Commission. Final Report on the implementation of the SOCRATES programme 1995-1999. COM (2001) 75 final.

Commission. Interim Evaluation of SOCRATES 1995-99. COM (1997) 99.

Inter-Institutional Declaration on the incorporation of financial provisions into legislative acts. COM (1999) 0293.

European Parliament. Report on Implementation of SOCRATES Programme. A5-0021/2002.

European Court of Auditors. Special Report No.2/2002 on the SOCRATES and Youth for Europe Community Action Programmes. Information Note. ECA/02/07. 09/04/2002.

Commission. Socrates II Initial Proposal: COM (1998) 329 final. OJ No. C314 1998.

Opinion of Economic and Social Committee. OJ C 410 30.12.1998.

Opinion of Committee of the Regions. OJ C 51 1999. Item 13.

Amended Commission Proposal. COM (1998) 719 final. OJ C 34 1999.

Common Position (EC) No.6/1999 adopted by the Council on 21 December 1998.

EP Second Reading OJ C 153, 01.06.1999.

Decision No. 253/2000/EC of the European Parliament and of the Council of 24 January 2000 establishing the second phase of the Community action programme in the field of education 'SOCRATES'.

Commission Proposal for a Decision of the EP and of the Council amending Decision No.253/2000/EC establishing SOCRATES II. COM (2002) 193.

EP Report A5-0268/2002 on Proposal COM (2002) 193.

Consumer Policy Primary Documents

Commission. 1975. First Action Programme on Consumer Policy. OJ C 92. 25.04.1975.

Commission. 1993. Tenth Report on the Application of Community Law OJ C 233. 30.08.1993.

Commission. 1993. Green Paper on Guarantees for Consumer Goods and After-Sale Services. COM (1993) 509.

Commission. Staff Paper. 1998. Consumer Policy: Past Achievements. April. SEC (1998) 564.

Commission. 2000. Report to the Council and the EP on consumer complaints in respect of distance selling and comparative advertising. COM (2000) 127 final.

Commission. 2000. White Paper on Food Safety. (COM) 1999 719 final.

Commission. 2001. Eighteenth Annual Report on Monitoring the Application of Community Law (2000). COM (2001) 309 final.

Commission. 2001. Green Paper on EU Consumer Protection. Brussels. COM (2001) 531 final.

Commission Communication to the European Parliament, the Council, the Economic and Social Committee and Committee of the Regions. Consumer Policy Strategy 2002-2006. COM (2002) 208.

Commission. 2002. Follow-up Communication to the Green Paper on EU Consumer Protection. COM (2002) 289 final. Brussels.

Commission. 2002. Proposal for a Directive of the European Parliament and of the Council on the harmonisation of laws, regulations and administrative provisions of the member states concerning credit for consumers. COM (2002) 443 final.

Commission. 2002. Nineteenth Annual Report on Monitoring the Application of Community Law (2001). COM (2002) 324 final.

Council Directive 79/581/EEC of 19.06.1979 on consumer protection in the indication of the prices of foodstuffs (amended by Council Directive 95/58/EC).

Council Resolution of 19 May 1981. OJ C 133. 13 June 1981.

Council Directive 84/450/EEC of 10.09.1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (amended by Directive 97/55/EC of the EP and Council).

Council Directive 85/577/EC of 20.12.1985 to protect the consumer in respect of contracts negotiated away from business premises (door-to-door selling).

Council Resolution of 23 June 1986 on the future orientations of the Community consumer policy. OJ C 167 05.07.1986.

Council Directive 87/102/EEC of 22.12.1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (amended by Council Directive 90/88/EEC and Council and EP Directive 98/7/EC).

Council Directive 88/314/EC of 07.06.1988 on consumer protection in the indication of the prices of non-food products (amended by EP and Council Directive 95/58/EC).

Council Directive 90/34/EEC of 13.06.1990 on package travel, package holidays and package tours.

Council Directive 93/13/EEC of 05.04.1993 on unfair terms in consumer contracts. EP and Council Directive 1999/44/E of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

EP and Council Directive 94/47/EC of 26.10.1994 on time share property purchase.

EP and Council Directive 97/7/EC of 20.05.97 on the protection of consumers in respect of distance contracts.

EP and Council Directive 98/6/EC of 16.02.1998 on consumer protection in the indication of the prices of products offered to consumer.

EP and Council Directive 98/27/EC on injunctions for the protection of consumers interests.

EP and Council Decision 283/1999/EC of 25 January 1999 establishing a general framework for Community activities in favour of consumers.

EP and Council Directive 99/44/EC of 25.05.1999 on certain aspects of the sale of consumer goods and associated guarantees.

European Parliament. Resolution on Commission Green Paper COM (1993) 509. OJ C 205 25.7.1994.

European Parliament Report on 'Commission Communication on priorities for consumer policy 1996-1998'. C4-0501/95.

European Parliament Report on the Communication from the Commission on the Consumer Policy Action Plan. 1999-2001 (COM (98) 0696). 21 April 1999. A4-0208/99. Rapporteur: Mr Philip Whitehead.

Economic and Social Committee. 1996. The Economic and Social Committee of the European Communities Opinion on the Single Market and Consumer Protection: Opportunities and Obstacles (Own-Initiative Opinion)'. *Journal of Consumer Policy* 19:211-244.

David Byrne. 2001. 'Consumer Protection – Past and Future'. Belgian Presidency Conference on 'The Consumer's involvement in the Single Market'. Brussels. 4-6 October.

David Byrne. 2002. Speech on Consumer Protection Green Paper to European Parliament Kangaroo Group. 9 July 2002.

Telecommunications Policy Primary Documents

Commission. 1980. Recommendations on Telecoms Policy. COM (80) 422 final.

Commission. 1987. COM (1987) 290 final.

Commission. 1988. Communication on the Implementation of the Green Paper proposals. COM (1988) 48.

Commission. 1988. Progress on the definition of the Open Network Provision – short status report. COM (1988) 718 final.

Commission. 1988. Directive (Terminal Equipment) 88/301/EEC. 16 May 1988.

Commission. 1994. COM (1994) 145 final. 27 April.

Commission. 1994. European and the Global Information Society: Recommendations to the European Council. 26 May.

Commission. 1999. Fifth Report on the Implementation of the Telecommunications Regulatory Package. COM (1999) 537.

Commission. 2000. 1999 Review Public Hearing Results. COM (2000) 239.

Commission. 2000. Communication on Unbundled Access to the Local Loop. COM (2000) 272.

Commission Communication. 2000. Results of 1999 Telecommunications Review. COM (2000) 239 final.

Commission. 2001. Seventh Report on the Implementation of the Telecommunications Regulatory Package. COM (2001) 760.

Commission. 2002. Decision Establishing European Regulators Group for Electronic Communications Networks and Services. Decision 2002/627/EC.

Commission. 2002. *Eighth Report from the Commission on the Implementation of the Telecommunications Regulatory Package.* COM (2002) 695 final. Brussels, 3.12.2002.

EP and Council Directive 95/62/EC on the application of the Open Network Provision to Voice Telephony.

EP and Council Regulation 2887/2000/EC on unbundled access to the local loop.

European Parliament. 2000. Report on Unbundled Access to the Local Loop Regulation. A5-0298/2000.

Open Network Provision Committee. 2002. Working Document. 6 February. ONPCOM 02-03.

Monti, Mario. European Commissioner for Competition Policy. 2002. 'Getting competition in local access'. Public Hearing Sector Enquiry Local Loop Unbundling. Brussels 8 July 2002. Speech/02/323.

Internet Websites Consulted

http://europa.eu.int/comm/secretariat_general/sgc/lobbies

Commissoner Viviane Reding. 2002. 'Has the EU an effective education and training strategy?' European Policy Centre. 6 March. http://www.epc.be. 10 March 2002.

Consumer Policy of the Member States of the EU, Doc XXIV (97) 1.0. http://europa.eu.int/comm/dgs/health_consumer/library/reports/nat_reports/index_en.html.

Consumer Committee. Minutes of Meeting Friday 28 June 2002. CC2002/123. http://europa.eu.int/comm/consumers/policy/committee/cc28_en.pdf.

http://europa.eu.int/comm/consumers/policy/developments/fair_comm_pract/hearing_greenpap.en.html.

http://europa.eu.int/comm/consumers/policy/developments/fair_comm_pract/responses/business_uk/cbi.pdf

http://europa.eu.int/comm/dgs/health_consumer/library/reports/nat_reports/rappde_en.pdf.

http://europa.eu.int/clab/index.htm.

http://europa.eu.int/comm/information_society/policy/index_en.htm

http://europa.eu.int/information_society/services/glossary/index_en.htm#t

http://europa.eu.int/ISPO/infosoc/telecompolicy/en/Study-en.htm.

Commission. 2001. Guide to the Case Law of the ECJ in the field of Telecommunications. http://europa.eu.int/comm/dgs/information_soc/index_en.htm.

Office of the Director of Telecommunications Regulation Annual Report 2000-2001. http://www.odtr.ie/docs/annual_report/00_-1.pdf.

Operational Implications of Local Loop Unbundling and the need for technical coordination. Contractors: Political Intelligence/Gilbert and Tobin. Start Date: 22.12.2000, End Date: 21.09.2001. http://europa.eu.int/information_society/topics/telecoms/regulatory/studies/overview/text_en.htm#(2).

http://europa.eu.int/comm/consumers/index_en.html