

LOBBYING THE EUROPEAN UNION:

INSTITUTIONS, ACTORS, AND ISSUES

EDITED BY DAVID COEN
& JEREMY RICHARDSON

OXFORD

Lobbying the European Union

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Lobbying the European Union: Institutions, Actors, and Issues

Edited by
David Coen
and
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Preface

In the Preface to the 1993 edition of this volume, edited by Sonia Mazey and Jeremy Richardson, it was suggested that ‘shifts in power are noted and acted upon by interest groups, who act as a type of weather vane for the locus of power in society’. The thrust of this new volume is very similar in that we see a consistent picture of interest groups exhibiting strong adaptive tendencies. The developments since the 1993 volume have been unidirectional confirming that groups, generally being rational actors, understand that it is best to ‘shoot where the ducks are’. Groups, therefore, allocate lobbying resources to those venues which present particular opportunities in the circumstances at the time and have the capacity to shift resources to alternative venues when necessary. Thus, the multi-institutional, multilevel, European Union policy process presents many opportunities for venue shopping by groups and there is plenty of evidence that groups are increasingly adept at exploiting the particular traits of the EU policy game.

Similarly, groups are seemingly increasingly adept at recognizing that ad hoc coalition building is also increasingly important to successful lobbying. The numbers of groups active in Brussels and Strasburg are now so large that any one interest or set of interests will find it difficult to mobilize sufficient resources on its own to secure a policy ‘win’. Allies must be found and networks of support must be constructed which span the complex institutional environment in which groups operate.

However, this innovative stance by groups is underpinned by a quite familiar phenomena, namely the need for policy-makers to consult those interests who might be affected by any proposed policy change. This ‘logic of consultation and negotiation’ is timeless and entirely familiar to group theorists. It is no surprise that the EU now has a fifty-year-old mature interest group system as it would be difficult, if not impossible, to govern without one.

The massive mobilization of interests in the EU is not without its problems of course. Familiar questions of transparency, possible elite capture of access, and even of lobbying regulation have arisen within the EU as at the national level. Moreover, the EU seems no better at resolving these difficult issues, which go to the heart of the democratic process, than have the member states. Our hope is that we have managed to at least shed more light on how the EU

lobbying system works so that others may be better able to judge if the system is the bane or basis of democracy.

In preparing this volume, we owe our greatest debt to our contributors. They have all been superbly professional in delivering draft and final chapters on time and to a very high standard. Moreover, they have been unfailingly patient and supportive as we, as Editors, have occasionally been blown of course by the vicissitudes of life. We could not have wished for a more cooperative group of colleagues. We also owe a huge debt to Dominic Byatt, Oxford University Press. He has been supportive and enthusiastic throughout and has been patient beyond the call of duty as deadline after deadline has been missed.

Finally we dedicate this volume to our wives, Natasha Coen and Sonia Mazey, who have grown used to taking second place as the volume edged towards completion. Their support has been vital to us.

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Abbreviations

ALTER	Alliance for Lobby Transparency and Ethics Regulation
BASP	Bureau for Action on Smoking Prevention
CAN	Climate Action Network
CCMI	Consultative commission on industrial change
CEEP	Centre of Enterprises with Public Participation
CFSP	Common foreign and security policy
CofM	Council of Ministers
CONECCS	Consultation, the European Commission, and Civil Society
COPA	Comité des Organisations Professionnelles Agricoles
COREPER	Committee of Permanent Representatives
EAC	Europe against Cancer
ECAS	European Citizen Action Service
ECJ	European Court of Justice
ECL	European Cancer Leagues
ECO	Economic and Social Cohesion
ECSC	European Coal and Steel Community
EEB	European Environmental Bureau
EEC	European Economic Community
EESC	European Economic and Social Committee
EFSA	European Food Safety Authority
ENSP	European Network for Smoking Prevention
ENYPAT	European Network on Young People and Tobacco
EPACA	European Public Affairs Consultancies' Association
EPHA	European Public Health Alliance
EPSU	European Public Services Union
ESPRIT	European Strategic Program for R&D in Information Technologies
ETI	European Transparency Initiative
ETNO	European Telecommunications Network Operators' Association
ETUC	European Trade Union Confederation

FoEE	Friends of the Earth Europe
GMOs	Genetically modified organisms
MEPs	Members of the European Parliament
MFA	Multifibre Arrangements
NHS	National Health Service
NRA	National regulatory authorities
OMC	Open Method of Coordination
QMV	Qualified majority voting
SDO	Sustainable Development Observatory
SEA	Single European Act
SEAP	Society of European Affairs Professionals
SMO	Single Market Observatory
SNE	Seconded national experts
SOC	Social Affairs and Citizenship
TABD	Transatlantic Business Dialogue
TEN	Infrastructure and the Information Society
UNICE	Union of Industrial and Employers' Confederations of Europe
WTD	Working Time Directive
WTO	World Trade Organization
WWF	World Wide Fund

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Part I

Introduction

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Chapter 1

Learning to Lobby the European Union: 20 Years of Change

David Coen and Jeremy Richardson

1.1. Context and goals

It is universally accepted that there has been a huge growth in European Union (EU) lobbying, at the EU and national levels, over the past two decades. There is now a dense EU interest group *system* and a concurrent explosion of EU interest groups studies (Mazey and Richardson 1993; Kohler-Koch and Eising 1999; Coen 2007; Beyer et al. 2008). However, while much progress has been made in collating interest group populations (Butt Philip 1989; Greenwood 1997, 2005; Berkhout and Lowery 2008), discussing mobilization strategies (Coen 1998; Beyers 2002; Eising 2004), and identifying access criteria to institutions (Bouwen 2002; Broscheid and Coen 2003), few studies have explained the full 'EU lobbying footprint' in a multilevel and institutional environment. This volume seeks to understand the role of interest groups in the policy process from agenda-setting to implementation. Specifically, the volume is interested in observing how interest groups organize to influence the various EU institutions and how they select different coalitions along the policy process and in different policy domains.

In looking at 20 years of change, the volume captures processes of institutional and actor learning, professionalization of lobbying, and the emergence of a distinct EU public policy style. More specifically, from the actors' perspective, we are interested in assessing the rise of direct lobbying and how the emergence of fluid issue-based coalitions has changed the logic of collective action, and what is the potential impact of 'venue-shopping' on reputation and influence. From an institutional perspective, we explore the resource and legitimacy demands of institutions and the practical impact of consultation processes on the emergence of a distinct EU lobbying relationship.

Introduction

There are numerous factors, at both the institutional and actor levels, that influence the role played by interest groups in public policy. In this volume, we consider three areas.

Firstly, we consider the environment in which interest groups operate, and specifically the multilevel and institutional aspects of the EU lobbying policy process. We assess where institutions fit in the policy process and how changes in institutional roles have influenced interest group activity. Looking at the European Commission, European Parliament, Council of Ministers (CofM), European Court of Justice (ECJ), Committee of Permanent Representatives (COREPER), and European Economic and Social Committee (EESC), we analyse what institutions demand from interest groups for access to the policy process and how they have shaped specific styles of representation (see Chapters 2–7). While each institution is assessed in isolation in terms of the informational, political, and transparency demands that it requires from interest groups, all speak to where and when they play the greatest role in the policy agenda, formulation, and implementation process. As a result this volume helps to present an integrated guide to lobbying in a complex political environment. Moreover, the volume explores the traditional pluralist problems of mobilization, representativeness, risk of ‘capture’, and speed of consultation in an EU context. As a result, the volume in addition to being a guide to EU lobbying will help inform policy-makers in the current transparency debates in Brussels.

Secondly, we observe that different interest groups supply different policy goods to the policy process. Noting variance in internal organizational structures, we assess what lobbying resources actors have in terms of finance, resources, information, reputation, and democratic credentials. These public affairs functions and lobbying capacities are explored in detail in Chapters 8 and 9. Moreover, Chapters 7 and 8 complement the previous institutional perspective by addressing actor responses to political demands in terms of style, frequency, and level of contact. In terms of understanding the holistic *lobbying footprint*, these chapters assess where and when in the policy cycle different actors talk to different EU institutions and how different strategies for different institutions have emerged. Correspondingly, Part II provides an introduction to lobbying in the EU and suggestions on how to organize public affairs functions in a multinational organization.

Finally, we recognize that the political approaches used to influence the policy process, such as high-cost and low-cost strategies, insider and outsider strategies, collective and direct action, and advocacy alliances, are a function of the policy type (Coen 2007). Consequently, we look at a range of regulatory and redistributive policies to assess the degree to which this *policy makes politics*. In regulatory terms, we look at the large sector of food regulation (see Chapter 12), the politically salient issue of tobacco advertising (see Chapter 11) and the creeping EU competencies in EU health policy (see Chapter 10). In more redistributive terms, this volume addresses the role of

societal interests in the formulation of social policy (see Chapter 13). Finally, the volume looks at trade policy, a sector where the EU has had a clear and long mandate and international interests to manage (see Chapter 14). All the chapters attempt to contextualize the Europeanization of public policy and discuss the key institutions, actors, and interests in this development. Moreover, building on the institutional demands section of the volume, the case studies discuss the lobbying resources available to the key interests and explore the lobbying opportunity structures for the key lobbyists, and the possibility of venue shopping (Richardson 2000; Baumgartner 2007; Berkhout and Lowery 2008).

In evaluating the above, it is also hoped that this volume is able to contribute to the wider theoretical debates on policy legitimacy and regulatory delegation (Scharpf 1999; Majone 2001; Broscheid and Coen 2007), to concepts of resource dependency and trust, and information exchanges between institutions and interest groups (Chapters 2, 3, 8, and 9), and indirectly into the more normative discussions on transparency and democratic deficits (Warleigh 2000; Commission Kallas Report 2005; European Parliament 2008; Chapter 15 of this volume).

1.2. The evolution of interest representation

The EU interest group system is a complex and ever-changing environment. Interest groups have both framed the integration process and been re-defined by treaty and institutional developments. Throughout the 1980s and 1990s, interest groups and lobbyists increased (see Figure 1.1) as a succession of treaties delegated regulatory competencies to the EU (Mazey and Richardson 1993, 2005, 2007; Kohler-Koch and Eising 1999; Greenwood 2003; Beyer et al. 2008). Having been pulled into the EU political orbit by treaty mandates and the development of a community method, interest groups have evolved distinct resource dependencies and interactions with the respective institutions in the policy process (Coen 1998; Bouwen 2002; Eising 2007). Nonetheless, few studies have attempted an integrated study of the interdependence and changing identities of interest groups, bureaucrats, and politicians' demands across the EU policy cycle (Kohler-Koch and Eising 1999; Richardson 2000), much less develop detailed comparative case studies of opportunity structures and rationales for venue shopping (Baumgartner 2007; Mahoney 2007).

As Figure 1.1 shows, interest groups and lobbyists have been active in European policy since its creation. However, the size, range, and type of interest groups have evolved dramatically in the last 20 years. While the early days of interest representation in the European Community were characterized by national representation and collective action via trade

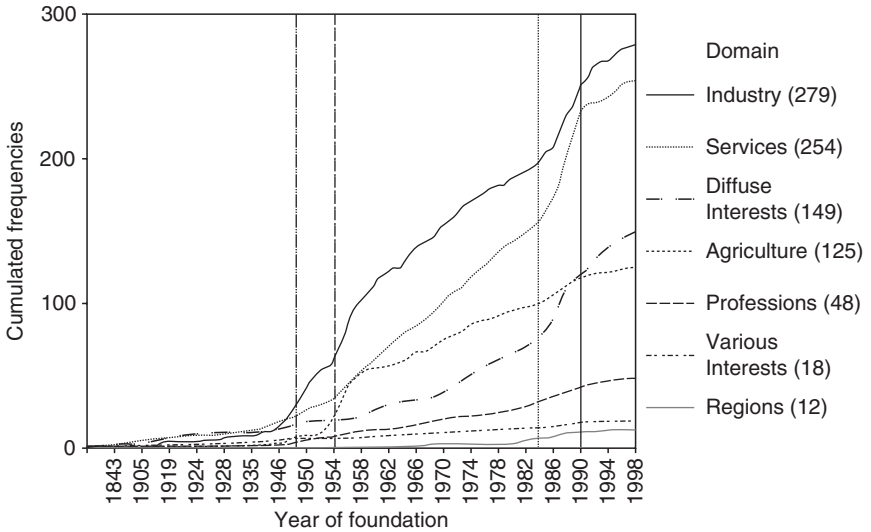


Figure 1.1. European interest groups according to domain and year of foundation from 1843 to 2001 (cumulated frequencies).

Note: Vertical lines denote the implementation of different treaties or treaty changes.

Source: Beyers et al. 2008. General Secretariat of the European Commission. CONNECS, May 2002.

associations, employee groups, and trade unions (Schmitter and Streeck 1999) by the early 1990s direct lobbying by business and the arrival of NGOs and societal interests were on the increase (Mazey and Richardson 1993; Coen 1997; Greenwood 2005). Today it is estimated that some 15,000–20,000 interests operate in Brussels and some 2,600 special interest groups have offices in Brussels (Commission Kallas Report 2005; Landmarks Publications 2003 Greenwood 2005). Disaggregating these figures, we see a vast array of stakeholders operating in the EU public policy process ranging from 300 firms and 843 trade associations, 429 citizen interest bodies, 198 regions, 103 think tanks, 115 law firms, and 153 public affairs firms (Greenwood 2005; Landmarks Publications 2003). These ratios are confirmed by the recent European Parliaments’ estimate of 5,039 accredited interest groups, breaking down into 70 per cent business orientated and 30 per cent NGO. However, as Berkhout and Lowery (2008) correctly observe, all these figures are open to some debate with double counting of economic interests, one-off visits carrying as much weighting as regular lobbyists, and undercounting of national interests that occasionally directly lobby or use intermediaries. What is beyond doubt is that today’s interest representation is a big business with an estimated 60–90 million Euro of revenue generated annually from lobbying activities in the EU (Gueguen 2007; Euro Active July 2008).

With such a variety of interest groups mobilized, it is hardly surprising that we are observing the emergence of distinct EU lobbying strategies and complex advocacy coalitions that take advantage of the new opportunity structures (Coen 1998, 2007; Richardson 2005; Woll 2006; Baumgartner 2007; Mahoney 2007). Effective lobbying in the EU had always depended on using all the available political channels in whatever permutation appears appropriate to the policy issue and stage of the policy cycle (see Chapters 8, 9, 10, 12, and 14). However, the creeping competencies of EU institutions and the establishment of the single market, in addition to pulling interests into the EU political orbit, also altered the political nature/structure of domestic interest groups with increased cross-border activity, joint ventures, and political alliances. As a result, we no longer see EU interest politics in terms of 'bottom-up' national interests feeding into the EU, or 'top-down' coordination of EU lobbying, rather we see a managed multilevel process with numerous feedback loops and entry points constrained by the size of the interest group, lobbying budgets, origin, and the policy area. The knock on effect of the multilevel lobbying strategy was the need for the professionalization of public affairs and government affairs functions in the late 1990s to manage this complex process (see Chapters 8 and 9).

1.3. EU lobbying policy cycle

Few doubt today that the gradual transfer of regulatory competencies to the EU contributed to the Europeanization of interest representation (Mazey and Richardson 1993, 2006; Greenwood 2005). While much of the increase in interest groups numbers can be explained in functional terms (Greer 2006; Chapter 10 of this volume), this volume makes a strong case for EU institutions acting as coercive forces for the change and the creation of a distinct EU lobbying model (Mahoney 2005; Richardson 2005; Broscheid and Coen 2007). We illustrate that each major EU institution has over time developed specific formal and informal institutional criteria for access, and that most significantly for EU public policy, trust and credibility have emerged as the strongest lobbying currency in Brussels.

In the case of the European Commission, Bouwen, in this volume identifies three functions that affect the style of lobbying in different ways: the legislative, executive, and guardian functions. In legislative terms, the Commission is an agenda-setter with the formal right to initiate and draft legislative proposals (Cram 2001; Pollack 2003). Moreover, the policies addressed have tended to be of a regulatory nature and as such the Commission can be seen to operate as a non-majoritarian regulator who requires a large degree of technical and political information (Majone 2003). However, with only 15,000 functionaries, the Commission looks to favoured interest groups from

Introduction

the 15,000 lobbyist to provide information in a complex elite pluralist arrangement (Bouwen 2002; Broscheid and Coen 2007). In fact, most Commission officials recognize the role of interests as legitimate and effective interlocutors in the policy process. For example, Koepl (2000) in surveying the 373 heads of unit in the Commission observed that lobbyists acceptance in the policy process was built upon professional competence and that 67 per cent of *fonctionnaires* believed that lobbyists were necessary and initiated contact with them. In executive terms, the Commission is responsible for the management of EU finances and as such is lobbied by member states, national interest, and EU interest group on the distribution of funds in the common agricultural policy (CAP), cohesion and research policy – and it is perhaps this lobbying that most reflects the US rent-seeking models with log-rolling and porkbarrel games. Finally, Bouwen and McCown observe lobbying by litigation on treaty interpretation and poor implementation and transposition of EU directives by domestic and EU interest groups (Bouwen and McCown 2007; see Chapter 5 of this volume).

Recognizing an institutional role for the Commission in framing interest groups, increased activity and variance in lobbying style can be explained in terms of the financial incentives provided, regulatory competencies of the Commission's units, and the creation of new institutional venues and forums. First and foremost, the Commission has been active in the creation of a number of societal and environmental interest groups and has thus helped overcome *Olsonian* collective action problems of large and diverse interest groups. The logic has been driven by a functional desire to create an EU constituency and policy elite (see Chapter 16) to formulate and disseminate policy. However, in recent years, this logic has also been underpinned by a need to legitimize the EU policy process, in response to complaints about the EU's democratic deficit (see Warleigh 2001; Chapter 15 of this volume). Moreover, in addition to directly funding and creating EU interests, there has been the creation of a number of Commission consultative committees in social, justice, and home affairs which has created institutional opportunities and increased lobbying activity by societal interest groups (see Mahoney 2004).

Most significantly and unique to EU lobbying is the emergence of the regulator – regulate lobbying model at the Commission (Richardson 2006; Coen 2007) and the establishment of an interest group intermediation system that requires trust-based relationships between what might be perceived as insider interest groups and EU officials. Accepting the rationale of delegated regulatory competencies to the Commission on the grounds of credible commitment, blame avoidance, and market and technical expertise (Majone 2001, 2005), the policy-making legitimacy of the Commission is often seen as high. However, this form of intermediation causes important tensions between *political* and *policy* legitimacy. That is to say that some policy-making requires high degrees of 'input' legitimacy from a limited range of technically informed interest groups that make for fast and efficient policy-making – this

is most true in product and market-creating regulation. However, in more redistributive policy and process regulation, the Commission will look for wider consultation to provide it with an *output* legitimacy (Scharpf 1999). As a result, we observe significant variance in interest representation interaction and concentration between Commission Director Generals (DGs) (see Broscheid and Coen 2007). As Coen in this volume illustrates, Enterprise and Industry DGs have the greatest cluster of interest groups and the highest degree of direct representation by lobbyists in line with the logic that market creation requires technical input from the regulated companies and consumer groups, while DG Research has the greatest number of forums designed to facilitate wider consultation. However, we would also expect interest activity to be dense in Enterprise, Environmental, and Health DGs as this is where the greatest EU legislative activity has occurred in the last five years (Pollack 2003; Richardson 2006; Chapters 10–12 of this volume).

In terms of interest representation, the European Parliament has gone through a huge transformation in the last 20 years. The Maastricht and Amsterdam treaties substantially enhanced its powers with the introduction of co-decision and conciliation procedures with the CofM and as a result its role in the policy formulation process has increased (Peterson and Shackleton 2006). However, while becoming a significant lobbying channel for interest groups in the EU, it is still a complex institution with multiple internal veto points and opportunities for log-rolling (see Hix 2005; Chapter 3 of this volume). Due to its political rather than non-majoritarian agency structure, it is more susceptible to media pressure and public opinion (Earnshaw and Judge 2006). As such, new styles of EU lobbying have emerged at the EP in the last ten years.

Lehmann (Chapter 3) while correctly noting that the Commission has the right of initiative makes a strong procedural case for power shifts between the three core EU institutions and for the need for careful monitoring and political intervention at the European Parliament by interest groups. As a consequence of its increasing role in EU policy formulation, it is now estimated that some 70,000 individuals make contact each year with the European Parliament (Corbett et al. 2005) and business now spends 20 per cent of its lobbying resources (compared to 25 per cent at the Commission) on attempting to influence the legislative committees and individual MEPs (Chapter 8). Much like the Commission, an important currency of influence is technical information, which legitimizes the committees' reports and responses vis-à-vis the Council and Commission positions, but unlike in the Commission consultation process, interest groups are also required to provide political capital to improve MEPs' reputations and profiles domestically and within the Brussels community. The above illustrates what Lehmann calls the tension between the effective branch of the legislative authority and a public arena for wider political debate. Thus the most successful interest groups at the European Parliament are those that have successfully demonstrated the capacity for issue linkage to

wider public goods such as the environment, global competitiveness, or employment policy via wider social and economic alliances.

In inter-institutional lobbying terms, the European Parliament and Commission are considered open and transparent institutions by most interests operating in Brussels. The CofM by contrast appears closed and difficult to access as it meets behind closed doors in search of intergovernmental consensus and, indeed, keeps no record of interest mediation (Greenwood 2005; Eising 2007). This limited interest representation is surprising, when we consider that in adopting EU legislation the European CofM is the final decision maker in the EU policy process, and a veto point for groups wishing to block proposals (Hayes-Renshaw and Wallace 2006). Thus at closer inspection, there is more activity at the CofM than the existing literature would have us believe; as Hayes-Renshaw demonstrates in this volume there are clear insider and outsider strategies that can be pursued by EU and national interest groups. However, to fully understand interest group representation at the Council we must first and foremost understand that the type of information required is not the same as the Commission and Parliament. Accepting that the Council members are representatives of national interests (Bouwen 2002; Chapters 4 and 6 of this volume), they are generally expected to reach agreement on legislative proposals from their national ministries, and thus do not seek the same level of technical information in Brussels as the Commission and Parliamentary officials. Rather, the Council members look to their respective stakeholders, including interest groups, in member states.

Accepting the notion of the council representing national interests, Hayes-Renshaw illustrates how domestic interests reversed EU proposals in the area of Takeovers Directives, Tobacco, and Food Safety (also see Chapters 11 and 12), by initially lobbying home governments and then looking for appropriate allies in member states. Thus domestic interest groups exert an influence via a bottom-up process with the aim of gaining a qualified majority at the council (see Chapter 6). In procedural terms, a domestic interest will have the greatest potential lobbying influence at the time of its own country's Presidency – as issues can be promoted onto the agenda or delayed for the six month presidency – such as in the case of the German presidency's withdrawal of support for the End of Vehicle Life Directive (see Tenbucken 2002; Tallberg 2006). However, such lobbying has a high degree of uncertainty and risk of intergovernmental concessions being made. As a result, those interest groups able to influence the agenda at Commission only use the Council as a last resort.

However, even at the Council not all the lobbying activity occurs domestically as the Council secretariat provides expertise to Council meetings and COREPER does much of the pre-negotiations and analysis via working groups of national civil servants and Commission officials (Hayes-Renshaw and Wallace 2006). While the secretariat has traditionally been under-researched

in terms of interest representation, it is a potentially interesting area for new study with the introduction of trilogues – an informal meeting between representatives from the three EU institutions to negotiate a legislative compromise either prior to the first or second reading or under conciliation – and the concurrent increase in the activity of secretariat officials with the Parliament, Commission, and lobbyists (Farrell and Heritier 2004). COREPER, on the other hand, provides opportunities at both the national level for groups by influencing national civil servants on the specialized working parties (Kohler-Koch 1994; Eising 2007; see Chapter 6 of this volume) and the EU level via lobbying the Commission representatives of the working parties and the permanent national representations in Brussels. In sum, lobbying the Council and COREPER can be effective in blocking and reformulating policy and is an important part of a well-managed multilevel lobbying strategy. However, because of the emphasis on the national lobbying channel, its impact in framing and altering EU interest group logics is often minimal. Rather, the national characteristics of lobbying will predominate at the Council and often create the problems of cross-national lobbying (Schmidt 2006; Schneider et al. 2007; Chapter 6 of this volume).

In lobbying terms, the European Court of Justice offers an alternative route for those interest groups that have not been successful in the EU or domestic public policy process we describe above. Such activity is not surprising when we consider that the ECJ has played a major role in the integration process, constitutionalizing treaties, and setting precedence of EU law over national courts (Slaughter and Mattli 1995; Stone Sweet 2000; Bouwen and McCown 2007). Rather than managing to access the policy process in the formative stages in a constructive way, some interest groups that may have found themselves marginalized due to profile, scale, resources, or limited geographical distribution can focus on domestic courts to block or redefine laws at the end of the policy process (Chapter 5 of this volume). Significantly, litigation strategies not only remove national barriers to harmonization, but they also set EU legal precedence and provide new opportunities to lobbying. In fact, McCown argues that the courts create an internal structural incentive to litigate in that *repeated litigators* tend to come out ahead due to the creation of legal precedent. However, building on case law and the success of some interest groups at the courts, we may observe greater risk of *tit for tat* litigation as a counter strategy and potentially some judicial activism (Stone Sweet 2000).

However, regardless of incentives, EU interest groups are less litigious than the traditionally adversarial US interest groups (Keleman 2006). Litigation lobbying strategies have been used more sparingly in the EU for a number of structural and lobbying cultural reasons. First, some of the reduced activity can be explained in terms of the absence of *class action* litigation at the ECJ and the fact that individual interest cannot file briefs directly to the ECJ, but rather must make submissions to the Member State or EU institutions. In terms of EU

lobbying culture, most EU interests are aware that there is a strong bias in favour of consultation rather than conflict lobbying and those constantly litigious actors are likely to damage their reputation and goodwill in Brussels. Thus for those that wish to remain insiders in Brussels lobbying circles, litigation lobbying is perhaps most effective when complemented by direct lobbying of the EU institutions (Alter and Vargas 2000; Bouwen and McCown 2007).

Outside of the legislative process, lobbyists may also seek to influence the EU public policy via the consultative bodies of the EESC and the Committee of Regions. While it is hard to quantify the direct influence of these venues on EU policy-making, Westalke in this volume notes that they can provide early intelligence about regional cleavages and offer the Commission an opportunity for a 'dry run' debate before going to Parliamentary Committees and Council. Moreover, he argues that the EESC by providing opinions early in the policy cycle may also inform the agenda of understaffed Committees of the European Parliament (Smismans 2004). However, the majority of commentators on EU interests over the last 20 years have questioned its impact on the policy process (Streeck and Schmitter 1991; Kohler-Koch 1994; Greenwood 1997, 2005; Grant 2000). Consequently, other than for some marginal societal interests, it is unlikely to be the sole access point of EU policy-making and is often seen as an indirect lobbying channel (Mazey and Richardson 2006). Rather, for most interests the EESC is seen as a potentially *complementary venue*, where lobbying messages can be reiterated to the Commission and Parliamentary Committees along the policy cycle.

It is clear that, over time, distinct institutional lobbying criteria have emerged for access to the EU policy process. However, even as EU institutions become political entrepreneurs and seek to encourage greater interest group participation and enhanced regulation and monitoring in their respective domains, increasingly sophisticated interest groups have learned to exploit the multiple opportunity structures as a given policy wends its way through the often long drawn-out EU policy cycle – with different voices, entry and exits points, and feedback loops. As a result, agenda-setting and policy formulation oscillate between national and European Channels, depending on the nature of the issue and the policy timeline. Therefore, as the study of European lobbying matures, it is important that we now attempt to develop academic studies that shed light on the lobbying process throughout the policy cycle. Part of the fascination of EU lobbying is that it is especially difficult to encompass its variety and fluidity in any one interest intermediation model. We return to this question in Chapter 16 but hope that the chapters which now follow succeed, at least in part, in meeting the objective which the founder of British pressure group studies, Sammy Finer, set himself as long ago as 1958. His call was that as the world of pressure politics was often obscured from public view we needed 'light more light!' (Finer 1958).

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Part II

Institutional Demands

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Chapter 2

The European Commission

Pieter Bouwen

2.1. Introduction

In this chapter, I investigate a number of elements that are crucial to understand the lobbying activity of private interests in the European Commission. First, the Commission's powers and responsibilities are analysed in order to study how they engender specific forms of lobbying at the European level. Secondly, the close interaction between the Commission and the lobbyists is analysed. Rather than viewing lobbying in the European Union (EU) institutions as a unidirectional activity of private interests vis-à-vis this institution, it can better be conceived as an exchange relation between interdependent public and private actors (Bouwen 2002:368). In order to fully understand the interaction between the lobbyists and the European Commission, the latter should not be regarded as a single, unitary organization. It is an internally much fragmented organization (Nugent 2001:135; Christiansen 2006:108). The functional and hierarchical fragmentation within this supranational institution is studied because it influences to a great extent the lobbying strategies of private interests. Thirdly, the various instruments the Commission employs to actively shape the system of EU interest representation are investigated: money, rule-making power, and governance style. Finally, this chapter studies how the role of the Commission has changed in the EU policy-making process and the impact this evolution has had on EU lobbying.

* The views expressed in this article are purely those of the author and may not be regarded as stating the official position of the institution for which the author is working. I am grateful to David Coen, Jeremy Richardson, and Margaret McCown for their useful comments on earlier versions of this chapter. The usual disclaimer applies.

2.2. The role of the Commission in EU policy-making and its impact on lobbying

The Commission's powers and responsibilities are prescribed in the treaties and in secondary legislation. Three crucial responsibilities are discussed here: (a) the Commission's legislative role, (b) the Commission's role as executive, and (c) the role of the Commission as guardian of the legal framework. These specific responsibilities are analysed because they each engender a specific form of EU lobbying.

2.2.1. *Agenda-setting and 'legislative lobbying'*

The Commission plays a central role in the legislative process by its sole right of legislative initiative that is based on article 211 TEC. The Commission has the formal right to initiate legislation and is thus responsible for the drafting of legislative proposals.¹ Unlike parliaments at the national level who have the right to initiate legislation, the European Parliament depends in this regard on the European Commission. The drafting of proposals takes place in the first phase of the legislative process and requires a substantial amount of technical and political information (Bouwen 2002:379). Because of the under-resourced nature of the European Commission, the institution depends heavily on external resources to obtain the necessary information (Edwards and Spence 1997:180; van Schendelen 2003:63). Its own administrative staff is for example much smaller than that of the local government of the city of Rotterdam.

Taking into account the EU's relatively small budget, the EU has developed mainly into a regulatory authority (Majone 1994). The EU institutions exercise their authority largely through the output of binding or non-binding EU rules. The attempts of private interests to influence the EU legislative process, i.e. legislative lobbying, have thereby become the major lobbying activity in Brussels (Buholzer 1998:8). In particular, the strategic choice of 'early lobbying' applies to the European Commission as an agenda-setter during the early phases of the EU legislative process (Gardner 1991:65; Nonon and Clamen 1991; Hull 1993:82; Buholzer 1998:276). It is common knowledge among lobbyists that as long as no formal documents are produced during the policy formulation stage, changes to the legislative proposals can be made much more easily.

2.2.2. *Managing EU finances and 'funds lobbying'*

The Commission exercises wide executive powers and is closely involved in the management, supervision, and implementation of EU policies (Nugent 2006:171). In particular, the Commission is responsible for the management of EU finances. In addition to overseeing the collection of the EU income, the Commission is in charge of spending the money operating within the bound-

aries of the annual budget approved by the Council and the Parliament. There are two major expenditure policies that together account for around 80 per cent of total budgetary expenditure: Common Agricultural Policy spending accounts for around 45 per cent of the annual budget and Cohesion Policy spending accounts for over 35 per cent. Less than 10 per cent of the budget is spent on investment in scientific research and development, on programmes to improve infrastructure and the EU's industrial competitiveness, and on projects to foster social integration.

The benefits of EU expenditure policies are also reaped at the individual or the group level (Hix 2005:303). For example, a Member State's receipts from the CAP are felt by individual farmers and in research policy money is targeted at specific scientific communities. Multinational firms have been able in the past to secure participation in the ESPRIT (European Strategic Program for R&D in Information Technologies) programme. It follows that private interests have engaged in lobbying strategies to participate in expenditure programmes or obtain grants, i.e. funds lobbying (Buholzer 1997:8). Private consultants and lobbying firms in Brussels sell their advice to numerous private and public interest groups on securing a grant from the European Commission usually in exchange for advice, research, or representation.

2.2.3. *Guarding the EU legal framework and 'lobbying for litigation'*

The Commission is charged with ensuring that the treaties and EU legislation are respected (Nugent 2006:180). Because of the lack of a full EU-wide policy-implementing framework, Member States have important responsibilities in implementing EU policies. In this context, the Commission's role as legal watchdog aims at checking the respect of EU law at a national level. The Commission has the power to initiate infringement procedures with the European Court of Justice based on article 226 TEC. This procedure can for instance be used in case of non-transposition or incorrect transposition of directives and in case of non-application or incorrect application of EU law. Most commonly infringements are related to the functioning of the internal market, industrial affairs, indirect taxation, agriculture, and environmental and consumer protection.

In addition to the procedure of self-notification to the Commission by Member States required in the context of certain treaty articles, illegalities may come to the attention of the Commission through interactions with private interests (Nugent 2006:181). Individuals, organizations, and firms who believe that their interests are being damaged by the alleged illegal actions of another party may and do lobby the European Commission to bring such suits (Bouwen and McCown 2007).² It follows that private interests develop lobbying strategies to push the European Commission to bring certain issues before the European Court of Justice, i.e. lobbying for litigation.

2.3. The interaction between the Commission and the lobbyists

2.3.1. *Understanding the relationship between the Commission and the lobbyists*

It would be a mistake to regard lobbying in the European Commission as a unidirectional activity of private interests vis-à-vis this institution. Also the Commission is eager to interact with lobbyists because it needs these contacts to acquire resources that are indispensable in order to fulfil its institutional role. The key to understanding the lobbying activities of private interests in the European Commission is to conceive the relation between these private interests and the Commission as an exchange relation between interdependent organizations (Bouwen 2002:368).

The exchange models developed by sociologists in the 1960s for the study of inter-organizational relationships constitute an interesting starting point for the analysis of the interaction between lobbyists and the EU institutions (Levine and White 1961:587). Some authors have already – either implicitly (Greenwood et al. 1992) or explicitly (Buholzer 1998; Pappi and Henning 1999) – used exchange theories to study EU lobbying. According to these theories, the interaction of private interests and the EU institutions needs to be conceptualized as a series of inter-organizational exchanges. These models are closely related to the resource dependence perspective of Pfeffer and Salancik (1978). Whereas both theoretical approaches emphasize the importance for organizations to exchange resources, resource dependency focuses more closely on the ensuing interdependence between the interacting organizations (Pfeffer 1997:63).

In order to gain insight into the process of resource exchange, it is important to study the resources that are exchanged between the Commission and the lobbyists. 'Access' to the European Commission is the main resource required by these private interests. In return for access to the European Commission's policy formulation, the Commission demands resources that are crucial for its own functioning: expert knowledge and legitimacy (Bouwen 2002:369–71). A Commission discussion paper from January 2000 explicitly points at the importance of expertise and legitimacy as the rationale behind the existing cooperation between the European Commission and non-governmental organizations.³

In view of the Commission's agenda-setting role in EU policy-making, expert knowledge is indispensable to draft legislative proposals in the early phases of the policy development process. It follows that a lobbyist can gain access to the Commission by providing expert knowledge to the official(s) dealing with the relevant policy proposal. Even though it might not be the Commission's primary concern, legitimacy contributes to strengthening its position in the inter-institutional decision-making process. Through wide consultation of private interests with a particular emphasis on consulting representative private interests with broad constituencies, the Commission

aims at enhancing its legitimacy and securing support for its proposals during the later stages of the legislative process (Bouwen 2006b:282). While some trade associations can certainly qualify as representative private interests with a broad constituency, trade association officials are considered in the literature to be 'industrial civil servants' who lack the expertise to inform policy formulation (Greenwood and Webster 2000:5). They are therefore likely to be granted access to the Commission for their contribution to enhancing the institution's legitimacy rather than for their provision of expert knowledge.

2.3.2. *The Commission as target for lobbying*

In order to understand lobbying in the European Commission, it is important to avoid the pitfall of viewing the Commission as a single, unitary organization. Far from being a unity actor, the Commission is an internally much fragmented organization (Nugent 2001:108; Christiansen 2006:108). It is important to study the functional and hierarchical fragmentation within the supranational institution because it influences to a great extent the lobbying strategies of private interests. A second crucial institutional feature that has to be taken into account is the extensive use of committees in the European Commission's policy formulation process. Committees thereby have become crucial access points for private interests to influence the EU decision-making process. The role of committee governance in shaping European interest representation will be analysed later in this chapter.

2.3.2.1. FUNCTIONAL DIFFERENTIATION: DIRECTORATES-GENERAL AND SERVICES

The European Commission is the product of a functionalist path of integration (Christiansen 2006:105). The Commission's organizational design has largely been determined by the tasks that it has had to fulfil. As these tasks have grown over time, the Commission has grown in size and administrative specialization. The European Commission is currently organized in thirty-eight Directorates-General (DGs) and a number of centralized services. These are predominantly sectoral in nature and provide for the specialized technical and administrative know-how in the various policy-sectors in which the Commission is active (Nugent 2001:135). In addition, there are horizontal DGs which deal with cross-cutting concerns such as the budget, personnel, statistics, press relations, financial control, or legal affairs.

The different DGs, inter-institutional contacts and relations often proliferate in specific sectoral arenas. Each DG has regular contact with the corresponding working group in the Council of Ministers and committee in the European Parliament. In a similar way, the various DGs are interacting with private interests whereby regular contacts are particularly maintained with the DG's corresponding constituency of interests (Mazey and Richardson 1997:183).

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While business interests are likely to maintain closer contacts with the Enterprise and Industry DG than with other DGs, most environmental groups will have developed close contacts with DG Environment. On the basis of the Commission's Conneccs database,⁴ Broscheid and Coen (2007) have calculated the number of interest groups that indicate lobbying activity in the different DGs.⁵ The presented data shows that interest group activity is clearly not evenly distributed across the different DGs. The very high interest group activity in the Enterprise and Industry DG reflects the important competences the EU enjoys in this functional domain, i.e. the competences related to the internal market. This example shows how the EU's expansion of competences as a consequence of successive treaty changes drives the formation and activity of interest groups (Mahoney 2004:461; Broscheid and Coen 2007) (Figure 2.1).

In several policy initiatives more than one DG is involved and internal policy coordination is therefore required. Whereas for instance the Internal Market and Services DG is always involved in financial services legislation, sometimes the Economic and Financial Affairs DG or the Health and Consumer Protection DG are also associated to the work. This situation unavoidably leads to internal Commission conflicts based on turf battles and political differences. It is the function of the Commission's Secretariat General to counter such centrifugal trends. The Secretariat General is designed to coordinate the policy initiatives between the different DGs that are involved. However, there is also one 'leading DG', which is responsible for a specific policy proposal in the European Commission (Nugent 2001:242). This DG takes the

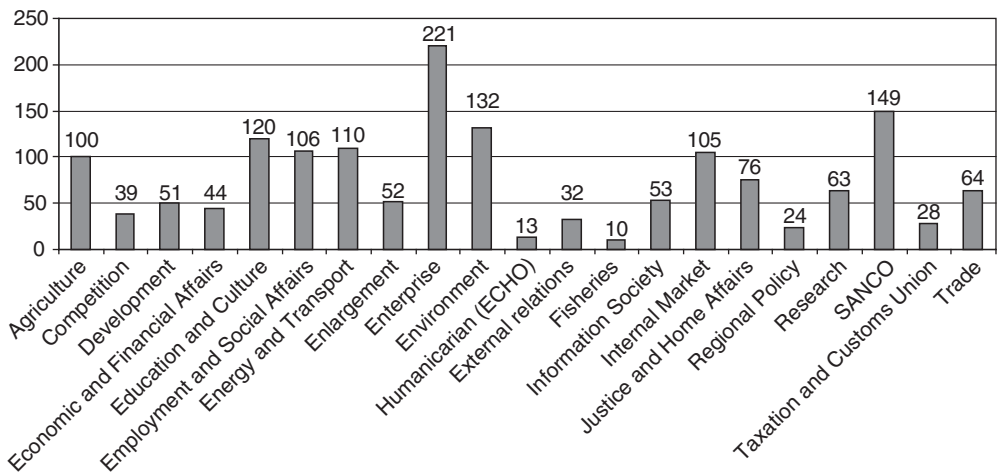


Figure 2.1. Number of interest groups active in various Directorates-General

Source: Broscheid and Coen (2007)

lead in initiating discussions with actors inside and outside the community institutional framework and thereby becomes a crucial target for lobbyists.

In the financial services area the Internal Market and Services DG is for instance the leading DG. The fact that each DG tends to maintain the most regular contacts with its corresponding constituency of interests does not necessarily entail the under-representation of other interest groups (Edwards and Spence 1997:183). Not only through the involvement of the associated DGs can other interest groups try to gain access to the policy-making process, the Commission's inter-service consultation process in this regard plays an important role. This internal consultation and coordination process guarantees the formal involvement of each interested DG and thereby offers possibilities to lobbyists to contact and mobilize their natural allies within the Commission.

2.3.2.2. HIERARCHICAL DIFFERENTIATION: THE COMMISSIONERS, CABINETS, AND CIVIL SERVANTS

Like most national administrations, the Commission is not only sectorally but also hierarchically differentiated (Cini 1996:115). Policy proposals are channelled through the different hierarchical levels in the European Commission before they are formally accepted by the college of commissioners. The college decides on policy proposals after thorough examination of the proposals by the commissioners' respective cabinets. It is, however, the lower grade Commission officials who undertake the bulk of the preparatory work. They have the resources and technical focus to deal with the policy formulation work. The higher officials tend to have more managerial functions (Nugent 2001:169). Most of the lobbying that takes place in the European Commission can be situated at the level of the lower Commission officials. They constitute the large majority of civil servants in the Commission and are more easily accessible than the high officials. Even though top civil servants, cabinet members, and commissioners have more discretionary power than lower officials, it is more difficult for private interests to successfully lobby them because they mostly get involved during the later stages of the policy formulation process.

The strategic lobbying advice of 'early lobbying' provides an explanation for the intensive lobbying that takes place at the lower levels of the Commission hierarchy. This well-known lobbying strategy is not only true with regard to the primary focus of private interests in lobbying the European Commission as an agenda-setter during the early phases of the EU legislative process (Gardner 1991:65; Nonon and Clamen 1991; Buholzer 1998:276); it is also true with regard to lobbying within the European Commission (McLaughlin and Jordan 1993:132). It is common knowledge among lobbyists that as long as no formal written documents are produced during the policy development stage, changes to the policy proposal can be made much more swiftly and easily. As

the degree of formality of policy documents increases when they move up the Commission hierarchy, it also becomes more difficult to amend them.

The Commission's decision-making procedures provide for a number of phases in the process of policy formulation and adoption: the initiation phase, the drafting phase, inter-service coordination, agreement between specialized members of the cabinets, by the *chef de cabinet*, and finally by the college of commissioners itself (Nugent 2001:250). In the first phases of the policy formulation process, the relevant DG often establishes one or more consultative committees that are chaired by Commission officials. When the policy proposal reaches the higher administrative levels, it has not only been more elaborated but the consultation with other services and DGs has streamlined the original legislative document. When a legislative proposal reaches the top Commission officials, cabinet members or commissioners, the higher degree of formality of the legislative document hampers considerably successful private interests lobbying. Even though high-level lobbying is not only necessary but under certain circumstances also highly successful, in the long run it is not an optimal lobbying strategy to gain sustained access to the policy-making process in the European Commission.

2.4. Various ways the Commission shapes EU interest representation

The European Commission is more than a 'passive' target in the relationship with private interests. It actively tries to shape the system of EU interest representation. In general terms, activities by governmental institutions draw certain interests into action and shape the patterns of interest participation in policy debates. In this way, the state can influence the level and nature of interest group activity (Broscheid and Coen 2003, 2007:180; Mahoney 2004:442). Applied to the EU, the European Commission has undertaken action to guide European interest activity. The Commission has three important instruments at its disposal to shape EU interest representation: financial resources, rule-making power, and governance style. The strategic use of these instruments is geared towards obtaining the crucial resources identified earlier in this chapter: expert knowledge and legitimacy. Through these instruments, the Commission draws certain interest groups into certain policy areas over others and consequently is a major determinant of the character of the prevailing constellation of active interest groups.

2.4.1. *Financial support*

One of the most direct methods of the Commission to influence interest group activity is the institution's direct funding of EU interest groups (Mahoney

Table 2.1. Types of groups receiving funding from the European Commission

Type of organization	Number	Per cent
Citizen organization	28	43.75
Youth/education	11	17.19
Trade association	5	7.81
EU integration group	5	7.81
Professional association	3	4.69
Association of institutions	3	4.69
Religious organization	2	3.13
Political associations	2	3.13
Federation of associations	2	3.13
Labour union	1	1.56
Business association	1	1.56
Research group/foundation	1	1.56
Total	64	100

Source: Mahoney (2004).

2004:446). In an attempt to shape the EU system of interest representation, the Commission does not equally subsidize across interest group types. Taking into account that the majority of private interests in Brussels represent producer interests (Greenwood 1997; Buholzer 1998; Schmitter, 2000), it is not surprising that the Commission appears to be funding citizens or social organizations at a higher rate than other types of groups. The Commission's aim is to foster a more balanced dialogue with civil society. From the sixty-four groups that are reported in the Commission's Conneccs database to receive some level of funding from the European Commission, the large majority are citizens or social organizations (Mahoney 2004:445).⁶ When the Commission provides funding to interest groups, the question should of course be raised of the extent to which such finance compromises their independence (Greenwood 1997:60). As shown in Table 2.1, all types of business interest groups (professional, trade, and cross-sectoral) combined make only about 14 per cent of Commission recipients, whereas citizen's groups alone comprise some 44 per cent of beneficiaries. The Commission's differential funding suggests a conscious attempt to shape the system of EU interest representation.

2.4.2. *Informal rules*

Over time, it has become the Commission approach to use informal rules or guidelines to organize and shape the interaction with private interests at the European level (Bouwen 2007).⁷ Informal rules are not the result of a legislative process at the EU level but take different forms such as customs, routines, or various procedural rules.⁸ The traditional discussion in the European Commission regarding the use of formal or informal rules to govern the consultation of private interests can be illustrated by the arguments proposed by the

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Commission in its communication on consultation from December 2002.⁹ The Commission explains in this document that a legally binding approach to consultation, i.e. the creation of formal rules, is to be avoided for two reasons. First, the Commission argued that a clear dividing line must be drawn between consultations launched on the Commission's own initiative prior to the adoption of a proposal, and the subsequent formalized and compulsory decision-making process according to the treaties. Second, a situation must be avoided in which legislative proposals could be challenged in the European Courts on the ground of alleged lack of consultation of interested parties. The Commission fears that such an overly legalistic approach would be incompatible with the need for the timely delivery of policy, and with the expectations of citizens that the EU bodies should deliver on the substance rather than concentrating on procedures.

In July 2001, the Prodi Commission issued a communication that became known as the White Paper on European Governance.¹⁰ The White Paper contained among other things a proposal designed to improve the involvement of the European civil society in the EU policy-making and implementation process. The proposal attempted to devise a set of informal rules to structure the interaction between the European civil society organizations and the EU bodies, in particular the European Commission and to a much lesser extent the European Parliament.¹¹ It was not the first attempt to organize the interaction with Europe's civil society (Lehmann and Bosche 2003); in 1993, the European Commission had produced a communication on 'An open and structured dialogue between the Commission and special interest groups'.¹² The communication discussed the situation of interest representation at the EU level and proposed some guiding principles to define the relations between the Commission and interest groups. In addition, the document encouraged private interests to take the road of self-regulation. As these principles were part of a Commission communication, they were informal rules that had no legal basis.

The proposal in the White Paper had two important goals (Vignon 2003). First, it was the Commission's aim to broaden the existing consultation process. Widening the range of consulted civil society organizations would increase the overall legitimacy of the Commission's policy actions. In particular, the Commission wanted to remedy the dominance of business interests in European interest politics by widening the existing consultation process to include increasingly non-business or diffuse interests such as consumer groups, human rights groups, or environmentalists. The second important aim of the Commission's White Paper was to rationalize the existing consultation process through a substantial reduction of the number of participants and an intensification of the existing contacts. As the European Parliament apparently felt threatened by the proposal for the extension of the Commission's consultation activities with interested parties, it pressured the Commission to make

a number of important amendments so that the second goal is unlikely to be attained (Bouwen 2007).¹³

‘Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties’ was the title of the final Communication based on the White Paper proposal. It was adopted in December 2002 and has been applied by the Commission since 1 January 2003 (Almer and Rotkirch 2004:34).¹⁴ The principles and standards set out in the document are not legally binding and therefore qualify as informal rules. The minimum standards apply when the Commission consults on major policy initiatives, in particular for the impact assessments of these major initiatives.¹⁵ The Commission’s impact assessment procedure is intended to systematically analyse the likely impacts of intervention by public authorities (Almer and Rotkirch 2004:26). According to the minimum standards, consultation processes run by the Commission should be transparent. The Commission must therefore be clear on what issues are being discussed during the consultation process, what mechanisms are being used to consult, and who is actually being consulted. On the other hand, the Commission is asking the organizations to make it apparent which interests they represent and how inclusive that representation is.¹⁶

2.4.3. *Committee governance*

One of the most important institutional features of the European Commission is its extensive use of committees in the policy process (Pedler and Schaefer 1996; Joerges 1999:8). Committee governance provides an additional instrument for the Commission to shape EU interest representation by selecting the policy areas where consultative committees are established and by choosing their participants (Mahoney 2004:447). The Commission creates the largest number of committees in the policy domains where the most interest groups are active such as enterprise policy, environmental policy, and agriculture. The establishment of committees seems to be a reaction to lobbying overload (Broscheid and Coen 2007). The composition of these committees, the responsibilities assigned to them, and the relevant procedures are all determined by the Commission (Schäfer 1996:8). Whereas so-called comitology committees and expert committees are exclusively composed of Member State officials, private interests can participate directly in the (non-comitology) consultative committees (Mazey and Richardson 2006:258).¹⁷ Because of the accessibility of the consultative committees for private interests, this section focuses in particular on these committees.

During the policy development phase, the Commission can establish consultative committees to obtain the two crucial resources identified earlier in this chapter: expert knowledge and legitimacy (Bouwen 2002:369–71; Broscheid and Coen 2007). Generally, no formal powers are attributed to

these committees. It follows that the outcomes of these committee meetings are not binding for the Commission. However, there is no doubt about the great influence of these committees during the policy development phase. They provide substantial input during the early stages of the policy process, EU legislative process, and are therefore crucial access points for private interests to influence the EU decision-making process (van Schendelen 1998:3). Participating in consultative committee meetings or alternatively indirectly finding out what is discussed in these fora has become one of the major goals of private interests in Brussels.

There is a large variation in the consultative committees organized by the European Commission. They can range from small expert groups with a limited number of participants to large hearings or round tables. The small committee meetings allow more focused and detailed discussions and are therefore the appropriate setting for obtaining detailed expert knowledge from the participants. The larger committee meetings engender rather broad discussions that often include a multitude of different voices. These larger meetings therefore seem the right setting for the Commission to get the endorsement by the stakeholders of the envisaged policy actions and thereby enhance the legitimacy of its actions. The Commission also organizes mixed committees composed of private interests, Member States, and independent scientists and experts.

As an illustration, Table 2.2 provides an overview of all the consultative committees that were organized by the Internal Market DG in the area of financial services between November 1996 and April 2001. During this period, the European Commission developed and started to implement the so-called Financial Services Action Plan (FSAP) in order to inject new momentum into the task of building a single financial market (Bouwen 2006a:183). The FSAP led to a renewed increase of Commission proposals and generated increased lobbying activity in this policy area. The creation of numerous consultative committees seems the logical reaction of the European Commission to deal with this increased lobbying activity. In contrast with comitology or expert committees, consultative committees mostly cannot be traced in the Community budget and often have a temporary nature. Establishing such an overview is therefore a rather difficult task.¹⁸

While some of the consultative committees organized by the Commission have a temporary nature and are called 'ad hoc committees', others have a more permanent nature and are therefore called 'standing committees'. Counter-intuitively, the standing committees are not necessarily the most important ones. While standing committees are often influential when they are originally set up, after a while the interest of the participants in these committees unavoidably decreases. Ad hoc committees focus the attention of their members on a precise problem for a limited period of time and are therefore often more influential. The round tables and so-called mixed expert groups

Table 2.2. Consultative Committees in the area of financial services²¹

	Ad hoc	Standing
Expert groups		
1. Financial Services Think Tank	Yes	No
2. Expert Group on Banking Charges for Conversion to the Euro	Yes	No
3. Strategic Review Group	Yes	No
4. Forum Group on Market Manipulation	Yes	No
5. Forum Group on Market Obstacles	Yes	No
6. Forum Group on Consumer Information	Yes	No
7. Forum Group on Updating the Investment Services Directive	Yes	No
8. Forum Group on the Cross-Border Use of Collateral	Yes	No
9. Forum Group on Facilitating Cross-Border Corporate Financial Services	Yes	No
10. Forum Group on Financial Conglomerates	Yes	No
11. Payment Systems Subgroup on Payment Card Charge Back	Yes	No
12. Payment Systems Subgroup on Payment by e-Purse	Yes	No
Mixed expert groups		
1. Payment Systems Technical Development Group	No	Yes
2. Payment Systems Users Liaison Group	No	Yes
3. SLIM Banking Task Force	Yes	No
Dialogue with European associations		
1. Bi-Annual Meeting with the European Federations	No	Yes
2. Comité des Organisations Professionnelles du Crédit de l'UE	No	Yes
3. Forum Group Process and the EU Representative Bodies	Yes	No
4. Consumer/Financial Industry Dialogue on Mortgage Lending Info	Yes	No
Round Tables		
1. Hearing on the Green Paper on Financial Services	Yes	No
2. Hearing on the Green Paper on Supplementary Pensions	Yes	No
3. Round Table on the General Good in the Insurance Sector	Yes	No
4. Reprioritization Hearing with the European Federations	Yes	No
5. Open Day on the Assessment of Insurance Undertakings	Yes	No
6. Reinsurance Supervision Open Day	Yes	No
7. Round Table on the Establishment of a Single Payment Area	Yes	No

include both public and private interests. Whereas round tables often have more than 100 participants, the participation in mixed expert groups is limited to a low number of experts. The so-called expert groups and dialogue with European associations are committees that consist of private sector interests only. While the expert groups consist entirely of experts from individual companies, in the dialogue with European associations, only representatives of the European federations can participate.¹⁹

2.4.4. *The European Transparency Initiative*

The latest attempt to shape European interest activity was initiated by the Barroso Commission at the beginning of 2005. Embedded in the larger European Transparency Initiative launched by Commissioner Siim Kallas, responsible for administrative affairs,²⁰ the Commission aims at increasing transparency of the participation and influence of interest representatives in

EU decision-making. The Commission adopted the Green Paper on the European Transparency Initiative on 3 May 2006. An open public consultation process started on the same day including the launch of a debate on EU lobbying and on the Commission's consultation practices.

On the basis of this consultation, the Commission decided in March 2007 to set up a public register for all interest representatives working to influence decisions taken in EU institutions. While registration will be voluntary, clear rules are envisaged on what information registrants would have to supply. The main incentives for groups to register – besides reputational – will be the recognition of their contributions by the Commission as representative of their specific sectors and the possibility of receiving alerts for consultations in their areas of interest. When participating in a public consultation, the Commission will encourage interest groups to register, otherwise their contributions cannot be considered as representative of their sector.

In addition, the Commission committed itself to draft a Code of Conduct to accompany the public register by the spring of 2008. The code contains a limited number of clear and concrete rules, indicating how interest representatives are expected to behave when representing their interests. When registering, registrants will be automatically asked to declare that they will abide by this code, or that they already abide by a similar professional code. The Commission's latest initiative to structure EU lobbying undertaken in the context of the European Transparency Initiative is fully in line with the traditional Commission approach discussed above to use informal rules or guidelines to organize and shape the interaction with private interests at the European level (Bouwen 2007). These informal rules are not the result of a legislative process at the EU level and therefore cannot be challenged by the courts.

2.5. Conclusion: The evolution of EU policy-making and its impact on lobbying

Over the last fifteen years, the EU institutions have evolved considerably and so has the Commission's role in the EU policy-making process. Generally, institutional change has important consequences for the lobbying behavior and strategies of private interests. New competences and procedures often provide new access points to influence the decision-making process. The length, the timing, and the number of EU institutions involved are important variables in this regard. But probably even more important is the relative political weight of each institution that is formally involved in the decision-making process. Institutions that can substantially influence the outcomes of legislative proceedings because of their formal role in the process naturally become important lobbying targets for EU private interests.

Important decision-making powers have been transferred through major treaty revisions from the national to the European level and this process has not yet come to an end. After the failed ratification of Europe's Constitutional treaty, the Treaty of Lisbon is the next step in the process of EU 'Constitutional Change'. In parallel, the membership of the EU more than doubled through a series of enlargements and new candidate countries are lining up for membership in the near future. These important institutional changes have been increasing considerably the Commission's responsibilities in terms of competencies and geographical spread. Moreover, they entail a substantial increase in the workload of the Commission and have thereby increased this supranational institution's dependence on outside resources. This increasing resource dependence has only been strengthening the interaction of the Commission with private interests.

On the other hand, there is an important factor that has negatively influenced the Commission's ability to fulfil its role as sole agenda-setter and that could thereby affect the attractiveness of the Commission as a lobbying target: the increasing activism of the European Council through its regular formal and informal summit meetings. As outlined in Article 4 of the Treaty on the EU: 'The European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof.' This quote seems to indicate that the European Council also plays the role of agenda-setter albeit at a more abstract level than the European Commission (Devuyst 2005:66). Even though the European Commission has been permitted to participate in meetings with the national leaders at the European Council summit meetings and to submit policy documents to these meetings, the Commission has experienced some undermining of its agenda-setting role (Nugent 2006:234). Two variables, however, put this argument somewhat into perspective. First, there is often a very close collaboration between Commission and the presidency of the Council which makes the new division of labour between these agenda-setters less problematic. Second, the Commission retains the formal treaty-based agenda-setting powers and thereby remains as gatekeeper to the legislative process, a crucial target for private interests. It follows that it is rather unlikely that increased European Council activism will fundamentally alter the relation between the lobbyists and the European Commission.

In addition to the rivalry identified between the European Commission and the European Council for exercising the agenda-setting power at the European level, more fundamental shifts in the inter-institutional balance of power have occurred. These shifts have influenced the relative weight of the Commission in the legislative process. In the literature on EU lobbying, the European Commission has traditionally been identified as the most important lobbying target in the literature (Mazey and Richardson 1999:111). The main reason is that for a long time it was conventional wisdom to argue that the European

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Parliament was an inherently weak institution (Mazey and Richardson 1999:113). While it was still possible at the time of the cooperation procedure to argue that the Parliament was relatively weak, this has changed. Consecutive amendments of the treaties have expanded the Parliament's role from mere consultation, through cooperation, to co-decision. The Treaty of Maastricht has provided the supranational assembly with real veto power in the EU legislative process (Article 189B TEU). As a consequence, the lobbyists have been considerably increasing the resources they invest for lobbying the European Parliament (Bouwen 2004b:475). While 'early lobbying' in the Commission remains crucial in order to successfully influence European public policy, it no longer suffices to be successful and more lobbyists increasingly approach the European Parliament and to a lesser extent the Council of Ministers (Bouwen 2004a:356).

While the lobbying activity of private interests in the Parliament might have increased in relative terms in comparison to the Commission, the important institutional changes over the last fifteen years outlined above have led to a further intensification of the lobbying activity of private interests in the European Commission. More responsibilities in terms of competencies and geographical scope have increased the Commission's dependence on external resources thereby necessitating a closer interaction with private interests. Through the development of informal rules and committee governance the Commission has tried to streamline the increasing interaction with private interests and address the situation of lobbying overload that has occurred in some policy areas. In view of the continuing process of constitutional change and enlargement of the EU, further attempts by the European Commission are needed to shape and streamline the system of EU interest representation. The Commission's recent attempts to further organize and shape European interest activity in the context of Commissioner Kallas's European Transparency Initiative should be seen in this light. As a consequence, private interests will need to adapt their lobbying strategies and develop new ways to approach the European Commission. It can be concluded that a stable and balanced system of interest representation is not yet for tomorrow.

Notes

1. Although the Commission has the formal responsibility of initiating legislation, it is not the only institution with agenda-setting powers. Both the Council of Ministers (Article 208 TEC) and the European Parliament (Article 192 TEC) can request the Commission to submit legislative proposals under certain circumstances. Even though these requests receive serious consideration, formal Commission proposals do not follow automatically. In this way, the Commission tries to preserve its agenda-setting powers.

2. In addition to suits based on Article 226, private interests can also push the Commission to bring cases on the basis of a set of other articles (Article 228 – bringing suits for failure to act; Article 230 – legal bases disputes).
3. Commission discussion paper: 'The Commission and non-governmental organizations: building a stronger partnership' COM(2000) 0011 final.
4. http://ec.europa.eu/civil_society/coneecs/index_en.htm.
5. Strictly speaking the Conneecs data relates to the activity the interest groups indicate in different policy areas. Broscheid and Coen (2007) argue that the institutional structures of the DGs approximate the shape of the corresponding policy areas.
6. This data is based on a data set compiled by Christine Mahoney (2004) of 700 civil society groups active in the EU from the Commission's Conneecs database.
7. In specific policy areas, however, the Commission also establishes formal rules to organize the consultation of civil society organizations (Bouwen 2007). Committees have been established on the basis of Commission decisions in order to shape the interaction with private interests. In December 1993, for example, the Commission established a General Consultative Forum on the Environment in which, among others, environmental and consumer interests could participate.
8. Another distinction between formal and informal rules is that informal rules are not subject to third party dispute resolution. In contrast, formal rules are legally enforceable by a third party judicial body. In the EU, third party legal oversight takes place via the European Court of Justice, which possesses the authority to issue binding legal sanctions.
9. Commission Communication: 'Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties', Brussels 11.12.2002, COM (2002) 704 final, p. 10.
10. European Governance, A White Paper. Brussels, 25.7.2001, COM (2001) 428 final.
11. The proposals in the White Paper on Governance are influenced by an interesting discussion paper issued by the Commission in January 2000: 'The Commission and non-governmental organizations: building a stronger partnership'. The Commission develops some guidelines for best practice in consultation in this paper.
12. Commission communication (93/C63/02).
13. European Parliament resolution on the Commission White Paper on European Governance (COM (2001) 428 – C5-0454/2001 – 2001/2181(COS)).
14. Commission Communication: 'Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties', Brussels 11.12.2002, COM (2002) 704 final.
15. In the context of the impact assessment procedure, consultation of the interested parties is mandatory and should be conducted in accordance with the principles set out in COM (2002) 704 final, supra note 14.
16. See COM (2002) 704, p. 10.
17. A distinction has to be made between so-called comitology and non-comitology committees (Van der Knaap 1996:84). Comitology committees enable the Member States to monitor the implementation by the Commission of policies decided in the Council of Ministers. However, they tend to play a less prominent role in the lobbying process because they consist only of representatives of the Member States and are not accessible for private interests. In addition, two different types of non-

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- comitology committees can be distinguished: the so-called expert committees and the advisory or consultative committees. These committees are established by the Commission to obtain expertise and legitimacy in the policy development phase.
18. The reason is that generally no resources are reserved by the Commission to finance committee meetings composed of private interests, i.e. consultative committees. Whereas the costs of national experts participating in comitology or expert committees are always reimbursed, private interests representatives have to pay their own expenses.
 19. For more details on the implementations of this initiative, see Chapter 15.
 20. http://ec.europa.eu/commission_barroso/kallas/transparency_en.htm.
 21. The table lists the committees that were operational between November 1996 and April 2001.

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Chapter 3

The European Parliament*

Wilhelm Lehmann

3.1. Introduction

Until quite recently, it seemed natural that a much-quoted description of the lobbying arena emerging in Brussels did not contain a separate chapter on the role of the European Parliament in EC decision making and the many ways and means to influence it (Mazey and Richardson 1993). One contribution to this book focused on the creative work of Commission desk officers and contended that final Commission proposals usually reproduced around 80 per cent of the first draft (Hull 1993). An increased role of the Parliament was acknowledged as a result of the recent entry into force of the Single Act, on issues related to the single market. Lobbyists were given the advice to stick to the Commission draftsman because he or she often exerted great influence over the Commission's attitude towards amendments proposed by the Parliament or the Council at the later stages of a legislative proposal.

Three treaty changes later and with another reform likely to arrive in 2010, things have changed both at the practitioner and the academic level. While the study of European lobbying evolves from an idiographic into a nomothetic discipline (Coen 2007), the practice of interest representation encompasses new institutions, policy areas, instruments, and avenues, all of this at a significantly higher level of financial and structural commitment. While the pivotal role the Commission plays due to its right of initiative remains uncontested it is an obvious fact today that with the extension of its legislative powers over the past 20 years the European Parliament has become an equally important addressee of companies, trade associations, public affairs consultants, and citizens' action groups.

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The goals of these organized interests are to transmit selected and well-prepared information to Members of the European Parliament (MEPs), to underline particular aspects of a legislative project and thus to influence the regulatory environment on their behalf or on behalf of their clients. They pursue similar objectives with the Commission and the Council but changes in the inter-institutional triangle have profoundly influenced the way lobbyists perceive the European Parliament. Consequently, new methods have been adopted to work productively in this new decision-making environment (Peterson and Shackleton 2006). Compared to dealing with streamlined hierarchical organizations such as national ministries, permanent representations, or the Commission there are important caveats when working with a heteroclitite and multipolar institution such as the European Parliament. It is an institution with multiple veto points and opportunities for horse trading and it is an institution at the centre of the rise of European party politics and media attention (Bouwen 2002; Coen 2007). Effective interest representation in the Parliament therefore requires wider coalitions, better networking, and non-technical approaches, combined with an acute sense for regional or even local political priorities.

This chapter has three objectives:

- to describe the most recent changes of the inter-institutional mechanics of European Union (EU) decision-making, particularly the evolving role of the European Parliament in codecision with respect to the other legislative branch, the Council;
- to provide a rationale of how this new role has provided new opportunity structures for EU lobbying and to investigate new logics of lobbying the European Parliament;
- to analyse the current state of affairs in lobbying the European Parliament, addressing questions such as Parliament's institutional reactions to increased lobbying and the adaptation of organized interests to new institutional demands.

At the outset, the role of interest representation in modern democratic systems will be briefly discussed. These are characterized by a new perception of the role of government with respect to markets and private actors. Some new questions for empirical lobbying research are suggested where necessary and likely scenarios for the further development of interest representation at the European level are discussed.

3.2. Public and private actors in advanced democratic systems

The legitimacy of democratic systems is usually seen to consist of three components: the quality and effectiveness of the political decisions, that is, their

benefit for citizens (output legitimacy); the recruitment, representativeness, and accessibility of political decision-makers (input-legitimacy); and finally, the legitimacy of internal procedures, that is, the transparency of legislative and administrative procedures and decisions, and the self-obligation of the institutions involved to follow rules of good administration and sufficient controllability by elected political representatives. This threefold legitimacy can be seen as the yardstick to evaluate national as well as European approaches to manage organized interest representation (on legitimacy see Scharpf 1998; Coen 2002; Broscheid and Coen 2007).

After the end of the cold war, a change of the role of the state had occurred in most European countries. Government was transformed from a carrier of sovereign powers to a service provider in an increasing number of domains. A trend towards deregulation and lean government changed the public sector (Moran 2003). This concerned not only the distribution of tasks between the private and public sectors but also the objectives and instruments of governmental activities. Regulation of economic policies, particularly in network industries such as telecommunications, energy, or transport, became an important research subject of political science. Recent work in this field has concentrated on describing intermediate 'third way' strategies between old-style interventionist, state-oriented policy-making, and liberal approaches to minimize the use of public resources for the implementation of common societal interests. Wishing to avoid a purely negative description of the objectives and the utility of state action, a recent paradigm develops the concept of the 'responsibility-sharing ensuring state' which assures the respect of public interests, for example in social policy or infrastructure, but does not carry out these activities by itself (Schuppert 2006).

The core of the ensuring state is a new definition of its instruments and the relationship between non-governmental and state actors. According to traditional legal norms, there is a hierarchical relationship between public and private acts, the state being exempt from competition and directly responsible for the implementation and surveillance of most of its activities. Recent theories stress that governance and regulation today are based on a network of public and private actors and negotiated contractual relationships. This new division of tasks may reduce the state's dependability as the last instance of many legal or political decisions (for instance, in cases of market failure) and make it more difficult to acknowledge its responsibility to provide all citizens with a given set of social or economic goods. The duty of government, both at the national and the European level, remains to respect general interests but it acts less frequently through legislation to implement them. Consequently, governments and their administrations cease to have the monopoly for assuring the common weal. In the United Kingdom, for example, both Labour and Tory leaders wish to make the National Health Service (NHS) independent from direct state interference. The basic idea in both parties seems to be that the underlying

raison d'être of the NHS is changing from the public provision of health care to the purchase of medical treatment from any provider, be it public or private. However, the principle of free service for patients remains valid. In France, traditionally more state-oriented, former President Chirac pronounced himself in favour of less regulation by law and more contractual approaches when speaking to the *Comité économique et social* in the autumn of 2006.

The new sharing of tasks and responsibilities entails new challenges for businesses and public authorities alike. It becomes essential to negotiate favourable terms for entering into contractual relationships. The public side of these negotiations is increasingly inspired by business practices such as outsourcing or focusing on core competences. Consultants specializing in the public sector often recommend solutions such as public–private partnerships for management problems at all levels of public administration.

New governance approaches still have to integrate into their theoretical framework the need for a state or supranational entity which safeguards the general interest; corrects failures in the non-governmental implementation of political, social, or economic responsibilities; and functions as an insurance against inequitable definitions of public priorities. Government cannot depend on arbitrary choices of private actors or their varying strength of implementation. There are risks that the insight into the necessity of certain regulations is sacrificed to achieve compromises with strong organized interests. Careful fine-tuning of private interest representation and intermediation, particularly in directly elected institutions, represents a substantial correction factor. Only if social groups have roughly equal chances to shape governance can an 'open society of public interest interpreters' (Schuppert) be created without running the risk of returning to a modern version of corporatism.

For the European level, a number of models similar to the above concept of the 'ensuring state' have been developed (Jachtenfuchs 2001; Kohler-Koch and Eising 1999; Lehmann 2002). Multi-level European governance is understood as a network of horizontal and vertical cooperative relationships between supranational, national, regional, and local public and private actors. At the same time, governance is also a normative idea to improve the functioning of democratic systems at the European or global level. Some years ago, this debate was intensified in the European context by the efforts of the European Commission to reform the community method through extensive consultation procedures with carefully selected partner organizations and thus to improve the input legitimacy of European governance.¹ The European Transparency Initiative (ETI) follows up on these earlier efforts but includes new elements such as special training programmes for Commission officials or internal awareness-raising campaigns.² It also gives new life to the debate on issues related to lobbying.

At the EU level great emphasis is placed on input legitimacy via provision of information and much of lobbying is still based on the logic of regulatory

delegation (Scharpf 1998; Schneider 2004; Majone 2006; Coen 2007). How far is this applicable to the European Parliament and to attempts to influence its decision-making? Interest representation, particularly at the European level, has long been seen by functionalists as instrumental for the increase of the supranational institutions' autonomy (Stone Sweet and Sandholtz 1998). At the same time, European governance is characterized by much less spending power and hierarchical implementation instruments than national governments, hence providing a case study of 'governance with less government'. Given that the multi-level structure of EU governance has mostly been more open and malleable to outside interests than close-knit and hierarchical national administrations, has the European level of governance benefited from a relative weakening of national state structures through deregulation? Or is it more easily captured by powerful trans-European associations which possibly have the support of some national governments in the Council?

3.3. The European Parliament in European policy-making: New powers and institutional demands

3.3.1. EU legislative decision-making today

The Commission, the only institution empowered to initiate legislation (right of initiative), sends a legislative proposal to the Parliament and the Council, which formally discuss it on one, two, or three successive occasions (readings). If they cannot agree after two readings (in codecision), the proposal is brought before a Conciliation Committee made up of an equal number of representatives of the Council and the Parliament. Representatives of the Commission also attend the meetings of the Conciliation Committee and contribute to the discussions, with a view to facilitating the development of acceptable compromise positions. When the Committee has reached agreement, the text agreed upon is sent to the Parliament and the Council for a third reading, so that they can finally adopt it as a legislative text. The final agreement of the two institutions is essential if the text is to be adopted as a European act.

In the Parliament, an MEP working in one of the legislative committees draws up a report on the Commission's proposal. The report usually amends the Commission proposal. The committee votes on the report and, possibly, amends it, thereby changing or supplementing the rapporteur's amendments of the original Commission proposal. When the text has been revised and adopted in plenary in the form of a resolution, Parliament has adopted its position. This process is repeated one or more times, depending on the type of procedure and whether or not agreement is reached with the Council at a

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certain stage. The codecision procedure puts Parliament on an equal footing with the Council. About two-thirds of EU legislation is now adopted jointly by the European Parliament and the Council on a wide range of areas (e.g. transport, the environment, and consumer protection). Box 3.1 provides a summary of the individual steps to be followed in the codecision and consultation procedures.

On sensitive questions of a quasi-constitutional nature or central to the Member States' interests (e.g. taxation, industrial policy, agricultural policy)

Box 3.1. The mechanics of the codecision and consultation procedures

3.1. Codecision procedure

The codecision procedure was introduced in the Treaty on EU (Maastricht 1992) and strengthened by the Treaty of Amsterdam (1999). It makes provision for a division of legislative power between Parliament and the Council of the EU. In practice, codecision has become the most important legislative procedure. The codecision procedure is based on Article 251 of the EC Treaty (formerly Article 189b). The European Parliament and the Council have to reach agreement in order to bring the legislative process to a successful conclusion.

The procedure applies to legislation governing a large range of sectors, such as the internal market, free movement of workers, education and culture (see Table 3.1). The Reform Treaty makes provision for strengthening Parliament's co-legislative powers by extending the codecision procedure to areas where it does not yet act jointly with the Council, such as the EU's agricultural policy, research policy, and regional and social development policy (Structural Funds).

The machinery of the codecision procedure

The codecision procedure includes up to three stages and, contrary to the consultation and coordination procedures, gives Parliament a right of veto. The general outline of this procedure is as follows:

A Commission proposal is presented to the European Parliament and the Council.

First reading Parliament adopts or does not adopt amendments to the Commission proposal.

If it does *not* adopt amendments *and* if the Council also accepts the Commission proposal, the act is adopted by the Council by qualified majority.

If Parliament adopts amendments there are two possible outcomes:

If the Council approves *all* the amendments *and* does not change the Commission proposal otherwise, the act is adopted by the Council by qualified majority.

If the Council does *not* approve *all* the amendments or rejects them, the Council adopts a common position by qualified majority, which is forwarded to Parliament. It must provide a full explanation of its reasons for adopting its common position. The Commission informs Parliament of its opinion.

Second reading Parliament has three possibilities for action within three months:

If it *approves* the Council's common position or if it does not deliver an opinion within that period, the act is deemed adopted in accordance with the common position.

If it *rejects* the common position by an *absolute majority* of its *members*, the act is deemed not to have been adopted.

If it *adopts amendments* to the common position by an *absolute majority* of its *members*, the text is forwarded to the Council and Commission for their opinion on the amendments. In the last case:

Either the Council *approves all* Parliament's amendments by an absolute majority of its members, in which case the act is deemed adopted and signed by the Presidents of Parliament and the Council.

Or the Council informs Parliament that it does *not approve all* its amendments to the common position, in which case the President of the Council and the President of Parliament agree on a date and place for a first meeting of the Conciliation Committee within a six-month period.

Third reading The *Conciliation Committee*, which comprises members of the Council and an equal number of MEPs, considers the common position voted at second reading on the basis of Parliament's amendments. It has six weeks to draw up a joint text.

If the Conciliation Committee does *not approve* the joint text within the agreed time period, the act is deemed not to have been adopted and the procedure is terminated.

If the Conciliation Committee *approves* the joint text, it is presented to the Council and Parliament for approval. The Council and Parliament have six weeks to approve it; the Council takes a decision by qualified majority and Parliament by an *absolute majority of the votes cast*. The act is adopted if the Council and Parliament approve the joint text.

The details of the procedure are provided in Rules 35, 37, 49–60, and 62–68 of Parliament's Procedure: Rules and in Article 251 of the EC Treaty.

3.2. The consultation procedure

The consultation procedure may be obligatory, if required under the Community Treaties—the legislative proposal acquires the force of law only if Parliament delivers an opinion, or optionally, if the Commission asks the Council to consult Parliament. The procedure is applicable in various areas, such as agriculture, competition, tax, and in the revision of the treaties.

The European Parliament may approve, reject or ask for amendments to the Commission's legislative proposal.

In the cases laid down by the treaty, the Council consults Parliament before taking a decision on the Commission's proposal and makes sure that its opinion is taken into account. The Council is *not legally obliged* to take account of Parliament's opinion but cannot take a decision without having seen it.

This procedure is specified in Rules 35, 37, and 49–56 of the Rules of Procedure and in Article 192 of the EC Treaty.

Consultation on proposals on the initiative of a Member State under Article 67(1) of the EC Treaty or Articles 34(2) and Article 42 of the EU Treaty in the area of police and judicial cooperation in criminal matters follows Rules 41 and 34–37 or 40 and 51 of the Rules of Procedure of the Parliament. Parliament's responsible committee can invite a representative of the initiating Member State to present the proposal. The Member State representative may be accompanied by a representative of the Presidency of the Council. Before voting, the committee asks the Commission whether it has taken a position on the initiative and, if so, invites it to present its views. If two or more legislative initiatives with a common objective are presented to Parliament simultaneously they will be covered in the same report.

The consultation procedure is based on Article 67 of the EC Treaty and Articles 34 and 42 of the EU Treaty.

Source: European Parliament, Directorate General for Internal Policies.

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the European Parliament gives only an advisory opinion (the consultation procedure). In some cases, the treaty provides that consultation is obligatory, being required by the legal base, and the proposal cannot acquire binding force unless Parliament has delivered an opinion. In this case the Council is not empowered to take a decision alone.

Parliament also has a power of political initiative. It examines the Commission's annual work programme and it expresses its political priorities on which acts it would like to see introduced as soon as possible. If necessary, it can ask the Commission by a majority of its members to present legislative proposals on specific policies (Art. 192 of the EC Treaty).

To summarize the important access points for influencing negotiations in the Parliament, it is useful to consider the following:

- The appointment of the rapporteur is the first important step but quite difficult to anticipate from the outside. It belongs to Parliament's own core business. Seniority, standing in the group, and individual qualities of MEPs are important criteria for this selection.
- Negotiations at the committee stage offer a wide variety of venues. It is important to understand the rules of committee work (early exchanges of views, working documents, draft report, opinions from other committees, calendar of votes) in order to be able to act with good timing.
- Later negotiations, particularly in the framework of the Conciliation Committee, are charged with general political priorities and highly formalized. Interactions with the Council and the Member States become important. You cannot usually regain ground that was already lost in the lead committee.
- Readings and votes in the plenary are tightly controlled by the political groups, second and third readings even more than first readings. Due to the tight deadlines imposed by the treaty for second and third readings, lobbying opportunities have to be sought out swiftly and with great precision. High-level interference from national political leaders is always possible and can sometimes tilt the table.

3.3.2. *Power shifts between the EU institutions*

Institutional analyses of the effects of the past treaty revisions do not give simple results. In the legislation and implementation game issues such as agenda-setting, gate-keeping, principal-agent relations, or administrative yield depend on a high number of interacting variables. However, recent studies concur to some degree that most decisions taken by Intergovernmental Conferences since the adoption of the Single European Act (SEA) in 1987 were motivated by the intention to reduce the democratic deficit of the EU.

Furthermore, empowerment of the European Parliament appears to have been selected as the preferred strategy to solve this problem (Tsebelis and Garrett 2001; Rittberger 2005; Thomson and Hosli 2006).³

The analysis of EU law-making does not, however, fully agree on the effects of the past treaty revisions on the relative powers of the supranational actors (Parliament, Commission, and Court). There seems to be a majority view that with the reformed codecision procedure the discretionary space for the Commission (and probably the Court) has diminished. In practice, a lot depends on the relative positions of the Council and the Parliament on a given policy issue. The closer their positions evolve towards each other (e.g. on the 'more integration' vs. 'less integration' continuum), the easier further legislation is adopted and the less discretion remains for the Commission (as the implementing agent and the guardian of the treaty) or the Court as the (activist?) interpreter of union norms. On the other hand, the Commission would probably benefit from such a facilitation of legislative 'production' in its capacity as the initiator of legislation. Yet the increasing importance of the 'better law-making' discourse in the Parliament (which can be interpreted as an expression at the European level of the deregulation trend portrayed in the previous section) and its focus on decreasing administrative burdens for economic actors reduces this theoretical advantage.

The distance of Council and Parliament from the status quo in the policy space varies, of course, according to the issues under debate and their particular preference structures. Practical experience with some important dossiers (take, for example, the negotiations on the services directive⁴) indicates that in case of close cooperation between the Presidency of the Council and leading players of the Parliament, the influence of the Commission wanes. On the other hand, as mentioned above, easier adoption of new legislation should increase the room for agenda-setting by the European Commission as long as the Council's and the Parliament's rights to request legislative proposals from the Commission are used quite sparingly.

Some observers claim that MEPs' increasing power could lead to more demands from EU citizens to align their political positions with those of their respective member state governments (Tsebelis and Garrett 2001). We could also witness in future an alignment of lobbying efforts directed at either the Council/Member States or the European Parliament. For the moment, this will remain exceptional because the traditional discrepancy between a European Parliament pushing for further integration and a rather more cautious Council still prevails. But more effective European lobbying could yet lead to a certain approximation between the two arms of the legislative authority at least in some highly politicized cases. The likely further extension of Parliament's legislative clout in the future treaty on the functioning of the EU, expected to enter into force in 2010, could corroborate this trend.

The negotiations on the REACH (Registration, Evaluation, Authorisation and Restriction of Chemicals) regulation⁵ may have provided an example of such a political alignment. In addition to the unsurprising antagonism between environmental and public health campaigners and the chemical industry facing increased production costs, the level of industry opposition to the Commission's proposals also varied across different branches and regions of the chemical industry. While British, French, and Italian firms adopted a flexible approach, German companies took a very intransigent position which was well transmitted to a majority of German MEPs because the German chemical industry is considered to be the second most important one for the national economy next to the car industry. Consequently, most German MEPs, including traditionally environment-friendly political groups, favoured setting high tolerance thresholds for dangerous chemicals in order to avoid costly testing for (German) industry.

3.3.3. Consultation and binding law: A new strategy for organized interests at the European level?

Before the Commission makes a proposal, Council and Parliament wide consultation is one of its duties according to the treaties and helps to ensure that these proposals are sound. According to Protocol no. 7 annexed to the Amsterdam Treaty, on the application of the principles of subsidiarity and proportionality, 'the Commission should [...] consult widely before proposing legislation and, wherever appropriate, publish consultation documents'. Parliament often requests the Commission to present more detailed information on who is consulted when and how such consultations have been carried out. MEPs often feel they have to recoup by themselves (and sometimes by consulting the same third parties) the information gathered by the Commission previously. In this asymmetric situation, MEPs sometimes fear a biased rendering of the results of consultations when a proposal for EU legislation is presented. However, with the increasingly transparent display of consultation results (on the Internet, say) this information lag seems to narrow. Nevertheless, compensation for a possibly biased or self-interested Commission evaluation of consultation rounds remains an elegant access point for interest representatives.

There are estimates that approximately 0.5 to 1 million 'actors' (i.e. industry groups, regional and local authorities, media, small and medium enterprises and trade union associations, NGOs, universities, research centres) are regularly in touch with the European institutions.⁶ About 200,000 of them may already benefit from EU programmes managed by the Commission and often expect to have privileged access to future consultation and participation processes. Hence there is a risk of establishing a class of favoured groups, firms, and institutes if the European institutions, including the Parliament, focused

too exclusively on these well-acquainted actors (Eising 2007). The experience made by the Commission with the feedback to the White Paper on European Governance indicated, for instance, that public, regional, and local actors as well as their associations responded with numerous contributions and concrete proposals, whereas there was relative silence of many organizations of civil society, including the social partners, when compared to their degree of involvement in the preparatory phase. Recent criticism of the high-level groups installed by Commissioner Verheugen (for instance, in the case of the REACH dossier) points in the same direction. A small number of well-organized groups seem to get preferential access to the services (Peters 2005). One consequence of this strategy is the so-called 'secondary lobbyism' of less connected organizations towards groups well placed in the consultation grid.

Organized interests often have high expectations on what the union's institutions should be able to do for them. There are regular complaints from civil society and other groups that there is a serious shortage in the European institutions of methods and human resources available for managing such a diversity of inputs and for functioning with open networks. Some groups require better cooperation and more technical support from management staff and other officials for these new consultation tasks. Their wish to influence is legitimate but it is also important to maintain an unbiased definition of the European general interest and to organize fairly an ever-growing number of consultations.

The European institutions are widely seen, at least by those in regular contact with them, as more accessible than national administrations and governments but they have much less publicity with citizens, associations, universities, or cultural institutions. Still, outside interests provide the Commission with key governance resources such as expert knowledge of highly technical dossiers (see Chapter 2). While the Parliament has turned at least to some regulation of its contacts with outside parties (see below), the Commission has long sought to encourage self-regulation amongst the interests themselves and continues to be open for all kinds of third party input. With respect to its own decision-making and to the role of the legislative authority (Parliament and Council), the Commission has made it clear at several occasions that consultation can never be an unlimited or permanent process. In other words, 'there is a time to consult and there is a time to proceed with the internal decision-making and the final decision adopted by the Commission'.⁷ A clear dividing line must be drawn between consultations launched on the Commission's own initiative prior to the adoption of a proposal, and the subsequent formalized and compulsory decision-making process according to the treaties, leading to binding legislation which can be attacked by judicial means.

There is less agreement nowadays on the generally accepted depth and width of EU responsibilities and, more specifically, the legitimate instruments to be used by the Commission in its role as guardian of the treaties. Legal cases

such as the recent judgment of the Court of First Instance on France Telecom's predatory pricing practices in its homeland and the question of whether and how the Commission can search France Telecom's premises⁸ demonstrate two things: firstly, a change of the allocation of political legitimacy between the national and the European level also gives rise to more aggressive strategies of interest representation (Bouwen and McCown 2007). While firms might long have seen it as too risky or costly an approach to take legal action against the Commission, such action is nowadays an almost normal instrument of defending companies' interests with respect to binding EU legislation. Secondly, the tactics an interest chooses depend entirely on its position in different markets. What can be good in one Member State (particularly the home market) can be detrimental in others.

The increasing likelihood and the possibly negative outcomes of such litigation are of course brought to the attention of MEPs by well-prepared lobbyists when they try to influence related legislative proposals that could impinge on their interests. Since a majority of MEPs are convinced that such proceedings are rather damaging for the public image of the European institutions and since they know that political attacks levelled against the Commission can soon hit the European Court of Justice and the European Parliament there is a general sense that it is crucial to avoid, if at all possible, confrontations which could lend themselves to the knee-jerk EU-criticism cherished by a good number of national media.

3.3.4. Interest groups in the European Parliament: Institutional demands and logics of lobbying

Interest representation takes place where decisions are made. As outlined above, the Commission and the Council were the preferred counterparts of non-governmental interest groups up to the entry into force of the SEA on 1 July 1987, while the European Parliament was still viewed by some as a 'phantom Parliament' (Shanks and Lambert 1962). After the institutional position of the Parliament had been upgraded with the introduction of the new legislative procedures, pressure groups intensified their action with the Parliament as a new channel of influence. In the early stages, less organized interest groups tried to form alliances with the Parliament on issues that most concerned the general public. Relations between the Parliament and 'weaker' civic interest groups could be seen as what some EU scholars called 'advocacy coalitions' (Coen 1998, 2002; Mahoney 2007). Apparently the main strategy of these groups consisted in lobbying the Commission and the Council as the final targets via the Parliament. This had a considerable impact on the inter-institutional balance. Today the Commission and the Parliament are not always allies representing the European interest but find themselves competing for legitimacy.

One of the most often read figures concerning European lobbying are the purportedly 15,000 persons pursuing a professional activity in Brussels related to interest representation. Their total budget is supposed to be at least between 60 and 90 million Euros (Guéguen 2007).⁹ The European Public Affairs Directory 2007 claims to assemble information on 18,000 'top European decision makers', among which are also senior officials of the EU institutions. While any precise estimate suffers from several inherent constraints (what type of activity constitutes active interest representation? what about people traveling regularly to Brussels? what about freelance writers, self-employed lawyers, or independent consultants dividing their time between journalistic, legal, and lobbying work?), this figure is probably exaggerated (Watson and Shackleton 2007). Given that some of the most powerful interests in Brussels employ between 100 and 150 staff members each, it seems difficult to arrive at the above total number. For example, the European Chemical Industry Council (Cefic) employs about 140 full-time staff in Brussels, the Committee of Professional Agricultural Organisations in the European Union/General Confederation of Agricultural Cooperatives in the European Union (Copa-Cogeca) about 60, and the European Automobile Manufacturers' Association (Acea) around 100. It is important to keep in mind though that lobbyists based in Brussels are complemented each and every working day by hundreds of national and regional officials, business managers, academics, or consultants flying into the city, not to forget colleagues from organized interests or member organizations based in national or regional capitals.

More specifically, it has been estimated some years ago that there are about 70,000 individual contacts per year between the MEPs and interest groups (Earnshaw and Judge 2006; Corbett et al. 2007), which would result in about 100 contacts per MEP per year. Figures obviously vary widely between, say, the chair of an important committee and a back-bencher mainly interested in non-legislative topics. It seems certain that today, contacts between MEPs and lobbyists are still more intense. Most MEPs, from the conservative to the far left of the PSE Group, agree that companies and consultants can provide a wealth of pertinent and up-to-date factual information without which serious work in legislative committees would be much more difficult. On the other hand, Angelika Niebler, chair of the Industry Committee, the lead committee for the roaming charges file, reported a few weeks before the adoption of the regulation that she received about 50 requests for appointments per day, mainly from telecom operators. A considerable part of some MEPs' office capacity is thus consumed by the management of outside networks.

3.3.5. *Lobbying committees*

The Parliament comes into the focus of special interests as soon as the rapporteur of the competent committee is appointed and starts to prepare his or her

report. The specialized press continues to report doubtful efforts by pressure groups to influence Parliament's internal procedures, for example, to avoid certain MEPs as rapporteurs for subjects for which they are known to be critical.¹⁰ Most often, however, appointments are a result of individual energy, qualification and prestige in one's group, political manoeuvring between groups, and geographical equilibrium. Rapporteur, shadow rapporteurs, and committee chair, with the assistance of the committee secretariat and group officials, are the main gatekeepers in forming the opinion of the Parliament at this stage.

Personal acquaintance, nationality, or political affiliation might influence the accessibility and openness of parliamentarians. Assistants, the secretariats of the political groups, or the Parliament's research services are less significant but can still weigh in with targeted research support or other information. Lobbyists usually give preference to staff close to the rapporteur and the secretary of the committee. There still is much sympathy on all sides for old-fashioned face-to-face contacts between lobbyists and MEPs. MEPs still receive most requests for help and support by letter or e-mail but surprise visits in the office are also part of the game.

One lobbyist recommends that 'lobbyists should be alert to opportunities to make individual rapporteurs "shine" in the eyes of their colleagues. Well-crafted legislative reports, based on careful investigation and meticulous analysis, can enhance the reputation of a newly elected MEP. And a reputation for diligence and intellectual acumen can lead to leadership positions in the future' (Buholzer 1998). Indeed, to a large extent MEPs act as individuals (Scully and Farrell 2003). Nevertheless, to secure re-election they will try to make use of interest groups and improve their reputation in the constituency and the national party. MEPs also rely on information from interest groups, chiefly if they are expected to make well-thought-out judgements about technical details and scientific expertise. Lobbyists recognize that it is not in their interest to be suspected of underhand practices. Good relations with major EU institutions are essential for most of them.

The fact that many MEPs are not ready to accept industry rationales at face value obliges trade associations and other business groups to find a wider range of policy goods to offer. It is not sufficient to advertise positive effects for some European industries if a clear majority of MEPs is to be convinced. Public goods such as a cleaner environment or higher employment need to be included in the political equation. In general, issues which are known to be of interest to large numbers of citizens in their home country or region attract almost automatically strong attention from most MEPs. Similar reflections should be made concerning the priorities of leading figures of the constituent national political parties. Moreover, Rule 2 of the Parliament's Rules of Procedure specifies that members shall not be bound by any instructions and shall not receive a binding mandate. To agree to vote in a particular way in exchange for

whatever advantages a lobbyist may be prepared to offer would be tantamount to accepting a 'binding mandate'. Contrast this to some lobbying techniques, for instance, those described by Scottish MEP Catherine Stihler: MEPs are phoned by lobbyists demanding urgent meetings or find them knocking on the office door without an appointment (Stihler 2002); sometimes members wonder how a lobbyist got there in the first place. However, some tactics are more disturbing than others. For instance, during the ten year long debates on Directive 98/44/EC on the Legal Protection of Biotechnological Inventions, some MEPs complained about the bombardment of letters and phone calls from pharmaceutical companies such as SmithKline Beecham, Boehringer, and Aventis. MEPs expressed their hope that such pressures brought to bear by outside organizations would not happen again.

3.3.6. *Issues and strategies: Is it policy or politics that counts?*

Policy is an important variable determining both Parliament's own institutional pull on consulting input and the level of lobbying activity pushing its members. As a directly elected institution, it is particularly sensitive to issues which suddenly receive focused public attention. Examples such as the services directive or the passenger data agreement with the United States show that press coverage, sometimes combined with legal proceedings covered by the specialized media, is a determining factor both for the supply and the demand side of the opinion market. As to the substance of policies, Scharpf's distinction between negative and positive integration is one useful heuristic to identify those that tend to be more important for Parliament than others (Scharpf 1998). Problems engendered by the transition from integration-only removing barriers to integration-imposing common norms are becoming more pressing with the extension of the single market to ever more policies. Macroeconomic and social public policies increasingly have immediate effects at the microeconomic or even personal level, too. For example, consider the possible effects on pay in many professional categories of an application of the principle of the country of origin in services. By definition, regulatory policy of such dimensions becomes politics and energizes the European Parliament.

The private sector faces different challenges which have also changed its approach to influencing, for instance, recent proposals for further completion of the single market. While this grand project was unabashedly welcomed by industry, trade, and banking interests as long as it constituted primarily the removal of barriers to trade, direct investment and capital transfers, projects such as the services directive, the roaming charges regulation or the single European payment area meet with much less enthusiasm. Such regulatory policies risk benefiting consumers or workers more than business, at least in the eyes of many dominant market players. Other issues are on the political

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agenda for reasons not directly linked to the economy (for instance, the passenger data dispute with the United States) and are hence viewed skeptically by many business representatives as possible new barriers for trade or international services. In such cases, organized interests often tend to argue for self-regulation, soft-law instruments, or even outright rejection of Commission proposals. In scenarios where there is only qualified support from business interests but intense pressure from other activists the European Parliament is likely to be an important arena for fleshing out difficult compromises.

One of the challenges of developing an evidence-based logic of lobbying will be to identify types of lobbying strategies in accordance to the type of integration envisaged by a new proposal. As a first step we could define several dimensions that determine the behaviour of Parliament and organized interests: veto powers; institutional positions with respect to the status quo and preference structures (Commission/Council/Parliament); addressees of regulation (countries/regions/firms/citizens/all); which issues attract strong public interest and where; is there internal consensus in the Parliament or deep divisions between groups/nationalities/leaders vs backbenchers?

The possible permutations of these dimensions would result in at least a few dozen types of opportunity structures. In practice, the following categories, of varying degrees of importance for Parliament, probably cover most of the Parliament's legislative business and related logics of influence:

- *For EU nerds only*: policies presenting little salience for the majority of organized interests because there is no regulatory content but having high symbolic or institutional value for Parliament and/or Member State governments (e.g. regulation on the financing of political parties at the European level; statute of MEPs)
- *Other oddities*: policies which are of great interest only for a limited number of addressees of sector-specific regulation and where no significant institutional interest of the Parliament is involved or where Parliament has little powers (e.g. reform of the sugar market)
- *Pork barrels*: policies providing immediate financial incentives for selected organizations or socio-economic actors because they distribute new EU funds or redirect existing funding programmes; mostly rather little interest outside Brussels except for those immediately affected (e.g. rural development, with little Parliament influence, or research framework programme, with codecision)
- *Mysteries but for specialists*: few but very powerful interests and specialized media are concerned and Parliament pursues an institutional agenda of its own (e.g. financial services directives, related to comitology issues)
- *(Redistributive) headlines*: policies which are of great interest and easy to understand not only for several important industries but also for powerful

action groups, particular Member States, and/or wide parts of the general public and the media (e.g. services directive or roaming charges regulation)

- *Moral or prestige issues*: EU decisions carrying few short-term economic incentives but affecting either deep-seated national traditions or wide-spread public concerns (e.g. embryonic research, patentability of biotech inventions, exchange and storage of passenger data in the United States)

In most of these categories high pressure lobbying is the rule. Despite the aversions expressed by many MEPs high-pressure strategies are still recommended in many current lobbying manuals (consider Guéguen 2007 as an example). The number of MEPs directly contacted and the preferred instruments may of course vary strongly from one category to the other. For a long time, the European governance level was quite isolated from public pressure, leading to a high importance of more confidential exertion of political influence such as lobbying (Michel 2005). Future experience will show whether closer cooperation between the Parliament and the Council enhances or reduces the risk of the legislative authority as a whole to be captured by special interests.

The fact that we are all now quite experienced in comparing the relative quality and availability of lobbying input has made the business of interest representation a more competitive one. Former MEP and Chairman of the Environment Committee, Ken Collins, former President of the Scottish Environment Protection Agency and member of the European Public Affairs Consultancies' Association (EPACA), has repeatedly claimed, probably speaking for many other MEPs, that the main problem in the influence market was quality, not quantity. Badly prepared and unfocused efforts can be annoying, whereas useful and competent information is often welcome to policy-makers. Particularly useful are comparative research and evidence that will enable decision-makers to assess the impact of their proposal on the law and practices and the individual situation of large groups of citizens in each of the Member States.

Over the last decade, half inadvertently and half intentionally, the European Parliament has succeeded in introducing or provoking some elements of popular democracy in the European political arena, such as demonstrations of unions and citizens' action groups. Recent examples include demonstrations in Strasbourg protesting against some liberalizing elements of the ports and the services directives as well as movements against the dilution of the REACH regulation on chemicals. While such events are still more exceptional than at the national level, they clearly demonstrate the impact of a directly elected and majoritarian institution not only on the rules of legislative decision-making but also on the logic of influence. One golden rule to remember for organized interests trying to steer Parliament to their desired goals is this: Parliament has two institutional faces with some inherent tensions. It is both an effective branch of the legislative authority and a public arena for wider political debate.

3.3.7. *The 1990s: Parliament's institutional responses to increased lobbying*

The question whether organized interest representation is legitimate has been answered in the affirmative and the debate has moved on towards questions such as how interest representation should be managed and, in particular, how transparent financial and other networking relationships should be. The Commission recently initiated, as part of the ETI, the creation of a new database on lobbying organizations which is meant to replace or supplement an Internet resource based on voluntary self-descriptions of the organizations involved.¹¹ One motivation for this appears to be that the Commission wishes to provide more detailed information on the flows of money that nurture the lobbying networks of the EU.

In the Parliament, there is agreement among most MEPs and civil servants that lobbying is acceptable and has increased significantly over the past decade. Some empirical research confirms this anecdotal evidence although hard quantitative data are hard to obtain given the informality and confidentiality of many contacts (Greenwood 1998, 2002). What can clearly be demonstrated is the development of new instruments and the professionalization of European lobbying. It will remain a challenge for this type of research to develop reliable indicators that encompass old and new phenomena such as Parliament's intergroups, lobbying work carried out by MEPs' assistants or temporary staff placed in committee secretariats. Generally speaking, lobbying the European Parliament has most increased since the 1990s in those policies where budgetary powers could be used for political ends or where the coordination or, later, the codecision procedure applied (for instance, in single market legislation, consumer protection, environmental policy, European networks, transport, and research¹²).

An early step to find solutions to rising pressure from lobbyists was a written question tabled by MEP Alman Metten, in 1989. In 1991, Marc Galle, Chairman of the Committee on the Rules of Procedure, the Verification of Credentials and Immunities, was invited to submit proposals for a code of conduct and a register of lobbyists. Galle's proposals included a code of conduct with minimalist standards aimed at preventing abuse (such as prohibiting the sale of documents and the use of institutional premises); the establishment of 'no go' areas in the Parliament's premises, including members' offices and library facilities; examination of the role of lobbying with intergroups; and, taking an idea from the United States, the registration of lobbyists on an annual basis, spelling out the rights and obligations of those on the register, and specifying penalties for failure to comply. A final and contentious proposal required MEPs annually to state their financial interests and those of their staff on a separate register. Since no consensus could be reached as regarded the proposed definition of interest groups and the financial interests of MEPs and their staff, the

report was finally not discussed in the plenary part-session. One reason for this failure was the time pressure of the upcoming European elections of 1994. The most substantive problem, however, were the controversies on the definition of what really constituted a 'lobbyist'.

After the elections, a second attempt at regulating lobbying was undertaken by the Committee on the Rules of Procedure, the Verification of Credentials and Immunities, which requested authorization to draw up a report on lobbying in the European Parliament in August 1994 (MEP Glyn Ford was later appointed rapporteur) and another report on the declaration of members' financial interests (rapporteur: Jean-Thomas Nordmann). Mr Ford first asked for a study by Parliament's research services of the rules governing lobbying in the national parliaments of the Member States, thereby making the connection to issues of standards in public life which had arisen on the political agendas of many countries in the years before. The study showed that only a minority of Member States had provisions governing the activities of interest groups or their representatives (notably Germany and the United Kingdom).

Avoiding the above-mentioned terminological difficulties Mr Ford proposed a straight-forward solution. He suggested that the College of Quaestors should issue permanent passes to persons who wished to enter Parliament frequently with a view to supplying information to members within the framework of their parliamentary mandate. Later on, the Ford report became concerned not only with regulating the activities of lobbyists, but also with those of parliamentarians, and the incremental extension of its scope led to spirited political debates among the principal groups.

In 1996, the Ford (and the Nordmann) reports were successfully submitted to the plenary after a first version had been referred back to the Committee in both cases.¹³ The Ford report proposed amendments to the Parliament's Rules of Procedure, according to which the Quaestors should grant interest representatives a pass in exchange for acceptance of a code of conduct and registration. With regard to financial interests, each MEP is now required to make a detailed declaration of his professional activities. MEPs have to refrain from accepting any gift or benefit in the performance of their duties. Registered assistants also have to make a declaration of any other paid activities. The rules currently in force are annexed to the Rules of Procedure of the Parliament. In a further resolution based on a second report drawn up by Mr Ford, Parliament decided to supplement the Rules with a code of conduct for lobbyists (to become Article 3 of annex IX to the Rules).¹⁴ The register of lobbyists provided for in Rule 9 (2) of Parliament's Rules of Procedure has been available on the Internet for some time now. In January 2009, the list comprised over 1,600 organizations, some of which have up to five people working for them.

There are several explanations for Parliament's quite difficult quest of a consensus on the regulation of lobbying and financial interests: persisting

national differences in political culture, lack of a European regulation replacing national rules, and different cultural and judicial attitudes towards lobbying in general. Parliament's approach to enhance transparency should of course differ from that of the Commission, because each of the EU institutions should respect the role it plays in decision-making (Lehmann 2003). While the Commission as the agenda-setter and guardian of the treaty wishes to keep an open dialogue and provides only minimum standards of self-regulation, the Parliament, as a pluralistic institution participating in legislation, requires institutional structures to secure transparency and the building of stable majorities. One observer contends that 'the EP should try to reduce the immense options of pluralism to an easily comprehensible number of options and actors. The regulation of lobbying should contribute to an aggregation of interests and not a fragmentation and a pluralization of interests' (Schaber 1998).

3.3.8. Conclusion

In inter-institutional comparison the European Parliament is probably as open as the Commission. Access to the Council is far more difficult. A majority of lobbyists are aware that they have to face varying degrees of acceptance in the Parliament. They attribute this to reservations based on national culture and political allegiance. There is, for example, a clear North-South division between countries familiar with professional lobbying and those where this industry is still in its infancy. Professional lobbying by public-affairs consultants is well known in the United Kingdom, for instance, but less in Latin countries and Germany (although the latter is rapidly catching up since the federal government moved to Berlin).

Unsurprisingly, Conservative and Liberal parties are more open to producer interest group lobbying than Social Democratic or Green Parties, whereas the opposite situation may be found with some civic interests. With certain members, consultants have a reputation of being too pushy. As many of them represent clients' interests, some MEPs do not consider them as players that they should rely on or include in their personal network. When evaluating interest positions on a given policy issue, MEPs mostly give preference to those outside interests that either represent a broad constituency such as trade unions, social movements, or political parties, or those that can provide them with an aggregate view on the most efficient ways to deal with the problems and economic consequences.

Lobbying is by nature an activity that feeds on itself. To see the efforts undertaken by competitors to exert influence or present selected information leaves little choice but to do your own lobbying as well. It probably takes more to win this struggle, especially in the Parliament, since non-business interests are better organized and more professional in their working methods. In many

complicated policy decisions the legislator risks to omit or overlook important elements of the decisional set-up. The roaming charges dossier, say, appeared in a different light when certain lobbyists underlined that the major part of the charges are paid by companies for their employees on business trips. Telecom providers' polemical language about 'economic populism' somewhat lost its lustre for other sectors of the economy after this information was widely circulated in the media.

A different complication are obstacles created by political decision-making itself. Useful decisions are sometimes impossible to make because of factors unrelated to the original problem. Airlines, for example, underline that a more efficient organization of European flight corridors and air traffic controls would be a major contribution to the reduction of CO₂ emissions. However, political self-interest of national authorities makes such a reorganization exceedingly difficult and may lead to decisions imposing burdens on parties which are less effective in the representation of their interests (e.g. supplementary charges on airline tickets). Similar observations could be made with respect to the creation of a real European patent system, which has been blocked for a long time by linguistic quarrels. Intelligent European lobbying can show political players the limitations of their own frame of operations and can contribute to a restructuring of the decisional space by questioning vested interests in national systems. Unsurprisingly, it is often Parliament set against the Council in such conflicts. Section 3.4 will examine their interactions in more detail.

3.4. Bicephalic European law-making: New rules for inter-institutional negotiations and for influencing them

Relations between the Commission and the Parliament have been often described and their relative influence is the subject of much legal and social science research on EU decision-making (see Rittberger 2003; Maurer 2003; or Hix 2005 as access points to this literature). The claim put forward here is that the working relationships between the Commission and the Parliament have mainly changed because of a new style of collaboration between the Parliament and the Council. The brokering activities of senior figures of the European Parliament, often lobbying their own governments, are now much more evident. This is obviously of great interest for campaigners and lobbying firms. Their resource allocation between the national and the European level may change as a result of this evolution. On the other hand, Parliament's institutional demands have also changed in the context of achieving a compromise at the latest stages of legislation and under close public scrutiny.

3.4.1. *Why first reading agreements?*

Only a few years ago, the first legislative acts were adopted under the codecision procedure and signed by the Presidents of the Parliament and the Council, now customarily called the two branches of the ‘legislative authority’. This label has been applied in the framework of the community budget (‘budgetary authority’) but not in the early years of codecision. The fact that in many cases it is not the Council alone which adopts EU directives or regulations has taken years to become common knowledge, even in the world of Brussels interest representation. The treaty formally refers only to the Council as the decision-making institution, even where codecision applies. This will only change with the entry into force of the treaty on the functioning of the EU.

The year 2006 saw the highest percentage ever of acts adopted under codecision. Moreover, Table 3.1 demonstrates that the importance of first reading agreements has almost continuously risen since the entry into force of the Amsterdam Treaty (1999 and 2004 were election years when legislative output decreased due to the electoral campaign and the influx of many new MEPs). The mechanisms to achieve agreements at the first reading have been further specified and formalized with the latest revision of the Joint Declaration on Practical Arrangements for the codecision procedure. The Joint Declaration also enhances Parliament’s profile at the moment of signature of an act adopted jointly with the Council (a ceremony with press conference is customary now).¹⁵

The increasing application of the codecision procedure has had an impact both intra- and inter-institutionally. It is important for consultants, campaigners, and other lobbyists to understand that inside Parliament committee rapporteurs and, to a lesser extent, chairmen are strongly attached to the substantive political issues under examination and fight for what they see as the best regulatory outcome in a given policy field. This is not to say that there is no influence from other strong figures of the political groups or from the (informal) national delegations. However, this sort of pressure, mostly quite unrelated to the technical aspects of the original dossier, mounts considerably with the advancement of a draft act to the second reading

Table 3.1. Percentage of acts adopted in first, second, and third readings under the codecision procedure since the entry into force of the Treaty of Amsterdam (1 May 1999)

	1999 ^a	2000	2001	2002	2003	2004	2005	2006
First reading	5	12	21	16	32	41	34	58
Second reading	19	30	26	45	46	37	19	35
Third reading	5	19	20	15	15	14	0	10
Total	29	61	67	76	93	92	53	103

^a From 1 May.

Source: European Parliament, Directorate General for Internal Policies.

or conciliation stage. There may thus be tensions between the expert MEPs of the responsible committee (who are in any case losing their direct grip on the further proceedings) and the conciliation specialists who tend to see Parliament's institutional position or the preferences of their political group leadership as determining factors of their posture in negotiations with the Council. Naturally, there are tactical calculations on whether it is to Parliament's (or a committee's) advantage to conclude or not at the first reading. In many cases, the decision depends on the situation in the Council.

Reasons why both Parliament and Council may decide to prefer a speedy first reading adoption are manifold. It may be because the issue is considered purely technical. There may be political reasons for avoiding the supplementary windows of opportunity for different actors to interfere with a legislative dossier. One of the first first-reading agreements was the regulation on the financing of European Political Parties.¹⁶ This was of little interest for lobbyists but there would certainly have been an increased risk of disturbances from some national delegations in the Council in the case of drawn out negotiations over second (or third) readings.

There may also be a wish to speed up the entry into force of an EU act because it is deemed useful for the public image of the EU's capacity to act. The recently adopted roaming regulation, for instance, was neither a particularly technical nor an uncontroversial issue. It was accompanied by an extraordinary lobbying campaign by telecom operators. So the main reason for a speedy decision process was to display the 'Europe of results' advocated by many in the EU institutions after the defeat of the constitutional treaty. A regulation with an immediate effect on many millions of EU roamers and even more citizens who usually switch off their mobile phones when travelling to other Member States indeed seems a classic case of achieving tangible results. Still, the Council Presidency was hard-pressed to overcome the reticence of some Member States, especially those with telecom companies benefiting from holiday roaming. These delegations threatened to block any agreement and force a second reading that would allow their telecom operators more time to reap higher roaming benefits. On the other hand, the Parliament was not far from the Presidency's compromise proposals and differences among MEPs were almost negligible.

3.4.2. *Early agreements: New access points for lobbyists?*

Until the end of the 1980s, there was relatively little contact between the Parliament and Council staff, except perhaps in the budgetary procedure. Developments on legislative texts within the Council were generally communicated to the Parliament by Commission officials. Under the old consultation procedure the Parliament's role, always relatively weak, practically ceased once it had given its opinion, and the main deals were then done between the

Commission and the Council. The cooperation procedure introduced by the Single European Act complicated the situation and gave greater bargaining power to the Parliament, but still left it in a weaker position than the other two institutions. The introduction of codecision, however, led to a new triangular relationship (in the legislative field) between the three institutions and thus to a much closer direct relationship between the Parliament and the Council, including between their respective staff.

The informal trilogues necessary for early agreements are often quite challenging to handle. Only a small part of the negotiation basis is stable and precise and improvisation is more the rule than the exception when there are meetings almost every week. Moreover, committee chair, rapporteur(s), drafts-person(s), shadow rapporteur(s), group coordinators, and officials have to liaise efficiently, often in real time, before and during such trilogues in order to construct a durable compromise enabling a convincing vote in the Parliament, sometimes just a few days after the last trilogue. Under such a tight negotiation schedule, the Council enjoys some natural advantages over the Parliament, with typically two COREPER meetings per week. MEPs often have difficulty in fitting such a stringent rhythm of negotiations into their loaded agendas.

Sometimes efficient control of various versions of working documents from the Council is difficult. This not only presents a permanent challenge for lobbyists wanting to be part of the game right up to the end but also forces MEPs to form an opinion very rapidly. Disputes over whose documents are the official basis for negotiation happen regularly and render some technicalities more confusing than would be necessary if there were some mutual confidence on the correct implementation of previous steps in the negotiation. The Joint Declaration mentioned above provides for some helpful new instruments in the form of exchanges of letters between responsible Parliament and Council negotiators but does not address the problems of first reading agreements in any detail. As far as Parliament is concerned, organized interests should be aware that their chances of playing a pivotal role are probably much greater at the first reading than at any later stage.

3.4.3. Closer involvement of the Council: Chance for a two-pronged influence strategy?

Contacts between the two branches of the legislative authority are of course not limited to the staff level. Ministers from countries holding the Presidency now not only address the Parliamentary committees within their area of responsibility at the beginning of their term of office (normally in order to outline their priorities and work programme) but increasingly offer to debrief committees at the end of their term of office on what they have achieved,

notably at their respective Council meetings. The way in which these ministerial presentations are dealt with by Parliament's committees is also evolving, with some committees (and Presidencies) seeking to move away from ceremonial presentations of Presidency priority lists to more in-depth discussions on matters of substance.

Besides visits to committees, Presidency ministers now routinely call on the relevant committee chairmen (and sometimes political group coordinators within the committees as well), typically before their Presidency has started, to discuss future cooperation during their term of office, but also just before they address the committee or when they are in Brussels for the final stages of conciliation negotiations. Ministers from countries not holding the Presidency are having increasing contact with committees and their chairmen, too. The Parliament's internal Rules of Procedure provide for this possibility, and indeed encourage it to take place, but traditionally there has been a great reluctance on the part of the Council to respond to such invitations, and a preference to leave the task with the Commission.

In the case of the roaming regulation, the Council Presidency participated actively in the works of the responsible Industry Committee, attending all meetings where roaming was discussed and even taking the floor to inform on the state of play at Working Party level. The Presidency also established numerous contacts with individual MEPs and political group staff. Its goal seemed to be that the committee report should resemble as much as possible the Council Working Party position. This could be called pre-negotiation by means of influencing the tabling of amendments in committee. Parliament concessions made too early could be rather damaging in such a situation and obstruct a clear negotiation mandate *vis-à-vis* the Council for later stages of the procedure.

There has also been a significant evolution with respect to active contributions from Council representatives other than ministers. Not only Presidency but also other Council working group representatives are increasingly present in Parliament committee meetings when legislative issues are being discussed. Moreover, the representatives present are usually technical experts from the ministry in question, and know best what is at stake within the Council. The Commission, which is present at Council discussions, can also outline the state of Council discussions, but it may have a different perspective. There are of course problems as to who should be authorized to represent the Council. Ministers are often too busy at home and perhaps not sufficiently involved in the details of the proposal. The COREPER 1 members (the Deputy Permanent Representatives who deal with most codecision legislation) are more expert on the key political problems at stake and have the necessary political weight but also do not have the time to master all the details of the dossier nor to be present in routine committee meetings. However, they often meet outside committee meetings with committee chairmen and coordinators

and even individual Parliament rapporteurs to discuss legislative planning and other matters. Chairmen of the relevant Council working groups are more likely to have the time and to know the technical issues well but may not always be trusted to have the necessary knowledge of the political preferences of the other Member States.

The permanent Secretariat of the Council is perhaps not generally seen as the appropriate spokesman for a specific Council Presidency. There are many informal contacts between Parliament and Council secretariat staff on codecision files but Council officials avoid naming and shaming specific delegations attempting to block progress or to push through their particular interest. All these considerations help to explain Council secretariat reluctance to speak in Parliament committee meetings. Parliament committee staff usually know their counterparts on the Council secretariat and may have regular meetings every three or four months to discuss horizontal legislative problems such as the timing of the transmission of the common positions which are in the pipeline. Regular contacts also take place between the two institutions' respective conciliation services.

A further development are invitations transmitted to committee chairs or their substitutes to attend selected informal Council meetings. During the fifth parliamentary term (1999–2004) this was by no means the case for all Council formations but it became much more frequent towards the end of the term in such fields as employment, civil liberties and justice, and the environment. In the meantime the majority of committee chairs attend such meetings.

3.4.4. *Conclusion*

The position of the Parliament with regard to the Council is now stronger than it was, and there are far more direct contacts between the two institutions, as well as more scope for occasional coalitions against the Commission. What is yet unclear is the extent to which the Parliament's increasing influence in the codecision and budgetary contexts will spill over into areas where the Parliament has less formal powers, such as international trade agreements, justice and home affairs, or foreign policy matters, cross-cutting issues such as the Lisbon Process, or non-legislative procedures such as the Open Method of Coordination (OMC). There may also be some resistance coming from within the Parliament against too cosy relationships with the Council Presidency or other big Member States. For instance, the recent close (and effective) cooperation between two German group leaders and the German government in some very important dossiers caused some misgivings among MEPs of other groups and nationalities.

Two lessons may be drawn by lobbyists and campaigners from this newly designed playing field: the Parliament can act differently at different stages of the legislative procedure (for instance, at the committee level in a first reading

agreement or at the conciliation level in a third reading agreement) and the Parliament can be a valuable source of information on the state of play not only as concerns its inner workings but also the balance of positions in the Council. To reap these fruits, however, close observation of the proceedings and knowledge of the essential players and their staff are crucial.

3.5. Outlook

Pluralistic democratic systems are supposed to give to all economic and social actors the chance not only to represent their private interests but also to express their views on how to balance interests in the shared public space between government, civil society, and private individuals making choices about how they want to live. Nation states less inclined to claim supreme authority and sharing sovereignty with the multi-level governance system of the EU are part of an evolution towards public authorities which increasingly prefer to negotiate contractual relationships rather than to enact binding legislation. Yet, transparency and fair access to decision-making institutions will continue to be highly important. One crucial issue here has been and will continue to be how to compensate for different levels of organizational proficiency among interest groups in order to include all relevant positions in the framework of negotiations and to arrive at balanced political priorities.

The 'ensuring state' and similar governance models place the duty to provide equitably for the public good at the centre of public actors' responsibilities. A guiding principle is to transform non-state actors' calculations to maximize their individual benefit in civic contributions to broader societal interests. Strong control mechanisms are necessary if there is to be a chance to arrive at such transformations. Whether the European Parliament specifically is in need of stronger control of its relations with private interests is an open question to which the results of the renewed debate on lobbying will bring the answer. True, its current rules date back to the mid-1990s but compared to many Member States this does not seem particularly irresponsible. However, in a recent working document, the Committee on Budgetary Control called for 'greater scrutiny of lobbying activities'.¹⁷ At the end of 2007 the Committee on Constitutional Affairs presented an own-initiative report on the constitutional questions raised by lobbying in the context of the ETI.¹⁸ Among other suggestions it proposed to create a joint working group of Council, Commission, and Parliament which should consider the creation of a common register.

The European Parliament is now more integrated into the policy-making process, has real legislative power and is thus a credible lobbying opportunity for interest groups (Mazey and Richardson 2006; Coen 2007). Fine-tuning of interest representation in the European Parliament can also be seen as a

contribution to the establishment of new public behavioural norms. European institutions would be in a much weaker position in dealing with national administrations without comprehensive knowledge of local situations and technical details. To an important extent they derive this expertise from non-state partners. On the other hand there is always a risk of instrumentalization for private agendas. Two-level games to exploit political differences between the national and the European level must be watched, too. Consider the use of the Euratom Treaty to influence national debates on the choice of energy sources in some Member States.

The European governance structure has given birth to a multi-layered system of different levels and sectors of organized and aggregate interest representation. Some authors have even seen a certain fragmentation of European interest representation in the expansion of EU powers and European lobbying of the late 1990s (Grande 2001). With the advent of new communication tools contacts between decision-makers and interests are seemingly less dependent on centralized associations or federations which often proclaim bland compromise positions of little appeal to EU institutions and which are not always truly representative for the majority of their constituent members.

The further evolution of the structure and the rules of interest representation within the European Parliament are difficult to anticipate. Considering the intensification of lobbying that was recently much covered by the media and the improved access of many groups to the public authorities of national capitals (Germany being a particularly instructive case) it would, however, be surprising if the European Parliament adopted a more restrictive posture. In the debate leading to the Constitutional Affairs Committee's own-initiative report, a rather critical attitude of the Commission's financial transparency demands emerged.

Even though the frequency and intensity of European legislation are likely to decrease over the next years, this might be compensated by further enlargement and the increasing openness of some national cultures for lobbying in the traditional sense. Tight public budgets should lead to increased competition for public funds and hence for re-energized competitive lobbying at all levels of redistributive and regulatory policy-making. The increase of the information load and the professionalization of interests make it reasonable to expect an upsurge in political consultancy, which is often hardly discernible from classic lobbying. Finally, the likely further extension of Parliament's powers in 2010 should lead to new opportunity structures in fields such as agricultural or energy policy. In any case, the new inter-institutional arrangements discussed in this chapter will have to be factored in when devising an effective approach of interest representation at all access points of the Parliament and at various stages of decision-making.

Notes

1. Towards a reinforced culture of consultation and dialogue—General principles and minimum standards for consultation of interested parties by the Commission (COM(2002)704 fin).
2. COM(2007)127 fin.
3. Thomson and Hosli test bargaining models based on previous knowledge of actor preferences and arrive at the conclusion that ‘the Commission and Parliament have substantial weight in the decision-making process, even though those weights are far less than that of the Council’.
4. OJ L 376 of 27 December 2006, p. 36.
5. OJ L 396 of 30 December 2006, p. 1.
6. Cf. European Governance Newsletter no. 7, European Commission, December 2001.
7. COM(2002)704, p. 11.
8. Case T-340/03.
9. See also Raphael Minder, The lobbyists that have taken Brussels by storm (*Financial Times*, 19 January 2006; *Der Spiegel* of 13 November 2006, p. 165).
10. For example, according to the *European Voice* of 9–15 January 2003 (p. 7) a business association representing British makers of food flavourings wrote to MEP Phillip Whitehead, Member of the Committee on the Environment, Public Health and Consumer Policy, asking him to oppose a Danish colleague’s appointment as rapporteur.
11. COM(2007)127 fin.
12. A list of the policies covered by the codecision procedure can be found in Corbett et al. 2007: 218–19.
13. OJ C102E of 24 April 2008, p. 112.
14. OJ C261 of 9 September 1996, pp. 51–2 and 73–5.
15. OJ C167 of 2 June 1997, pp. 14 and 22.
16. OJ L297 of 15 November 2003.
17. Working document on the ETI, rapporteur: José Javier Pomés Ruiz (PE 380.881), 4 December 2006.
18. COM(2007)127 fin and P6-TA (2008) 0197 (adopted on 8 May 2008).

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Chapter 4

Least Accessible but not Inaccessible: Lobbying the Council and the European Council

Fiona Hayes-Renshaw

The Council and the European Council are important (some would argue the most important) and powerful actors in the European Union (EU) today. Although the similarity in their names frequently gives rise to confusion, they are separate (if interlinked) bodies with distinct decision-making roles. The Council (increasingly together with the European Parliament) is the EU's chief decision-making body on day-to-day issues, while the European Council takes the strategic decisions that shape the future of Europe. Given their respective pivotal roles, it seems only logical to assume that these two bodies and their members are the object of intense lobbying activity on the part of those whose aim it is to attempt to influence the outcome of European-level deliberations.

Yet a perusal of the literature reveals very little evidence of or advice about lobbying the Council, and still less as regards the European Council. Why should this be so, when potential lobbyists can find plenty of information about lobbying the Commission and, increasingly, the European Parliament? Two possible answers immediately present themselves: either the Council and the European Council are lobbied *less* than the other institutions, or else they are lobbied *differently* in ways that are more difficult to identify or quantify. Indeed, there is a third possibility: that they are lobbied both less than *and* differently to the other institutions.

This in turn suggests that the Council and European Council are not viewed by lobbyists in the same way as they regard the Commission and the European Parliament. This is probably due in no small measure to the Council's long-standing and oft-repeated reputation of being the most secretive and least accessible of the EU's institutions (Meynaud and Sidjanski 1971:491–638;

Nicoll and Salmon 1990:82–3; Boessen and Maarse in this volume). This negative perception has tended by extension to be applied equally to the European Council. But is this reputation well deserved? Or is it merely a ‘frame’, readily accepted by lobbyists overburdened by the complexity of the EU and anxious to simplify their task? If it is even a partial reflection of reality, what is it about the Council and the European Council that make them more difficult to approach than the other institutions? These questions will be addressed in Section 4.2 of this chapter, following a rapid explanation of the role of the Council and European Council in the EU’s decision-making process. On the basis that ‘least accessible’ is not the same as ‘inaccessible’, Section 4.3 will identify the routes by which determined lobbyists can and do approach the Council and the European Council, utilising outsider (voice) and insider (access) strategies (Eising 2005). In Section 4.4, we briefly discuss when and how lobbyists should act in approaching the Council.

4.1. The Council and the European Council

For the first four decades of its existence, the Council was largely neglected by academics in favour of the more innovative Commission, the nascent European Parliament, and the enigmatic European Council. The balance has been somewhat redressed in recent times with the publication of several comprehensive studies dedicated to the Council (see References), attesting to its central role in EU affairs. The Council emerges from these studies as a complex institution, combining characteristics that are simultaneously European and national, intergovernmental and supranational, multi-issue and sectoral; it acts both as an executive and as a legislature, and is a forum for both negotiation and decision (Hayes-Renshaw and Wallace 2006:1–30).

The Council is complex not only in terms of its basic characteristics, but also as regards its organization. Designed as an intergovernmental body, it brings together the ministerial and official representatives of each of the member governments, and provides the forum for them to articulate and defend their national interests. As such, it is the place where national and European interests collide or clash and, all going well, where they are reconciled, frequently in ways that owe more to supranationality than to intergovernmentalism. Like a large iceberg whose visible tip hints at the massive structure beneath the water, it is composed of many layers, each of which plays its part in supporting the entire structure.

The ministers who meet in the Council’s nine different configurations have neither the time nor the expertise to engage in all the detailed discussion and negotiation which their decision-making responsibilities require. They have therefore delegated the preparatory work to what is now a sizeable number of preparatory bodies, retaining for themselves the most sensitive or intractable

issues. This efficiency-enhancing arrangement effectively means that most of the Council's decisions are agreed by national officials acting under instructions from their capitals and merely rubber-stamped by the ministers when they meet as members of the Council. Thus, the Council's headquarters in Brussels hosts multiple working party meetings every day, the outcome of whose deliberations are reviewed by more senior preparatory bodies who meet on a weekly basis, also in Brussels. They in turn pass the dossiers on to the relevant Council, where the final decision is taken, with or without discussion. Strict rules laid down in the treaties determine whether these decisions are subject to unanimity or qualified majority voting (QMV), but in practice most decisions are reached by consensus, whichever voting rule applies. Transparency measures agreed over the past decade mean that some parts of Council meetings are now open to the public by means of video-streaming.

The Council is presided over by each of the member states in turn for a period of six months, during which time it is responsible for managing the Council's business. This entails not only convening and chairing all meetings from the level of working parties up to the Council (and the European Council), but also acting as the spokesperson of the Council both internally (*vis-à-vis* the other institutions), and externally (*vis-à-vis* third countries and international organizations) and managing the EU's common foreign and security policy (CFSP) in close association with the High Representative for the CFSP. In fulfilling its many tasks, which have increased in number and importance over time as a result of enlargement and the extension of the EU's agenda, the presidency is assisted by the Council Secretariat. Staffed by international civil servants, it provides administrative and legal support for the Council as a whole, and is available to advise the presidency on questions of substance, legality, and procedure.

The European Council has fascinated onlookers, both insiders and outsiders, academics, and the public, since its inception in the 1970s. The seniority of its members combined with the political importance of the topics they discuss has turned their infrequent meetings into objects of intense media attention. However, the number of in-depth studies of the European Council undertaken has been relatively limited (see References for the most recent ones) partly because of the 'difficulties of conducting research on a political body that convenes behind closed doors, whose proceedings are undocumented, and whose participants are unusually hard to gain access to' (Tallberg 2007:8). Situated atop the Council, like the apex of the iceberg, the European Council provides strategic direction and acts as the final arbiter of disputes that have proved impossible to resolve at lower levels. Composed of the heads of state or government of each of the member states, it meets only about four times a year and its work is prepared by the Council machinery. The European Council normally reaches its decisions by unanimity, although it can and does sometimes use majority

voting to reach agreement. It is presided over by the representative of the member state which currently holds the Council presidency.

4.2. The least accessible EU institution?

If we look at the EU's institutions from the point of view of interest groups wishing to influence their work, the Council differs from the Commission and the European Parliament in a number of important respects, which have the combined effect of making it difficult to lobby – or at least feed the perception that the Council is a difficult body to approach. The following five are the most obvious.

4.2.1. *Lack of transparency*

The European Commission and the European Parliament are generally regarded as 'open' institutions that welcome and indeed often actively encourage input from interest groups. Not so the Council and the European Council, which have been variously described as opaque (Dinan 1994:246), closed (Sherrington 2000:1), elusive and inscrutable (Christiansen 2001:136), secretive (Bainbridge 2003:107), and intractable (Eising 2007). Indeed, far from trying to shake off this negative image, both institutions appear to have embraced it, by insisting for decades on holding their meetings behind closed doors and refusing to release papers relating to their deliberations. The justification for this was that privacy was a necessary precondition for the compromises inevitable in negotiating agreements based on consensus. Those who rejected the evidence of the Council's hybrid institutional design and insisted on viewing it as an ordinary legislature continued to call for greater transparency of its proceedings, reaching a crescendo in the 1990s.

Realizing that it had no choice but to comply, the Council elaborated and then began to implement its transparency policy from the end of the 1990s onwards. Much has been achieved, although the perception of opaqueness remains. Despite allowing the television cameras into the meeting rooms to film certain parts of their working sessions, the Council continues for the most part to meet behind closed doors, making it extremely difficult for those with an interest in their deliberations to determine what goes on there. Even in those instances where the ministers can be viewed deliberating via video-streaming, the nagging suspicion remains – and is confirmed by insiders – that the real negotiations are now taking place elsewhere, be it in the corridors, over lunch, or in other locations before the formal meetings even begin. Agendas and very brief minutes of all Council meetings and of the senior bodies which prepare them are now made available via the Council's website, but even when combined with the rather bland and synoptic press

releases made available after Council meetings, they provide only the bare outlines of the discussion.

4.2.2. *Fragmentation and multiple layers*

We speak of ‘the’ Council as if it was a monolithic body, and indeed legally speaking this is the case (which explains, e.g., how the Justice and Home Affairs Council was able to adopt the Takeover Directive relating to company law in April 2004). However, the reality is much more complex. The Council meets in nine different configurations (Agriculture and Fisheries, Competitiveness, Environment, and so on), each one attended by the relevant minister or ministers from all the member states, making for a minimum of some 240 ministers who collectively make up ‘the’ Council as a whole. Sector specific interest groups will usually only have to follow the work of one Council configuration, but even that entails keeping tabs on the positions of twenty-seven ministers (sometimes more, if the responsibility is divided between several ministries in a particular member state).

As mentioned above, the items that appear on the agendas of the various Council configurations are discussed and prepared by a network of specialized working parties and senior preparatory bodies, each of which is also composed of official representatives from all twenty-seven member states. Given that here is where the real work of the Council takes place, here too is where lobbyists need to operate if they are to be effective in influencing deliberations in the Council. For some lobbyists, however, the resources required to monitor the detailed work of hundreds of actors and multiple layers are just too costly. Even for relatively resource-rich groups, the sheer number of actors and forums involved means that decisions have to be made about key people and critical stages on which to concentrate.

4.2.3. *Fewer permanent personnel*

With the exception of the international civil servants who constitute the permanent staff of the Council Secretariat, the personnel of the Council are temporary. In comparison to the Commission and the European Parliament, whose members can expect to remain in their posts for a set period of five years, the Council is in a state of constant flux. Since those who constitute the Council are there *ex officio* (as the national ministers responsible for the issues under discussion), the members of any particular Council configuration can and do change periodically, for example as a result of national elections or cabinet reshuffles. The members of the European Council change too, though less frequently on the whole than their compatriots in the Council.

The members of the Council and European Council are temporary too in the sense of being based not in Brussels but in their national capitals, the main

focus of their attention as national representatives. They fly into the Belgian capital for meetings, surrounded by officials, and usually leave as soon as the meeting has ended, if not before. Indeed some ministers have been criticized for failing to turn up at all. (Sarah Ludford, a Liberal Democrat MEP for London, revealed in March 2007 that the British Chancellor had only attended two out of eleven scheduled meetings of the Council of Economic and Finance ministers in 2006, and that there had only been a 32 per cent attendance record of British secretaries of state at meetings of Justice and Home Affairs Councils since 2003.) The time they spend in Brussels is therefore usually short and well filled, leaving little or no time to speak to anyone except those directly involved with the meeting.

A lack of permanency pervades other levels of the Council hierarchy too. The Council presidency constitutes a key route for anyone wishing to influence the work of the Council, but since this office rotates among the members of the Council and the European Council, committed lobbyists are required to identify and build up a relationship with a new group of key players every six months. The Brussels-based national *attachés* who represent their member states in the working groups normally spend about four years in the national permanent representations, while the permanent representatives and their deputies who constitute the two parts of the Committee of Permanent Representatives (COREPER) also spend only a few years in Brussels before moving on to other diplomatic postings (see below). The relatively temporary nature of many aspects of the Council machinery may thus constitute a difficulty for resource-poor and resource-rich interest groups alike. Effective lobbying is dependent on the building-up of mutual trust and exchange relationships over an extended period of time, but given the relatively rapid turnover of staff associated with the Council, such relationships are difficult to foster, making effective lobbying more problematic for all concerned.

4.2.4. *Informal decision-making norms*

The process of decision-making in the Council is governed not only by the formal rules laid down in the treaties and other legal documents, but also, and perhaps more importantly, by informal norms adopted over the years and now an integral part of the process. Some of these norms have been introduced in the interests of efficiency, while others are geared towards encouraging consensus among Council members. Whatever the reasons for their introduction, lobbyists need to be aware of these norms and their impact on the process of decision-making in the Council. By way of example, we can point to the so-called A and B points procedure and the conventions relating to voting in the Council.

The treaties formally state that Council meetings are the forum where the ministers adopt legislation and agree on common actions in response to

European-level issues. However, because of the relative infrequency of Council meetings as compared to the large number of issues to be adopted at them, the items on Council agendas are divided into 'A' and 'B' points, of which only the latter are actually discussed by the ministers. 'A points', so designated because they have already been the subject of an agreement at a lower level of the Council hierarchy, are adopted by the ministers without discussion. As a result, a piece of legislation of relevance to a particular interest group may well be adopted without ever being discussed by the ministers meeting in Council. This could work in the interests of the group in question, since the pre-Council discussions are not open to the public and do not normally become the subject of big political fights, which may affect their final shape. The monitoring of the Council's work by an interest group therefore includes assessing the likelihood of a dossier arriving on the Council agenda already the subject of agreement and merely needing to be voted upon in order to become a legislative act.

The Council has three main voting rules: unanimity, simple majority, and QMV – a system whereby each member state has a fixed number of votes roughly proportional to its size, with certain thresholds having to be attained in order to reach or block agreement. The decision as to which voting rule will apply to the negotiation of a particular legislative act is not arbitrary; it is dependent on the treaty article on which the Commission's proposal is based. This so-called 'legal base' is sometimes the cause of heated debate between the institutions, or even between the member states in the Council, since the voting rules are usually linked to procedures for interaction with the European Parliament, determining the extent of its role in the process (e.g. consultation as opposed to co-decision).

According to the treaties, about 70 per cent of all legislative decisions taken by the Council are subject to QMV, and only about 30 per cent to unanimity. But rules and practice do not always correspond. Under its new transparency rules, the Council is now required to publish the results of any votes it takes, and this it does in the monthly summary of acts which it posts on its website. The data thus made available has enabled researchers to prove what has long been claimed by insiders – that the Council votes only rarely, and that, even when the decision rule is QMV, most decisions are actually taken by consensus (Hayes-Renshaw and Wallace 2006), an important fact for potential lobbyists of the Council to keep in mind. It is easier for lobbyists to gauge their impact under unanimity rules, since those they approach will either vote in favour of or veto the measure under discussion. Where no voting takes place, however, or where the results of the votes are not made public, lobbyists have no way of verifying whether promises made to them have actually been kept.

Even if agreement is reached on a dossier at the level of one of the preparatory bodies, it is not deemed to be adopted until it has been voted upon. Legally speaking, only the members of the Council and the European Council

may vote on behalf of their governments, but indicative voting can and does take place lower down the Council hierarchy. This may occur in cases where the presidency is anxious to determine whether a qualified majority or blocking minority is already evident, and what measures may be required in order to bring the contesting member states on board. Alternatively, it may be used as a means of putting pressure on marginalized member states to withdraw their objections to the matter under discussion.

A final word on voting relates to abstentions, which are permitted under both unanimity and QMV. An important difference lies in the fact that, under unanimity, they do not prevent agreement whereas under QMV they effectively count as a 'no' since they detract from the attainment of a qualified majority. A member state may choose to abstain in a vote on a particular measure for any one of a number of different reasons. It may be that the member state in question has no specific interest in the issue and has not come under pressure from its colleagues (or from interest groups) to either support or vote against it. It may have proved impossible to reach a national position on the dossier in question because of insuperable differences between domestic ministries, within the government or with another national authority. Alternatively, the member state may choose to abstain rather than to be seen to vote against the strongly held views of another member state.

4.2.5. *Different access goods*

EU decision-making is a complex multi-level process, in the course of which various interests are incorporated at different stages. Because of its composition and the stage at which it gets involved in the decision-making process, the type of information required by the Council to fulfil its decision-making role and the nature of the groups which can most easily supply it are not the same as for the Commission and the European Parliament.

The ministers who sit in Council do so *ex officio*, operating as the indirect representatives of their national citizens, whose interests they are expected to articulate and defend. The emphasis in the Council, therefore, is on national interests – what Bouwen (2002:8) calls the 'domestic encompassing interest' – as opposed to the European interests articulated by the supranational Commission and to some extent by the European Parliament.

In most cases, by the time the Council is called upon to play its part in the decision-making process at EU level, a technical proposal elaborated by the Commission in consultation with national experts will already exist. In fulfilling its role in the process of adopting EU legislation, the Council is expected to examine and reach agreement on the proposal, if necessary by identifying amendments which would make the proposal acceptable to the majority of its members. In so doing, the members of the Council must engage in a process of negotiation and bargaining with one another and, in those cases where

co-decision applies, with the European Parliament. Each member of the Council therefore needs to know first, whether the proposal is acceptable to those groups within its member state who will be affected by its adoption and second, if not, what amendments would make it palatable to them. What is required, therefore, is information that can facilitate the bargaining process among the member states (Bouwen 2002:16).

In defining its national position, therefore, each member of the Council engages in consultation with those (usually domestic) groups that can provide information about the national interest in the area involved. When they then operate in the context of the Council, national ministers and officials are in effect intervening as the delegates of the national interest groups whose interests they have chosen (or been persuaded) to defend. Once a national group has successfully lobbied its government regarding an issue under discussion at EU level, it may also delegate the task of lobbying other members of the Council to its national representatives (both ministerial and official) in that body. But members of the Council at all levels are open to pressures from many sources in the course of European-level negotiations, making such delegation unreliable and therefore risky. As a result, committed lobbyists who possess the necessary resources try to approach the Council at several levels and various points in time.

Where does this leave us in determining whether or not the Council is the least accessible of the EU's institutions? Clearly, lobbyists attempting to approach the Council labour under difficulties not associated with gaining access to the Commission or the European Parliament. The number and mutability of players to be monitored is greater, it is more difficult to determine how decisions are actually arrived at, both formally and informally among the many decision-making layers, and the nature of the information required to gain access to key players is very specific. Various quantitative studies suggest that the Council as a body is indeed approached less frequently than the other institutions (e.g. Bouwen 2002; Eising 2007) but anecdotal evidence suggests that the Council can be and is lobbied using routes specific to it. Indirect lobbying of the various levels of the Council has therefore become the route of choice for lobbyists because of the difficulties associated with lobbying the Council as a body. In the following section, we examine each of the layers of the Council in turn for evidence of activity by lobbyists.

4.3. Gaining access to the Council

The Council (including the European Council) spans the EU's multi-level system, constituting the place where national interests are most directly confronted by European ones. It represents the interests of the member governments and, where it is required to do so, works closely with the Commission

and the European Parliament to combine them with the overarching European interest. Interest groups will approach the Council or its constituent parts in different ways (or not at all), depending on whether their focus is national or European. Domestic interest groups will tend to focus their efforts, initially at least, on their own governments. Indeed some national systems such as the German and Spanish ones have institutionalized access for certain interest groups when the national interest is being determined and the national position is being defined. Interest groups with a more European focus and/or a presence in Brussels may also or exclusively rely on approaching the Commission and the European Parliament in an attempt to influence outcomes. In this section, we look at routes into the Council commonly followed by various types of interest groups.

4.3.1. *The Council and European Council as bodies*

The description of the Council as being ‘almost impossible to lobby... collectively because it is corporate only during its meetings, and it is then not available to outsiders’ (Nicoll and Salmon 1990:82–3) still applies by and large, and can be extended to include the European Council. But lobbying activity can take many different forms, and the key position of these two bodies in the EU system has encouraged interest groups to explore ways of making Europe’s politicians aware of their views when they attend meetings of the Council and European Council. Some have been granted access to the members of the Council and the European Council as a group, while those less fortunate have had to rely on more distant forms of communication with Europe’s political leaders.

Both the Council and the European Council have taken tentative steps to make themselves available collectively to selected groups. Thus for example, on the eve of Environment Council meetings, representatives of environmental NGOs are invited by the presidency to a dinner during which they can speak to ministers about the items on their agenda for the following day. Not all ministers attend these dinners, but they provide an important point of high-level access for these representatives. Similarly, meetings of the spring European Council, which is normally dedicated to the Lisbon process, have since 2003 been preceded by a session of the Tripartite Social Summit for Growth and Employment. This brings together representatives of the current and two subsequent Council presidencies, the President of the Commission, and representatives of the social partners (workers and employers) at the highest level. It is arguable, however, whether these limited forms of access to the Council and European Council have any effect on the subsequent deliberations of these bodies, given that they occur at a very advanced stage in discussions in the Council hierarchy.

Organizing demonstrations outside the building where the ministers or heads of state or government are meeting to take important decisions affecting

Institutional Demands

the interest groups is one way of drawing attention to the issues under discussion. This method is only available to a small number of well-resourced groups, with farmers, environmentalists, and anti-globalization activists constituting the most frequent examples. Their actual impact on what is actually decided is however questionable and in any case virtually impossible to calculate, barring a direct acknowledgement from the decision-makers themselves that their views were swayed by the action. In the EU context, demonstrations during Council and European Council meetings are more likely to serve a public relations function than a lobbying one, given the advanced stage of negotiations by the time a dossier reaches either of these levels.

The demonstration organized by Friends of the Earth outside the Justus Lipsius building in Brussels on 9 March 2007 was intended to put pressure on the members of the European Council who were meeting there to decide on an energy policy for Europe. It could be argued that such a demonstration was pointless because the heads of state or government had already held their in-depth discussion on the matter the day before on the basis of a text drafted several weeks beforehand at a lower level of the Council hierarchy. However, the demonstration was also an attempt to show the extent of public dissatisfaction with the targets being discussed. There was little mainstream media coverage of the demonstration, and Friends of the Earth professed itself disappointed with the final outcome of the meeting (<http://www.foeeurope.org>). This reinforces the message that, in order to have any realistic hope of influencing outcomes in the Council, interest group activity has to start at the earliest possible stage in the process. Some demonstrations, however, can have a more direct if negative effect on decision-makers. Thus the degeneration into violence of the anti-globalization demonstration outside the Gothenburg summit in June 2001 forced the heads of state or government to change their dinner arrangements at short notice (Ludlow 2001:5).

4.3.2. *National governments*

Given that discussions in the Council and European Council are based on the notion of national interests, the national governments would seem to be the most obvious route for lobbyists, particularly those with specifically national interests. Indeed, there are many examples of decisions in the Council being affected or even reversed as a direct result of pressure exerted by domestic interest groups on their national representatives in the Council. Three examples will give a flavour of such activity.

First, in 2001 the German government, under pressure from its business community, reneged on a common position it had agreed the previous year with its Council colleagues regarding the Takeover Directive, and forced through a new, weaker agreement which was beneficial to German business (Hayes-Renshaw and Wallace 2006:292–3). Second, the tobacco industry put

pressure on several European governments in the 1990s to oppose an EU-wide ban on tobacco advertising, concentrating their efforts on Germany, the United Kingdom, and the Netherlands as the major tobacco producing countries (Boessen and Maarse in this volume). Third, the intense and widespread politicization of the issue of genetically modified organisms (GMOs) following a series of food-safety scandals in the EU in the mid-1990s resulted in deadlock in the Council for several years when the ministers met to discuss implementation of a Commission decision on the sale of GM crops in the EU (Pollack and Shaffer 2008).

Depending on their importance in the domestic context, representatives of domestic interest groups seek or gain access to officials in (or even the minister in charge of) the relevant national ministry or ministries to encourage them to take the group's particular viewpoint into account when determining the national position on an issue being discussed in the Council hierarchy. In some cases, the interest groups may be consulted as of right when the national position is being determined, or one of its representatives may even be given a place in the national delegation, thereby affording them a direct line into the negotiations.

Where decisions are subject to unanimity in the Council and the aim is to block agreement, an interest group needs to convince only one government – whether its own or another one – to vote against the matter. Where the voting rule is QMV, however, a domestic interest group will have to look beyond its own government for support in having an EU decision adopted or blocked. This is obviously easier for an interest group that is part of a European federation or confederation, which can call on colleagues with resources in other member states to reinforce their message. In the case of the tobacco advertising ban mentioned above, letters from public health organizations throughout Europe were sent to the Danish and Dutch governments in an effort to persuade them to cast their decisive votes in favour of the ban (Boessen and Maarse. in this volume).

4.3.3. *Members of Council (by other Council colleagues)*

The individual members of the Council occupy their positions in that institution *ex officio* as the elected representatives of the citizens of their member states, who expect them to speak on their behalf at European level. At the same time, the members of the Council must collectively engage in negotiations with the Commission and the European Parliament in order to adopt EU legislation. It may therefore be necessary for them to lobby other Council colleagues in order to have their particular national interest (or that of a specific national interest group) taken into account. In this sense, national officials or ministers may become policy advocates for national interest groups, a distinct advantage for those groups without the resources to pursue a lobbying strategy themselves at European level.

Such lobbying by Council colleagues (which can take place at any level in the Council hierarchy, from working party up to European Council) may take the form of an informal chat between officials in a corridor or over a coffee, or a more formal *démarche* between ministers by means of a telephonic conversation, a letter, or a scheduled meeting. Sometimes, such lobbying will involve a *quid pro quo*, as in the case of the Takeover Directive, when the German government persuaded the United Kingdom to support it in stripping the proposed directive of any force in return for German help in fighting Commission proposals on temporary workers' rights (*Financial Times*, 20 December 2003).

4.3.4. *The presidency*

The presidency is another important avenue for lobbyists to pursue, although they may find it a rather overcrowded one. This is because the presidency becomes the almost exclusive focus of internal and external attention during its period in the chair, and for a certain amount of time leading up to it, because of the centrality of the role which accompanies the holding of the office. It is thus a prime target for those wishing to influence the work of both the Council and the European Council. Indeed, some national officials who have served in Brussels while their member state was in the chair speak rather wearily of the amount of lobbying to which they were subjected by various interest groups during their period in office. Others remember, seemingly rather wistfully, the marked silence of the telephone in the days after their presidency came to an end, and they were no longer in the middle of the action.

Each member state holds the presidency for a period of six months according to an agreed order of rotation. However, the extent and importance of the role, coupled with a natural desire to 'do a good job', means that preparations for the presidency now commence about two years before the actual start date. Those who wish to influence Council outcomes via the presidency are therefore well advised to try and make contact with officials or even ministers well in advance of the start of the presidency period itself. Thus, for example, AmCham EU (the American Chamber of Commerce to the EU), widely regarded as one of the most successful interest groups in Brussels, presents every incoming presidency with a concise but comprehensive document containing its position on, and recommendations for dealing with, the main dossiers of interest to AmCham's members on the Council's agenda for the forthcoming six months.

Because of its agenda-setting powers, the presidency member state has a certain amount of influence over what appears on the Council's agenda, in what form and when, but care should be taken not to over-exaggerate the extent of this influence. The Council's work programme is a rolling one, with

the majority of issues in a new presidency's in-box being inherited from its predecessor. That being said, every presidency identifies one or two priority areas it wishes to emphasize during its term in office, and tries to ensure that progress is made on them. Thus, the ear of a sympathetic presidency can be a useful tool for an interest group wishing to promote a particular issue at a particular time or stage in its negotiation. However, such initiatives need to be prepared well in advance, if they are to come to maturity (i.e. be ready for agreement) during a particular six-month period.

Alternatively and more controversially, a member state may, in response to pressure from interest groups, use its time in the chair to prevent the reaching of an agreement. During the German presidency in the first half of 1999, German car manufacturers persuaded their government to withdraw its support for – and thus delay the adoption of – the so-called end-of-life vehicles directive until an agreement more favourable to their interests could be negotiated (see Tallberg 2006:101–10).

4.3.5. *The Council Secretariat*

The Council Secretariat is the one permanent element of the Council machinery and the chief facilitator of its activity. It is divided into eight Directorates General (DGs) and a horizontal Legal Service; six of the DGs deal with distinct policy areas and two have horizontal responsibilities. Each of the six vertical DGs coordinates the work of one or more related Council configurations through all stages of the decision-making process. Council Secretariat officials follow the progress of 'their' dossiers by attending the working party, COREPER (or other senior preparatory body), and Council meetings where they are discussed, providing briefing notes for the presidency and producing the reports or minutes of the meetings on which subsequent discussions are based. They may, on occasion, get involved in the drafting of amendments to the negotiation text, but this depends on several factors, such as the seniority of the officials in question, their experience and expertise in the area, and the extent to which they are trusted by member state delegates and the presidency itself.

The Council Secretariat exists to serve the Council and, by extension, the presidency. Yet, in a frequently shifting population, the Secretariat officials are often the one constant in the life of a committee or working party, imbuing them with institutional memory and making them potentially useful sources of information and allies for those who want to affect outcomes. Brussels-based policy communities are small, and it would be surprising if personal contacts were not used on occasion, even if only to obtain information about dossiers under discussion.

While sometimes being invited by presidency officials to accompany them when they meet representatives of interest groups, there is little direct evidence of overt lobbying of Secretariat officials in their own right. Interest

group representatives may try to approach Secretariat officials to put their point of view, but in those cases where access is gained (and not all Secretariat officials are likely to agree to meet), they are usually received 'in listening mode' only. On the basis that they exist to serve the Council, Secretariat officials tend on principle to refuse to circulate position papers from interest groups, or to provide them with mailing lists of working party or committee members. In sum, if acknowledged at all by interest groups as important actors in the decision-making process, Secretariat officials are most likely to be recognized as merely one of several potentially useful sources of information about issues under discussion.

4.3.6. *The preparatory bodies*

The work of each configuration of the Council is prepared by one or more working parties and senior preparatory bodies, which operate a system of filtration. Each level reaches agreement on as many points as possible, thereby allowing the next level up to concentrate on those issues which have, for whatever reason, proved difficult to resolve at the lower level. The filtering starts at the level of the working parties, whose members reach as much agreement as possible on a dossier before passing it up to a more senior body. In most cases this is COREPER, but some policy areas such as agriculture, justice and home affairs, or CFSP have specialized senior preparatory bodies which work alongside or in place of COREPER (see Hayes-Renshaw and Wallace 2006:68–100, in particular Figure 3.1 on page 71). The senior preparatory bodies in turn review the work of the working parties in their respective areas and, where possible, reach agreement on outstanding issues in current dossiers before sending them to the Council for adoption or further discussion. A dossier can thus move up and down the various levels of the Council for some time before being finally adopted by the Council. Interest groups that are unaccustomed to such long lobbying periods or whose resources are thin or thinly stretched may consequently fall prey to lobbying fatigue, dropping out of the game before its conclusion.

The real work of the Council takes place at the level of the specialized working parties, an important fact to be borne in mind by those who wish to influence the outcome of Council deliberations. They number about 250, are composed of one or more officials from each of the member states, and are chaired by a representative of the member state holding the presidency of the Council. Their meetings take place in the Council's headquarters in Brussels, with the member state representatives either flying in from their respective capitals or being based in their respective national permanent representations in Brussels.

Those representing their member states in working party meetings are the chief focus of lobbying activity in the Council, because it is at their level that

the scope for incorporating the interests of lobbyists is greatest. Because of the A and B points procedure which governs the movement of dossiers between different levels in the Council hierarchy, it becomes increasingly difficult (though not impossible) to change texts once they have been the subject of an agreement at a lower level. Thus, whether national representatives are based in their capitals or seconded to their national permanent representation in Brussels (see below), they can expect to be contacted by groups requesting them to take specific interests into account when negotiating with their colleagues from other member states.

Each of the national permanent representations in Brussels is headed by an ambassador, who occupies the post of Permanent Representative, and sits in the most senior of the preparatory bodies, the Committee of Permanent Representatives (COREPER). He or she is assisted by a Deputy Permanent Representative, who sits in another configuration of COREPER, and each one takes responsibility for preparing the work of specific Councils. The permanent representations are staffed by seconded national officials (known as *attachés*) who represent their member states in one or more working parties.

Besides speaking for their respective member states during meetings in Brussels, officials from the permanent representations are expected to gather information about the views of the other member states and the EU institutions for transmission back to their colleagues in the capital and to pass on the views of their own member states to their colleagues in Brussels. They therefore act as lobbyists for the national position, and are in turn lobbied by other actors in the decision-making process. They can be useful contacts for lobbyists because of their intimate knowledge of the dossiers under discussion in their groups, and their familiarity with the positions of their colleagues from the other member states. Brussels-based consultants view the permanent representations as useful sources of information about the progress of a dossier. The choice of which representations to focus on may depend on such factors as a common language, personal contacts, or the importance of the dossier in question for the particular member state.

The officials in the permanent representations often carry great weight in their national capitals because it is assumed that their location in Brussels invests them with a well-developed sense of what will or will not 'be acceptable' at European level. As a result, they may play a central role in the definition of the national position to be articulated and defended at meetings in Brussels. However, much depends on the margin of manoeuvre allowed to them by their colleagues at home, a judgement that will rest on many factors, including their expertise in the area under discussion, the length of time they have spent working in Brussels, and the degree of inter-ministerial rivalry in the capital.

When a member state holds the presidency of the Council, the national permanent representation becomes the Brussels hub of activity for officials

from that member state. The number of officials working there is increased by anything up to 20 per cent in the lead-up to and during the period in office, in order to deal with the increased workload. The presidency permanent representation also becomes the focus of intense lobbying activity by other actors in the process.

4.4. Conclusions

This chapter opened by questioning whether the Council and European Council were lobbied less frequently or differently (or both) than the Commission or the European Parliament. It has been shown that they certainly operate very differently to the Commission and the European Parliament. Because of the way in which their meetings are prepared, what happens when they meet is only a small, and often not the most important, part of the story. In addition, Council and European Council meetings occur at an advanced stage in the decision-making process on any particular issue, when other, more accessible, actors (such as the European Parliament) are also involved. The consequent impression is that they are lobbied less than the other institutions.

But our analysis has suggested that the Council and the European Council, while less accessible than the other institutions, are certainly not inaccessible. Indeed, interest groups can and do approach them at a number of different levels and entry points, both directly and indirectly, demonstrating that they have understood that attempts to influence Council and European Council outcomes must commence at a very early stage in the decision-making process and at a very low level of Council activity.

When, then, is the best time to lobby the Council or European Council? The short answer is: the earlier, the better. Because of the way in which these two bodies function – by means of gradually accumulated agreements, often based on compromises – it stands to reason that the further up the hierarchy a dossier progresses, the harder it becomes to try to unpick agreements already arrived at. By the time a matter has reached the most visible stages – a meeting of the Council or European Council – what remains to be decided may be only a tiny part of the whole, is likely to have become highly politicized, and its agreement may be dependent on compromises already negotiated, even involving side-payments via other dossiers.

Potential lobbyists can attempt to make their voices heard in the Council using one of the routes mentioned in the previous section. As with the other institutions, what national officials and ministers need in particular is information based on specialized knowledge and reliable data. Given the national focus of the Council, and the tendency to approach it through its national

components, any information of particular relevance to a single member state or a group of member states is likely to be particularly welcome. The approach of individual member states towards the process of lobbying may differ due to national characteristics, administrative structures, and traditions (see van Schendelen 2003:119–28), and potential lobbyists would do well to bear this in mind if they need to approach officials or ministers from a variety of member states.

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Chapter 5

Interest Groups and the European Court of Justice

Margaret McCown

5.1. Introduction

Court cases are effective if, often, expensive opportunities to strike down or re-write legislation, from local regulations up to constitutional provisions. Moreover, winning before a court is not a matter of persuading officials of a majority preference or the representatives of a cause, so courts can be very appealing venues for minority interests to challenge rules. If the case is decided by a constitutional court, there are few means, besides the court overturning its own ruling, to change the decision, so successful litigants not only secure a desired change but one that is very insulated from other challenges. It is no surprise, then, that courts whose decisions have significant policy implications are the focus of interest group attention. European Union (EU) lobbyists have found that the supranational level of government is no exception – the European Court of Justice (ECJ) has proved to be a highly successful venue in which to seek policy change and many organized interests have long cultivated strategies for targeting it, albeit with varied success. This chapter will discuss the ECJ as a target of lobbying, the strategies developed by EU interest groups and the factors that shape selection of these strategies.

5.2. The ECJ, European integration, and policy change

The ECJ has been a major site of integrative institution building in the EU. Rules promoting the supranational expansion of the Union and chipping away at Member State derogations from them have come in a steady stream from Luxembourg. The ECJ is credited with the ‘constitutionalization’ of the

* The views and analyses are those of the author and do not necessarily reflect those of the National Defense University, Department of Defense, or United States government.

Treaties founding the EU, delivering rulings that assert the supremacy of EU law over national law (ECJ 6/64 *Costa v ENEL*, 1964; ECJ 106/77 *Simmmenthal*, 1978), giving individuals the right to invoke EU law on their own behalf in their own national courts¹ (ECJ 26/62 *Van Gend en Loos*, 1963) and to claim damages from EU Member States that abridge those rights (C-6 and 9/90 *Francoovich* ECJ, 1991). Interest groups have been among the many private actors that turned to the ECJ as that became an option after its *Van Gend en Loos* decision declared that 'Community Law not only imposes obligations on individuals, it is also intended to confer upon them rights'. The ECJ's case law, heavily influenced by organized interests, significantly structured or even created areas of EU law ranging from intellectual property rights to gender equality.

5.3. Courts and interest groups: Incentives to litigate

Indeed, it is unsurprising that EU interest groups targeted the ECJ, irrespective of the institutional-environmental incentives, for there is a long literature that points to the relationship that exists between organized interests and the judiciary across many political systems, with much of it focused on American interest groups and the US Supreme Court (e.g. Epstein 1981; Koshner 1998). Interest groups in the United States, in many ways the paradigmatic case of pressure groups' judicial activities, seek access to the bench and its judicial law-making by several means. They are actively involved in bringing cases (e.g. Epstein and Rowland 1991; Wasby 1995) and lobby courts even when not a party to a given case. They constantly observe changes in the relevant law and when legislation or previous court decisions seem to indicate a possible interpretation of law that they feel is advantageous, they will bring test cases. A carefully selected test case will unite, in one suit, points of law, fact patterns, and plaintiff characteristics most likely to achieve the desired outcome. Interest groups also sponsor cases of interest through the various stages of appellate review, thus making their financial resources available to costly litigation sagas.

In the United States, the liveliest literature has focused on interest groups' use of *amicus curiae* briefs which are, indeed, probably the closest to traditional lobbying to be directed at the bench. US courts allow interested actors, even if not directly a party to the case to file 'friend of the court' briefs arguing for specific interpretations or highlighting the material and legal consequences of a potential outcome. At the level of the Supreme Court, researchers have argued that these briefs have an influence on justices' decisions over which cases to hear (Caldeira and Wright 1998), the impact of the persuasive argumentation in *amicus* briefs on decisions (Collins 2007), and on their rulings in the cases (O'Connor and Epstein 1982; Songer and Sheehan 1993).

Some structural features of judicial systems also advantage litigants like interest groups. In one of the most cited articles in the field of law and society,

Galanter argued that ‘repeat players’ who litigate often tend to come out ahead, as compared to ‘one shot’ claimants, who only litigate once (Galanter 1974). Although whether, as Galanter argued, the ‘haves do come out ahead’ in redistributive terms, in terms of success at prompting institutional change this certainly seems to be correct, especially in systems in which judges use precedent-based reasoning to decide cases. This is because, where precedent forms part of legal reasoning (as it does on the ECJ), each court ruling essentially constitutes a piece of judge made law – in fact, creating precedent or settling a case to avoid doing so is usually the goal of interest group litigation. As will be discussed below, interest groups, large firms, and other collective actors have extensively developed strategies for bringing sets of cases in order to establish, build on, and entrench precedent in an ever harder to reverse web of institutional rules.

In fact, although one thinks of lobbying and demonstrating (or, more elegantly put, ‘access’ and ‘voice’ strategies) as interest groups’ primary tactics, going to court is enough of a mainstay strategy for those seeking policy change that there is even a small literature focusing on how they choose one over the other (de Figueiredo and de Figueiredo 2002; Holburn and Vanden Bergh 2002). Scholars have recently directed attention to this question in the context of the EU as well (Bouwen and McCown 2007), as will be discussed later.

There are some institutional reasons that would tend to discourage EU interest group litigation, however, relative to other countries. Indeed, lobbying tends to be perceived differently at the EU level than in other countries – scholarly accounts characterize it as mutually beneficial exchange of information between EU institutions and lobbying groups, rather than the brokering of undue influence as is, particularly highlighted in the United States. Exploring the reasons for this variation in groups’ nature (or, anyhow, perception of it) is beyond the scope of this chapter (but see Baumgartner 2007). But it is interesting to note that there are national differences in propensity and opportunity to litigate too, which shape the incentives for doing so and, thus, the strategies that are used. Recourse to litigation strategies is not static in any political system, however. Even in the United States, distastefully considered the bastion of adversarial interest group legalism, it has been a trend that has increased over time (see Koshner 1998). And earlier studies examined it more as a strategy of disenfranchised groups unable to effectively access the legislative branch than pressure groups seeking to manipulate the policy process. In the EU, litigation has grown to be an effective means of securing policy changes.

The EU does differ in some substantive ways from the United States which change interest groups’ propensity to litigate. Perhaps the most important of these is the absence of any real class action litigation at the EU level and in most Member States, so there is no formal legal recognition of a collective legal interest to litigate (Koch 2001). The ability to file cases where it can be

demonstrated that the damage was done, if in a marginal way, to a large group, has underpinned much of the expansion of interest group litigation in the United States. There does also appear to be a general European reluctance to follow a perceived excessively adversarial American approach (Kelemen 2003). Finally, another way in which interest groups' toolsets for accessing the bench is more limited is their practical inability to file *amicus curiae* briefs. In the United States, the Supreme Court accepts 'friend of the court' submissions arguing for a particular legal outcome from outside parties, not directly involved in the case, but who have an interest in the decision. The ECJ only accepts such submissions from Member States and EU institutions.

However, despite these factors, once individuals, including firms and organized interests, became able to bring cases invoking EU law, the structure of the EU legal system also created incentives to do so. According to Article 234 of the Treaties founding the EU, when a case invoking EU law comes before a national court in an EU country, if that court is unsure how to apply the law or unclear about its meaning in the context of the case at hand it may and, if it is the highest court of appeals, must, refer the case to the ECJ. It is thus, relatively speaking, a low-cost tactic for a litigant to add an argument using EU law to their submission if they feel it might be advantageous. ECJ decisions are returned to the referring national court, which actually pronounces the ruling. So, whilst they become applicable EU-wide and create precedents for the ECJ and litigants to subsequently draw on, they are given particular and immediate force in the referring legal system because the decision is 'spoken through the mouth' of the national court (Weiler 1994).

The ECJ is also a very attractive venue if litigants are having difficulty achieving their desired policy goals through the other EU institutions. It is commonly held that litigating is a useful strategy where actors are faced with relatively large numbers of oppositional Member States: actors often litigate where some organizational actor, often at least part of a Member State government, is very opposed to an EU rule, or where there is insufficient consensus amongst Member States to facilitate changes in the relevant law through legislation.

Often this has been even more pronounced when the European Commission, the 'motor' of integration, has been less active – during, for example, the period of the Luxembourg Compromise. From the 1966 Compromise, when the Council agreed to take all decisions by unanimity, through the 1980s, when the Single Europe Act reinvigorated the integration process, the legislative output of the Community was small. During this time, however, the ECJ continued to deliver decisions, finding various Member State laws to be inconsistent with the Treaties of the EU, with a net effect of promoting integration, especially in the area free movement of goods (Stone Sweet and McCown 2004), laying much groundwork for the Single Market Project. This counter-majoritarian body, generally pro-integrative in its preferences, has been

targeted by strategic actors seeking to change rules when it might be more difficult or costly to do it through legislative procedures or they wish to complement tactics that already focus on the legislative process.

Choosing to go to court places actors in a distinctive strategic environment with its own incentive structures – certain situations favor litigating as a means of seeking policy change and as a strategy it advantages some actors relative to others. As will be discussed in the next section, this shapes the litigation strategies that interest groups develop and bring to bear.

5.4. How interest groups litigate

Organized interests bring cases to the ECJ via the ‘preliminary reference’ mechanism described in Article 234 of the Treaties. The EU offers a wide variety of legislation that can be claimed in national courts and can form the basis for legal challenges to national laws and practices with which interest groups may disagree. For the other party, the case may be either a public or a private actor, although they are most frequently a Member State, with litigants directly claiming that its law or practice conflicts with some EU law they find preferable. EU law can be claimed in cases against other private parties, with some limitations, and there are some strings of cases that have done just that – from trademark to transnational advertising, EU interests, particularly multi-nationals often find there is a way in which they would like to use or develop EU law to challenge competitors’ practices.

Different EU legal instruments do have somewhat different status or ‘effect’ before the ECJ, though, which impact how they can be used by litigating interests. Like Treaty provisions, EU regulations take full legal effect immediately on passage by the Council: they become the law of the land, do not require any national legislation to implement them, and can be claimed before the ECJ. Directives, EU legislation that requires Member States to pass their own national legislation incorporating it into national law, can be claimed by litigants in Article 234 references in which a Member State is party to the case (and Member States can be forced to pay damages for having failed to transpose a directive or having done so improperly). Unlike Treaty articles and regulations, they cannot, however, be invoked in cases against other private parties – or, in EU legal terms, lack ‘horizontal effect’.

Litigation strategies are, therefore, ones that begin at the national level, bringing a case in a national court in a country where there is a point of law or practice that is particularly disadvantageous or where the court seems fairly hospitable (practitioners anecdotally report a certain amount of forum shopping across the EU, in competition cases especially – e.g. McMichael 2007). They are also a rather lengthy process – the ECJ has a large backlog of cases and has only grown slower at delivering rulings over the years.

Some characteristics intrinsic to interest groups shape both their propensity to litigate, the strategies they craft, and their success at doing so. At the most basic level, two variables are key: the material resources at their disposal and their organizational form. This section will present some of the major litigation strategies of EU interest groups and explore the relationship between strategy selection and the structural features of the groups.

5.4.1. *Characteristics of interest groups*

Individuals and other minority interests may identify courts, as non-majoritarian institutions, as good sites for the less powerful to seek policy change and, from flight attendants taking on national airlines for gender discrimination (ECJ 43/75 *Defrenne/SABENA*, 1976) to Turkish guest workers (ECJ C-4/05 *Güzeli*, 2006), sometimes the little guy wins in Luxembourg. The superior material resources that organized interests can often bring to the table do, however, constitute a significant advantage and variation in them will shape the strategies. Bringing cases (or being a defendant) is costly and bringing several, very much more so. Interest groups' propensity to use litigation strategies will be limited by what they can afford.

Just as it has been shown that variance in the organizational structure of interest groups shapes their selection of lobbying strategies (Bouwen 2002, 2004) and, in fact, their choice between litigation and lobbying strategies (Bouwen and McCown 2007), it informs how they litigate. How narrow or broad the interests represented in a group are will affect how easy it is for them to reach consensus on which issues are important enough to begin a litigation strategy and how easy it will be for them to sustain this over time. Compare, for example, the European Automobile Manufacturer's Association (ACEA) with any of its fourteen constituent companies. Broad, transnational organizations can effectively lobby Brussels, providing information about industry conditions and capacity, but in order to pursue a litigation strategy would have to identify a single issue of compelling concern to all members and sustain that over the time necessary to bring at least one, and possibly a series of cases. And thus, ACEA has never, from its foundation in 1991, been involved in proceedings before the ECJ. In contrast, individual automobile multinationals have little difficulty identifying when practices contrary to their interest might warrant litigation and when; for example, Renault disputed with an Italian car body parts manufacturer about use of their trademarks, the dispute ended up in an Italian court and then the ECJ without much ado (ECJ 53/87 *Renault*, 1988). And Renault are no stranger to the courtroom in Luxembourg – they have been party to five proceedings before the ECJ since the 1980s.

Taken together, organizational form and resources of interest groups will impact the strategies they develop and their success. Better resourced groups will be more likely to litigate than those with fewer, who may prefer to save

their limited funds and influence for lobbying strategies, and those with narrow, more focused interests, will both be more likely to litigate and to pursue longer, multi-case strategies.

5.4.2. *Litigation strategies*

Litigants, including interest groups, if not bringing a single, one-off case, principally deploy three broad types of legal strategies at the EU level, often in conjunction with traditional lobbying activities. The most successful litigants implement well-planned, long-term strategies for effecting legal change through the courts. They take advantage of the ECJ's now well-established tendency towards precedent based decision-making (McCown 2004), so that rulings become integrated immediately into EU law and, eventually, if they are used as precedents in later rulings, form an ever more firmly entrenched part of the relevant law. Typically, more organized litigation strategies entail plans to bring multiple cases, either in sequence or simultaneously. Test cases, rapid repeat litigation and the strategy of joining or otherwise bringing multiple cases simultaneously will be discussed below.

5.4.3. *Test cases*

The first part of any successful string of cases is a test case. They can open an issue and test both jurisdictional waters and the ripeness of the question. Because the ECJ has no docket control – it cannot choose which cases to review – the litigant will get a legal answer to their question. Win or lose, any decision will give the litigant useful information about the viability of pursuing an issue through the judiciary and the worth of a more elaborate litigation strategy. A positive response will potentially open a floodgate of cases from them and other parties, putting pressure on Member States and EU institutions to change national practice or even provide more EU legislation in the area.

The potential consequences and role of test cases are quite evident in the contemporary EU. In a recent example concerning a case requesting the application of an EU Equal Treatment Directive to UK disability discrimination law (ECJ C-303/06 *Coleman v. Attridge Law*, Pending), one of the UK-based organizations supporting the case issued a press release announcing 'Landmark test case could benefit millions of Britain's carers' as soon as a British court agreed to refer the case to the ECJ, well in advance of any ECJ ruling (Carers UK 2006).

The ECJ's free movement of goods case law has been particularly driven by the construction of test cases and subsequent streams of litigation. This is probably due to the subject matter of these disputes – it is relatively easy to find a case of some business that works with some product that crosses some

EU boundary at some point. But the type of litigant in free movement of goods cases also matters. As one scholar notes, 'In the field of goods, corporations may find it worthwhile to litigate aggressively and construct test cases to advance their commercial interests. By contrast, particularly in the case of (free movement of) workers, the litigant is often a private individual who may not have the means or motivation for a prolonged legal struggle' (Snell 2004: 54).

An ideal test case, then, begs as many questions as it answers. It not only delivers a ruling favorable to the interest that brought the case, but creates space for further legal probing of the issue. For example, the initial ECJ ruling (ECJ 179/88 *Herz*, 1990) protecting women from dismissal during pregnancy was hardly the Court's last word on the subject. It enabled later cases questioning whether dismissing a pregnant woman from a position that was barred, under national law to pregnant women (ECJ 177/88, *Dekker*, 1990), was allowable or whether, were an employee hired to replace one on maternity leave, herself to become pregnant, she could be dismissed (ECJ C-32/93 *Webb*, 1994; for a more extensive discussion of the ECJ's gender equality case law, see Cichowski 2001).

5.4.4. *Sequential litigation strategies*

Litigants have enjoyed success at changing legislation through legal means even in the face of significant Member State hostility by deploying strategies of rapid repeat litigation (McCown 2003). This is essentially a strategy whereby litigants, once they have won a case, rapidly bring a subsequent suit before the court. This has the effect of locking in the earlier, favorable ruling, by having it applied as precedent in subsequent decisions. Writers have long pointed to the advantages that accrue to repeat litigators (e.g. Galanter 1974) and private actors have found that being repeat litigators is particularly effective in EU judicial politics.

The strategy works most effectively where a very organized interest group that is well endowed with resources (often individual businesses and sometimes specialized associations) is able to swiftly bring several cases, while those actors that oppose the policy change embodied in the court rulings are less organized, and have difficulty effectively opposing these strategies, either by filing counter suits or enacting legislation that might qualify the effects of court rulings.² In the time in which it takes the opposition to mount a counter strategy (which is often delayed if they have difficulty in reaching and maintaining consensus as to their own policy goals or mustering resources), the repeat litigators have brought multiple, subsequent suits. This strategy has proved effective for actors even where it has been quite difficult to obtain any legislative changes to complement and support legal rulings (McCown 2003). This strategy relies on actors that are wealthy enough to be engaged in

long-term ongoing legal battles and organizationally stable enough to remain focused on a complex set of legal strategies over several years.

5.4.5. *Simultaneous litigation strategies*

Litigants also bring multiple suits simultaneously, with slightly different strategic effects. The ECJ has long had the habit of ‘joining’ cases, where multiple referrals come before it with the same fact pattern concerning the same EU law or action. The trend towards joining cases has increased significantly over time. From the judicial point of view, this habit is sensible because it increases the consistency and coherence of legal interpretations. From the point of view of litigants and national courts (typically a single court refers all the cases, although the ECJ will also join references from different referring courts), it is also pragmatically and strategically advantageous. Sending multiple references signals to the ECJ the saliency of the issue to private litigants and also maximizes the immediate applicability of a legal change. If the Court rules in a litigant’s favour, the ECJ decision will be announced and applied by several national courts, rather than just one. Another means of bringing multiple cases is to group the cases at the national level. Although class action litigation is limited across the EU, group litigation order proceedings in the United Kingdom (essentially a British version of class action suit) to allow for it and can send a powerful signal of saliency as well as allowing interests to combine into powerful legal forces.

Strategies whereby multiple agents bring suit at the same time put somewhat different demands on litigants than those of rapid repeat litigation. The latter requires that actors have sufficient resources and an organizational form that guarantees enough long-term coherence in their policy preferences in order to plan and pursue complicated and costly legal strategies over multiple years. Simultaneous strategies, in contrast, make fewer time demands but require immense upfront coordination across, sometimes, a wider array of actors.

In order to effectively simultaneously litigate, an interest group needs to find multiple actors that wish to make a legal challenge on the same point of EU law at the same time. The characteristics of agents bringing joined cases are less well studied, but a reading of the case law makes it clear that they are typically not all brought by different branches of the same firm, but rather by sets of similar interests. These sets of interests are likely to be brought into contact with each other through associations, rather than bilateral contact between firms. Interest groups with large enough memberships to find groups of agents with common interests, with the resources to litigate and able to stimulate cooperation are the most likely to use these tactics. They do not need to be able to sustain this intense cooperation over particularly long periods of time, though – simply long enough to file multiple cases – and so it is less demanding of consensus than rapid repeat litigation.

5.4.6. *Litigation and wider activities of interest groups*

Long term, multi-case litigation strategies are not conducted in a vacuum, but are rather nested in a wider range of lobbying activities. Effective litigation is often reinforced by lobbying, which may lay the groundwork for further cases by coordinating litigants or making others in the field aware of the legal possibilities to bring cases (Alter and Vargas 2000; Conant 2002). Similarly, interest groups may trade off the two strategies – lobbying and litigation – frequently emphasizing one over the other in ways that vary dependent on their organizational features and resources (Bouwen and McCown 2007). Traditional lobbying can follow up court decisions by raising awareness of the issue amongst the relevant industry, putting pressure on policy makers through the usual lobbying channels and, very often in the EU, providing institutions with technical information about legislation and its potential effects.

5.5. Litigation strategies at work: Corporate taxes and the ECJ

The recent increase in cases before the ECJ to do with corporate taxes provides an interesting example of how all three of the litigation strategies can be used to good effect even in areas where EU law should seem to be of very limited applicability. The EU Treaties leave direct taxation almost exclusively to the Member States. Article 94 does allow the Council, acting under unanimity, to pass directives for the approximation of laws that directly affect the establishment or functioning of the Common Market, although ‘fiscal provisions’ are noted as a derogation in Article 95. The EU has passed some legislation relating to taxation pursuant to Article 94: particularly the Parent/Subsidiary Directive and the Interest and Royalties Directive, but has generally found it extremely difficult to pass legislation. The exclusivity of Member States’ competencies with respect to taxation is a sensitive issue, consistently identified by members such as the United Kingdom as a ‘red line’ in Treaty negotiations. The unanimity requirement has ensured that this is a classic area of EU law where legislation is extremely slow to be produced.

Multinational firms are large, well endowed with resources, and conduct ever more business across webs of subsidiaries established in multiple Member States, and are subject to multiple, complicated direct taxation systems. That subsidiaries of a country based in one Member State may be differently treated by that or another State for tax purposes, with respect to mandatory withholding, interest paid, crossborder dividends, and other forms of direct taxation have created incentives, as firms have grown larger and holdings more complex, to challenge national tax rules. With Brussels slow to produce harmonizing rules on corporate taxes, firms have turned to the ECJ. As the

Commission itself has acknowledged, 'Due to the unanimity requirement in the Council (Article 94 EC Treaty) there has been little harmonization, and political cooperation assisted by the Commission has not led to progress. In fact, EU direct tax harmonization has been determined by ECJ decisions' (Commission 2006).

In the mid-1990s, a flurry of cases came before the ECJ asking questions about the relationship between the 'fundamental freedoms' of the EU Treaties and Member State competences, like taxes, that might be discriminatory under the Treaties. In a string of cases, the ECJ established a new rule, which it now articulates like this: 'It should be remembered that, according to settled case-law, although direct taxation falls within their competence, Member States must none the less exercise that competence consistently with Community law and, in particular, avoid any discrimination on grounds of nationality.' It repeats this language verbatim (this is a frequent technique of the ECJ for underscoring the rule created by any given set of precedents) and attributes it to several cases in particular: C-80/94 *Wielockx*, C-107/94 *Asscher* and C-311/97 *Royal Bank of Scotland*. One thing one can see from the filing dates of the cases, two in 1994 and one in 1996, is that firms, a diverse set of European firms with branches in multiple Member States, were swift to file subsequent suits, locking in earlier decisions as precedents in subsequent cases. When Royal Bank of Scotland brought their suit against the Greek Government, they were quick to point to *Wielockx* and *Asscher* as the enabling precedents.

Litigation can pave the way for and be reinforced by broader interest group activities. These test cases and rapid follow-ons created an effective opening into which a broad range of corporate interests stepped, putting immense and effective pressure on Member States, EU institutions, and, especially, the ECJ. A flood of cases ensued, accompanied by wider interest efforts. At a 2005 meeting of the Tax Executive Institute's European chapter, several members of the firms engaged in the packaging industry gave a talk highlighting how their firms were 'anticipating and capitalizing on ECJ case law through a multifaceted approach covering appeals and litigation, planning and risk management and . . . collective action'. They identified a range of lobbying partners ranging from national lobby groups to transnational ones such as the European Business Initiative on Taxation with which they planned to work in order to shape their preferred tax policy for the EU (Tax Executive Institute 2005).

Through the 2000s, more cases came before the ECJ, many of which proved rather controversial. The ECJ developed its case law with respect to how national direct taxes can constitute hindrances to Freedom of Establishment (Article 43), ruling first that a Member State's direct tax mechanisms as it affects a nationally based company's overseas subsidiaries may not constitute 'an unwarranted restriction' on its establishment (ECJ 397/98 *Metallgesellschaft*, 2001) and then finding that it may be contrary to EU law if it simply creates a 'less attractive' environment for a company (ECJ 324/00 *Lankhorst*,

2002). A stream of other cases came concerning thin capitalization as discussed in *Metallgesellschaft* and *Lankhorst* as well as crossborder dividends, (ECJ 35/98 *Verkooijen*, 2000). Each ruling elicited a stream of follow-on cases. For example, the ECJ finding that a Member State may not tax a resident more heavily on its foreign earned dividends than those from a domestic company was rapidly followed by cases asking whether Member States could reduce the availability of tax credits or deductions to recipients of foreign dividends (ECJ 315/02 *Lenz*, 2004 and ECJ 319/02 *Manninen*, 2004).

Corporate interests joyfully stepped into the breach to take advantage of this new flow of decisions attacking national tax laws. PricewaterhouseCoopers formed an 'EU Direct Tax Group' with targeted advertising in new EU Member States asking companies: 'Are you familiar with the consequences of the latest developments in EU case law? Are you aware of the fact that in many EU Member States tax regulations are in breach of Community law, which has primacy over national law? Do you know the potential risks and opportunities resulting from EU law for your own company? PwC can assist you all the way.' (EU Direct Tax Group Advertisement, accessed 2008). Academic commentators began also to write of dividend and other corporate taxation as 'when the ECJ makes policy' (Graetz and Warren 2007).

A consensus began to emerge across government bodies and commentators that the ECJ had been making tax policy in the EU in the absence of any coordinated legislative action and that the flow of cases was driven by corporate interests, accelerating rather faster than institutions could control, even as corporations deployed ever more articulated legal strategies. Commentators wrote that, 'the sharp increase in litigation by taxpayers in national courts and the ECJ in recent years has reshaped the direct tax landscape in Europe' (van der Made 2007), while legal practitioners baldly stated that, 'the Court has, in short, gone too far' (Airs 2005). This criticism of ECJ decisions, which were construed as unclear, conflictual, and disassembling national tax systems without providing any new harmonizing norms, began to spread, fuelled, in part, by a sense that there was no effective check on the corporate interests' ability to bring cases and demand new interpretations of EU law faster than the ECJ could develop coherent law in this complex, technical area, and certainly more quickly than the Council could create enough consensus among Member States to craft an effective legislative response.

It points to the power of the corporate interests bringing these suits, however, that even as the Commission has responded by pitching a plan to the Council for closer coordination of taxation, litigation continued apace in 2007. In 2006, the Commission issued a communication to the Council, urging exploration of tax coordination, acknowledging the ECJ's role in pushing the issue to the forefront but noting, with a hint of criticism, that 'despite a substantial body of case law of the ECJ, it is not always easy to understand how the broadly expressed Treaty freedoms apply in the complex area of tax law'

and going on to observe that legislative action would serve the EU interest better because ‘there is a need for guidance on the principles flowing from the case law and how these apply to the main areas of direct taxation’ (COM 2006). The ECJ, however, already had a case pending before it which represented a compelling example of a simultaneous litigation strategy – a class action suit on the UK’s thin capitalization laws (ECJ 524/04 *Thin Cap Group Litigation*, 2007) arising from *Lankhorst*.

At the end of the day, the Commission moved slowly on its initiative – in October 2007 issuing another communication, ‘inviting Member States to carry out a general review of their anti-abuse rules in the direct tax area, in light of the principles flowing from relevant ECJ case law’ (COM 2007) and the ECJ delivered a fairly nuanced ruling in the *Thin Cap* case that was not as fiscally demanding of the United Kingdom as was first feared. It seems that the EU institutions are slowly moving to counter the tsunami of cases and pressure brought by corporate interests. What is so compelling about the example of the tax litigation saga, however, is the rapidity and breadth of the lobbying efforts, brought by a wide range of industries with great efficacy.

5.6. Conclusions

The interest group–court relationship in the EU is well and long established. Although institutional incentives vary somewhat across national legal systems making the strategies that are constructed by litigants distinctive in the EU, as compared with other systems such as the United States, they nonetheless constitute a staple tool in interest groups’ tool kits for driving policy change. This is unsurprising because although the details of litigation: how to bring suit, how decisions are handed down and with what effect, the legal culture in which disputes are embedded, and the inter-institutional balance in which rulings are made varies, the importance of courts to policy interpretation and rule change is shared across most developed polities. This is of real consequence in the EU where interest group litigation has developed into a powerful force in the policy process and has played an important role in shaping the form of contemporary EU law.

Notes

1. International law typically applies only to states, not individuals.
2. Although this is hard to do where the ECJ has interpreted the Treaties, in its decisions, because that is effectively constitutional interpretation which legislation cannot modify.

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Chapter 6

COREPER and National Governments

Sabine Saurugger

Adopting an institutionalist viewpoint, we argue that the characteristics of political systems and their structures of power and decision-making deeply influence the nature of interest representation. While the first writings on the European integration process predicted a supranational governance system, where actors would reorient their loyalties (Haas 1958), the 1970s and 1980s contradicted this approach. Decision-making processes remained mainly intergovernmental, with member state governments making decisions. According to a neo-liberal intergovernmentalist approach (Moravcsik 1993, 1998), member state governments thus remained the most important actors in EU policy-making processes. For this reason, interest groups were said to attach more importance to national arenas than to European processes.

The intergovernmentalist perspective has been subject to a series of challenges. Criticisms are directed at its analyses of preference formation and its understanding of decision-making in the European Union (EU). Preference formation does not only take place at the national level: national governmental representatives interact at the European level, are surrounded by supranational organizations that are more than just entities keeping transaction costs low. It follows that policy positions defended by national governments in Brussels are not only the product of a strictly endogenous process. EU decision-making processes involve the engagement of sub-national, member state, and supranational levels of authority, and this complex interplay between them creates multiple arenas, venues, and access points for interest groups (Wallace 2005, Beyers 2004). Despite this complexity, national governments, and their EU-level representations, as well as the institutionalized meeting platform – the Committee of Permanent Representatives (COREPER) remain major contact points for interest groups. While decision-making is increasingly multi-layered, in a large number of areas national governments still collectively take the final decision. Furthermore, interest groups – be they federations or individual groups – still emerge at the national levels and are very much influenced

by domestic institutional, social, and economic structures. These structures differ tremendously in EU member states and thus produce different national and sectoral lobbying styles. The differences influence the ability and willingness of interest groups to use the EU or supranational venues to represent their interests. To complicate matters further, governments are not unitary actors but comprise a variety of functional and political preferences. It is thus essential to understand, through a comparative perspective, how the national coordination of EU matters are organized to analyse what they demand from interest groups so that they be granted access to the policy process.

This chapter will analyse national governments through three focal points: firstly, as access points of interest groups both at the national and European level. Secondly, they will be presented as lobbied lobbyists, as they occasionally play the role of interest groups themselves (see Spence 1993). Finally, they are mediation structures that co-determine interest group strategies both at the national and at the European level.

To analyse these aspects, the chapter is divided into two parts. The first part will present the varieties of institutional frameworks that national governments developed at the domestic as well as at the European level to allow interest groups access to decision-making processes and to play the role of interest groups themselves. This multitude of institutional contexts or lobbying styles must be taken into consideration in order to understand the EU's complex interest representation system. The second part will analyse how the changing roles of member state governments in EU policy-making processes have influenced interest group activities, and how theoretical accounts of these changes can help us to understand the transformed venues for interest groups.

6.1. National and European coordination of EU member states

While member states are embedded in a system of shared decision-making and collective governance, the defining characteristic of which is the 'emeshing of the national and the European' (Laffan et al. 2000: 74), it is necessary to underline the basic understanding that member states and national governments keep their specificities with regard to their political systems. The structure of the member states' political systems, their policy style as well as public opinion, and elite attitudes present different opportunities and constraints to interest groups. To understand national governments' attitudes towards the EU, and, more importantly, to understand how these attitudes forge national interest group attitudes towards the integration process, it is necessary to look closely at the national level. The first subsection will thus analyse more precisely the national coordination structures of national governments and their interest intermediation structures more generally, concentrating particularly

on the relationship with interest groups. In a second subsection, the chapter will then look more closely at the European-level coordination structure with which interest groups have to deal when influencing member states in Brussels.

6.1.1. *National coordination and interest intermediation structures*

European integration has had various forms of influence on national governments since the beginning of the integration process. All member states adapted by creating new structures that dealt with European affairs at the national, regional, as well as local levels when joining the EU (Bulmer and Lequesne 2005). This had an important influence on the access points interest groups have at the national level.

With EU membership, the domains of governmental action and responsibility have been extended. National governments must be prepared to defend more coherent programmes at the EU level and also ensure that their proposals in Brussels and their actions in national capitals are compatible. In some cases, the EU has even had a very substantial impact on power structures. Thus, the Dutch prime minister's position has been significantly enhanced as a consequence of the coordination role played by the prime minister in EU affairs (Kassim 2005: 292).

To a certain extent, these changes have also altered the relationships between national governments and interest groups. While national governments have been faced with the task of coordinating their policies since the establishment of the European Communities, this task has become increasingly complex as European policies have had a major impact in all policy fields and thus include all ministries in the policy-making process. This leads to a situation where domestic interest groups needed to multiply their access points. At least three scenarios are possible: Firstly, being linked to one single ministry, as were French farmers' unions until the 1990s, hinders interest groups' deployment of a multiple-access strategy to ensure that all relevant public actors were informed of their positions (Saurugger 2001). A second scenario where national access points are extremely important concerns the increasingly common situation of qualified majority voting. This rule makes it impossible for one member state alone to block a decision, as Boessen and Maarse. (this volume) show in the case of tobacco lobbying, an industry concentrated on forging alliances with national policy makers. The relevant companies sought contacts with political actors outside the national health ministries, since they tended to support the initiative for a tobacco advertising ban. The result of this successful lobbying was that several governments opposed the ban despite the positive attitude of the national health ministries. The large tobacco producers also used the public arena to make their opposition to the advertising ban heard. Ads were posted in a large number of

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European newspapers and magazines, underlining the so-called 'domino effect', spreading to cars and alcohol.

In a third scenario, interest groups may circumvent the national level and intervene directly at the EU level. Thus, German private banks chose to represent their interests directly at the EU level as national policy-making structures were considered to be too open to public banks, a situation considered to put private banks at a competitive disadvantage (Grossman 2006). In banking, close ties were not only undermined in Germany but also in France where private banks complained to the Commission about the preferential treatment given to *Crédit Lyonnais* by the State bail-out. Thus, while there are cases of path dependency, the emergence of a multi-level polity may endanger historical institutional arrangements at the national level. In these cases, interest groups may choose to circumvent national routes, and more particularly national governments.

A more systematic analysis of domestic EU coordination patterns illustrates the access points interest groups can choose domestically. Kassim (2000: 237) underlines six similarities among EU member states when analysing their national coordination structures.

Heads of government have at their disposal specialist expertise and institutional support to enable them to carry out the increasingly routinized role they perform in EU decision making; foreign affairs ministries continue to occupy a central role in national processes though they face challenges from several directions; interdepartmental coordination in EU matters is generally managed by mechanisms that have been specifically designed for the purpose; individual ministries have made adjustments to their internal organisation and procedures; national parliaments usually have a formal role in EU policy-making but are rarely influential; and most member governments have a junior minister for European affairs, but, with the exception of France, the office is not typically central to coordination.

Important differences exist, however, amongst member states' national EU-coordination structures. The comparative analysis of national coordination structures of EU affairs generally distinguishes three types of structures: centralized coordination, decentralized coordination, and complex coordination structures (Petiteville 1999). Kassim (2005) elaborates a similar typology – comprehensive decentralized, comprehensive centralized, and selective centralized – while according different main values to member states' coordination structures. This typology is particularly useful when looking at interest group access to national governments in EU lobbying. While labels such as 'pluralist', 'neo-corporatist', or 'statist' help differentiate between the overall characteristics of domestic interest intermediation structures, the typology of coordination structures shows how interest group demands are transferred – or not – at the EU level. While, in general, all ministries are directly concerned by EU affairs, some countries have established distinctive coordination structures to minimize the room for manoeuvre of different ministries.

France, the United Kingdom, Denmark, and Sweden can be characterized as having centralized coordination structures. While the ministries of foreign affairs, of the economy, and of finance, are most central in the national treatment of European affairs in all member states, in France, the United Kingdom, Denmark, and Sweden, respectively, three structures deal primarily with European affairs. In France, it is the SGAE (Secrétariat général des affaires européennes, the former SGCI or Secrétariat général du Comité interministeriel pour la coopération économique européenne) established in 1948 to coordinate the implementation of the Marshall Plan, which really gained visibility and importance in the 1980s. The SGAE has become a neurological point for information stemming from Brussels. It is the main interlocutor of the French permanent representation. Its main task is to establish a common French national position (Lequesne 1993; Menon 2001). On receipt of proposals from the Commission, the SGAE convenes inter-ministerial meetings which all interested departments attend. The volume of Community legislation is such that a virtually non-stop process of meetings takes place at the SGAE, as many as ten per day. France, as does the United Kingdom, Sweden, and Denmark, calls for comprehensive coverage and the capacity to impose decisions that reconcile societal interests and departmental views. In the United Kingdom, the European secretariat of the Cabinet office – the functional equivalent of the SGAE – is responsible for EU policy coordination. However, it is smaller and less interventionist. Its coordination role is more subsidiary than that of the SGAE. These centralized structures mean that interest group interventions are very much filtered through the central coordination structures. Except for national champions or interest groups that have established a close clientelistic relationship with ‘their’ ministry, influencing the national position is rather difficult. Contrary to the French structure, the British administration intervenes early in the decision-making process, influencing the Commission’s activity at a very early stage. Sweden and Denmark, though centralized, have different organizational structures with regard to EU affairs. While Denmark coordinates its EU policy through a pyramidal structure of technical committees, where political issues are solved by the highest-ranking foreign policy committee, Sweden offers a secretary of state of the prime minister’s cabinet the possibility of coordinating Sweden’s EU policies. The existence of technical committees, compared to the politicized cabinet procedures, allows for stronger interest group influence, as technical details call for expertise that interest groups are – more often than not – able to offer (Radaelli 1999).

The majority of national governments have, however, decentralized coordination structures. Most of them rely on a head ministry in a specific issue area. Thus, in Germany, as in Greece, so called ‘twin-track systems’ exist where the Ministry for Foreign Affairs coordinates treaty-related and institutional matters, and the economics ministry has responsibility for economic and

domestic policy issues (Derlien 2000). In the Netherlands, the minister of foreign affairs deals with European issues, seconded by the secretary of state for European affairs and the directory for European affairs. In parallel to these structures, an inter-ministerial coordination committee examines the Commission's proposals, carrying out an initial evaluation and preparing for a common Dutch position. Finally, the Coordination Committee for EU problems (CoCo) prepares the EU Council's meetings (Petiteville 1999: 21). In Portugal and Spain, the routine coordination of EU policy is the exclusive preserve of the foreign ministry. There is, however, a major difference between the countries where central government determines EU policy unilaterally – Greece and Portugal, where a centralizing apparatus is in place, but does not function (Spanou 2000) – and those where sub-national authorities are involved in decision-making. In Italy as well as in Spain, Austria, and Germany, the Regions and Länders have a substantial say in the preparation of domestic positions on EU policies. In Austria, the system is, what is more, very inclusive. All government departments, the national bank, the federation of local communities, and the major social partners participate in the weekly Tuesday meeting that is the formal centrepiece of EU coordination in Austria (Müller 2000). In Germany and Austria, interest groups are integrated with state actors in neo-corporatist policy-making processes. These groups are much more diversified than employer and labour interests and involve 'a whole range of intermediary interests that partly assume public functions and partly represent private interests' (Benz and Goetz 1996: 17). Consensual decision-making is the rule. This makes it an efficient system for non-state actors but one which is prone to 'joint decision traps' (Scharpf 1988). Interest groups are thus trained to act as multi-level players in EU and national lobbying structures (Eising 2004; Woll 2008).

As did 'old' member states, the new Central and Eastern European member governments have established specialized units inside their national administration bodies. Goetz (2005: 272) argues that in Central and Eastern European states there has been a pronounced tendency towards the emergence of distinct 'EU core executives' who are separated from the rest of the administration. This is particularly due to the fact that negotiating accession and ensuring legal transportation of the entire *acquis* needed to be coordinated efficiently. The EU itself insisted on dealing with a small range of authoritative interlocutors, stressing the need for an effective lead from the centre. However, differences emerged even before accession. Thus, while Slovenian EU affairs structures turned increasingly polycentric (Fink-Hafner and Lajk 2003), the Polish government experienced a major shift towards a much more centralized approach in 2000 which included 'reinforced central and hierarchical coordination mechanisms' (Goetz 2005). These domestic coordination structures however have not (yet) exercised a recognizable impact on the state/non-state actor relationships in the new member states. In her research, Perez-Solorzano

observes the existence of important path-dependent patterns, particularly in view of the generalized absence of participatory politics and consultation between the state and independent stakeholders before 1989 (Perez Solorzano 2004). Only Slovenia displays neo-corporatist traditions that lead to prior coordination between state and non-state actors at the domestic level (Fink-Hafner 2005).

Now, how do these structures and the changes experienced within them influence interest groups' activities with regard to EU affairs? Numerous studies (Schmidt 1999, 2006a, 2006b; Falkner 2000; Balme and Chabanet 2002) distinguish summarily between three initial forms of relationships – neo-corporatist, statist, and pluralist. It is important to note, however, that this typology does not apply to entire domestic intermediation structures but to policy fields. In statist policy areas – particularly numerous in France, Britain, and Greece – state actors have traditionally provided interest groups with little access or influence in policy formulation, but as Schmidt (2006a: 672) notes, 'have accommodated them in implementation, either by making exceptions to the rules as often as not or limiting the number of rules to allow self governing arrangements'. However, only in exceptional cases, such as the French farmers' unions, interest groups adapt extremely marginally to the multi-level decision-making process, in not relying solely on their national governments, either at the domestic or EU level. A similar attitude can be found in the French government's position vis-à-vis mergers and state aid, where relying extensively on national governments seems a winning strategy at least for large French firms, as demonstrated in the cases of Alstom, EDF, and Renault (Le Galès 2001). In policy fields where neo-corporatist structures prevail, interest groups have difficulties adapting to the multi-level EU framework, except in cases where governments establish EU coordinating structures which include major interest groups as applies in Austria or Sweden. Interest groups in pluralist policy fields accommodated rather rapidly to become the main interlocutors in the specific policy field – as illustrated in the example of the Netherlands (Wilts 2002).

Schneider et al. (2007), however, come to an entirely different conclusion. In analysing domestic pre-negotiations of EU legislation, they argue that the interaction between government agencies, interest groups, and parties is largely statist (*étatiste*), but account for small variations towards neo-corporatist patterns, independently from policy fields or domestic intermediation interest patterns. This conclusion is convincing when considering national coordination patterns of EU policies, where, as Kassim states, all countries have more or less centralized coordination structures. Thus, whilst interest groups want to defend their corner, national governmental actors act as the ultimate arbiter in domestic pre-negotiations. It is only at the agenda-setting phase that resourceful interest groups have the possibility of circumventing the state. And it is here where groups used to pluralist or semi-pluralist policy

areas have a competitive advantage and do not need to operate via national governments.

6.1.2. *European-level coordination*

With regard to European-level coordination, Kassim (2005) argues convincingly how difficult EU decision-making procedures have become for member state governments. While member states remain Masters of the Treaty, the increased use of qualified majority voting prevents any single government from blocking regulations or directives to which it is opposed (Garrett and Tsebelis 1996). Furthermore, institutional fragmentation is very high, linked to increasing sectorization (Kerremans 1996). This complex environment requires important resources, for both national governments and interest groups. As emphasized earlier, analysing the relationship between national governments and interest groups at the European level shows three different aspects of this relationship. Firstly, the classical question of access points to national permanent representations; secondly, the lobbying role of permanent representations themselves – what Spence (1993) calls the ‘lobbied lobbyists’; and, finally, the indirect lobbying role national governments play in providing seconded national experts (SNEs) to the Commission – both access points for permanent representatives and national interest groups.

When looking at the EU level, the central agents of national governments are the national permanent representative offices. Permanent representatives initially performed three functions: first, they provide a Brussels base for national governmental negotiators and a focus for advice, information, and coordination; second, they are the prime negotiators in most Council meetings; and finally, they monitor developments in European institutions (Spence 1993). While the first two tasks are still particularly important, gathering information has become an extremely widespread activity, and no serious actor of EU affairs can rely solely on information stemming from the permanent representative’s office. All national ministries have staff monitoring EU affairs, as do resourceful interest groups – national as well as European-level federations. At the same time, though, permanent representations are the most up-to-date with regard to the Council decision-making process.

However, national governments’ permanent representatives are not the only ones who represent ‘national interests’ at the European level. SNEs can be found inside the European Commission to assist Commission officials in their task, another useful contact point for national interest groups at the EU level. As in other international organizations, permanent representations play a key role in maintaining close contacts with nationals that have embarked on a career with EU institutions. This is particularly developed by the French permanent representation, where one official has the task of

monitoring the careers of permanent civil servants as well as SNEs, and is, in particular in the first case, made responsible for failed promotions (Lequesne 1993; Menon 2000, 2001). SNEs can be seen as a particular form of 'national interest representation' inside EU institutions, and in particular the Commission.¹ While this feature can be seen as something of a throwback to French attitudes in the 1950s and 1960s when Paris made the case for the Commission to be staffed solely by secondees, considered by the French as a way of undermining the notion of European public service (Cini 1996: 121), it is today considered as an efficient way of keeping an ear to the ground within the Commission for early warnings about projects under construction. Whereas SNEs can be found in nearly all policy fields, as Table 6.2 shows, nuclear energy was of particular importance (Saurugger 2001). Thus, whilst the French (nuclear) electricity producer EDF, under its former monopolistic and public status, had particularly close ties with the French government, we note that it has the same contacts with the European Commission. Even more so, like EDF, Framatome and COGEMA (today AREVA) regularly sent numerous experts to the Commission where they obtained the status of SNEs during the 1980s and 1990s.² It thus seems that one could still echo Mazey and Richardson's statement generally that, 'the "procedural ambition" of many Commission officials to seek a stable and regular relationship with the affected interests might be seen as presenting a particular advantage to those lobbyists used to that type of policy style at the national level' (Mazey and Richardson 1993: 9). Therefore, it is not only the interest groups which create relationships with Commission officials, but the officials themselves. The important role of Commission civil servants in the establishment of these networks cannot be underestimated.

Almost all permanent representations make efforts to identify those areas where individual member states are under-represented in the Commission's Directorate Generals and tend to find detached national experts to fill these gaps. As Table 6.1 shows, the Joint Research Committee is the most attractive place for SNEs, followed by RTE and the Statistical Office (ESTAT). Strategic DGs are Transport and Energy, where engineers are particularly sought after, with seventy-one SNEs and Environment with sixty-five.

Ensuring that national interests are effectively represented in Brussels creates incentives on the part of member states to establish effective coordination procedures. According to Mazey and Richardson (2006: 248), 'interest groups generally exhibit a preference for state bureaucracies as a venue for informing themselves about and influencing public policy'. We can differentiate between two forms of coordination, on the one hand, centralized and vertical coordination, that can be found in the case of the United Kingdom, France, Portugal, Sweden, and Denmark, on the other, vertical and horizontal pluralism (Germany, Italy, Greece, Belgium, the Netherlands, and Austria).

Table 6.1. Seconded national experts

SG	9
SJ	5
COMM	2
BEPA	3
ECFIN	34
ENTR	48
COMP	40
EMPL	50
AGRI	28
TREN	68
ENV	65
RTD	90
JRC	48
INFSO	42
FISH	17
MARKT	50
REGIO	32
TAXUD	53
EAC	31
SANCO	47
JLS	52
RELEX	35
TRADE	35
DEV	26
ELARG	19
AIDCO	30
ECHO	3
ESTAT	67
ADMIN	14
DIGIT	3
BUDG	11
IAS	2
OLAF	22
SCIC	–
DGT	10
OPOCE	–
OIB	1
PMO	–
OIL	–
EPSO	7
RELEX CdP-OSP	28
Total	1,099

Source: Statistical Bulletin of Commission Staff 1/2009.

As Kassim (2001: 48) underlines, United Kingdom and French government action in Brussels takes place within the context of a well-defined national coordination objective: a common position defined at the national level is followed through consistently during negotiations. Its organizational structure is similar to that of other EU member states' permanent representations. It is headed by two senior figures: a permanent representative of ambassadorial rank and a deputy. Sectoral responsibilities reflect to a certain extent on the

Table 6.2. National coordination systems at the European level: sample

Country	Type of coordination system	Main elements	Interest group access to the permanent representations
France	Centralized vertical coordination	Clear common position defined domestically through the SGAE Arbitration of complex cases through PM's Cabinet	No coordination structures at the national level Statist intermediation structures Important access points in the permanent representation in particular agriculture, commerce, energy
United Kingdom	Centralized vertical coordination	Clear common position defined nationally through Whitehall Responsible ministry initiates consultation with other interested parties before submitting position to permanent representation	Pluralist structures at the national level Interest groups either access national ministries or permanent representation
Slovenia	Centralized vertical coordination	Government office for European affairs coordinates circulation of information Adopts coherent position transferred to permanent representation	Neo-corporatist traditions at the national level lead to prior coordination at the domestic level Difficult for interest groups to intervene at the permanent representation
Germany	Vertical and horizontal pluralism	EU units in government departments feed information to permanent representation Issues are generally resolved by lead ministry Finance and foreign affairs ministries are central ministries	Interest groups are redirected to the national level Neo-corporatist intermediation structures Relatively poor direct access to permanent representation
Austria	Vertical and horizontal pluralism	Information to permanent representation through weekly coordination meetings involving ministries, Länder, and social partners	Coordination at the national level mainly Neo-corporatist intermediation structures Easy access to ministries for social partners in particular
The Netherlands	Vertical and horizontal pluralism	Information to permanent representation through lead ministry but also interdepartmental working group	Neo-corporatist traditions at the national level Interest groups chose between different strategies – national or directly the permanent representation

Sources: Wilts (2002); Fink-Hafner (2005); Kassim (2005).

organization of the Council: Agriculture (particularly important for France), Industry and Internal Market, Social, Environmental and Regional Policies, Economic Affairs, Finance and Tax, External Relations, Development and Trade Policy, Justice and Home Affairs, Security and Defence. The French permanent representation also has a section dealing with nuclear questions, a very important contact point for industrial interests. The sections vary in size and internal organization, reflecting the organization of work and the volume of EU business (Kassim 2001: 54). It is important to note that the extremely centralized coordination structure at the national level leaves important access points for interest groups at the European level. Thus, French interest groups always find a way to have their interests accounted for at the European level via their national permanent representation.

Generally, the permanent representations are responsible for supplying representation for all levels in the Council, except during presidencies when permanent representation officials hold the chair and officials from the capital carry out the representative function (Menon 2001, Bostock 2002, Lewis 2002). While in Portugal and in France instructions to the permanent representative pass through a specific national structure – as we have shown, respectively, the General Directorate for the European Communities, located in the Ministry of Foreign Affairs, and the SGAE – the UK permanent representation collects and relays information to Whitehall. With regard to Ireland, coordination is restricted to areas of national interest and is generally informal, within small political and administrative elites. Ireland has a small permanent representation with limited resources that focus on a few selected issues (Laffan 2001). Sweden introduced more centralized arrangements after accession in 1995. However, contrary to the French permanent representation in particular, there are no particular networks in Brussels and no special openness to interest groups on the grounds that consultation takes place in Stockholm, a very similar attitude to that of the German representation. Interest groups are told to contact national ministries to represent their claims; the German permanent representation rather strictly follows the guidelines from Berlin (Saurugger 2001, 2005).

However, centralized and decentralized coordination modes exercise both 'upstream' and 'downstream' functions in the sense that they are an official post-box, providing a base for national negotiations, or monitoring contact with private interests more broadly (upstream functions) as well as reporting back to the appropriate national bodies and advising the national capital (downstream functions).³

Permanent representations characterized by vertical and horizontal pluralism, nevertheless, show a distinctive set of common features. Individual ministries have substantial room for manoeuvre. Their autonomy is reflected in the internal organization of permanent representation and involves complex systems of coordination on the federal and sub-national level (Austria,

Belgium, Germany, and the Netherlands). It is important to note, however, that only Austria includes the Federal Employment Chamber, the Federation of Trade Unions, and the Federation of Austrian Industry in the list of staff of the permanent representation (EU Information Handbook 2005). For Greece and Italy, in addition to the fact that their EU coordination is rather decentralized, poor domestic coordination, inter-ministerial rivalries, cross-departmental competencies, and a fragmented national administration make efficient coordination of national politics and policies difficult (della Cananea 2001; Spanou 2001, Magone 2001).

Faced with these challenges, interest groups have adapted, more or less quickly depending on their political system, their countries' policy style, the political opportunity structures at the EU level, and their internal organizational framework. For this reason, it is not possible to draw a simple correlation between the type of coordination system at the EU level and the form interest group access takes with regard to national permanent representations in Brussels. It is however possible to summarize the results through three hypotheses.

1. Firstly, if the interest group is linked to one particular ministry or department at the national level, it will use the same type of relationship when it is available at the EU level. If this type of relationship is modified, as we observe in the case of fragmented and sectoralized policy, the interest group will continue to extensively use the policy community relationship it has created with the specific DG, and has enormous difficulties developing access to other DGs. On the other hand, if there is a possibility of entering an individual relationship with one SNE from its ministry, the interest group will use this way to represent its interests.
2. The second model is an interest group that is accustomed to a large number of relationships with public authorities at the national level. If confronted with all three different ideal forms of networks at the Community level, the interest group will continue to extensively use action repertoires at the national level initially.
3. The third model is used by financially resourceful – mainly economic – interest groups. If confronted with change, and given sufficient resources, these groups will adopt the most relevant action repertoire and adapt themselves to the requirement of the European level. This form reflects particularly well social learning processes, possible under certain circumstances.

6.2. Changing roles of government in EU decision-making

Looking at the national institutional structures to understand how interest groups access decision-making processes through the national route is not enough, however. EU decision-making procedures are of fundamental

importance to the nature of interest representation. The procedures determine the role and the powers of different institutions and in particular the veto powers of national governments. A decision to initiate legislation by the Commission will partly depend on how it views the likelihood of finding a sufficient majority in the Council of Ministers. Where EU competencies exist, qualified majority voting and co-decision-making between the institutions are now the most common decision-making procedures, diluting the power of any one institution.

It is common wisdom today to characterize EU decision-making as multi-level governance, where public and private actors cooperate in decision-making processes. This, however, does not allow for conceptualizing the specific relationships between member state governments and interest groups. Greenwood (2003) offers a useful distinction between intergovernmental and supranational forms of decision-making. While intergovernmental decision-making is based on indirect forms of interest representation (national route), supranational decision-making is confronted with direct forms of decision-making (European route). As the structure of the 'national route' for interest groups has undergone major changes since the creation of the European Community, so have the different theoretical and conceptual accounts for this national route, helping to understand interest group access to policy decisions and implementation.

6.2.1. *The development of the 'national route'*

Neo-functionalists explained that interest groups with defensive postures would take the national route while pro-Europeans would choose the European route. Prior to the Single European Act, though, interest groups mainly adopted the 'national route' to represent their demands. Previous treaties have, however, resulted in a much greater use of the Brussels strategy, although whether the balance has now tipped towards the latter is an open question. Furthermore, the increasing use the Commission makes of the internet in its consultation procedures might have influenced these attitudes further.

The use of the national route for interest representation at the European level is conditioned by the role of the national level at different stages in the European policy process, and by the institutional framework provided at the national level. The macro-level of treaty discussions match the remit of the peak, horizontal interest groups. In intergovernmental negotiations or even the constitutional treaty, Business Europe (former UNICE) and ETUC play a rather important role. The introduction of co-decision with the Maastricht Treaty has changed considerably the nature of inter-institutional negotiations within the EU. Agreements between the Council, the Commission, and the European Parliament have become crucial elements in the majority of EU

decisions. It seems as if an increasingly common objective for working groups is to avoid the conciliation procedure by involving the representatives of the EP much earlier in the negotiation process than previously (Fouilleux et al. 2005). The co-decision procedure has complicated the negotiation phase greatly, as it has induced a second negotiation phase which takes place in the Council. This means that national delegations try to reach a compromise among themselves on the basis of Commission proposals which can then be presented to the EP as a Council position. This, of course, makes the role of national governments in the EU more complex. The permanent representative is increasingly becoming just one actor amongst many – central actors of course, but who must stay permanently in contact not only with their national administrations but also with interest groups and European institutions.

Greenwood (2003) mentions that, in these intergovernmental processes, the national route is particularly important for interest groups. Thus, in 1996, a loose network of large British firms, the European Business Agenda, sought to influence the British government's agenda. The position papers they produced were sent to UK Commissioners, the UK permanent representation, and to British business federations with a presence in Brussels (Mazey and Richardson 1997). However, 'damage limitation' is the best that could be attributed to the direct influence any one interest constituency held over any one outcome.

This example shows how difficult it is for interest groups – business as well as public groups – to intervene efficiently in the intergovernmental process, despite the fact that this route remains central and widely used, particularly in cases where 'national champions' such as Renault, Alstom, and EADS seek to defend their interests. The biggest problem of the European route – compared to the 'national route' – remains the need for substantial resources. In these times of extended qualified majority voting, it is not enough to lobby solely one's own national government. A majority of twenty-seven member states must be convinced, requiring major financial, social, and societal resources (Grossman and Saurugger 2006). Thus, even in the dwindling scope where decision-making in the Council through unanimity remains, reliance upon national governments can be a very unstable strategy as member states frequently trade one issue against another between themselves.

The national route represents a 'tried and tested access strategy for interest groups' (Greenwood 2003: 32) as well as protest movements (Imig and Tarrow 2001) because established policy networks and dependency relationships operate which can equally well be used for EU and domestic purposes. However, the danger with those well-established routes at the national level might lay in the fact that interest groups do not seek the European platform. This is particularly true for interest groups without significant financial resources. Faced with a very weak European public space, and thus relatively weak media coverage on account of the issues at stake, these groups are particularly dependent on their national governments – or must possess substantial capacities for

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network-building – a phenomenon increasingly observed in the field of social movements (Imig and Tarrow 2001).

Mazey and Richardson (2006) suggest differentiating between three forms of ‘indirect lobbying’, as they call interest group representation via the national route: permanent representatives, individual members of working groups in the Council, and national governments. The permanent representation officials participate in the Council working groups and prepare the ground for meetings of the COREPER and ministerial councils. These negotiations need to be informed on the ‘national encompassing interest’ (Bouwen 2004), that is, the national federations’ view on negotiating points. Basically, the Council needs information on the aggregate needs and interests of a sector in the domestic markets.

Individual members of the working groups of the Council, though generally well-informed, also rely on the expertise individual interest groups can offer. It is important for groups to know the identity of the national officials representing their member state’s interests in different council, working groups so as to be able to contact them during negotiations. The third and last possibility, contacting national governments, at ministerial, cabinet, or civil servant level, remains a very important platform, in particular since the Commission’s role has become less central since the 1997 Amsterdam Treaty. As Mazey and Richardson observe, ‘the importance of national governments as an opportunity structure varies however accordingly to the policy issue, the type of interest group, the period in the policy process and the institutional structure of the government itself’ (Mazey and Richardson 2006: 264).

Thus, as we have seen earlier, more centralized member states, for example, France, generally have more efficient coordination of governmental machinery in handling European public affairs, whereas the more decentralized states sometimes find coordination rather difficult, as is the case for Germany. On the other hand, a strong degree of centralization may mean that COREPER delegates have rather limited bargaining scope in discussions at the Council, and that such delegations may therefore be less available to direct interest representation from private interests than others. However, empirical insights show that this differentiation is not always the case, as it has proven much more difficult for interest groups to lobby German permanent representatives as they invariably direct them to the relevant ministry at the national level, than it is for French – mostly – economic interest groups to lobby their permanent representatives in Brussels (Saurugger 2005).

At the same time, official delegations are themselves lobbyists in the sense that they keep fixed contacts with civil servants from the same nationality within the Commission (Spence 1993; Cini 1996). As we have shown earlier, particularly seconded national experts working in the European Commission are considered to be import access points. The SNEs, of whom there are 1,166 (Statistical Bulletin of Commission Staff 1/2009, see Table 6.1), are seconded

from the civil service of EU member states, so the vast majority are national, regional, or local civil servants. Experts from the private and voluntary sectors or international organizations can also be accepted where the Commission specifically requires their skills.

6.2.2. *Theoretical understandings of the 'national route'*

This understanding of the role of national governments in relation to interest groups is very different from the hypotheses put forward by intergovernmentalists (Moravcsik 1993; Milward 1995) who took the member state as the unit of analysis. The member state – and specifically its national government – was seen as a gate keeper aggregating national interests before representing them in EU-level debates. National governments are thus certainly key actors in EU decision-making, whether in the decision-making of the European Council or intergovernmental conferences on the architecture of the EU. They are equally important in the more routine decisions of the Council and its supporting committee structure on the other. They are also actors in the implementation of European policy in providing the administrative structures necessary at the national, regional, and local level. National governments matter but to what extent they matter depends on the number of factors that change over time.

Clearly, theoretical accounts of the importance of member state governments, and thus their importance for interest group platforms, have also changed over time. In the early years of its existence, the European Community was subject to two opposed interpretations. On the one hand, neo-functionalists looked at the dynamics behind the accumulation of powers at the supranational level. They argued that national governments would readily give up their authority to the EU. In 1995, in order to block an increase in Community capacities, de Gaulle pulled France's representatives out of the Council and its preparatory body, the COREPER. This Empty Chair Crisis ended six months later with the Luxembourg Compromise in January 1966. Nonetheless, European integration concentrated, once again, on the action of member states. It is seen as a venture in cooperation amongst states which are rational actors and whose domestic functioning is governed by principles of authority and hierarchy (Hoffman 1995). The resulting 'pooled sovereignty' does not lead to a diminution of the role of the states but on the contrary, to their strengthening. Based on this approach, Moravcsik (1993, 1998) argues that bargaining among states is a confrontation of national interests, which are addressed by domestic societal actors to their national government. As Milward, Moravcsik sees in EU institutions only agencies created by national governments with the purpose of increasing the initiative and influence of national governments. Mark Pollack's work on delegations makes explicit the institutional link between national governments and supranational institutions without concentrating exclusively on supranational or non-state

actors. Supranational institutions are considered as agents created by member state principals to reduce the transaction costs in the functioning of the EU (Pollack 1997). In this context, member state governments call upon national interest groups for information and expertise.

Parallel to this understanding of the role of governments, theorists and observers have moved, however, from the idea of nation states being powerful in both the international and the domestic spheres to an understanding of governing as governance. This particular form of political management is presented as the interaction of a large number of actors (Rosenau 1990; Mayntz 1998). Given the absence of a single 'ruler' and a clear divide between 'public' and 'private' actors in the EU, the EU's characterization as a governance system enjoys broad acceptance (Kohler-Koch 1996; Armstrong and Bulmer 1997). In this analysis, member states are no longer in a situation of monopoly or of hierarchical superiority. EU politics and policies are the results of interactions between the Commission, the member states' governments, regions, and interest groups. This concept, while a useful heuristic notion to describe the complex political system of the EU, has a number of drawbacks. In the context of this chapter, it is linked to the fact that it does not help us to understand how these relations do actually occur – are there patterns to observe?

Thus, instead of being a zero-sum game, the member states' roles are shifting according to issue areas and time periods. Two main approaches allow for conceptualization in this context: on the one hand Peterson and Bomberg's three-level-model, and on the other, Helen Wallace's 'moving pendulum'. Peterson and Bomberg (1999) develop three analytical categories or types of EU decision-making – all of them linked to a dominant group of actors. Thus, history-making decisions mainly involve the European Council, governments, and the European court of Justice; policy-setting decisions are based on the interaction of the Council, COREPER, and the European Parliament, while policy-shaping decisions are based on the Commission, Council working groups, and EP committees.

Wallace (2000, 2005) uses a more dynamic conceptual framework, arguing that the EU is characterized by a shifting balance between member states and the supranational institutions. She sees a shifting balance between the member states in terms of their power and influence within the Union. The EU system is in a constant state of flux, in that practice, experience, and experiments over time alter the ways in which the member states are involved in the EU system (Wallace 2005: 26). At the same time, national political structures also alter over time and between constituencies. It is therefore crucial to take domestic structures into account when attempting to understand the link between interest groups, national governments, and European institutions (Streeck et al. 2006).

A specific example is the open method of coordination particularly developed in the field of employment policies. Empirical analysis (Borras and Conzelmann 2007) has shown that this instrument allowed member states to exert greater influence and circumvent other actors such as EU interest group federations or European institutions. Member states have access to the EU system at all phases of its policy and political processes – in the agenda-setting phase, negotiations, decision-making, and policy implementation. Interest groups, on the contrary, and except in specific situations such as the European Social Dialogue, must establish links with political or administrative actors to influence policy-making. While interest groups' influence on national governments and the permanent representation is fairly well known in the agenda-setting phase, as sequences in the policy process, policy decision, and policy implementation they have received less attention.

6.3. Conclusion

The role of national governments in lobbying strategies remains important, as we have seen, despite the fact that the ability of states to steer national interest groups and control their national policy agenda has weakened. National governments – and their permanent representation in Brussels – function clearly as mediators for interest group access. While interest groups with large financial, social, and societal resources can circumvent national governments and represent their interests directly at the European level, this is not always possible for smaller interest groups. However, even for those who do not need to represent their interests domestically, the national route – both through national governmental coordination structures and through their permanent representatives – remains important in cases where majority voting needs a majority of member states to agree on a specific issue.

However, we have also seen that it is increasingly difficult to analyse national lobbying styles. More often than not, interdependent issue areas are the key level of analysis when dealing with lobbying strategies of governments. This is consistent with the fact that governments are not unitary actors but comprise a variety of functional and political preferences. National governments remain important actors at the European level, as we have seen. Their coordination structures help us to understand the differences of interest group attitudes at the European level.

Finally, institutional frameworks do not simply offer scenarios for adjustment, but are themselves constructions of economic and political actors and therefore subject to change and reorganization. Thus, the classifications undertaken in this chapter, though necessary, must be regularly confronted with empirical observations to determine their continued relevance.

Notes

1. Trondal (2006) has voiced scepticism as to whether seconded national experts really were so highly conscious of their national background as was argued by Coombes (1970) who compared them with Trojan horses. Trondal argues, on the contrary, on the basis of a survey of 71 SNEs out of more than 1,000 working in the Commission that they are more strongly affected by organisational characteristics of the Commission itself and less by the member state administrations from which the secondees originate.
2. Interview, European Commission (1999).
3. See also Spence (1993).

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Chapter 7

The European Economic and Social Committee

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The European Economic and Social Committee (EESC) is, alongside the Council of Ministers, the European Parliament, the European Commission, and the Court of Justice, one of the most venerable of the European Union's institutions.¹ As a consultative body, the EESC is naturally less well known than its peers. In the burgeoning literature about EU interest group representation, the Committee has frequently been portrayed as an anachronism, but this chapter will argue that a series of developments have shifted the Committee back to greater relevance and a productive role. Through a process of modernization and reform, it has developed considerable potential value to the lobby and therefore should figure more on the latter's radar screen than is currently the case. The Committee does not pretend to an exclusive role, but its Treaty-based prerogatives make it a privileged interlocutor and a valuable partner. From the lobby's point of view, the EESC potentially represents a valuable source of intelligence and an additional vector for influence.

This chapter is divided into five parts. The EESC's origin and development is briefly described in Section 7.1. Section 7.2 considers the Committee's basic structures and the members, and Section 7.3 its working methods. Section 7.4 describes the modernization process that the Committee has been undergoing and in particular the way the EESC has been honing the traditional methodology of drafting and adopting consultative opinions as well as developing new aspects of the consultative function to flank this. The chapter concludes with some considerations as to why the lobby could and should better exploit the Committee's role.

7.1. Background

The EESC was set up in 1957 by the Treaty of Rome. Modelled closely on the French Economic and Social Council (though similar bodies existed in five of

the six founding member states), it was intended to be both a forum for dialogue and an institutional platform that would enable representatives of organized civil society to be an integral part of the Community's decision-making process. Its inaugural meeting was held on 19 May 1958. The Committee initially had little autonomy, with the Council deciding on such matters as its internal organization, senior administrative appointments, and members' allowances. At the end of that same year, the Council adopted the Committee's first set of Rules of Procedure. These enabled the Committee's then 101 members to organize themselves into three groups: employers, workers, and various interests – a basic division that corresponded well to the structure of Western European societies at that time.

For the first fourteen years of its existence, the Committee was strictly limited to giving opinions on legislative proposals drawn up by the Commission. But the 1972 Paris European summit gave the Committee the right to draw up opinions on its own initiative on all matters relating to the European Community – a power it used very sparingly at first but which has since come to be an important part of the Committee's activity. In 1973, following the first enlargement of the Community, the number of Committee members rose to 144, reaching 156 in 1981 (accession of Greece), 189 in 1986 (accession of Spain and Portugal), and 222 from 1995 onwards (after the accession of Austria, Finland, and Sweden). Following the historic enlargement of 2004, with the accession of ten new member states (Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia, and Slovakia), the number of Committee members rose to 317, and in 2007, with the accession of Bulgaria and Romania, this number rose further to 344.

The entry into force of the Maastricht Treaty (1993) granted the EESC considerable autonomy and put it on a footing comparable with that of the other institutions, particularly with regard to its Rules of Procedure, the budget, the strengthening of its right of initiative, and management of the staff of its secretariat. In 1997, the Treaty of Amsterdam considerably extended the EESC's sphere of activity, especially in the social field, and granted the Committee the right to be consulted by Parliament. The Treaty of Nice (2003) in its turn represented a big step forward in defining the identity of the Committee, which currently consists of 'representatives of the various economic and social components of organized civil society'.² The Lisbon Treaty further refines and consolidates the definition of membership: 'representatives of organizations of employers, of the employed, and of other parties representative of civil society, notably in socio-economic, civic, professional and cultural areas' (TEC Article 256a). The cumulative intention behind these developments was to enable the institutions better to exploit the EESC's potential by enhancing the Committee's autonomy and broadening its scope.

Alongside these constitutional changes, the Committee has also benefited from a number of what might be termed pseudo-constitutional developments.

Two are of particular significance in this context. The first is a protocol of cooperation with the European Commission. It was first signed in 2001 and, after significant revision, renewed in 2005 and further amended in 2007. The protocol introduced a number of innovations (see 'Exploratory opinions' below) and locked the two institutions into a more symbiotic relationship that increasingly goes beyond the formal delivery of opinions. A second important development came in February 2004, when the EESC adopted several important proposals for stronger and more structured cooperation with *European* civil society organizations and networks (as opposed only to those within the member states). In particular, the Committee decided to set up a Liaison Group to interact with these organizations and networks. Designed to be both a liaison body and a structure for political dialogue, the Liaison Group ensures that the EESC has a coordinated approach towards these organizations and networks, as well as monitoring joint initiatives. Its establishment was in line with a number of measures taken by the Committee designed to strengthen cooperation with European civil society organizations and, therefore, to bolster the EESC's role as an intermediary between the EU institutions and organized civil society in general.

7.2. The Committee's structures

The EESC's internal bodies consist of the plenary assembly, the bureau, the president, and the sections. As seen above, the Committee is divided into three groups and is assisted by a general secretariat.

7.2.1. *The plenary assembly*

This currently consists of 344 members split up according to the size of the member states' populations (twenty-four members for Germany, France, Italy, and the United Kingdom; twenty-one for Spain and Poland; fifteen for Romania; twelve for Austria, Belgium, Bulgaria, Greece, the Netherlands, Portugal, Sweden, the Czech Republic, and Hungary; nine for Denmark, Finland, Ireland, Lithuania, and Slovakia; seven for Estonia, Latvia, and Slovenia; six for Luxembourg and Cyprus; and five for Malta). When opinions are drawn up, the assembly adopts them by a simple majority on the basis of the opinions of the specialized sections. If an opinion has to be drawn up urgently, the assembly votes directly on a text prepared by a rapporteur-general. The plenary assembly is a sovereign body. It takes all the decisions on the organization of work and the allocation of specific duties to its members. It elects the president and the bureau from among its members for a term of two years. It ratifies decisions taken by the bureau.

7.2.2. *The bureau*

The bureau decides on the EESC's organization and working procedures and adopts the provisions for implementing the Rules of Procedure. It is, in effect, the Committee's prime managerial body. In agreement with the president, it exercises the budgetary and financial prerogatives provided for by the Financial Regulation and the EESC's Rules of Procedure. The bureau has the political responsibility for the general running of the EESC and the proper use of human, budgetary, and technical resources in carrying out the tasks assigned to it by the Treaty. In particular, it intervenes in the budget procedure and the organization of the EESC secretariat. It may set up ad hoc groups drawn from its members to investigate any matter within its terms of reference. A budget group assists the bureau in exercising its budgetary and financial powers, and a communication group guides and monitors the Committee's communication strategy.

7.2.3. *The presidency*

TEC Article 260 allows for the Committee to appoint its president 'and other officers'. Through a rules-based procedure, the Committee appoints two vice-presidents. The vice-presidents chair the budget group and the communication group, respectively. The president and the two vice-presidents together constitute a 'presidency', which meets with the presidents of the groups when preparing the work of the bureau and the assembly. The president chairs EESC meetings in accordance with the Treaties and the Rules of Procedure. After their election, they present to the plenary session a work programme for their term of office and, at the end of their term, an assessment of achievements. The president represents the EESC at outside functions and handles relations with the EU institutions.

7.2.4. *The quaestors' group*

A group of three quaestors responds to members' concerns, attends to their rights, wishes, and complaints and ensures that members fulfil their duties. The quaestors are responsible for ensuring that the 'Members' Statute of the European Economic and Social Committee' is properly implemented, for suggesting improvements and taking initiatives to resolve disputes. They also have an advisory role, regarding decisions or measures potentially affecting members individually or collectively, and act as mediators.

7.2.5. *The sections*

The EESC currently comprises six sections, which handle most of the fields covered by the Treaties. For the drawing up of important opinions, sections

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generally form study groups from among their members, which include a rapporteur assisted by one or more experts. For certain special subjects or ones falling within the terms of reference of several sections, the EESC may resort to a temporary 'ad hoc' sub-committee structure. Sub-committees operate in a similar way to the sections but their tasks are limited to examining a specific issue within a given time.

The current sections are responsible for

- Economic and Monetary Union and Economic and Social Cohesion (ECO)
- Single Market, Production, and Consumption (INT)
- Transport, Energy, Infrastructure, and the Information Society (TEN)
- Employment, Social Affairs, and Citizenship (SOC)
- Agriculture, Rural Development, and the Environment (NAT)
- External Relations (REX)

A full description of the sections' competences can be found on the Committee's website at <http://www.eesc.europa.eu>.

7.2.6. *The Consultative Commission on Industrial Change*

The Consultative Commission on Industrial Change (CCMI) was set up in 2002 by a decision of the plenary assembly, but with the political support of the European Commission and the European Parliament, and was intended as a successor to the consultative assembly that had existed under the now defunct European Coal and Steel Community. An innovative and hybrid entity, the CCMI is composed of forty-eight EESC members and forty-eight delegates appointed by the Committee on the basis of their extensive knowledge and experience gained in a number of socio-professional organizations from various sectors affected by modernization of the economy (organizations currently represented by the delegates include, to give a few examples, the Confederation of UK Coal Producers, the Polish Textiles Federation, the European Construction Industry Federation, the European Transport Workers' Federation, the Romanian Chamber of Commerce, and the Finnish Electrical Workers' Union). The Commission has rapidly developed expertise on such burning topics as relocation and efforts to meet the challenge of globalization.

7.2.7. *The single market, sustainable development, and employment market observatories*

A Single Market Observatory (SMO) was set up in 1994 under the auspices of the INT section. This permanent group of thirty-three members studies the operation of the single market and proposes improvements to the other institutions. It has forged close cooperation with the European Commission and has developed considerable expertise in the field of better regulation and

simplification, including management of a joint database of best practices. In 2006, in response to a mandate given by the Spring European Council that year (see below), the Committee set up a Sustainable Development Observatory (SDO). The Observatory's main tasks are to stimulate debate, create mechanisms to share practices, and generally to encourage greater awareness about the Union's Sustainable Development Strategy among civil society organizations. In 2007, the Committee decided to create an Employment Market Observatory.

7.2.8. *The Committee's members*

The unique status of the EESC's members is little known and yet it is this status that gives the Committee its potential. The nomination process for members begins within the major strands of organized civil society in the member states. Governments propose their nominees to the Council which, after consulting the Commission, approves nominations by qualified majority.³ Members are appointed for terms of office of four years (the Lisbon Treaty extends this to five years, thus aligning the EESC's membership with that of the European Parliament and the European Commission). These terms can be renewed. Nevertheless, each 'renewal' sees significant turnover (over 30%) in the Committee's membership. TEC Article 258 expressly provides that the Committee's members cannot be bound by any mandatory instructions and that they should be completely independent in the performance of their duties, 'in the general interest of the Community'.

Uniquely among the EU's institutions, EESC members do not receive an EU salary. They receive an allowance when on Committee activities⁴ and their Committee-related travel expenses are also covered. However, their primary source of income is their main occupation, which is not membership of the EESC, but of their own, member state-based organization. This means that most EESC members will always owe their primary allegiance to their own organizations and this, in turn, gives them a unique authenticity. Moreover, because EESC members are appointed and not elected their behaviour is very different from that of the members of any elected or party-political body. EESC members have operational interests, as representatives of the various economic and social components of organized civil society, and have an expert knowledge of the issues under discussion, because of their knowledge in a wide range of fields. At the same time, when drawing up opinions, they promote, on the basis of mutual respect, the search for a consensus, which in turn makes it possible to identify the common interest and, often, the general interest.

A brief description of the backgrounds of the current president and two vice-presidents of the Committee illustrates the rich diversity of the Committee's membership. The president, Dimitris Dimitriadis, is a longstanding businessman, having set up a number of his own small- and medium-sized companies before becoming involved in the local (Thessaloniki) Chamber of Commerce

and, through that, in Eurocommerce and hence European policy-making. Vice-president Graf Alexander Von Schwerin is a member of the German Amalgamated Services Union within the German Trade Union Confederation (DGB). Vice-president Jillian van Turnhout is Chief Executive of the Irish Children's Rights Alliance and is a former president of the National Youth Council of Ireland.

Because of its deliberate and insistent search for consensus, the Committee is often portrayed as a body lacking in the excitement of political debate. There is truth in this, particularly by the time draft opinions rise to the plenary assembly, but the juxtaposition of sometimes diametrically opposed views, and the dialogue between the members, often requires real negotiations involving not only the traditional socio-occupational organizations, in particular those of employers and employees, but also – and this is a main feature of the EESC – all the other components of civil society, in the socio-economic, civic, and occupational fields, represented within the Committee.

Nevertheless, like representatives in other EU institutions, the EESC's members have a dual role to play. On the one hand, they must be aware of the impact and consequences that EU legislation will have on the daily lives of their respective organizations and, if they agree with it, explain and justify such legislation to their colleagues and peers. On the other hand, they have to see that the wishes and requirements of society as expressed in the organizations that they represent at EU level are fed through to the EU decision-making bodies. The potential of this bridging function has perhaps previously been overlooked but increasingly the European Commission in particular has seen the worth of entering into a two-way dialogue, not only with the representatives of organized civil society brought together within the Committee, but also with the broader community that the Committee represents and upon which it can draw. In the recent past this has been illustrated by the Commission's high-level (President Barroso, Vice-President Wallström, various commissioners) involvement in a number of stakeholders' forums organized on such topical themes as sustainable development and the communication gap.

7.2.9. *The groups*

As seen above, from the outset, the Committee's membership formed itself into three groups representing employers, employees, and the other economic and social categories of organized civil society. Each group elects its own president and, if necessary, vice-presidents, and has a secretariat. The group presidents are *ex officio* members of the EESC bureau and assist the EESC presidency in preparing work programmes. The three groups propose candidates for election to the section presidencies, the consultative commission, the observatories, the Committee's other bodies, and for appointment as a rapporteur or member of a study group.

Group I (the Employers' Group) draws its members from the private and public sectors of industry, chambers of commerce, wholesale and retail trading, banking, insurance, transport, and agriculture. The vast majority of the members of Group II (the Employees' Group) come from national trade unions which are members of the European Trade Union Confederation; some come from unions that are affiliated to the European Confederation of Executives and Managerial Staff. The originality and identity of Group III (group for other economic and social categories of organized civil society) is rooted in the variety of the categories of which it is composed: farmers, SMEs, the craft industries, the professions, cooperatives, mutuals, consumer protection associations, environmental protection associations, associations that promote the interests of families, women, and disabled persons, members of the scientific community, teachers and lecturers, non-governmental organizations, and so on.

7.3. The consultative function of the Committee

The EESC's basic instrument for carrying out its advisory function is opinion. Across a broad range of policy areas, such consultation about Commission legislative proposals is obligatory, but the Treaties also allow for facultative consultation of the Committee on other issues and policy areas.⁵ The views of the EESC's members are drawn from, and illuminated by, the positions they occupy within their organizations or associations. Through a process of study and discussion, these views are synthesized and condensed into a consensus which thus grants the decision-making authorities not only an early opportunity to assess the impact of Commission proposals or policy issues but also to identify problematic aspects and to see where compromise solutions are most likely to be found. The Committee also provides valuable technical assistance, and its own-initiative opinions or information reports contain elements of analysis and appreciation that can in due course lead the Commission to consider taking initiatives. The value of a Committee opinion is thus fourfold: it comes very early in the decision-making process; it is based on inputs from a very broad range of civil society organizations; it identifies potential problems and possible solutions; and it forges consensus positions spanning the breadth of organized civil society, from employers' organizations to trades unions, from environmental concerns through to human rights.

The stages in the preparation of an EESC opinion are generally as follows:

- A request for an opinion is sent to the EESC president, usually by the Council but also by the Commission and, since the Treaty of Amsterdam, by the European Parliament.
- The EESC bureau designates the section responsible for the preparatory work.

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- For important reports, the section sets up a study group (usually of up to nine members) or a drafting group and appoints a rapporteur, who either works alone or with an expert of their choice and, where appropriate, one or more experts appointed by the groups.
- On the basis of the work of the study group, drafting group, or rapporteur, the section adopts an opinion by a simple majority, which is then put on the agenda for a plenary session.
- At the plenary session, the Committee adopts its opinion by a simple majority on the basis of the opinion adopted by the section.
- In certain cases a rapporteur-general is appointed, who submits a draft opinion directly to the session without going through a section.

In formal terms, opinions are sent to the Council, the Commission, and the European Parliament, and are published in the *Official Journal of the European Union*. However, beyond these formal mechanisms the Committee puts increasing emphasis on broader and targeted distribution of its work.

The EESC may issue three types of opinion:

- *Opinions following a referral* – either mandatory or optional – by the Commission, or the Council. The fields where consultation is mandatory are set out in the Treaties. It should be noted that the Committee can also be consulted by these institutions in any case which they consider appropriate (the so-called ‘facultative’ referrals).
- *Own-initiative opinions*, which enable the EESC to express its views on any matter it considers appropriate.
- *Exploratory opinions* in which, at the request of the Commission or the Council (or the Parliament), the EESC may reflect on and make suggestions about a given subject, which may lead at a later date to a proposal for European legislation.⁶

In addition, the Committee may instruct one of its specialized sections to prepare an *information report* on an issue of general or current interest.

7.4. Modernization

In the 1980 and early 1990s, it seemed that the Committee’s role might be eclipsed by a number of developments. The most important of these was the advent of a directly elected and rapidly growing European Parliament, with the European Commission rightly obliged to direct its attention more towards the Union’s only directly elected democratic body. This period saw also the direct introduction of social dialogue into the Treaties, and the establishment of a range of new institutions and bodies, including a sister advisory body, the

Committee of the Regions. Successive enlargements brought more member states with similar bodies within their domestic structures, but also a number of member states with no corresponding institution and therefore no automatic understanding of the role the Committee was designed to play. More generally, the proliferation of pan-EU representative bodies and their ability to enter into direct dialogue and consultations with the European Commission seemed to undermine the Committee's role, Treaty-based though it was, and hence its influence.

However, more recent developments have combined to enable the Committee to play a far more proactive and relevant role in the policy-making process. The debate on good governance which began in the 1990s underlined the need for genuine stakeholder consultations. The Commission, which had encouraged the creation of a network of pan-European organizations in order to facilitate direct consultation, began to recognize that such consultative networks were not necessarily a sufficient mechanism to engender a wider spread sense of ownership of Commission initiatives. External critics have been more forthright:

The Commission's preference for working with well-established NGOs and the resulting inequity in the distribution of funds can be seen as undermining its aim to foster grassroots involvement in the European political process. The dominance of Commission-funded and Brussels-based NGOs in the consultation process exacerbates the disconnect between European interest groups and grassroots organisations, with the former often speaking on behalf of the latter without their viewpoints necessarily being in accordance. (Kirchner 2006: 48, see also Guiraudon 2001: 171–3)

The Commission, understanding this, has been increasingly willing to enter into a series of commitments (the cooperation protocol, memoranda of understanding, exchanges of letters) and explore innovative mechanisms (exploratory opinions, and stakeholders forums, for example) in order more fully to exploit the EESC's potential and, in particular, the authenticity of its members, as described above. Thus, the Committee is increasingly seen as a tool with considerable potential which should be put to good use. It does not eclipse or preclude other tools, but it is an important complementary player.

The past fifteen-year period has also seen a series of constitutional developments which have extended and consolidated the Committee's role – Amsterdam, Nice, and, most recently, Lisbon. This latter was of particular significance for the EESC, not only because the Committee itself played an important support role in organizing debate with civil society organizations during the European Convention which preceded it but more particularly because of the rise of the concept of participatory democracy (which, ironically, was seen as being of even more importance in the continued absence of the constitutional treaty which would have established it), a concept tacitly taken over in the Lisbon Treaty, which will oblige all of the EU's institutions to engage in

structured (open, transparent, and regular) dialogue with organized civil society (TEU Article 8B).

The three waves of enlargements during this period (1995, 2004, and 2007) brought younger members to the Committee, established better gender balance, and also brought in new aspects of civil society, particularly from those member states previously subject to communist rule.

At the same time, the Committee itself embarked on a sustained modernization process. A first step was a better prioritization of the Committee's work. Under the Treaties, for example, the Committee receives obligatory referrals on a whole series of legislative proposals (codification, for example) where the Committee's opinions can bring little added value but which are nevertheless mandatory. Using its autonomy, the Committee has consciously devised procedures and processes which enable it to prioritize its work and redirect the resources freed up in this way towards more politically important opinions where the Committee's expertise is much better utilized. A second step has been the establishment of a strategic communication plan, with implementation overseen by the communication group, designed to ensure that the Committee's work is better known, not only among the institutions but also among civil society organizations at large. Here, the Committee's privileged relationship with the network of national economic and social councils and similar bodies, a network loosely coordinated by the EESC, is of great importance.

The Committee has also sought to give fresh interpretations to the advisory function. The concept of the exploratory opinion, delivered deliberately upstream of any legislative proposal, is a good illustration of this. A recent example, of an exploratory opinion on animal welfare labelling, graphically illustrates the way in which the Committee can have influence. The opinion in question was requested by the 2006 German Presidency. The issue was three-fold: growing public interest, from both the consumer and animal rights angles, in the welfare of animals raised for slaughter; a growth within a number of member states of labelling schemes; and fears that these trends could lead to consumer confusion and market fragmentation. The Committee's opinion, adopted in March 2007 (rapporteur: Lief Nielsen, a member of the Danish Agriculture Council) called for the current mandatory animal welfare standards to be backed up by voluntary labelling rules. The spirit of the recommendations was a sort of gentle harmonization, based on commonly recognized scientific principles. In late March, the Committee followed up its opinion with a conference in which the German Federal Minister for Food, Agriculture and Consumer Protection, Horst Seehofer, and the European Commissioner for Health, Markos Kyprianou, participated, and during which it became clear that the Committee's recommendations reflected a growing consensus among stakeholders about the need for action. On 7 May, the Agriculture and Fisheries Council conclusions took note of the EESC's exploratory opinion and of the ensuing conference and, considering 'that account

should be taken of the recommendations made by the EESC in its exploratory opinion', called on the Commission to submit a report which would allow an in-depth debate on the subject. It is too early to see whether some sort of regulatory or legislative approach will be adopted but, clearly, the Committee's opinion and its recommendations will lead to some sort of EU-level action in this area.

The Committee has also sought to exploit own-initiative opinions to engage in 'blue sky thinking' going beyond current policy reflection. During the 2003–4 period, for example, the Committee adopted a number of distinctive initiative opinions about the Union's future energy requirements and likely energy mix. The questions it addressed on issues such as fusion/fission and a post-carbon world are now part of the orthodoxy behind, for example, the deliberations of the March 2007 European Council, but at the time the Commissioner then responsible for energy, Ignacia Loyola de Palacio, was happy to have an ally in insisting that these issues had to be addressed urgently. The Committee has also devised a series of measures – hearings and forums, for example – that can provide additional opportunities to exercise its bridging function and ensure closer dialogue with civil society organizations in the member states.

7.5. Concluding considerations

The EESC is an advisory body. By definition, therefore, its influence cannot be accurately quantified and, even where its advice is heeded, this is not necessarily openly acknowledged. In recent years the EESC has enhanced its reporting function considerably, particularly vis-à-vis the budgetary authority. Such exercises amply demonstrate the different ways in which the Committee can, and does, have an impact on the EU's legislative and policy-making processes. The lobby, which until now has naturally given its attention to the growing role of an accessible European Parliament, would do well to take a closer look at the EESC. The Committee cannot deliver 'hard' power; it cannot amend legislation, and it cannot force the policy-maker's hand, but it does sport a number of potential advantages.

First, the Committee is still relatively open and accessible and the sort of deontological problems that members of elected bodies sometimes experience in their dealings with the lobby do not occur in the same way in the Committee.

Second, because the Committee must necessarily deliver its opinion early in the legislative process if it is to have any effect, the Committee's drafting processes effectively provide early intelligence about the likely nature of the legislative debate, including the early identification of probable pitfalls and possible solutions. Indeed, Commission officials attending study group and

section meetings are sometimes known to liken them to 'dry runs' before legislative proposals go to parliamentary committees and Council working parties. (This was certainly my own experience when, as a Commission official, I had to shepherd the legislative proposal for the Erasmus Mundus programme through the institutions. The EESC gave the Commission early warning that some redrafting would be required to avoid the perception that the programme inadvertently favoured the English language, and such redrafting was indeed later undertaken.)

Third, the Committee's rapporteurs have access to two supports which are in increasingly scarce supply to the European Parliament's rapporteurs: time and expertise. In particular, EESC rapporteurs have access to external expertise and, because of the nature of the drafting process of the Committee's opinions (described above), they have the time to make best use of that expertise alongside the knowledge and contributions of the members of the Committee (and its secretariat).

Fourth, though it is impossible to quantify, the Committee definitely wields 'soft' influence and perhaps more than is commonly thought. For example, one commentator points out that

In some instances, the actual influence of the Committee on the policy-making process may also be underestimated. For example, parliamentary staff may take the pre-digested opinions of the EESC as an inspiration or basis for drafting amendments for parliamentary committees without acknowledging the original writer's contribution to the policy outcome. (Smismans 2004: 168–72; Kirchner 2006: 43; for an opposite point of view, see Nugent 2006)

Lastly, as the Committee has evolved, its role has gently grown (the symbiotic relationships it now has with the Commission in areas like better regulation, impact assessment, and sustainable development are good examples of this) and attitudes towards it are clearly changing. An illustration of this trend is given by the fact that the European Council has twice recently mandated the Committee to contribute or play a coordinating role on matters of topical interest. In March 2005, the European Council had already noted the initiatives the EESC had undertaken in support of the Lisbon Agenda, and encouraged the Committee to create and coordinate an interactive network with national economic and social councils and similar bodies, but the March 2006 European Council called for the Committee to produce a summary report 'in support of the partnership for growth and employment'. The June 2006 European Council, in adopting its review of the EU's Sustainable Development Strategy, declared that 'The European Economic and Social Committee should play an active role in creating ownership *inter alia* through acting as a catalyst to stimulate debate at EU level,' and invited it 'to prepare input to the biannual progress report of the Commission including a collection of best practices of its members.'

The Committee is definitely not the only show in Brussels town, but maybe the lobby should think twice before missing it. Clearly, the proliferation of Brussels-based institutions and organizations has made it increasingly difficult for the lobby to cover all of their activities (though the move of the Committee to its new headquarters at 99 rue Belliard, in the heart of the European quarter, has, both geographically and psychologically, placed the EESC nearer to the centre of the EU 'map') but a judicious combination of monitoring of the Committee's website (which is well structured and provides easily accessible information), together with strategic and targeted lobbying of the Committee's members and organs could provide more innovative and attentive advocacy organizations with privileged, and early, information and input into the EU's policy-making and legislative machines.

Notes

1. In the recondite parlance of the Treaties, the EESC is not, in fact, an 'institution', as set out in TEC Article 7. That article provides that 'The Council and the Commission shall be assisted by an Economic and Social Committee and a Committee of the Regions acting in an advisory capacity.' For ease on the reader's eye, the term 'institution' will be used throughout this chapter.
2. TEC Article 257 continues, 'and in particular, representatives of producers, farmers, carriers, workers, dealers, craftsmen, professional occupations, consumers and the general interest'.
3. In reality, the Council decision is invariably a formality.
4. Decided by the Council of Ministers, by qualified majority.
5. TEC Article 262 declares that 'The Committee must be consulted by the Council or the Commission where this Treaty so provides. The Committee may be consulted by these institutions in all cases in which they consider it appropriate. It may issue an opinion on its own initiative in cases in which it considers such action appropriate . . . The Committee may be consulted by the European Parliament.'
6. This sort of device was made possible through a mixture of the Committee's rule-making autonomy and the provisions of the cooperation protocol with the European Commission.

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Part III

Actor Supply

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Chapter 8

Business Lobbying in the European Union

David Coen

8.1. Introduction

Business lobbying is an ever present reality in European Union (EU) politics. With their significant economic and informational resources, business interests are able to exert influence along the European policy process from initiation and ratification of policy at the Council of Ministers, agenda-setting and formulation at European Commission (EC) forums, reformulation of policy at the European Parliament (EP) committees, to the final interpretation, harmonization, and implementation of regulation in the nation state. In being one of the few actors to follow all points of the policy process, business interests are an important supply of information for the development and delivery of EU public policy, and a potential source of legitimacy to policy-makers.

Ever present at the formation of the European Community and Union, political activity by businesses exploded in the 1990s, building on access afforded by the single market programme and the creeping EU regulatory competencies (Mazey and Richardson 1993; Coen 1997, 1998). In response to this increasingly crowded and competitive lobbying environment, business interests have evolved new direct lobbying strategies (Coen 1997, 1998), collective action arrangements (Eising 2007; Greenwood 2007), complex political advocacy alliances (Coen 2002; Mahoney 2007), and adapted national interest models (Grossman 2004; Beyers and Kerremans 2007). Accordingly, business interests have matured into sophisticated interlocutors that often have more awareness of inter-institutional differences than the functionaries they lobby. The result is EU interests now have unparalleled access and understanding of the multi-level governance structure and lobby with a multitude of political voices. Albeit, this unprecedented lobbying explosion provided legitimacy for the European integration programme, it also has put a strain on the openness

and transparency of EU policy-making, and pressure for the creation of rules and regulation of interest representation (Commission European Transparency Initiative 2006). However, as a result of the multi-level and institutional lobbying it is important that policy-makers and academics can first and foremost map business interest inputs across the whole policy process.

Today we are faced with how EU institutions can manage and regulate the expanding numbers of interests and conversely how business interest groups can continue to influence and contribute to the EU public policy process in a positive and constructive form. Few would question the importance of business interest groups to facilitate policy, advocate positions, provide expertise, and at times scrutinize authority. What is more difficult to agree is how we monitor and regulate their access to the policy process without constraining information exchange and political trust. To understand these normative questions it is first important that we identify: how firms lobby along the policy cycle and between EU institutions, firms' logic of collective and direct action, and how government affairs functions have evolved to coordinate the above.

8.2. The evolution of European business lobbying

EU interest group activity exploded in the 1990s, as a result of the gradual transfer of regulatory functions from member states to the EU institutions, and the concurrent introduction of qualified majority voting on the single market issues. In parallel with this increasing functional supply, institutional demand for EU interest group activity was facilitated by the openness of the EC and EP (Commission 1993a) and the funding of EU groups by the EC. The bare facts speak volumes for the ease of access to the EU institutions during this period, with an estimated 1,400 economic interest groups operating at the European level (Greenwood 2007; Berkhout and Lowery 2008), and some 350 firms with European affairs offices (Coen 1999).

In the last decade many have studied why interest groups came to Brussels and how they attempted to influence the EU policy process (Kohler-Koch 1994; Coen 1997, 1998, 2007; Greenwood 2002a, 2007; Eising 2004, 2007). These studies recognized that regulatory rent-seeking motivated EU interest politics, just as for their cousins in Washington, but they also noted that distinct collective action logics and reputation maximizing strategies have also emerged. While the first body of studies identified that the gradual transfer of regulatory functions to the EU institutions contributed to the Europeanization of interest politics, the second wave of interest studies attempted to understand the uniqueness of the EU institutional and interest relationship and the emergence of elite pluralism (Bouwen 2002, 2004; Broscheid and Coen 2007; Coen 2007; Eising 2007).¹

Today, we are faced with a need to understand first how the emergence of individual direct action has impacted on traditional forms of collective action

(Coen 2007), and second how we can regulate this complex interest representation. Significantly, the recent explosion of lobbying in the EU has not seen increases in traditional interest organizations like trade associations or NGOs but in individual lobbyists such as companies and law firms. It has been estimated that some 40 per cent of all interest representation at the Commission and the EP would now appear to be individual actors (firms (24%), think tanks (4%), government/regional authorities (11%), law firms, public relations companies, etc.) rather than interest group organizations (CONECCS 2007 and EP 2007; Lahmann 2002; Berkhout and Lowery 2008). In view of this, new studies need to observe strategic games between individual interests and collective groups, firms and firms, and between firms and traditionally countervailing public interest groups (Broscheid and Coen 2007; Eising 2007; Mahoney 2007). But new transparency regulation must also monitor how individual lobbyists may also fund and participate in alternative collective action arrangements to access the EU institutions.

To illustrate how the new EU individual lobby mobilizes, this chapter tries to describe and analyse how individual firms lobby in the EU and how their behaviour has developed, so that we can assess how to regulate and monitor lobbying more generally in the future. The analysis is rooted in two surveys completed in 1994/5 (n94) and 2004/5 (n50) of 200 firms with European Government affairs functions in Brussels. Using this empirical evidence, the chapter pursues the idea that large firms have developed sophisticated EU political affairs functions that are capable of complex political alliances and EU identity building in response to EU institutional informational demands and access requirements.

8.2.1. *Learning to lobby: The business lobbying explosion of 1984–94*

The original study showed that, between 1984 and 1994, over 200 companies chose to develop direct lobbying capabilities in Brussels. More specifically, Figure 8.1 demonstrates that over this ten-year period the locus of political activity shifted away from national and towards European institutional channels. A parallel trend was the general tendency of firms to favour direct individual representation at the national government (Govt), Ministry (N. Civil), EC, EP as opposed to using intermediaries such as professional lobbyists (Lobby) and national associations (N.Ass.). However, there was an early realization by business that all the channels were mutually reinforcing and that a holistic approach to lobbying involving national and regional government and all EU institutions along the policy process was most effective.

The most favoured political channel was to lobby the Commission directly, with about a quarter of the significance of all political activity attributed to this. While much of this increased activity can be explained by the single market legislative boom acting as a pull factor, it should be noted that

Actor Supply

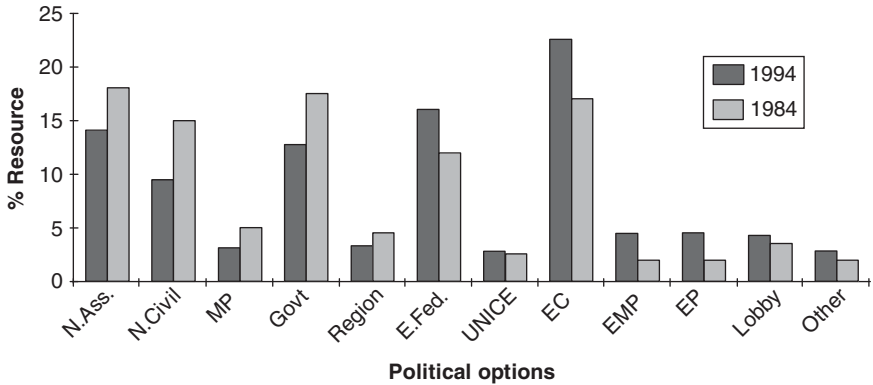


Figure 8.1. The changing nature of business political activity in the EU.²

Source: Coen (1997)

qualified majority voting also acted as a push factor for many firms. Thus, business recognized that some 80 per cent of single market regulations and standards were initiated and formulated at the Commission (Pollock 2003). As a consequence, businesses changed from reactive and destructive EU lobbying strategies focused on member states and the veto at the Council of Ministers, towards more pro-active EU strategies (Coen 1997). Thus, a new and distinct EU public policy process evolved that was unlike Bonn, London, Paris, or Washington (Coen 1998; Greenwood 2007).

Running concurrent with the increased EU interest supply was a willingness by the EC and EP to open their doors to more lobbyists. In reality, this new openness was a recognition by the EU institutions that they no longer had the resources to deal with the expansion of legislation without the active participation of technical experts. Significantly, it was not only transnational firms that were attracted to Brussels by the creeping competencies of the Commission, and by 1992 it was estimated that more than 3,000 public and economic lobbies were active in Brussels (Commission 1993b). Faced with this increasingly crowded political market, the increasing use of multiple access points, and a growing number of European issue areas, business developed a high degree of political sophistication. In this complex environment, 84 per cent of the firms surveyed reported that the most successful lobbyists were those able to establish 'goodwill' with the relevant 'heads of unit' and 'Director Generals' of 'Commission Directorates'. In a political market where numerous counter-vailing interests were trying to influence an open political system, greatest weight was given to those actors who were prepared to establish a 'European identity' through European alliances with rival firms (hence the growth in numbers and size of European Federations and ad-hoc groups) and/or solidarity links with societal interests (Coen 1998; Eising 2004).

Gradually it became apparent that large firms that wished to exert a direct influence on the European public policy process would have to marshal a greater number of skills than merely monitoring the progress of European directives and presenting occasional positions to the EC. Successful lobbying of the EC meant establishing an organizational capability to coordinate potential ad-hoc political alliances and to develop and reinforce existing political channels at the national level and European level. To achieve good access for *direct lobbying* of the EC – the primary focus – large firms were encouraged to develop a broad political profile across a number of issues and to participate in the creation of *collective political* strategies. Accordingly, the cost of *identity building* would be discounted against better access to ‘company specific’ issues at a later forum or Committee. Significantly, during this period of norm creating, some firms were establishing themselves as political *insiders* through a process of regular and broad-based political activity. It was these new insiders which stood to benefit most from the gradual *closing down* of access to the EC in face of the *interest overload* in the 2000s.

Recognizing that the political take-up of political channels was influenced by cost considerations and that companies were faced with an internal budget constraint. It is fair to assume that the importance of cost grows with increases in the uncertainty of the political returns associated with a political channel. As a direct consequence of this uncertainty, the usage of channels in Europe has built up only slowly and has required large institutional and market changes to become decisive. Political change is particularly slow in periods of recession – when corporate affairs budgets are the first to be cut back. Moreover, whilst the establishment of government affairs units has reduced some of the information transaction costs and facilitated an understanding of EU institutions, the constant evolution of many of the political institutions inhibited the full adoption of all the available political channels.

This was illustrated by the slow lobbying take-up of the EP after the Maastricht Treaty. While many interviewees in the 1984–94 periods recognized the increasing policy-making powers of the EP and the emergence of new lobbying opportunities, the reality was that until a time when they had additional resources or they had suffered a clear cost of non-participation, the focus of lobbying would continue to be the EC. In this period, the low lobbying take-up was clearly a legacy of past reputation. In fact, until Maastricht the EP had only had a limited consultation role and the impact of co-decision and conciliation was still to impact many lobbyists. Rather, the reluctance to commit resources to lobbying the EP was attributed to the ambiguous political outcomes of EP committees and the risk of log-rolling at the Strasbourg vote.

To firms used to lobbying in the EC on technical expertise and information exchanges, the more socially and politically aware EP was also seen as too uncertain and marginal to the agenda-setting and formulation process. Significantly, this perception was also changed during the late 1990s with some

high profile lobbying campaigns on bio-technology patenting and tobacco, alerting business to the cost of non-action at the Parliament (Earnshaw and Judge 2006). Thus, over time interests have learned to target the EP over propositions for amendments to Commission directives. Conversely, like EC officials, EP officials have to establish an informational lobbying arrangement based on direct, technically rich, and well timed contact. However, in addition to the *facilitator* and *expert* roles of interests groups that provided *policy legitimacy* the EP required a wider range of interests groups that provide an *advocate* and *representative* roles to provide it with *political legitimacy*.

The low take-up of hired lobbyist was explained by the realization by business and newly created European interest groups that they were capable of direct lobbying of EU institutions. The private lobbyist's position worsened with the green papers on open access and transparency in the EU (Commission 1993a), especially as the report made a clear distinction between representatives from business and society and those making representations for profit. However, professional lobbyists and increasingly law firms maintained a specialist niche as most firms used them to identify new political issues and legislative trends, while government affairs offices were used to respond to the immediate market threats. For this reason, hired lobbyists provided a complementary benefit to the firms' government affairs functions, providing specialist information and continuous political monitoring. They did not, however, establish 'goodwill' or *political reputations* that would facilitate private business access at a later date. However, while take-up by big business and established European NGOs may be lower than expected, the profession continues to grow in Brussels as smaller national interest groups and SMEs use them to access the EU policy process. Moreover, as lobbyists themselves recognized the importance of reputation-building as a Brussels lobbying strategy, we saw the arrival and expansion of a number of large public relations companies – such as Hill and Knowlton, Burson-Marsteller, and the growth of think tanks.

However, the increasing numbers of lobbyists in Brussels at the turn of the century have become a concern to EU institutions and interest groups alike (Commission Governance White Paper 2001). As a consequence, EU institutions have attempted to informally manage access to committees and forums, and are currently debating transparency and codes of conduct (Commission European Transparency Initiative 2006). The result is a more competitive *elite pluralist* environment, where access to decision-makers is restrictive, more competitive, and codes of conduct met.³

8.2.2. *The emergence of a distinct European lobbying style: 1994–2005*

The unobtrusive nature of much lobbying activity has restricted our understanding of European behaviour and influence. Unlike the visible lobbying of rent-seeking industries in the US Senate and Congress and Political Action

Committee contributions, most EU interest studies have focused on the trade associations and the visible logic of collective action (Eising 2007; Greenwood 2007). However, if we are to define codes of conduct and create database of institutional lobbying activity it is important that we have a clear understanding of how and when interests make representation across the policy process and for different policies.

Figure 8.2, as Figure 8.1, clearly illustrates that a number of mutually reinforcing political channels are utilized to influence the EU public policy process. However, the timing, take up, and the style of activity have altered as EU procedural rules have changed and EU interests and functionaries learned to trust one another.

Regardless of treaty changes and the slowing legislative outputs of the EU, the EC continues to be the primary focus of lobbying activity in Brussels both directly and/or via trade associations. However, while the Commission is still recognized as the policy-entrepreneur and exerts a huge influence on the formulation of the directive – via initiative, consultation, and increasingly at trialogs, it has, via its discretion to invite or exclude interest, been able to demand behavioural criteria for the participation in its more exclusive policy forums and committees. Thus, the most significant development in lobbying in Brussels over the last 20 years has been the emergence of an *elite pluralist* arrangement where industry is perceived as an integral policy player but must fit certain access criteria (Coen 1997; Coen 1998; Bouwen 2002; Schmidt 2007).

The recognition of the existence of elite pluralism raises the important tension between ‘political’ and ‘policy’ legitimacy that the new EU lobbying transparency debates often fail to explore. Significantly, the regulatory agency style of Brussels policy-making has produced the emergence of an elite

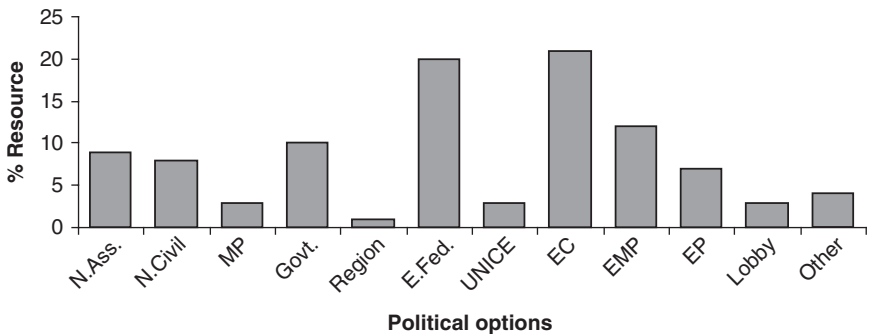


Figure 8.2. Allocation of company resources 2005.

Source: Coen (2005)

trust-based relationship between insider interests groups and EU officials. Accepting the rationale to delegate regulatory competencies to the EC in terms of credible commitment, blame avoidance, and market expertise, the *policy-making legitimacy* of the EC is seen to be high by most EU interests. Within this credibility game the Commission makes much of its attempts to build long-running relationships with interests, based on *consistency* for information exchanges, wide *consultations* and *conciliatory actions*. Conversely, interest must develop strategies that create *reputations* that will help them to *gain access* to the closed decision-making arenas. The result of this discretion politics is that policy-making in Brussels is reliant upon both social capital and deliberative trust. Faced with these specific depoliticized institutional arrangements, it is important that we build accountability and transparency arrangements that take account and foster trust building, credibility, and institutional discretion. However, where policy is more *distributive* we will expect to see greater consultation and perhaps a form of Camilian pluralism (see Chapter 16).

In fact, contrary to the perception of aggressive lobbying of bureaucrats suggested in the popular media, EU lobbying and business representation is often characterized by institutions seeking out and in some cases funding interest groups and ad-hoc alliances. A study by Broscheid and Coen (2007) illustrates this by showing how interest group and Commission preferences for forums and/or direct action are a function of the informational demands of the Directorate, number of interests, and capacity to process interest group inputs, balanced against the 'input' and 'output' legitimacy requirements of the policy domain. Moreover (see Table 8.1) in highly regulatory policy areas, where technical policy input defines the policy legitimacy and staffing numbers are low, they hypothesize that the Commission creates forums and committees to manage lobbying activity. Equally significant, as Table 8.1 shows, the greatest lobbying activity is clustered around the Enterprise and Environmental Directorates General as these have the greatest regulatory output and competencies. It is therefore important that we do not attempt to see business lobbying of the Commission as a single strategy and only collect access and frequency of contact data for individual institutions, but rather assess interest access to the whole EU policy cycle and across policy types.

Building on this integrated lobbying strategy and recognizing the creeping competencies of the EP, direct lobbying of MEPs and EP civil servants increased by 100 per cent from 1994 to 2005. Moreover, new EU lobbying styles emerged and greater professionalism in the exchange of information between EP officials and business representation evolved. As expected the greatest lobbying activity has emerged in committee secretariats where co-decision applies – such as single market and environmental legislation (Lehmann 2008; Chapter 3, this volume). Accordingly, the greatest activity has tended to mirror the EC's legislative activity and a strong argument for monitoring interest groups' access to both institutions should now be made. However, while much of the

Table 8.1. European Commission and lobbying resources dependency

Directorate General	Number of fora	Number of groups	Distributive policy domain	Personnel in Directorate General	Number of policy units
Agriculture	71	100	1	984	29
Competition	22	39	0	626	30
Development	33	51	1	277	17
Economic and financial affairs	12	44	0	465	25
Education and culture	90	120	1	645	13
Employment and social affairs	56	106	1	676	25
Energy and transport	104	110	0	953	38
Enlargement	0	52	0	333	15
Enterprise	94	221	0	858	38
Environment	124	132	0	541	21
Humanitarian aid (ECHO)	18	13	1	179	4
External relations	25	32	0	676	28
Fisheries	1	10	1	290	12
Information society	39	53	0	1,054	35
Internal market	70	105	0	437	24
Justice and home affairs	51	76	0	368	14
Regional policy	59	24	1	595	23
Research	132	63	1	1,552	65
SANCO	55	149	0	711	26
Taxation and customs union	99	28	1	396	23
Trade	10	64	1	456	16

Sources: CONECCS (2006); Broscheid and Coen (2007).

political capital of business interests is their understanding of technical issues and the input legitimacy that this provides at the EP's wider political considerations apply.

In such a complex environment, we have seen business interests reformulate or re-emphasise economic competitiveness arguments to focus on wider public goods such as regional employment consequences or create wider issue linkages – this was perhaps most visible during the pharmaceutical patent debates in the early 2000s. However, the more substantial difference, between the Commission's bureaucratic discretionary model and the Parliament's political environment, is the growing use of the economic media and public opinion in lobbying the EU (Earnshaw and Judge 2006).

The previous sections discuss the institutional characteristics that have determined business lobbying preferences, but equally important is the nature of the policy being formulated and the type of institutional legitimacy required to deliver regulations (Lowi 1964; Scharpf 1999; Hix 2003). In the EU public policy context, Figure 8.3 illustrates the huge variance in business political activity across regulatory and distributional issues and policy cycle (Coen and Broscheid 2007). As hypothesized, at the formulation stage preference is for direct lobbying of the EU institutions and is supported by the potential sector consensus building activity at the European Federations. However, in line with subsidiary, transposition, implementation, and

interpretation of directives are still very much in the domain of the national regulatory authorities (NRAs). Hence we see in the recently liberalized sectors of telecommunication, energy, and financial securities a higher degree of political budget going into lobbying the NRAs and the new European networks of NRAs (Coen and Thatcher 2008), rather than the EU institutions.

In looking for variance in allocation between national and EU lobbying channels, we must look at the formal and informal delegation of policy-making powers to the EU (Pollack 2003; Franchino 2005). In policies where the outcome is creating market standards which harmonize trade and competitiveness we would expect post-Maastricht to see a high EU profile, while issues that touch on sovereignty such as fiscal and justice and home affairs issues are not surprisingly still dominated by domestic lobbying. We would also expect to see a distinction in lobbying strategy depending upon whether the market regulations were product or process regulation – as the incentives to collaborate or go it alone will vary dramatically on the nature of the common good available (Hix 2005).

In sum, any studies of business–government relations must take account of the nature of the *policy good*, *political delegation*, and the *policy-cycle*. Moreover, as access to different EU institutions requires different access strategies we have seen the creation of new political alliances. As a result, it is sometimes hard to identify who is actually lobbying and how many times they have told their message to different Commission forums, Parliament committees, and national permanent representations. Hence, rather than collecting data for individual EU institutions, future lobbying studies should attempt to follow the *lobbying footprint* of a directive across the policy life-cycle and audit the institutions and individuals who are lobbied.

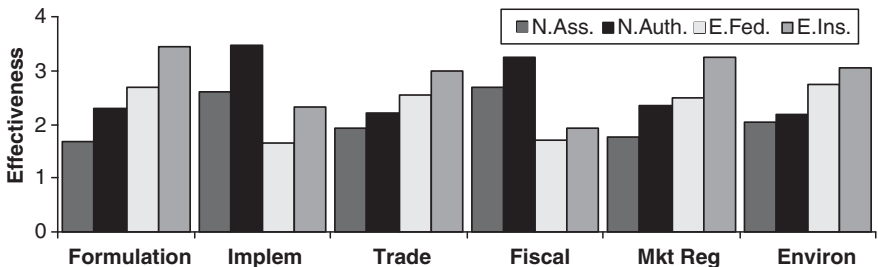


Figure 8.3. Variance in business lobbying along policy process and issue.

Source: Coen (2005)

8.3. Business–government relations: An EU business logic of political action

Business lobbying is booming in Brussels. Between 1983 and 2003 the number of firms with European government affairs offices rose dramatically from an estimate of 50 in 1980, to 200 in 1993, and an all time high plateau at 350 in 2003 (see Butt-Philip 1990; Landmarks Publications 2003; Coen 1997, 1999). During this 20-year period, US companies, such as Ford, GM, and IBM, British and Dutch multinationals such as BP, Phillips, and Shell and major EU conglomerates such as Fiat and Daimler-Benz established a significant political presence in Brussels and were instrumental in the EU integration process (Sandholtz and Zysman 1989; Cowles 1995, 1996). Today, as Figure 8.4 illustrates, a variety of companies from most of the EU’s 27 members lobby in direct competition with US, Japanese, Swiss, and South Korean firms for access and influence. Significantly, regardless of origin, a *distinct EU public policy* and lobbying logic has emerged in Brussels (Coen 1999, 2002, 2007; Woll 2006; Hamada 2007).

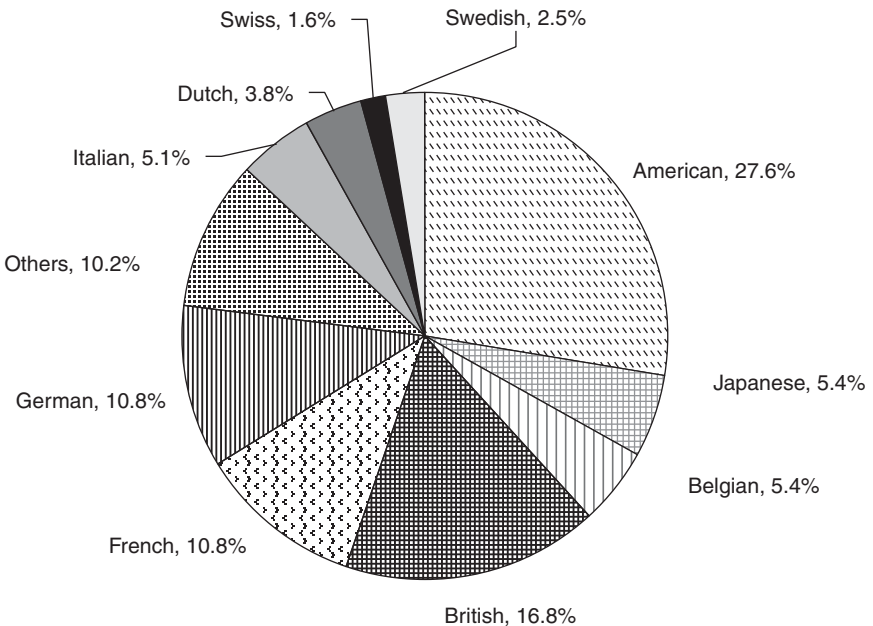


Figure 8.4. Firms with public affairs offices 2003.

Source: Landmarks Publications (2003)

Yet, for all the growth in direct representation in the EU policy process, EU collective action remains an important lobbying option for big business (Streeck and Visser 2006; Greenwood 2007; Grossman and Woll 2007) and was complementary to the emerging *elite forum-based politics* (Coen 2007). In fact, for many of the same institutional and policy reasons, the growth of collective action paralleled the explosion of direct business lobbying in the 1990s, and it is estimated today that there are around 1,000 business associations active in the EU public policy process (Greenwood 2002a, 2002b, 2007). More significantly, as the numbers increased, so too have the variety of collective arrangements ranging from high level business clubs to sector-specific European federations constituted of national trade associations (Greenwood 2007; Berkhout and Lowery 2008).

8.3.1. *The logic of direct business lobbying*

Few would doubt the importance of direct representation of business in the EU policy process (Cowles 1996; Coen 1997; Mazey and Richardson 2006; Schmidt 2007; Woll 2006). Avoiding lowest common denominator concessions of trade associations and increasingly consulted by European and national institutions on regulatory agendas, large firms have professionalized their EU representation. However, although the Commission is considered open and accessible, a firm's effectiveness in influencing policy directly continues to be determined by its ability to establish a positive reputation in the European political process: that is to say by the extent to which it can establish its reputation as a provider of reliable, sector-specific, and pan-European information (Coen 1998; Broscheid and Coen 2003, 2007). Most large European firms achieve this insider status from the extent of their cross-border production, size, and length of time in Brussels. But occasionally some firms may find themselves insiders on specific Commissioner forums due to the sympathetic political leanings of Commissioners. Consequently, the level of access expected and provided can vary markedly for firms across sectors, Directorates, and policy areas – see Figure 8.5.⁴

With such political uncertainty, it is logical and responsible political behaviour to develop a mix of direct and collective political strategies which are often *mutually reinforcing*. Equally, lobbying to successfully utilize direct and collective channels requires four interrelated characteristics: the ability to identify early on clear and focused policy goals (Gardner 1991; Greenwood 2007); to develop relationships and credibility in the policy process (Coen 1998; Bouwen 2002; Broscheid and Coen 2003); to understand the nature of the policy process and institutional and policy demands (Richardson 2006; Broscheid and Coen 2003); and the identification of natural alliances to facilitate access and redefine reputations (Coen 2002; Mahoney 2007). This requires political resources and expertise.

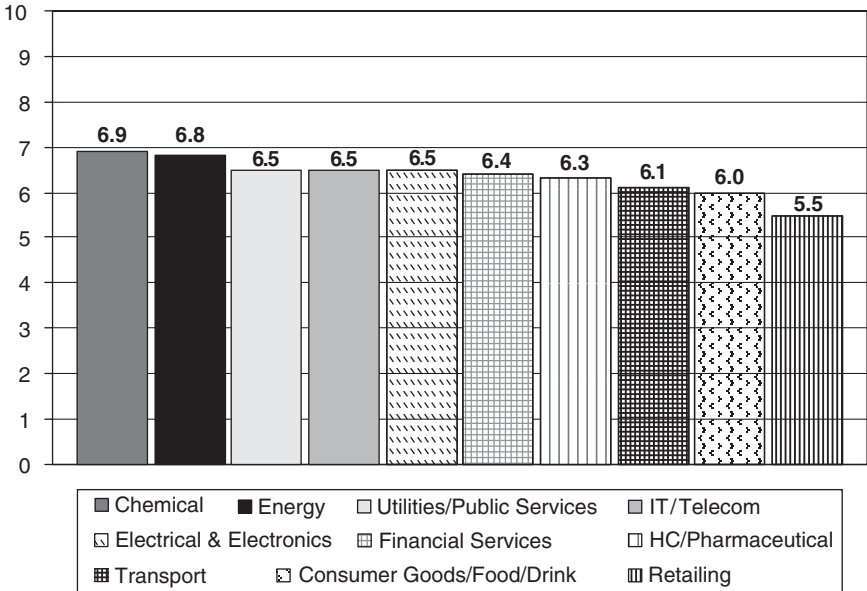


Figure 8.5. Perceived effectiveness of lobbying efforts at the European Commission. *Source:* Burson-Marsteller (2003)

EU government affairs offices are often skeleton staffed with two to three permanent staff and operate as an early warning set-up for headquarters. More significantly, many are empowered to directly mobilize experts from within the company and to commission expert advice from outside the company to respond to EU consultation calls. However, the most important functions of EU offices are to identify the potential EU policy consensus (and potential qualified majorities) and nurture relationships with EU officials in the EC Directorates, EP committees, and national permanent representations. In terms of a successful Brussels operation, the seniority of EU directors helps in developing informal networks with other like-minded companies and EU interest groups, and may facilitate invites to informal EU expert groups and high level forums – such as the C21 (Broscheid and Coen 2003; van Schendelen 2003; Gornitzka and Svendrup 2008).⁴ Moreover, and perhaps equally important for political credibility, senior EU appointments are more likely to influence policy-making and strategic goals within their own company. In sum, for successful direct access it is important that firms have individuals who can operate within small policy communities as equals and have the political credibility to warrant invites to select committees and industrial policy forums. Within this elite EU business/lobbying community we have seen a high degree of political learning and a convergence of lobbying strategy

throughout the 1990s (Coen 1998, 2002; Woll 2006). What is clear is that creating credible working relationships with the EU institutions requires time, informational resources, and an element of ‘give and take’ on behalf of firms and EU institutions. However, while trust and political legitimacy are developed through the provision of quick, reliable, and credible information over time, they can be lost in a much shorter period.

In assessing the logic of the EU business lobby it is important to note that multinational companies are not a single unitary actor, but are made up of a number of stakeholders and subsidiaries. As such, it is paramount that firms can identify their long term political aims and provide consistent messages across the various EU and domestic institutions. To enable such focused and constant lobbying activity, firms need to establish clear lines of communication between the government affairs departments, technical line managers, public relations departments, board, and CEO. It is only by creating this distinct and centralized government affairs function that business can establish clear political accountability within the firm and credibility with EU officials; by monitoring the internal and external flow of information – see Figure 8.6. While focused information improves the credibility and the political weighting that business ascribes to the policy, consistency of message from all divisions of a company avoids the playing off of different groups by EU officials with differing competitiveness, environmental, health, and safety agendas. In fact, in disaggregated EU public policy process it may actually be possible for large firms to have more information about the various directorates general and European Committee positions than the EU functionaries involved.

Therefore, we should see regulatory affairs as an informational *post box and gatekeeper* supplying information to EU officials, receiving and demanding *policy credibility* from the quality of information from company experts, and deriving *political credibility* from the board’s support – see Figure 8.6. In a perfect world we would hope that EU institutions and business could reach a *strategic awareness* where industry would trust policy-makers enough to fully disclose information for a well informed and optimal directive to be created. However, reaching this strategic awareness position (Figure 8.6, Box D) has taken time and has had to be incentivized by creating a competitive forum-based politics.

More often government affairs offices result in asymmetric information flows that result in sub-optimal policy-making; as important interests and information flows are lost to the decision-makers (Figure 8.6, Box A). Rather, where asymmetric information occurs – we tend to see a *policing focus* by the government affairs office (Willman et al. 2003). Such activity was observed in the early days of the single market programme as many companies monitored the EU from national government affairs offices and in-house legal teams (Coen 1997). Believing in the national veto at the Council of Ministers and embedded in their domestic political environment, few incentives existed for

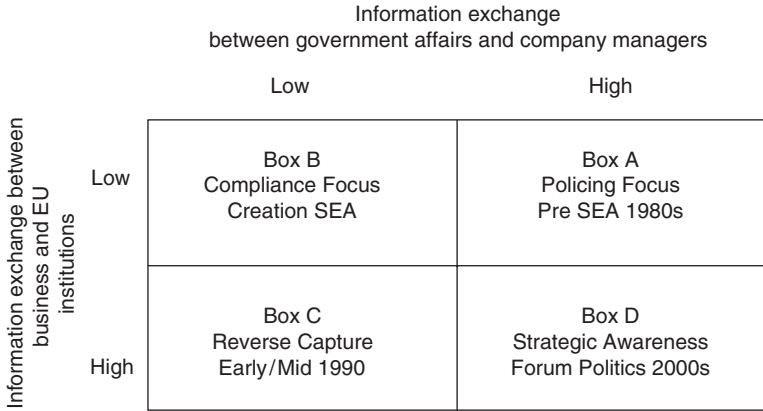


Figure 8.6. Evolving EU business–government relations

business to engage fully with the EU institutions. However, this reactive and negative lobbying failed to establish relationships with EU officials and resulted in a number of political and legal clashes at the Commission and the ECJ (Mattli 1999; Bouwen and McCown 2007). The result, after a period of business compliance focus, was the discussed explosion in EU government affairs functions and lobbying in Brussels, as firms recognized that the Commission was increasingly an international standard setter and market liberalizer (Pollack 2003).

Recognizing the discretion of the EU officials in ‘who and when to consult’, large firms initially established small monitoring operations staffed by ex-Commission officials (Gardner 1991; Hull 1993; Mazey and Richardson 1993). It was hoped that these informal networks would facilitate insider status, provide advance warning of proposed directives, and in the long run influence policy-making. However, industry quickly learned that such ‘quick fixes’ had their limits – as the ‘revolving door’ strategy while facilitating access to the EU institutions often alienated HQ and domestic technical managers, and potentially other directorates general. Thus, by the mid 1990s there was a perception by industry that many EU affairs offices had gone native (Figure 8.6, Box C) and that there was a need for the professionalization of the government affairs function. Over time and by managing the relationship with government and EU institutions directly, firms were gradually able to select appropriate senior managers within the firm to deal with specific informational requests. This has had the dual affect of reinforcing political credibility with the policy-makers for fast and effective information and developing a broader understanding of the policy-making process (Figure 8.6, Box D).

Accepting this level of sophistication, government affairs directors have noted that at different times along the policy-process the level of management mobilized and the type of political good required from business alters. As such, in the early framing and agenda-setting stages of a policy, CEO/commissioner contact is encouraged for the political momentum and political legitimacy engendered with the nation states and within the company. However, in the policy formulation and implementation stages it is the responsibility of the government affairs office to facilitate the inclusion of appropriate middle managers in the policy committees.

Although large firms have established their credibility as policy actors in the EU, whether all firms who participate can attain the same favoured access is open to debate. Rather, the parallel impact of increased EU business lobbying overload, coupled to a slowing down of the EU legislative activity in the 2000s, saw a fall in institutional demand for policy information and a shift towards 'consensus politics through forums'. This is a more focused and elite structure than the traditional corporatist arrangements of the 1970s or the open lobbying of the 1990s. Rather, it is possible to see the current 'elite pluralism' as a system where access is generally restricted to a few policy players, for whom membership is competitive and strategically advisable, but not compulsory or enforceable (Coen 1997; Coen 1998; Broscheid and Coen 2007) at the European Commission. However, even if we see a move towards forum politics at the EC in some issues, a rational strategy still requires multi-channel lobbying and an ability to create multiple issue identities.

The upshot of forum politics and multi-channel lobbying has been that EU institutions have become more concerned about transparency in the EU policy process. Some of this call for change has been driven by democratic deficit debates and a desire for the EC and EP to define their role vis-à-vis one another and their interest groups. The consequence is that direct lobbying by big business is coming under greater scrutiny as it has been obvious to many that firms have often been directly funding collective arrangements or fronting apparent ad-hoc alliances to further their own individual access. It is hoped that the proposals by Commissioner Kallas at the Commission and Dr Stubb, the MEP rapporteur for constitutional affairs and transparency at the Parliament, will create greater disclosure and capture the individual *lobbying footprints* of business – even if hidden under different hats along the policy process (European Commission 2006; EP 2007).

8.3.2. *The distinct EU logic of collective action*

The above illustrated that large firms considered direct lobbying as the most effective means of influencing EU policy process, and that direct political action improved via establishing trust in the information provided and good political management of secondary collective channels. Significantly, the

most common means of establishing an element of trust between EU officials and a large firm was to attempt to foster European credentials. The result was the increased take up and redefined use of EU trade federations in the 1990s as illustrated by Figures 8.1 and 8.2 as part of their strategic lobby strategy.

As previously observed, business associations increased dramatically in number in the 1990s and currently accounted for almost two thirds of all EU interests; nevertheless like the plateau in government affairs functions, growth has slowed in the 2000s (Greenwood 2007). More significantly, we see a greater variation in the collective groupings available to business lobbies, ranging from high level business clubs like the European Round Table (Cowles 1995) and Transatlantic Business Dialogue (Coen and Grant 2001; Cowles 2001), high politics peak organizations such as Business for Europe, sector federations of national trade associations (Greenwood 2002b and 2007), and national chambers of commerce like AmCham (Cowles 1996). However, today much of the collective action growth is outside of the traditional sectors and national cleavages and instead focuses on short life issue alliances with small secretariats (see Mahoney 2004, 2007). As such the traditional analysis of business logic of collective action needs to be reassessed in the context of multi-level and multi-collective options.

While much focus in nation states has traditionally been on the *logic of formation* and overcoming free riding (Olson 1965; Moe 1980; Kimber 1993; Hart 2003; Streeck and Visser 2006), this has been less of an issue for EU collective action debates (Greenwood 2007). First and foremost, the EU institutions fostered and often funded the creation of many sector federations in the early days of the European Community as a means of developing a functional 'interest elite' that would work in parallel with the member states (Grant 1993; Mazey and Richardson 1993). However, despite recognition of the value of structured corporatist system of consultation, the reality in Brussels was always a less formalized and pluralist policy-making system (Streeck and Schmitter 1991; Coen 1997). Secondly, the nature of membership of European federations, often combinations of national associations and large firms, has meant that entry costs would appear low to these established large political actors (Greenwood 2002b). Moreover, once the initial decision to join has been made many large firms cease to continue the cost/benefit calculation of membership and may even fail to reach their *rationality threshold* (Kimber 1993).

So if the logic of formation and membership are less significant, the question becomes what is the *logic of participation*? As noted, there is a big difference between joining a federation and utilizing it to actively participate in the policy process (Gray and Lowery 1997; Jordan 1998; Gray and Lowery 2006). In the early days, many firms were frustrated with the role of trade associations in the EU policy process, feeling that they represented the *lowest common denominator* positions of their respective national associations (Grant 1993; McLaughlin and Jordan 1993). As a result, in the 1990s in sectors with high

large firm concentration ratios, such as automobiles, chemicals and pharmaceuticals, encouraged the restructuring of European federations to foster direct firm membership. The rationale was that the new EU business associations would be more responsive to the informational demands of the EU institutions, that they would provide credible information with large end users and standard-setters, and potentially be efficient organizations focusing on a limited range of consensus policy areas. The evidence is mixed for the success of firm-led association over traditional peak federations with Eising arguing that the latter EU federations have more contact with the Commission than business led groups (Eising 2004, 2007). However, this result may represent an undercounting of firm-led federations' impact and contact, as it fails to capture direct business representation, which should be seen as having an accumulative and complementary affect on the EU federations (Coen 1997).

The rise of such hybrid associations has challenged our traditional perception of EU collective action. First, what is beyond doubt is that these new collective arrangements provided firms with opportunities to develop their *positive European credentials* in the EU policy process. Accordingly, one EU rationale for active participation in collective channels is to develop a long run reputation that can be discounted for direct lobbying access to the EU institutions. In Olsonian terms, membership and the continued high usage of European federations can be explained in part by the concept of the *positive externality of reputation building* for direct lobbying creating a private good incentive (Coen 1998).

Secondly, given that most firms based in Brussels have limited political budgets, it is logical to assume that they prioritize political issues between the core strategy that they lead and secondary issues in which they pool their expertise. Hence, in periods of high legislative activity, firms are more willing to share out the burden of political representation to collective arrangements. Accepting greater resources at their disposal and the insider status of large federations, it is logical that EU federations are able to monitor a greater number of issue areas, with a greater level of expertise, and potentially gain more political coverage at lower cost for business.

Extending this concept of the logic of collective action some argue that the rationale of firm level participation at the EU federations is more a logic of the *cost of non-membership*, than a calculus of the benefits (McLaughlin and Jordan 1993; Jordan 1998; Greenwood 2007). The costs may be linked to reputation building and favoured access for direct lobbying, the risk that the sector federation may become a countervailing voice to the outside firms' political preferences, and the loss of information and expertise. Overall, however, most firms surveyed saw positive benefits from active participation in the collective political channels with 25 per cent of all their EU political resources going into national trade associations and EU federations, and recognition that these channels are mutually reinforcing direct access to the Commission and EP.

Recognizing that federations are an important political channel to influence the policy process, what type of collective business action is most likely to thrive? First, as discussed in Section 8.2, we must assess the nature of the political goods debated and the economic structure of the sector. As already alluded to, governance of a business federation is a function of uniformity of the membership, (i.e. does it deal with the competing interests of network providers and service providers? does the association have large and small firms, manufacturers, and retailers? (Greenwood 2007:69)). Thus, firms are more likely to participate directly in associations where clear goals can be identified and common ground found amongst a small group of key players – this would perhaps explain the success of the Association of European Automobile Constructors or the European Chemical Industrial Council. Equally important is the nature of the proposed legislation in as far as it is a collective or private good. As Figure 8.3 illustrates there is greater likelihood of collective action in policy areas that define products and markets, where incentives to collude are greater, than in sectors where the policy debates are about manufacturing processes or transposition of regulation into domestic markets.

The rise of long term lobbying perspectives and sophisticated political business logics has challenged traditional forms of collective action. As previously noted, in the interest-crowded EU public policy process, access improved for those that achieved a credible political voice and political mass. The best means of achieving the latter was to establish some form of political alliance with rival firms, associations, and other public interests (Coen 1998; Mazey and Richardson 2005; Mahoney 2007; Long and Lörinczi, this volume). In so doing, firms created ‘issue identities’ for themselves. These alliances can be temporary ad-hoc groups based around fast changing single issues (Pijnenburg 1998) or more permanent groupings organized around formalized committees, forums, and even short life trade associations (Greenwood 2007). This informality gives the European public policy its vitality and flexibility, allowing as it does for the development of informal relationships, the apportioning of favours, and the establishing of political trust.

8.4. Conclusion

In the last 20 years, the overall locus of business political activity has moved towards the European institutions, but as firms learn to manage the political cycle variation in sector activity has been observed. In the same period, and based on discretionary politics, a distinct European business–government model has evolved founded on information dependency. Thus, as the EU institutions have demanded increased specialized technical expertise to

formulate policy, firms have responded by developing direct representation in Brussels to coordinate their multi-level and institutional political activity.

It is apparent from the behavioural data presented here that firms must make two distinct allocation decisions. The first involves the allocation of funds to the government affairs unit within the company. In most firms, the political affairs team must compete with strategic divisions for resources, and, as a new division, must constantly prove its worth. The political affairs unit is held accountable for its actions and, to some extent, the amount of profit it can generate. Such constraints on budget and action demonstrate that even large multinationals have to be aware of political effectiveness. The second allocation decision is the distribution of political funds between the various political channels. Here the data indicates that action is predominantly determined by the perception of influence and the establishment of goodwill for future influence. Such behavioural rationales indicate that, as political actors, businesses are very sophisticated – they are able to discount short-term collective political activity against long-term direct access to the decision-maker.

In distilling a trend from the 20 years of lobbying data collected for this study, it is possible to argue that the utilization and ranking of political channels is ultimately determined by how focused and close channels are to the appropriate regulators and legislators along the policy process. There is also a distinction between loud lobbying and effective lobbying. Finally, it is important to emphasize the complementary nature of political channels and the increasing ability of firms to discount the costs of participation in one channel against improved access in another. Accordingly, some political channels or business associations may be utilized, not for the collective good they create, but for the improved access they provide for individual direct lobbying.

Notes

1. Elite pluralism is a lobbying system in which access to the policy forums and committees is generally restricted to a limited number of policy players for whom membership is competitive, but strategically advisable. As such EU institutions can demand certain codes of conduct and restrictions in exchange for access (Coen 1997).
2. Figure 8.1 shows the lobbying pattern for large firms seeking to influence the European policy process and represents the mean average who responded to the question: How would you allocate 100 units of political resources (time, money, expertise) between the channels listed to influence the EU today and ten years ago? The percentage data therefore represents firms, revealed preference for various political channels, as opposed to their actual expenditure.
3. Figure 8.5 was adapted from the Burson-Marsteller survey 2003, in which Commission officials were asked how effective a sector was in terms of lobbying effectiveness on a scale of 1 to 10.
4. It is estimated by Gornitzka and Svendrup 2008 that about 1,350 expert groups now exist at the drafting phase of the Commission's proposals. Moreover, the Commission

can establish expert groups whenever they see a need with the approval of the General Secretariat. But most significantly for lobbying transparency the majority are informal groups and require no public document or formal list of membership. (See Framework for Commission's expert groups. EC (2005) 2817.)

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Actor Supply

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Chapter 9

NGOs as Gatekeepers: A Green Vision

Tony Long and Larisa Lörinczi

9.1. The complexity of the European Union public policy style

The European Union (EU) is a highly complex political setting and the public affairs function for NGOs and other lobbying organizations is becoming equally complex as it seeks to mirror the institutions and processes with which it interacts. A central feature of the EU-lobbying system is that it is essentially a multi-arena, multi-level decision-making system, in which all actors necessarily participate in a complex series of what Tsebelis termed 'nested games' (Tsebelis 1990). Depending on the subject matter, decision-making powers are distributed between Community institutions in different ways. This adds up to a highly complex system of governance and a high degree of functional segmentation.

Moreover, the EU is a dynamic system under constant change. A succession of Intergovernmental Conferences, especially in the 1990s, has introduced a steady process of incremental change to the EU policy process. Until the decisive and negative referendum results on the Constitutional Treaty in France and the Netherlands in 2005, this process has generally meant a transfer of more and more responsibilities upwards to the European level with accompanying changes in the distribution of power between the various EU institutions. This is now certainly changing with the 'Community method' being increasingly called into question. Thus, lobbyists face a somewhat unstable EU policy process and have to continuously adapt to changes in the rules of the game.

In practice, interest groups have been rather successful in adapting to the emerging European polity. The growing importance of the EU has led to a huge increase of lobbying in Brussels. This growing army of EU lobbyists has not left the national battlefields void. It has simply doubled the amount of lobbying to take account of multiple decision-making venues. Interest groups have adapted to this multi-layer character of the European system via institutional

innovation. Thus, they have established new organizations at all levels, building direct channels of contacts to supranational, as well as to national political actors, and seeking to become involved in the relevant national, transnational, and supranational networks of policy actors.

Interest groups pursue a 'dual strategy', striving for access and voice in European policy-making through national governments and directly through communications with EU institutions. The use of multiple channels of access has almost become obligatory. In a sense this is now one of the accepted rules of the game. This is because in the course of the policy-making cycle, the arena changes from one level of government to the other and back again. This only reinforces the point that European decision-making is a mix of intergovernmental and supranational bargaining. This EU institutional setting presents both advantages and disadvantages to interest groups. Its machinery of decision-making provides an almost infinite number of access points through which to lobby EU authorities. In such a differentiated institutional setting, the problem for interest groups is not a shortage but an over-supply of potential routes to influence among which they must allocate scarce resources. However, the plurality of actors and the complexity of the decision-making process can be serious obstacles for private interest groups as well. It is virtually impossible for any single interest or national association to secure exclusive access to the relevant officials or politicians, let alone to exert exclusive influence (Mazey and Richardson 1996: 228–9). This complexity for lobbyists is increasing also with the recent enlargement of the Union. Many new Member States have a political culture that is quite different from that of the earlier members. Interest groups face, therefore, quite new challenges in adapting their styles and methods to a set of Brussels norms which are ever more varied as enlargement progresses.

9.2. Interest group adaptation. The emergence of the 'Green Ten'

9.2.1. *The environmental movement*

The surge in interest in the Single Market in the mid-1980s coincided with the accession of Spain, Portugal, and Greece as new Member States, as well as the passage of the Single European Act (SEA) in 1986. The new title added to the Treaty of Rome by the SEA introduced an explicit environmental chapter for the first time. Language such as prevention at source, polluter pays, and precautionary principle was included in the legal basis of the Community. The crucial idea of integrating environmental policy into all the Community's other policies, first given prominence in the Commission's Third Environmental Action Programme (1980–5), was now given legislative weight in the Treaty. Although expressed in fairly vague terms, the integration requirement in

Article 130r put an end once and for all to the idea that environmental policy and legislation could be confined to a discrete box managed by Directorate-General XI (DG XI, now DG Env). In other words, NGOs had many more targets for their lobbying in Brussels and more legislative muscle for their arguments than had existed prior to the SEA (Long 1998: 105–18).

In this turmoil, changes were taking place in the environmental movement too. The mid-1980s were a time which Hey and Brendle (1992) describe as marking a far-reaching transformation from what they call an environmental 'movement' into an 'institution'. This transformation was a response to three important developments:

- the substantial growth of large environmental organizations which by the early 1990s could boast a membership of more than 10 million people in the EC;
- the political trajectory of 'environmental issues' and the consequent changed requirement profile; and
- the internalization of environmental policy, requiring coordinated action at various levels.

The second half of the 1980s saw an explosion of interest among the NGOs in the policy-making and legislative functioning of the EC. This interest was reflected in the decisions taken by several NGOs to establish an institutional presence in Brussels at that time. The first group of environmental groups to move in this direction in the late 1980s and join the longer established European Environmental Bureau (EEB) formed in 1974 were the large international organizations, Friends of the Earth Europe (FoEE), Greenpeace, and the World Wide Fund (WWF) for Nature. A second wave of new environmental NGO arrivals occurred in the early 1990s marked by the opening of Brussels offices of more specialized networks, including the Climate Action Network (CAN), the Transport and Environment Federation, and BirdLife International.

There are several reasons to account for this explosion of interest in European-wide campaigns and lobbying by NGOs at this particular time. The amount of EC environmental legislation started to expand enormously to the point where the UK Secretary of State for the Environment claimed in 1993 that 80 per cent of domestic environmental legislation in Britain originated in Brussels (Sharp 1998). The impacts on the environment of sectors and Community programmes previously largely immune from environmental scrutiny, such as agriculture, energy, transport, regional policy, and overseas development, became better understood. There was a clear advantage for environmental groups in tackling these impacts at the level where many of the environmental problems created by the effects of other EU policies originated. This was often more likely to be Brussels than the Member States. This was particularly the case where large landscape-level changes, especially

among new entrant countries like the United Kingdom, were being brought about by the perverse effects of the Common Agricultural Policy or large development projects funded by Integrated Mediterranean Programmes and later the Structural Funds.

In the public debates about the environment in the mid-1980s, there was a growing recognition that environmental issues had transfrontier impacts. The acid rain controversy of the mid-1980s pitting Scandinavian countries against Britain was a case in point. The discharges from the Sellafield nuclear waste facility into the Irish Sea was another. As more money began to be available for the environment in EC budget lines, often inserted by a sympathetic European Parliament, some organizations saw an advantage to step up their presence in Brussels for fund-raising purposes (Long 1998: 105–18). Development NGOs with their own dedicated budget line for development assistance projects were forerunners of this move to locate in Brussels to maximize funding potential from the EU. Thus, two developments at the EU level caused an intensification of interest group mobilization at the EU level. First, the increase in the amount of EU legislation was an important ‘pull’ factor. Secondly, groups were keen not to just influence the content of EU legislation but also wanted to gain more resources for their organizations. Most organizations wish to expand over time and environmental groups are no different in exhibiting a degree of entrepreneurial drive to maximize organizational benefits. For all these reasons, an exclusive focusing at a Member State level for some of the more policy-orientated environmental groups was no longer adequate.

There are now ten groups that make up the so-called ‘Green 10 (G10) environmental NGOs’.¹ The G10’s mandate lies in its constituencies: member organizations, their staff, boards, and members. A protocol drawn up in 1999 and revised in 2004 states:

The purpose of the Group is to give a greater voice to the environmental NGO community in Brussels by promoting a message of strength, unity and professionalism to the key targets, the European Institutions. The intention is to facilitate internal co-ordination and collaboration between the members of the Group, and not to create a new organisation with its own external profile.

The protocol continues with criteria for membership as follows:

New member organisations may be admitted to the Group subject to the unanimous approval of all existing members. An organisation should meet the following criteria to ensure that its mission, legal status, level of professionalism and legitimacy/accountability match those of existing members and that it adds value. In concrete terms, the candidate organisation should:

- Have statutes which confirm non-governmental and not-for-profit status;
- Have as its principal task environmental protection;

- Have in its scope policy advocacy with institutions of the European Union in furtherance of protecting the environment;
- Be non-affiliated and non-aligned with any particular political party or parties;
- Have a membership base that consists primarily of environmental NGOs and that is largely trans-European in nature (in other words, not restricted to a few Member States);
- Have an office with full-time staff in Brussels;
- Have demonstrated stability over a couple of years in organizational terms and not be excessively dependent on one single funding source;
- Be prepared in principle and practice to send a high level representative (Director, Secretary General, etc.) to the Group's meetings, which take place in Brussels about once a month;
- Preferably cover a wide range of environmental policy areas;
- Preferably bring added value to the Group, for example, add relevant new perspectives, fields of work or contacts to those the Group already covers;

The first collective action of what is now the G10 (still only four organizations at that stage) marked a foray into a policy area that has been a defining characteristic of the group throughout its sixteen year history. In their document *Greening the Treaty* (November 1990) the groups made detailed proposals for altering the Treaty of Rome as amended by the Single European Act (WWF et al. 1990). The document states:

the organisations believe there must be a counter-balance and strengthening of the EC's commitment to guarantee a clean and healthy environment for present and future generations of European citizens in the drive towards the completion of the Internal Market, Economic and Monetary Union and European Political Union.

The principal demands in that document included a revision of the opening articles in the Treaty (Article 2) to insert 'sustainable and equitable resource use for present and future generations', an 'improvement in the quality of life', and 'citizen's rights to a clean and healthy environment'. Alternative wording was proposed for Treaty articles dealing with agriculture, transport, state aids, and other sectoral policies. The groups called for greater use of qualified majority voting, the right of any Member State to introduce more stringent environmental protection measures where these were justified, and proposed new Treaty articles calling for a Community environmental inspectorate and rights for freedom of information on the environment.

Five years later, the Green 7 (G7, as it then had become) produced 'Greening the Treaty II: Sustainable Development in a Democratic Union – Proposals for the 1996 Intergovernmental Conference' (G7 1996). It stated that the Maastricht Treaty incorporated a number of the proposals made in *Greening the Treaty I*, 'if not verbatim, than at least in recognisable form'. Many of the

calls in this document, and a subsequent one in 2000 (G7 2000), remained the same and were presented within a common frame of three objectives:

1. Making sustainable development the paramount objective of the Treaty of European Union;
2. Securing the integration of environmental considerations in the other policy areas of the EU; and
3. Reducing in the interests of environmental protection the democratic deficit in the EU's institutional structure.

By the time of the Constitutional Convention in 2002, the G10 had become part of, and helped form, the Civil Society Contact Group, a very broad coalition of organizations with European social, environmental, human rights, women's rights, and development backgrounds (and the European Trade Unions Confederation with observer status). This Contact Group initiated the 'Act4Europe' campaign, with its main objective to increase civil society's involvement in the work of the Convention and later the Intergovernmental Conference. Its common concerns included a strong concept of sustainable development in the Constitution as well as transparency and participatory democracy (see <http://www.act4europe.org>). Again we see NGOs exhibiting a capacity for institutional innovation in order to maximize their leverage in the EU policy process. Within this general innovative trend, the capacity to construct coalitions (either ad hoc or permanent) has been an important feature.

In fact, the revision of the Treaty by the Convention in 2003 achieved only very limited advances in the environmental field, for example with respect to the objectives of the external action of the Union. Rather a great amount of time and resources were devoted to safeguarding existing provisions. In other words, the environmental organizations spent a great deal of time running to stand still, essentially defending past political gains in the face of increased mobilization from their opponents. The G10 considers that the revision of the policies in Part Three of the Treaty will be a priority for the next reforms, while also demanding a further discussion on citizen's access to justice (see Christopoulou and Long 2004).

Besides the Treaty, there have been other G10 initiatives over this same period. Notable were the contributions to the first and second seminars held under the Delors Presidency on sustainable development held in November 1993 and November 1994, respectively. The sustainable development focus and the integration of environment into all Community policies and decisions, a Treaty requirement after the Treaty of Amsterdam (Article 6), continued with the discussions surrounding the Cardiff Summit in 1998, the Gothenburg Sustainable Development Strategy in 2001, and the Vienna Council revised strategy in June 2006.

In addition, the G10 produced a joint 'manifesto' outlining key recommendations for action by MEPs in the European Parliament 2004–9. They

worked with member organizations to promote these recommendations with MEP candidates and political parties at a national level. The EU's annual budget procedure presented an opportunity for the G10 to lobby for a shift in funds away from environmentally damaging measures to those budget lines that deliver public goods and environmental benefits. A G10 letter to President Barroso in July 2005 was undoubtedly influential in saving the seven thematic strategies on the environment being proposed by Commissioner Dimas from disappearing off the Commission's agenda.

Not all actions necessarily involve all G10 participating organizations. In fact, most do not as a degree of market segmentation has emerged. The G10 protocol from 2004, referred to above, foresaw the formation of 'policy clusters' of individual NGOs drawn together for collective organization and action on specific topics that may not involve all members of the G10. Non-G10 organizations are able to join these clusters and are encouraged to do so, including NGOs from non-environmental sectors. These so-called 'clusters' have formed *inter alia* around reform of the Common Agriculture and Fisheries policies, the reform of cohesion policy, EU energy and climate change policies, and development aid. One of the most visible of the clusters has concerned reform of the EU's chemical legislation, or Registration, Evaluation and Authorisation of Chemical substances (REACH).

The new chemicals law has been the subject of intense lobbying activity on the part mainly of WWF, European Environmental Bureau, Greenpeace, and Friends of the Earth. The objective of the Commission was to put forward a 'balanced proposal' that took into account both economic competitiveness and environmental/public health issues. From the perspective of the NGOs, the balance has consistently been struck too much in favour of commercial interests. From the first proposals in the Commission White Paper in 2001, the NGOs have played an important role in defending their position and keeping key features intact in the face of strong and persistent counter lobbying by business interests. This counter lobbying is itself testament to the effectiveness of NGOs over time. Thus, the very success of the environmental NGOs has caused business groups to mobilize yet more lobbying resources as a defensive strategy.

The REACH campaign has been a case study in environmental groups' use of political communication tools and approaches in their lobbying work. The usual formal and informal meetings with Commission officials, mainly in DGs Enterprise and Environment, continued as normal. Some of these meetings are more informal than others, particularly when officials are seeking help or support for their positions at particularly awkward or critical junctures in the legislative process. Invitations to participate in official hearings in the European Parliament were routinely extended to NGO representatives. Places were made available to NGO representatives on a Commission High-Level Group looking at impact assessments of REACH. But in addition to this bread and

butter lobbying that is stock in trade for all Brussels-based lobbying groups, the NGOs adopted other strategies, including:

- Building alliances and coalitions not only with the other environmental groups in Brussels but with consumer groups, health groups, women's associations, retailing businesses, and trade unions.
- Creating new, single issue organizations such as 'Chemical Reaction', a specialized NGO bringing together Greenpeace, Friends of the Earth, and the European Environmental Bureau.
- Commissioning cost-benefit analyses to counter claims that REACH would be anti-competitive and instead focus on the business and innovation benefits of implementing REACH (WWF).
- Analysing previous examples of what they saw as exaggeration of projected costs associated with previous examples of environmental legislation (WWF).
- Mounting high interest media events such as bio-monitoring of ministers, members of parliament, and three generations of families to show that the chemicals contaminate the human body (WWF) and analysis of household dust in different Member States (Greenpeace).
- Participation in the Commission's internet consultation with over 200,000 signatures gathered in the form of a petition for stronger chemicals laws.
- Organizing television and video spots highlighting the ubiquitous nature of chemicals in everyday products (WWF).

A DG Environment official is quoted as saying that, 'in REACH, without the persistent and very strong lobbying from the environmental NGOs, it would not have been possible for the Environmental Commissioner to put forward such a proposal with such consequences for industry. REACH is the most consulted piece of legislation in the history of the Commission' (Interview with Tomas Gronberg, European Commission, DG Environment, April 2005).

9.3. Strategic action

The action strategies for different NGOs vary according to different stages in the policy process. Perhaps five main opportunities can be identified for engagement in the EU policy process:

1. Early agenda setting phase – identifying issues not yet salient in the political process
2. Consultation period for new proposals – Commission communications, Green Papers and White Papers
3. Legislative activity in the Parliament and Council – first and second readings, common positions, conciliation

4. Post-legislative and pre-implementation – comitology, guidelines, and implementation rules
5. Monitoring implementation and enforcement – NGOs as watchdogs

NGOs are generally regarded to be most effective in the first, second, and fifth stages. It is also the case that these three stages are where the European Commission is the most involved institution – with the Parliament concerned also – and traditionally the easiest lobbying target for NGOs. An example of agenda setting includes NGO-led efforts to have hormone disrupting chemicals legislated for more effectively using parliamentary own initiative procedures in the mid-1990s (in other words well before REACH emerged as a White Paper in 2001). Influencing EC targets for the Kyoto Protocol is another example of NGO agenda setting. NGO networking skills make consultation exercises in stage two particularly fruitful. For instance, this is true of the succession of environmental action programmes starting in the mid-1970s.

The intense legislative activity in stage three is not always as amenable to NGO lobbying. This is because of the competition for attention and access from other, very often better-resourced industry and federation lobbying organizations. The Parliament and even more the Council are extremely resource intensive in terms of demands on time – effective lobbying here is more likely to favour the well-resourced membership organizations. However, as the REACH campaign has shown, effective coalitions of NGOs working easily across national boundaries and upwards into the European political institutions and processes can be extremely effective. To some degree, perhaps, NGOs might have an advantage over business groups in that NGOs find it easier to construct and maintain broad cross-national coalitions than do business interests who are essentially in competition with each other and who are differentially affected by EU regulation.

The long implementation tail of the policy process, stage four, is even more resource intensive – and drawn out over a longer period – and generally difficult for NGOs to engage in over protracted periods. The participation of some environmental groups in the formal Common Implementation Strategy of the Water Framework Directive, where they sit alongside Member State officials and water directors from the private and public sectors, shows however that this kind of involvement in stage four is possible.

The imbalance of resources as between NGOs and other interests needed for effective interest representation in Brussels is creating conditions for new partnerships and alliances to emerge. Local authority, trade union, individual company, and more recently trade association formal and informal links to NGOs are becoming more commonplace, some of them including financial relationships, illustrating the kind of ‘promiscuity’ referred to by Mazey and Richardson (2006: 256–64). But it is not a one-way street. The self-interest in these new types of partnership for all the parties involved is to gain effectiveness and impact in

the general shift in attention in Brussels towards levels one and two in the policy chain described above. The fact is that legislative activity in stages three and four is noticeably drying up, partly or even largely due to the reassertion of national interests and to the decline in the Community method. Yet again, we see groups being able to adapt to institutional changes in the EU policy process.

9.4. Does this add up to NGO influence?

Literature on NGOs' involvement in policy advocacy provides different approaches to measuring their *influence*. The questions of how and under what conditions NGOs (or indeed other groups) achieve tangible impacts in their advocacy activities are notoriously difficult to answer. It is very difficult to prove the influence that lobby organizations have on policy making (for a discussion of the problems of measuring influence see Michalowitz 2007). Betsill and Corell analyse NGO's influence in international environmental negotiations and contend three elements need to be present: access, activity, and resources. They conclude 'it is important to remember that NGO activity does not automatically translate into influence. It is entirely possible that NGOs are extremely active during a negotiation process but that the actors do not alter their behaviour in response to those activities' (Betsill and Corell 2003: 65–85). Also referring to the international dimension, Princen argues that NGO influence is 'achieved by building expertise in areas diplomats tend to ignore and by revealing information economic interests tend to withhold. Moreover, it is influence gained when other actors need what only environmental NGOs can offer' (Princen 1994: 29–47). The NGO resources to which Princen refers are the knowledge, interests, and values they represent, as well as the particular role NGOs have in international environmental negotiations.

Keck and Sikkink argue that to 'assess the influence of advocacy networks [NGOs] we must look at goal attainment at several different levels' (Keck and Sikkink 1998: 25). In other words, it is important to ask whether political outcomes reflect the objectives of NGOs. A comparison of NGO goals with outcomes provides more concrete evidence of NGO influence than a focus limited to activities, access, and/or resources. Analyses demonstrating that NGO activities designed to promote a particular position can be correlated with an outcome (e.g. inclusion of specific text in the agreement) can make a plausible case for the possibility that NGOs had something to do with bringing about that outcome (Betsill and Corell 2003).

Another procedural indicator of NGO influence mentioned by the authors Elisabeth Corell and Michele M. Betsill is if delegates give serious consideration to an NGO proposal, even if they do not ultimately include that proposal in the final agreement. 'NGOs can also be said to have been influential if evidence can be found suggesting they have shaped the jargon used by state

decision-makers during the negotiations. In the Kyoto Protocol negotiations, for example, environmental NGOs are widely credited with coining the term “hot air” in reference to proposals that would enable a country whose greenhouse gas emissions were below its legally binding limits to trade the difference’ (Correl and Betsill 2001: 86–107). Establishing jargon or shaping the language that is used in policy discourse/argument is a way for NGOs to influence how negotiators and observers perceive various issues and proposals in a negotiation’ (Corell and Betsill 2001: 86–107).

In his analysis of the G10, Greenwood (2003) cites another factor which might increase the influence of NGOs. Thus he notes that the combined membership of environmental organizations, 20 million members in the EU or 5 per cent of the EU population, as one source of their considerable advantages in working at the EU level. Environmental organizations with their mass membership base and the skills acquired by their European offices ‘enable them to combine institutional politics with traditional social movement activism’. Greenwood concludes that if NGOs count their ‘successes’ in terms of short term victories, they are likely to be disappointed. But where they take a longer term view of the impact of their work upon the broader thinking that shapes the behaviours of politics and wider civil society, the account looks more robust’ (Greenwood 2003: 49). Also, noting the importance of discourse as a resource, he goes on to suggest that ‘of all public interest groups, environmental organizations have the most favourable discourse of all within which to operate’ (Greenwood 2003: 49).

Yet another possible indicator of actual influence is the *reputation* of groups among other policy actors. Some evidence of this kind comes from the commercial public affairs community in Brussels. The Burson-Marsteller ‘Guide to Effective Lobbying of the European Parliament’ (2001) stated that environmental non-governmental organizations were regarded by MEPs as most effective at lobbying. Nearly one in four MEPs – 24 per cent – cited environmental NGOs when asked which sectors they thought were most effective at lobbying. The significance of the findings, the report continues, is heightened because MEPs were not prompted but asked instead for sectors that came first to mind. However, an update of the report in 2005 put NGOs and industry lobbies on roughly equal par in most sectors regarding their effectiveness as lobbyists, illustrating the effectiveness of industry’s counter lobbying efforts in the European Parliament and the catch-up nature of the lobbying game in Brussels.

The trade association for the chemical industry, CEFIC (European Chemical Industry Council), commissioned a report in 2005 from the UK-based consultancy, Sustainability, to analyse ‘the structure, governance, messaging, communications of “the Green 9”’ NGOs as well as CEFIC itself (see <http://www.sustainability.com/sa-services/casestudy.asp?id=313>). Comparing the NGOs with industry, the report found that NGOs are characterized by focusing on the ‘pre-policy’ environment, they are fluid and networked, they are emotion

and values-based, and their brands are a source of their value. By contrast, industry focuses on policy and regulation, tends to be rigid and hierarchical, is science-based, and can allow their brands to become a source of risk. This is not to suggest that reputation *necessarily* equals influence. However, it might well be an important precondition for exercising influence. Thus, if an actor is already thought to be important, then his or her chances of actually being influential must surely be enhanced, as any messages emanating from that actor are likely to be given some credence.

Finally, *imitation* might also be seen as an indicator of influence in that, if other organizations copy NGOs, it might suggest that there is a degree of 'learning' across types of lobbying organizations. For example, Jonathan Cohen suggests that a clear indicator of the influence of NGOs is the fact that they are often imitated by 'fake' NGO structures, or the so-called 'astro-turf' organizations (fake grass). He cites the Global Climate Coalition in the United States as a prime example with its support coming from Exxon, American Petroleum Institute, Chevron, and Texaco and over forty other corporations and trade associations. 'If the sincerest form of flattery is imitation, then NGOs should be honoured by business front groups that trade on the NGO credibility of grassroots organisations . . .' He also states that 'a clear indicator of influence is not only imitation, but backlash' (Cohen 2004).

9.5. Regulating success?

This boom in lobbying activity in Brussels has, inevitably, raised some concerns particularly about lobbying practices, which are considered to go beyond legitimate representation of interests. For example, Commissioner Siim Kallas caught this mood in his Nottingham speech in March 2005, only months after having assumed office. His singling out of NGOs for criticism was harsh but not totally unexpected:

People have a right to know how their money is being spent, including by NGOs. Currently, a lot of money is channelled to 'good causes' through organisations we know little about. Noble causes always deserve a closer look. In the Middle Ages the forests of Nottingham were famous for the courageous Robin Hood, the 'prince of thieves' who tricked the Sheriff of Nottingham and stole from the rich in order to help the poor. One may regard this legendary figure as an early NGO. His cause seemed noble, but his ways to redistribute wealth were not always quite transparent.

Not unexpected because writers had been warning this was coming, particularly following the international prominence of NGOs in the 'Battle of Seattle' around the WTO deliberations in 1999. In *AccountAbility* Susan Todd states, 'Calls for increased accountability of non-profits may also reflect a general decline in trust in all public institutions and greater public scrutiny of the private sector' (Todd

2001). The special editorial on NGO accountability concludes: 'So the irony is that by raising public awareness of the practices of government and business, NGOs have also invited scrutiny of their own practices.' Another sign of increasing concern is to be found in *The 21st Century NGO – In the Market for Change* (2003), published by Sustainability in the UK. It saw 'warning signs of seismic shifts in the landscapes across which NGOs operate'. Part of the shift was the recognition of the roles NGOs can play in developing and deploying solutions. These solutions will be complex and not based on single-issue responses. Public and private partnerships are increasingly essential in leveraging change which in turn is leading to new forms of competition in the 'NGO market' and more attention being given to branding and competitive positioning. The upshot: 'the mainstreaming trend is exposing established NGOs to new accountability standards'.

The Commission's Green Paper on a European Transparency Initiative in May 2006 cited the context for lobby reform. This included distorted information provided about the possible economic, social, or environmental impact of legislative proposals; mass communication campaigns for or against a given cause; and possible conflicts of interest when options are voiced by those relying on financial support from the EU budget. It is not just NGOs that have been in the reform spotlight however; some have seen an excessive influence from corporate lobby groups on EU decision-making as also becoming an issue. In response to the European Transparency Initiative, public affairs professionals have repeatedly stated their preference for self-regulation over a mandatory system of transparency rules. For their part, a coalition of NGOs grouped under the ALTER-EU alliance (Alliance for Lobby Transparency and Ethics Regulation) has signalled their readiness to apply a code of ethics applicable to all lobbyists across the board, including themselves. In their response to the internet consultation on the Green Paper, ALTER-EU calls for mandatory registration (ALTER EU, Press release, 3 May 2006). The group of ten environmental organizations has also endorsed and supported Commissioner Kallas in his effort to improve transparency around lobbying. They are among the NGOs that have registered in the Commission's CODECCS database, offering complete information about their identity, policy interests, and financing.

9.6. Conclusion; pluralism, elite pluralism, or clientelism?

The emergence of the original Gang of Four (G4) in 1990 (EEB, WWF, Greenpeace, and Friends of the Earth) was prompted by a request from DG XI for the environmental groups to become better organized among themselves. This was particularly needed for the exchange of information prior to and following Council meetings. This genesis lends support to the view that the G10 origins reflect the normal rules of bureaucracy, with, in this case, a relatively weak environment

directorates looking to bolster its support with outside legitimacy. Furthermore, environmental groups generally have enviable links into their membership networks in the Member States and can provide intelligence and influence to the bureaucracies that traditional, official channels do not always allow.

The formalization and extension of these consultation arrangements between G10 and DG Env grew throughout the 1990s. Normally twice yearly meetings would be held with the Director General and/or the Environment Commissioner. One former commissioner had the habit of participating in G10 meetings without any formal invitation. At this time, it was not uncommon for the G10 to be meeting the President of the Commission on a formal and usually annual basis, a tradition continued more irregularly by President Barroso who met G10 leaders within months of taking office.

The integration of environment into Community policies and actions called for by Article 130r of the SEA meant that what had become a close *client* relationship between DG Env and the G10 inevitably needed to be widened. Throughout the 1990s, new opportunities were opening up to individual NGOs to participate formally in a variety of Commission advisory and working groups. The leaders in this regard were the initiatives taken by Commissioner Lamy to create consultation mechanisms with civil society on trade matters and Commissioner Fischler responsible for the opening up of agriculture and fisheries advisory committees to NGO participation. DG Development was also advanced in its relations with NGOs and DG Social and Economic affairs was similarly inclined to open dialogue. By 1999, NGOs were included as formal members of the EU delegation to the trade talks in Seattle, along with representatives from business and the trade unions. NGOs were also on the formal EC delegation to the World Summit on Sustainable Development in Johannesburg in 2002. This explosion of possibilities for formal and informal participation by NGOs in EC policy processes confirms the idea that Brussels is the prime example of 'venue shopping' for securing access and influence.

The further question arises whether this represents pluralism reserved for 'elite' NGOs. The 'elite pluralism' concept has at least two 'faces'. Greenwood states that 'The most striking feature of the system of EU interest representation is its elite nature . . . almost all EU interest organizations represent associations and interest groups which are confederated . . . almost no associations of any type admit individuals as members' (Greenwood 2003: 51). He concludes, 'These factors mean that EU interest organizations have a structural remoteness from the grass roots interests they represent, but they do tend to embrace a broad range of European interests' (Greenwood 2003: 52).

This notion of elite pluralism is predicated on the notion of individual membership of the Brussels-based institutions rather than federated membership providing more equal access. A counter case can be made that in fact it is the federated structures that permit smaller and more specialized NGOs, sometimes in the smaller and also newer Member States, to obtain access to Brussels

intelligence and decision-making. It is precisely to give voice to smaller or nationally or regionally based organizations that groups like CEE Bankwatch, CAN Europe, the environmental network of the European Public Health Alliance, Transport and Environment Federation, and the original precursor federation, EEB, exist in Brussels. Individual membership organizations like WWF, BirdLife, Greenpeace, and Friends of the Earth are the minority in the G10.

Warleigh argues that there is another type of elitism based on internal governance of representative organizations. 'Although NGOs can score highly on their ability to influence EU policy and are developing higher profiles as political campaigners, their internal governance is far too elitist to allow supporters a role in shaping policies, campaigns and strategies, even at one remove.' He continues 'more disconcertingly, it appears clear that most NGO supporters do not actually want to undertake such a role' (Warleigh 2001).

In a similar vein, Marguerite Peeters interpreted European developments, for a predominantly American audience at an American Enterprise Institute conference 'Non-Governmental organisations: the growing power of an unelected few' in 2003. She complained about the EU's increasing reliance on NGOs and their lack of representativeness arguing that this does not bode well for the future of the Union. Referring to a Commission paper of 2000 'The Commission and Non-Governmental Organisations: Building a Stronger Partnership' authored by Commission President Romano Prodi and Vice-President Kinnock, she said the proposals would further empower NGOs that already regularly interact with the Commission. 'Participatory democracy would then be reduced to the EU interaction with a few Brussels-based NGOs, just as "civil society" is in practice often reduced to mean those Brussels-based actors who participate and are consulted, and among which NGOs often prove to be the most proactive' (Peeters 2003).

Marguerite Peeters's critical tones illustrate the fact that environmental NGOs in Brussels can be portrayed in quite contrasting ways. In the early period of their activities, they can be presented as a long overdue correction to the power of the business lobby – the first lobby to be effectively organized at the EU level. It was no accident that the Commission facilitated the growth of environmental NGOs in Brussels. Basically DG XI was keen to see a better balance in the lobbying market, in part for good democratic reasons but, no doubt, also out of self-interest. In a sense, the Commission nurtured a new 'market entrant' to compete with the business lobby. Now, after several decades of expansion, the new market entrant is seen by some as possibly part of a 'lobbying oligopoly'. As environmental lobbyists we are, of course *parti pris* in this debate. We believe that we are an essential transmission belt of opinion between citizens (our members) and policy-makers in Brussels and are, therefore, a central part of the process of democratizing the EU rather than part of a system of privileged access granted under a system of elite pluralism. We leave it to readers to make their own judgement.

Note

1. The G10 members are: BirdLife International (European Division), CEE Bankwatch, Climate Action Network Europe, the European Environmental Bureau, Health and Environment Alliance, Friends of the Earth Europe, Greenpeace European Unit, International Friends of Nature, European Federation for Transport and Environment, and WWF European Policy Office.

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Part IV

Sectoral Studies

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Chapter 10

The Changing World of European Health Lobbies

Scott L. Greer

Health seems like an unlikely candidate for Europeanization. It is at the core of the welfare state, vitally important to member states and their politicians, and consequently long protected from European Union (EU) policy. EU treaties have only weak and tightly delimited health policy competencies, reflecting member states' unwillingness to countenance EU (or any outside) intervention in health. The interest group ecology is also tightly bound to states, no matter how international the conference circuit. Even in countries with little or no corporatism, such as the United Kingdom, there is a great deal of 'private interest government' in health (Streeck and Schmitter 1985; Salter 2004). In such tightly drawn policy sectors, Europeanization of interests and policy-making might be a dramatic shock for policy-makers, and a dramatic case study of theories of European politics and integration for the scholars.

The development of EU health policy is giving scholars just that case study. A fledgling European health policy arena is developing as a result of exogenous shocks to existing systems administered by the Court and Commission. I argue that investment by interest groups and policy advocates in EU health lobbying is in response to either the explicit efforts of the Commission to win allies for new policy ventures (so far mostly in public health) or a defensive reaction to the increasingly complex and important EU judicial and legislative agenda in health services, consistent with the findings of Wessels that groups become engaged when they realize the EU is potentially engaged with their issue (Wessels 2004). Groups that would be interested in liberalization – seemingly just what the EU health services agenda provides – are focusing not on helping the liberalizers at the EU level but on developing connections in member states. The result is NGO and professional dominance that stands in contrast

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to the usual EU pattern in which business dominates lobbying. It also poses the question as to why the expected beneficiaries of liberalization – cross-border health care providers – are not present.

The pattern of interest group engagement can be explained by what is on offer. Public health advocates see a useful new forum and are welcomed by the Directorate-General (DG) Sanco, private-sector cross-border providers prefer to concentrate on lobbying the member states that actually run health services, and incumbents in health services are engaged in largely defensive mobilization against the destabilizing activities of the Court and Commission.

The chapter is based on an ongoing project that includes 102 interviews conducted since July 2004 with member state, EU institution, and interest group representatives from the United Kingdom, France, Spain, and Germany as well as quantitative analyses (Greer 2009; Greer et al. 2008). It excludes pharmaceuticals and medical devices and the related issue of access to medicines. These sectors have very different actors and politics from the public health and health service sectors (including a number of large and very political companies with no equivalent), have been Europeanized for much longer and under different treaty bases, are well covered by a different literature (Mossialos et al. 2004; Sell and Prakash 2004; Hauray 2006; Permanand 2006; Altenstetter 2007), and in the case of access to medicines are better considered part of trade politics (especially when framed as ‘intellectual property rights’).

10.1. Dominant and subordinate groups in health policy

Twenty-seven health systems create one of the most complicated political arenas imaginable. Every seemingly basic concept dissolves upon application to the complexity of the systems, as discovered by the officials saddled with the task of implementing a series of ECJ decisions premised on the idea that there is something that can be reliably defined across the continent as ‘hospital care’. It turns out that no such thing exists outside European jurisprudence (interviews, lobbyists, London, June 2003, Brussels, December 2005; EU official, Brussels, March 2006) (Healy and McKee 2002). It is hard not to despair of scholarship or policy if it is impossible to clearly define hospitals or the work they do.

Abstracting from the complexity, though, it is possible to identify broad groups of actors in health policy whose interests and capacities shape their participation in EU health politics. In health politics they have a long lineage as ‘structural interests’, groups with strong points of view entrenched in politics (Alford 1975; Greer 2004), but they are not a phenomenon confined to health. Rather, sharing core values, understandings of priorities and mechanisms, and generally policies, they resemble policy advocacy coalitions (Jenkins-Smith and Sabatier 1994; Sabatier 1998).

We can say, broadly, that there is one dominant coalition in health policy in the EU countries, and two challenging coalitions. Their conflicts, interacting with the EU's treaty bases and politics, shape the kind and amount of mobilization that we see on the EU level. It is no commentary on their virtues to call them dominant and subordinate.

The dominant health services coalition is made up of the organized professions and the publicly run or funded health services organizations that are the mainstays of the corporatism that has historically been characteristic of health services. Professions are historically very different from country to country in status, pay, and skill demarcations, but they all have a high degree of interpenetration with the state and control over accreditation and practice. Their counterparts are the traditional operators of hospitals and health care facilities. These vary, but are often religious orders, municipal governments, charitable foundations, or agencies of the state itself (as with the UK's 'trusts'). This interest is focused on medical treatment, and is usually so well entrenched that health politics focuses on squabbles within it rather than its dominance (Hunter 2003).

There are two challenging coalitions. One is also focused on health services, but is made up of private providers rather than incumbent ones. This is made up of those who would sell medical services or insurance outside the tightly state-governed systems seen today – in short, those who support liberalization and increased competition in finance, provision, or both. This does not mean the traditional private sector. There are often large areas of private ownership and finance in European health systems, including private hospitals and virtually all of the doctors in many countries, but independent professionals are tightly controlled by organized professions and the state agencies or funds that pay them, while private hospitals and clinics occupy small niches, typically providing simple or outré services faster than public services can. They are usually well adapted to their system. Rather, this challenging coalition is made up of those who seek liberalization, greater competition, and reduced barriers to entry. Its members are private providers and insurers.

The second challenging coalition is the public health advocacy coalition. Public health is about improving population health – keeping people from getting sick rather than treating them once sick. It is naturally out of place in health systems dominated – politically, economically, and in the public mind – by health services, and is subordinate in every EU country. It is almost impossible to pin down a definition of membership or organizational map that elicits consensus, but it is possible to identify the values and approach that they share – the values are those of reducing ill health in the population, and the tools usually regulatory and outreach interventions (Baggott 2000; Hunter 2003). The power and nature of the public health system varies greatly across Europe, with the politically and organizationally strongest systems to the north and northwest (Holland and Mossialos 1999; Allin and Mckee 2005). The pronounced gradient

in the quality of public health infrastructure and professions is important, because it means that appealing to the EU is a source of credibility and influence for public health activists in the states where it is traditionally weak, while it is an attractive field of action for public health activists from the stronger states who seek a wider stage.

The intrusion of the EU into health policy, both through the pump-priming activities of part of the Commission and through the exogenous liberalizing shocks administered by the Court and other parts of the Commission, should destabilize the existing politics of dominant and subordinate interests. Transfers of authority from one level to another, especially one not previously entwined in interest politics, creates an opportunity for advocacy coalitions that were dominant to be subordinated and vice versa (Mawhinney 1993). There are at least three dynamics that existing literature suggests we should find. The first is that parts of the Commission (with no necessary overall coordination) should seek to sculpt interest group networks that combine information and political support (Broscheid and Coen 2003) also Coen 2007 and Chapter 14. The second is that groups that are outsiders, subordinated coalitions in status quo ante politics, should mobilize on the EU level, where they face a better chance (in what Beyers calls a 'compensatory' strategy). The third is that dominant groups should also transfer their activity to the EU level in order to preserve their positions (Beyers 2002). All three can happen at once; the research question is the extent to which each dynamic is at work.

10.2. Making health European

The EU does not have major treaty competencies in health; insofar as it does have them, they are in public health. This means that the EU policies of note are either relatively marginal public health ones, or extensions of internal market and social security law to health services. This shapes the politics in each area.

10.2.1. *Epistemic Europeanization: Public health policy*

Public health policy is a case of two things. One is 'epistemic Europeanization' – Europeanization through the development of groups with shared ideas rather than coercive policy or even soft law (Lamping 2005). The other is the role of the Commission in creating networks and supporters around itself through forums and support to groups, thereby improving its information flows and political position.

Public health advocates, subordinate everywhere and scarcely existing in some countries, saw some obvious attractions in the EU. Public health policy, as against health and safety regulation, dates back to 'Europe against cancer'

and 'Europe against AIDS' programmes started in the 1980s as a result of member state leaders' interest in doing something about those highly public problems. The result was, principally, a series of research programmes and international networks (Trubek et al. forthcoming [2009]). The issue changed with the development of a health and consumer protection function in the EU when the idea of a 'social dimension' coincided with the 'mad cow' (vCJD/BSE) scandals and the sensitive politics of blood (AIDS-tainted blood had brought down governments) to lead member states to insert a specific EU power to regulate blood and blood products (Farrell 2005). It combined with the general ambition to develop a post-Maastricht 'social Europe' to produce a treaty clause that obliges the EU to take public health into account (art. 152) (Hervey and McHale 2004). Public health worries combined with public health activism to create a European Centre for Disease Prevention and Control. More important, though, it created an institutional focus for public health interests within the Commission. This is DG Health and Consumer Protection, also known by the approachable nickname 'DG Sanco' (Clergeau 2005).

Built largely out of minor units of DG Agriculture and DG Employment and Social Affairs (its health staff is still concentrated in Luxembourg), and equipped with only weak legislative bases in health (and only marginally stronger ones in consumer protection), Sanco could not create significant legislation, carry the College of Commissioners, or have much impact based on coercive authority. It needed a constituency. It set out to find or create one by reaching out to the EU public health policy community that was growing around nodes such as the WHO-led European Observatory on Health Care Systems and Policies (<http://www.observatory.dk>) or the annual European Health Forum Gastein (<http://www.ehfg.org>), both of which now attract public health activists and have support and heavy participation from Sanco.

Thus, for example, a major issue in the negotiations on the EU budget passed in 2006 was the possibility of merging consumer protection and public health funds within Sanco's budget. The difference between the two was that the consumer protection budget line, unlike the public health budget line, permitted ongoing core funding of 'civil society' groups. The intent, on Sanco's part, was to fall in with a long line of others in Commission history and support interlocutors in public health who could act as lobbyists for EU public health action, feed it information, support it in clashes within and between EU institutions, and even contribute to the embryonic 'European public health policy community'. What is interesting is not so much the outcome (failure to merge the two lines, but strong signals from Sanco to consumer protection NGOs that they should incorporate more health issues); the interest is in the interviewees' bland acceptance that Sanco was trying to create its own supporters' federation.

Sanco had tried once before, when it was one of a number of DGs involved in tobacco politics. It networked almost exclusively with public health anti-tobacco-activists (van Schendelen accuses them of falling in with 'health

freaks') (van Schendelen 2002). This gave the politics of tobacco a distinct cast as the weak Sanco, allied with public health, took on those mighty companies, which (operating through public affairs consultancies) proceeded to focus on member states (especially Germany) and more pro-tobacco commissioners in order to weaken or stop Sanco legislation (interview, Gastein, October 2006). By October 2006 high-level Sanco officials and members of the cabinet were telephoning lobbyists asking for support as their various proposals were amended into insignificance in the College of Commissioners.

Learning from this experience, and led by a new DG, Sanco began to build public health platforms not so dominated by public health. The new-model Sanco network is the EU Platform on Diet, Physical Activity, and Health. This is a classic network-building exercise. It builds on the worldwide preoccupation with diet and obesity, a concern of public health activists in rich and poor countries alike but one whose politics are very different from country to country (Oliver 2006; Kurzer 2007). In the case of the EU, the politics of obesity cross-cut the politics of economic liberalization (the 'Lisbon agenda' that otherwise preoccupies the leadership of the Commission, much of the EP, and a strong coalition of member states). The result is that 'we have a Commission and a Parliament that do not want to pass any laws, so Sanco is trying to make policy without laws' commented one lobbyist (Brussels, October 2005).

The tool should not be a surprise: a platform of platforms. EU-wide platforms (largely made up of member-state-based organizations) unite to agree on common goals in a sort of non-binding corporatism (Chapter 12). They further break this down; each member submits goals and commitments. Membership is a mixture of EU-wide associations such as the European Vending Association and the European Modern Restaurant Association (which only commits on behalf of the branches directly owned by its members, as against franchises); the Standing Committee of European Doctors (CPME) and BEUC (the European Consumers' Organisation). Others can and do make commitments, including member state associations and states such as Luxembourg and the United Kingdom, but participation is limited and geared to incorporating (and reinforcing) EU-wide platforms. The current DG of Sanco, Robert Madelin, brought the innovation along from DG Trade, where he had introduced something very similar. He said, on the record, that the goal of the platform is to create a space for effective EU-level action despite the unwillingness or inability of the Commission to act (for example, in a talk at Gastein, October 2006).¹

10.2.2. *Coercive Europeanization: Health services*

Health services policy is not a case of epistemic Europeanization or any successful effort by the Commission to create an attractive 'pull factor' to the incumbents. Rather, the key policies have been cases of coercive Europeaniza-

tion (Lodge 2002), setting regulatory standards with which member states must, to some extent, comply. The development of EU powers at this level should attract the attention and lobbying efforts of incumbents (eager to re-stabilize their favourable environment) and those challengers who stand to benefit from what is, in this case, a liberalizing form of coercive liberalization.

Health services incumbent groups, and the ministries that work with them, had little reason to seek an expansion of the arena to include the EU. That lack of demand explains why the extension of EU policy has been so pronouncedly one of institutions driving integration under internal market law. Health services policy has not been made. Rather, health has been drawn into internal market law and regulation, principally by the Court, in a way that is coherent in its market-making thrust and incoherent in its specifics (Hervey and McHale 2004; Greer 2006b; Mossialos et al. 2008).

There had been professional regulation law since the 1970s, but the first really prominent EU health policy issue was patient mobility. One of the basic attributes of the welfare state in Europe has been its 'closure' (Ferrera 2005a, 2005b). Until the late 1990s, the member states controlled entrance and exit relatively closely; until 1998 it was considered under social security treaty bases that demanded unanimous decisions. This simple system, which gave member state governments almost total control over patient mobility, was blown apart in 1998 by two European Court of Justice decisions in the *Kohll* and *Deckerrulings* and subsequent cases. In these cases, the Court switched the treaty bases, moving health from social security to internal market law. Reading the treaties directly (and thereby making its decision almost impossible to overturn with legislation), it decided that access to health services was an internal market issue rather than a social security law issue, and EU internal market law is hard on violations of the principle of non-discrimination and the four freedoms. The basic issue at stake is not the actual mobility of patients. They present interesting planning and financial challenges in some border and other areas such as British retirement destinations in Spain, but the actual financial instability is minimal and hard to identify (Ackers and Dwyer 2002; Rosenmöller et al. 2006). The problem, rather, is the increased exposure of the health services to internal market law. Patient mobility decisions increasingly apply the internal market *acquis* in the course of disallowing mechanisms that force closure of systems. Apart from legal instability, and the potentially enormous transition costs to compliance with internal market law, there are also real questions about whether, for example, social insurance systems can maintain their risk-pooling or internal market systems their tightly circumscribed markets.

The next big issue was labour market regulation. Beyond the market-making work of the Court, there is also harmonization, most prominently through the Working Time Directive (WTD). The WTD harmonizes labour law by limiting the work week progressively to forty-eight hours, with holidays and the

requirement that a shift be followed by rest time. It was initially filled with exemptions ranging from truck drivers to junior doctors, but these were progressively eliminated. A fifty-eight-hour transitional restriction on the hours worked by junior doctors came into effect in 2005. Implementation in health went badly; presumably as a sign of the disconnection between health ministries and the EU, no member state prepared seriously until the final year before the WTD went into effect. Then, catastrophically for planners (if not professionals), the Court ruled in *SiMAP* and *Jaeger* that on-call time is work, instantly undermining many governments' workforce strategies. Unions and doctors organizations appreciated the decision (and at least one – the UK Royal College of Nursing – staged a campaign in support in EP elections; interview, London, December 2005), but member states were unhappy in most cases as it promised to massively increase the number of doctors and others necessary to provide steady-state services compliant with EU law (interview, UK official, London, September 2005).

The final set of issues are the interconnected ones of competition law, state aid, and public procurement law. Patient and professional mobility are major issues today, but they are also part and parcel of a trend to treat public services in general, including health, as if they were part of a European market. It takes the form of the European Court of Justice, and its litigants, slowly nibbling away at the exemptions provided from internal market law by taking signs of 'economic' activity as a reason to force public-sector organizations to abide by competition and some other internal market regulations. This is already a significant, and basically unexplored, issue. The new problem is that the 2004 decentralization of EU competition policy, with member state competition authorities carrying out EU law, creates significant scope for EU law, in a member state competition authority's eyes, to be invoked against policies that sustain solidarity or efficiency (Giubboni 2006; see the various discussions in Mossialos et al. 2009).

10.2.3. *Beyond the Court*

In health services, the pattern is one of (at least potentially) liberalizing action by EU institutions – first the Court, later, in the wake of newly Europeanized legal instability, the Commission – followed by often confused and hesitant member state reaction. The Commission reacted with a variety of instruments (Greer 2009). DG Sanco, better connected to the member state health policy communities, was the first off the mark with the High Level Reflection Process – a process partly started by the findings of a research project that DG Research funded the European Health Management Association to conduct (Busse et al. 2002). This High Level Reflection Process made the case that the EU was key to the development of health policy and suggested that the EU form a standing health policy that could coordinate responses and guide

policy; this group, the High Level Working Group, was duly constituted. Later, to try to take advantage of patient mobility, build its networks, and provide an undoubtedly useful and efficient service, Sanco created and advanced a group and agenda on 'centres of reference', i.e. EU-wide facilities for especially rare, expensive, or complex problems that could not be sustained by all the member states. It took member states years to beat it back to 'networks of reference', a weaker policy that simply identifies high quality areas without giving the Commission a licence to shape resource allocation, priorities, or patient flows.

As in most fields, the various DGs behaved very differently, framed issues differently, and worked with different networks (Mazey and Richardson 1995). Sanco played to the dominant health services coalition. They were the bureaucracies and interest groups that were, so to speak, homeless in Brussels, and there was an obvious logic to their paying court to Sanco rather than the (more relevant) DG Markt or DG Employment and Social Affairs. It was well positioned to suggest these non-interfering schemes when health ministers complained (in the aftermath of the major ECJ decisions on patient mobility and working time) that they were talking about HIV/AIDS education while other parts of the EU reshaped the legal and economic bases of their health systems.

Meanwhile, two other DGs came forward with policy tools that they were advocating across a wide range of fields. One was DG Employment and Social Affairs, which successfully pushed to have health incorporated into the Open Method of Coordination (OMC). This duly happened, and member states are now engaged in that (still young) process. There is an element of inter-institutional competition in this; Employment and Social Affairs had previously been the dominant player in health services through its administration of social security law issues, and in its self-appointed role as the guardian of the European social model was eager to fold health in as a key part of that model (interviews, DG Employment and Social Affairs, Brussels, November 2005, April 2006). The OMC in health has had almost no discernable effect on lobbying strategies (Greer and Vanhercke 2009).

The other DG to enter the stage was DG Internal Market (Markt), which is the guardian of legislation about the internal market. The origins of 'its' Services Directive lie outside health policy; they are more in the argument that Europe's persistent lack of job growth, productivity improvement, and economic growth are due to the highly regulated and therefore slow-developing service sector. DG Markt and the Commission, partly as part of a Dutch auction of powers and partly to take advantage of the clearly liberalizing thrust of ECJ decisions on patient mobility, abruptly incorporated health into the draft directive. This, if nothing else, infuriated Brussels health groups, which had been focusing on consultations on the text and content of a directive (from DG Employment and Social Affairs) on 'services of general interest' or 'services of general economic interest' that would codify a halfway house

between the internal market and wholly protected social services. Two interviewees expressed outrage at what they saw as (at best) Commission disorganization and (at worst) as a feint to disguise a neoliberal agenda by distracting interest groups with the general interest ideas (Brussels, September 2005).

Regardless, Article 23 incorporated health into the proposed Services Directive, a piece of legislation with two chief legal principles. One, freedom of establishment, eliminates the ability of member states to discriminate on the basis of member state in allowing service providers to establish operations. The other, country of origin, was more contentious because it would mean that service providers would in large part be regulated by the country of origin rather than the one in which they were operating. One UK official, putting it diplomatically, asked if the UK's medical regulators would be able to guarantee the quality of medicine practiced by a British doctor in Lithuania (interview, London, February 2006). Interviewees at DG Markt insisted that they were merely codifying and restraining the ECJ's patient mobility thinking (interview DG Markt, Brussels, February 2006).

The Services Directive was a catalytic event for interest groups in health. The almost uniform response was outrage; according to one very well-connected lobbyist only a handful of groups out of many even tried to help refine the directive (by, for example, helping them define 'hospital') rather than demanding the exclusion of health (interview, London, March 2005). The Commission refused to release any data or consultation responses, but DG Markt officials in interviews freely admitted that health sector opposition was overwhelming. In the context of the general problems facing the Directive – it seems to have played a role in the failure of the referendum on the treaty establishing a constitution in France – it was not hard to amend.

While the new (Barroso) Commission immediately signalled that it was backing away from the Directive's more controversial aspects, it was the EP that shaped the final outcome. The EP was heavily lobbied in the months leading up to the February 2006 vote to amend. This was the first big outing of the health service lobbies in EU politics, and it took place in the context of a great deal of protest and interest group activity. Ad hoc coalitions of lobbies worked to identify blocks of MEPs (such as the French right) who had voted to support strong versions of the WTD and might bolt from their party group. As it happened, the two largest party groups, sensing the degree of opposition, the potential fragmentation of their party groups, and the Commission's clearly signalled retreat, developed a deal that stripped out both the health and the controversial country of origin principle. This might be a turning point not just for the scale and perceived high stakes of the European-level effort, but also because it marked serious engagement with the EP on health issues among groups that had often focused on the Commission and the first time that most health groups in the member states had engaged in any prospective analysis and political action on EU legislation.

DG Markt retired hurt. At this point demand for some legal clarity (as an alternative to piecemeal policy-making by the ECJ) was so widely shared that even the UK government had given up its aversion to EU law in an area where there was no competency. Supporters of the failed Services Directive approach warned of the (even more neoliberal) consequences of letting the Court make policy now that it would not even have the Services Directive to set limits (interview, DG Markt, February 2006). The result was that there was political and lobby support for a health services directive. Given that Employment and Social Affairs OMC was superficially irrelevant to patient mobility or competition law, and that the argument of most anti-Services Directive lobbies had been that health deserved specific legislation, the opportunity to write legislation fell to DG Sanco.

Sanco came forth in late 2006 with a consultation on a health services directive, with a closing date of 31 January 2007. In contrast to the sledgehammer of Article 23 of the Services Directive, this was such an open consultation with such general questions as to leave at least four lobbyists and two member state diplomats assuming it was a cover for proposals that had already been agreed (interviews, Gastein, October 2006). At the time of writing, there was not much evidence of this. Rather, it seemed that DG Sanco was trying to establish a consensus in the emerging European health policy community, just as they said. The staff of DG Sanco fanned out across the more important and mobilized European health policy communities to give talks about their ideas, focusing on important member state stakeholders (in the United Kingdom, where I attended these events, this meant the royal colleges of medicine, the NHS, and the Department of Health – exactly the groups that define English health elites). Unlike DG Markt, DG Sanco published all the responses online as they came in from member states, private individuals, academics (respectfully categorized as ‘universities’), and others. This consultation was supposed to lead to a proposal for specific health legislation in late 2007, but it has not been officially brought forward as of mid-2008 due to disagreements within the Commission and a difficult political environment.

In short, Sanco is trying to merge the political and legal streams – to use the EU networks it is building in incumbent health policy communities to gain control over the agenda created by the Court. If it is successful, it will have created an EU health services arena organized around itself and the EU groups that advise it, in addition to the public health arena it has helped create.

10.3. Logics of lobby development in health policy

At present, the EU story is of a mixture of public health and outside actors in health who see in the EU a way to improve the positions they have at home as well as dominant actors who want to defend their positions. The former are

concentrated in public health and the latter are concentrated in health services. The former are invited by an entrepreneurial DG that wants to improve its profile; the latter are incumbents who want to preserve their member-state-level influence. Those who might benefit from an expanded EU health services market, meanwhile, are concentrating on the member states.

10.3.1. *A subordinate coalition: Public health*

It is not hard to see why public health activists would see an attractive partner in the EU. They are nowhere as strong as they would like to be, and in some countries a public health infrastructure scarcely exists. There is an obvious alliance between Sanco – charged with a mission to aid public health and very few ways to do it – and public health advocates around the EU, often marginal and willing to form an EU-wide public health advocacy coalition. The EU regulates so much that affects public health that its policies could be expected to interest them under any conditions (Rowland 2006). Further, the simple assumption of symmetry that comes from participation in EU politics has significant consequences. The Blood Directive's requirement, enforced by Sanco, that member states set up competent authorities to work with the EU and regulate blood has strengthened blood regulators and lobbies in member states where there was little tradition of independent blood regulation (interview, DG Sanco, December 2005). Avian influenza (H5N1) worries also led to countries with less self-confident public health infrastructures seeking help from the Commission from 2006 onwards. The EU legislated under agricultural treaty bases, but there was a great deal of Commission activity as Sanco, to the great irritation of the United Kingdom and Scandinavia, happily obliged states and public health groups that wanted help in identifying and implementing EU best practice.

The result is that many public health advocates have taken the opportunity to put their issues on EU, and by extension domestic, agendas. Much of this participation is by government or health service officials and is on advisory committees and other such forums; most public health advocacy coalitions are dominated by public-sector professionals and academics (based on a reading of groups in the European Health Forum (EHF) and other Sanco advisory groups in the Secretariat-General's register of expert groups). It is difficult to develop indicators for participation in the new European public health community, but it seems to be growing apace.

More visibly, there is participation in the European Health Forum, the group serviced by DG Sanco that comments on proposed legislative and policy developments in the EU. The EHF is made up of EU-wide organizations and is easy to join, so it is possible to both identify the EU associations that are interested and at least minimally credible and to identify the groups in each member state that, through membership in an EU association, have a more or

less intentional role in the EHF's opinions. Many of the groups that join an EU association do so for reasons other than its participation in the EHF; it is not likely that Dorset Council, member of the Association of Regions of Europe, cares much about EU health policy. Sanco also, on a very distinct track, cultivates anti-tobacco advocates in its advisory groups – a strategy it no longer pursues, given the difficulties its tobacco proposals face.

The world of public health lobbying (as against the world of food and consumer safety, pharmaceuticals, etc.) is very low on resources, and dominated by NGOs and professional societies (the Royal College of Physicians of London, for example, has one-third of a staffer, and he spent much of his time facilitating public health lobbying on issues such as smoking rather than professional lobbying because public health interests the College's members; interview, September 2005).

10.3.2. *A subordinate coalition: Health services market entrants*

What is more puzzling is the logic behind the development of lobbying in health services. Health services interest group mobilization in Brussels has, by any standards, been largely defensive and dominated by incumbents – professions and NGOs rather than firms. It is not obvious why. Even the most slightly pluralist soul will expect to find groups lobbying for something from which they should benefit and which they ideologically should like. But the subordinate interest of those who would liberalize provision is invisible at precisely the EU level where there have been the most determined political efforts to liberalize. Public health advocates, subordinate at home, found an ally in a weak part of the Commission and responded. Liberalization advocates, finding allies in the Court and strong parts of the Commission, did not.

Proving a negative is difficult, but the circumstantial evidence piles up. First, who is formally engaged? This means engagement in the European Health Forum, which advises on health in general but focuses on health services and is larger and more important than any other DG Sanco group working on health services. The overwhelming majority of participants are NGOs rather than firms (Greer et al. 2008). The second approach is to look directly for evidence of lobbying by the provider groups who could benefit from liberalization. One way to do this is to seek out their EU-wide association. There is an EU association of private hospitals with a Brussels office; this is a one-man offshoot of an association based in Rome (the residence of its founder) that shares space with the Italian industry association Cofindustria and is largely made up of small independent providers that occupy traditional niches in different health services. It was, in the EHF, the main dissident from opinions opposing further extension of the internal market in health and it has lobbied for extended opportunities for private provision of health care. It is typical that

the organization's website, at the time of writing, had not been updated for years. This is emblematic of the comfortable, and generally unambitious, traditional European independent sector. Its main goal in the later stages of the Services Directive debate was to avoid having its members exposed to the Directive if (when) public services were excluded – in other words, to avoid cross-border competition and liberalization. There might have been informal lobbying; a trade union representative interviewed in Brussels spoke of think tanks and self-described experts, advocating health sector liberalization, whose funding was questionable. He pointed out that it might not help advocates of liberalization to have the visible help of private international health care firms (interview, Brussels, September 2005). They clearly use consultancies such as Cabinet Stewart – buying the expertise and avoiding any negative publicity. But otherwise the search for a supporter of the EU's liberalizing policies turned up nothing.

The third is to ask interviewees in the European Commission and member states to identify lobbies by asking who approaches them. Interviewees in the European Commission (DGs Internal Market, Sanco, and Employment and Social Affairs, February–March 2006) and member states (Permanent representatives of the United Kingdom, October 2005, and Spain and France, July 2006) could not identify any other pro-private market lobby of significance. Interviewees at DG Markt repeatedly said, in an interview (February 2006) and in seminars (December 2005, Brussels), that they knew there was a problem of inadequate compliance with the rulings because they receive letters of complaint from people who want to use cross-border services rather than informed representations. The fourth is to ask other lobbyists; apart from their suspicions about the backing for some 'experts', they all pointed to the private hospitals' associations. The fifth is to ask the companies that are the main providers of private cross-border health services in the EU. This is a short list (and one that is getting shorter thanks to mergers); it is made up of large companies with declared interests in expansion and largely amounts to Sweden's Capio, the American UnitedHealth, South Africa's NetCare, and the British BUPA. Their annual reports at the time of writing do not discuss EU politics or significant new expansion in Europe. One interview with an industry representative led to the interviewee arguing that the EU was not worth the effort (May 2006, London). Another pair of interviews with a director of policy for a private health firm (February and April 2007, London) produced a similar argument: while his firm employs a public affairs consultancy in Brussels, they view member state politics as the crucial factor in determining their market entry and success.

Each of these lines of enquiry turned up the same puzzling result: EU health services policy is a liberalizing operation, pushing hard to create a market in health services provision, but there is no really significant lobby for it. So: why is there apparently no pro-privatization lobby behind the policies?

The answer is that EU law is not enough in a sector as complex as health. Clues to this can be found in literature on the development of other EU policy areas, such as government procurement, telecommunications, and postal services. Mitchell Smith points out that the mere existence of an EU market-making policy need not lead to the creation of competitive or European markets in a given sector. Whether competition and a European market develop depends on the existence of players willing to enter the market and benefit from liberalization (Smith 2005). More generally, the effects of ECJ decisions depend on domestic groups that would force broad compliance; without them, member states can engage in 'contained compliance' by defining the decision and its effects very narrowly (Conant 2002, 2006). The likelihood that there will be pressure to respond with major changes, in turn, depends on lobbies' strength and estimation of the likely benefits. In a market such as public procurement, there are many ways for governments and public sector buyers to undermine and harass unwanted outsiders.

Just as in public procurement, potential vendors of health services are wary of entering state-dominated systems without an invitation. States – and incumbent providers – have an enormous range of fiscal, regulatory, and administrative devices that can harry an unwanted vendor out of the market. EU law, especially law as nebulous as a series of ECJ decisions, is little protection. The result is that while EU law might be helpful to such companies, it is a far more solid strategy to cultivate governments that show an interest and build up a presence in those markets. UnitedHealth Europe, part of a large for-profit chain from the United States, might have 'Europe' in its name but its operations are in England where it is led by Simon Stevens, the influential former special advisor on health to Tony Blair, and where it worked with a government that was determined to bring international and private sector operators into its health service. What is the short- or even medium-run gain to such a firm of trying to batter down regulations in another country when it is being graciously invited into the enormous market of the British NHS? The trend to increased private provision and finance in several countries should guarantee new markets for quite some time, independent of expensive, politically contentious, and possibly duplicative efforts on the EU level.

This is not to claim that there will not be groups seeking to benefit from the decisions. ECJ decisions create opportunities, and it is reasonable to expect some people to take them. There are already reports of doctors and clinics in the Low Countries (the home of Messrs. Kohll and Decker) developing services with the explicit intent of making money through cross-border arbitrage (interview, Brussels, March 2006). There is already a considerable amount of arbitrage in dental and laboratory services between Germany and Central Europe. But it is one thing to exploit a niche, which they are doing, and another to try to shape policy.

Nor is it to claim that big private actors in health care do not use the EU. While most liberalizing ECJ cases on health have been brought by individuals and referred upwards (including *Kohll* and *Decker*), private firms that feel mistreated by member states have had recourse to EU law in order to protect themselves. The most public evidence comes from the ECJ cases that they bring. One clear example of this is the 'BUPA case' (T-289/03). Pursuing its own health policy ends, the government of the Republic of Ireland invited the UK health insurer BUPA into its market and then, in a 2003 policy reversal, levied an equalization charge on insurers that BUPA argued was a subsidy to its public-sector rival. BUPA sued the Commission for not starting an enforcement action against the Republic. Legal defence of an established interest is not the same as attempts to use EU law to pry open domestic markets – although that means there will be a ratchet effect as it becomes impossible to reverse liberalizing policies. That explains why, of the major ECJ cases, the most important cases have been brought by individuals rather than interest groups – and why the headquarters of the newest entrant, UnitedHealth Europe, is in London rather than Brussels.

10.3.3. *The dominant coalition: Health services incumbents*

The predominant form of mobilization is defensive and by incumbents. This means the extension of member state incumbent groups and regional governments towards Brussels. They control significant resources, have established roles, represent durable interests (doctors, nurses, hospitals, etc.), and can often draw upon older representational networks. They mostly also stand to lose more than they gain from EU-wide health services liberalization.

There are, unsurprisingly, two principal forms of engagement. One, obviously, is membership in an EU-wide association. This is a prerequisite for participation in many forums (such as the EHF) and is a useful way to draw on the associations' legitimacy and specialist skills. EU federations have a spotty history in health. Greenwood notes that the professions are a highly fragmented area of representation (Greenwood 2003). The extremely diverse landscape of European professions, the weak EU role to date, the number of professional lobbyists trying to fund their careers by appealing to professionals, and the weak connections between any given group and Commission and professionals all mean that there have historically been many groups who purport to represent professionals but whose capacity to do so is questionable (they cluster as representatives of diseases, organs, and professional sub-specialisms).

As interest increases, however, clear leaders are developing among the different organizations. The Commission, over-lobbied as ever, quite typically is trying to corral health lobbies into the EHF and focus on 'better', more representative ones (Mazey and Richardson 2006). The Standing Committee of European Doctors and the European Federation of Nurses both have a clear

lead that comes from the member state peak associations that make up their membership. Much the same appears to be happening with the European Public Services Union (EPSU), which is developing a strong niche as the representative of public sector workers in health. Social insurance funds have the AIM (International Mutual Association, representing principally members in France and Germany). The European Health Management Association broadly represents managers of incumbent systems, and built an important niche after entering the EU health policy arena very early and effectively. HOPE represents the remarkably diverse group of hospital owners. These may be the main organizations, but none have more than ten EU health staff.

The alternative to reliance on the often rather unimpressive and always fragmented health EU associations is to develop one's own office. That fits with the fact that good lobbies diversify their strategies (Richardson 2000). The numbers are small, and most are from Germany and the United Kingdom. It is a challenge to find any from Southern Europe, in what Greenwood calls the 'southern European question' (Greenwood 2002). Even controlling for size, population, and receipt of EU funds, a large quantitative study found that interests in German-speaking, Scandinavian, Benelux, and English-speaking countries were more likely to affiliate to EU groups than groups in Mediterranean and recent accession states. In health, this is partly to do with long traditions of connection between state, health systems, and professions. The tradition of state-profession engagement in Spain or Italy, with 'vertical state-dominated structures' modelled on those of France, makes it unsurprising that the relevant public authorities take the lead on EU affairs (Josselin 1996; Fairbrass 2003). Thus, where we find independent lobbyists for some northern European systems (especially the United Kingdom and Germany), regional and member state governments appear to dominate the representative role in more statist systems. These groups are as capable as European groups of effectively lobbying (given especially the bad reputations of some incumbent European health groups). Furthermore, they also keep watch on the EU federations. The British and German medical associations' lobbyists in Brussels take credit for keeping the Standing Committee of European Doctors from endorsing large parts of the Services Directive, and instead steering it into opposition (interview, Brussels, April 2006).

A study of the investments made by UK stakeholders over 18 months found this to be an unstable ecology (Greer 2006a). There were six purely health organizations with offices in Brussels in May 2005 (NHS Greater London, NHS West Midlands, NHS Northwest, the British Medical Association, the Royal College of Nursing, and the Royal College of Physicians). By June 2006 one was 'under review' (NHS West Midlands), one restructured and expanded (NHS Greater London), and one expanded from one to seven people (NHS Northwest). By February 2007, the NHS organizations had decided to fund one NHS representation through their umbrella group, the NHS Confederation.

Scotland, Wales, and Northern Ireland each detailed part of a person in Brussels and some officials at home to track EU health issues, but did not lobby much. Part of the problem is that the role of these offices, their influence on the issues that matter, the range of the issues that matter, the extent to which those issues matter, and their relative importance to the funding organizations are all being debated. There is no established, shared, cost-benefit analysis regarding the usefulness of EU offices and their purposes. Lobbyists in EU health are not just lobbyists for their organization's preferences in Brussels; they are also lobbyists within their organizations for the idea of incorporating the EU as a concern. Such 'backwards lobbying' is a sign of the novelty of the EU's health policy.

Regional governments with health responsibilities have a slightly different position. There is a great deal of work on the activities of regional governments in Brussels; what is interesting here is patterns in their engagement in health policy. It is reasonable to expect that regional governments in at least some countries should engage in Brussels health policy debates. It is reasonable to expect it because they have primary responsibility for health policy in some states (Spain, the devolved parts of the United Kingdom), significant roles in others (such as Italy), and a role in some states normally regarded as having centralized health systems (such as Belgium and Germany). The Basque Country or Catalonia basically runs its health system, and usually has a standoffish relationship with the central state, so if there are interests to be pursued, the regional government will pursue them. It is also reasonable to expect some regional governments to take a role because there are a number of regional governments with a well-documented propensity to value international projection and a role in Brussels; if there is the slightest reason to expect Bavaria or Catalonia to be active, they probably will be. Some regions, such as Veneto and Andalusia, have explicitly used health to enhance their international images.

There is a third reason for regional engagement, which is that many of them are from Spain and Italy, with the tighter vertical connections between public authorities and interest groups. That said, the incidence of regional engagement is as highly variable as the engagement of lobbies; Valencia and Veneto each stressed the issue, while Catalonia, normally a top region, has three people in Barcelona, La Rioja has part of one person (even when it is given the rotating task of coordinating EU health issues for all the Spanish regions), and the UK devolved systems have fewer than two full-time people on the dossier when we add up the various fractions in Brussels and capitals (Greer 2006a). That is not too surprising; in a field this small, one or two energetic officials make a government a superpower.

The Commission's interest in regional lobbying reflects the effectiveness and stability of lobbies (as with Veneto) but also their power. It pays close attention to German states, meeting with them regularly. This because of the political power of *Länder* in Germany; without their support Germany might

not support legislation. This reflects a basic, unfortunate, fact about regional governments in health (and other areas of) lobbying (Jeffery and Palmer 2007). Strategies that work through and with member states are generally more effective than independent lobbying because any given region is likely to have more leverage over its member state than it is over EU institutions. This is no substitute for lobbies, and intergovernmental coordination in EU affairs is unlikely to ever work too well, but when it works it is a complementary tool that can be more effective than anything the lobby does.

10.4. Conclusion

Up to about a decade ago, business associations were an overwhelmingly national phenomenon. They organized firms or their owners from one country only, by sector, region, firm size, religious or political sentiment, or generally; lobbied national governments or, in corporatist countries, undertook to perform functions of public policy; negotiated with trade unions from the same country at sectoral, regional, or national level – and generally participated in both the construction and regulation of national markets. (Streeck and Visser 2006)

Losers lobby

– overheard in Brussels

Health today fits the picture that Streeck and Visser draw of business in the early 1990s: specialized, ‘traditional’, and deeply imbricated with states in established and largely closed systems of governance. The risk of any transition to a new representational arena is clear and is what Coen and Dannreuther suggest: ‘while it may be that the European Union is uniquely open and accessible for those with clearly defined interests, those parts of European society that lack these organizational resources, or remain too embedded in national tradition, to match the stringent requirements for interest articulation, may find themselves excluded from the emerging European polity’ (Coen and Dannreuther 2003).

The question is the extent to which the changing politics of health and EU health policy will continue to restructure interest representation in Europe. That is partly a function of how far EU health policies develop – a question with no clear answer at this stage. So far, the development is impressive. The politics have been different, depending on the structural interest at stake.

But we are still in the first feedback loops of policy and interest organization. So far, the EU interest system in public health and health services is a combination of loose networks assisted by DG Sanco, a small number of serious lobbies and regional representations, a large number of fragmented associations with questionable claims to responsibility, and a few serious EU associations. This is an effect of the role of the EU institutions in creating the

EU health policy agenda and the largely reactive role of even important groups such as regional government and medical associations. At the moment, events point to the incumbent health services coalition creating a strong position in the EU, and public health a role for itself. In the medium term, public health advocates might find that they become more politically dispensable as powerful incumbents from health services, and their issues, move to the EU arena. For the short term there should also continue to be a lack of support for top-down health services liberalization by the EU. Trying to pick up and wield the club of EU law would just offend the member state policy-makers who still matter so much in health policy.

Note

1. I witnessed the astonishment of EU health lobbyists at a launch event in Brussels, June 2004. The invited panelists included representatives of the WHO, doctors – and Coca-Cola. When the Coca-Cola executive could not come, he was replaced with an executive from the brewer ImBev. Crucial to the Platform strategy, it was a visible shock to the public health advocates in the room.

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Chapter 11

A Ban on Tobacco Advertising: The Role of Interest Groups

Sandra Boessen and Hans Maarse

11.1. Introduction

Since the launch of the Europe against Cancer (EAC) programme in 1987, various tobacco control measures have been introduced: the ban on tobacco advertising on television (89/552/EEC), two directives on tobacco labelling (89/622/EEC and 92/41/EEC), the directive on tar maximums for cigarettes (90/239/EEC), and three directives on minimum tax levels for tobacco products (92/12/EEC, 92/79/EEC, and 95/59/EEC) (Duina and Kurzer 2004). The ban on tobacco advertising, prohibiting any form of communication, printed, written, oral, by radio, television and cinema, was without any doubt the most contentious one (Mossialos and Permanand 2000: 66–8). Its adoption in 1998 followed after almost ten years of negotiations (see Boessen and Maarse 2008).

Advocates of a ban argued that it would reduce the number of smokers, since advertising fostered the idea of tobacco as a socially acceptable product. Opponents argued that advertising did not affect the number of smokers. According to them, advertising was important because of brand building (Saffer and Chaloupka 2000). A ban would harm the tobacco and advertising industry and, therefore, have adverse labour market consequences. The costs of harmonization would concentrate on Germany, the United Kingdom, and the Netherlands as the major tobacco manufacturing countries. Thus, there was not only controversy on the welfare aspects of the ban (does it generate health gains?) but also about its distributional economic impact. Ideological considerations affected the level of conflict too. Germany, Denmark, the United Kingdom, and the Netherlands had a tradition of minimal state intervention in the private consumption sphere and for that reason favoured voluntary

agreements with the tobacco industry (Duina and Kurzer 2004). Together with Greece, they blocked the adoption of a ban for a long period.

Even after agreement had been reached in the European Parliament (EP) and the Council of Ministers, the policy-making process did not yet come to an end. In 2000, the European Court of Justice (ECJ) annulled the directive after an appeal of Germany. Following the suggestions of the ECJ in its ruling, the Commission introduced a new proposal in 2001. This was approved by the EP and the Council in 2003. Despite the restricted scope of the new directive, Germany appealed again. However, in December 2006, the ECJ dismissed the challenge by the German government against Directive 2003/33/EC.

A policy-making process cannot be explained without analysing the role of interest representation (Greenwood 2003). This is also certainly true for policy-making in the European Union (EU). The growing importance of the EU in many policy areas has resulted in a tremendous increase of the number of interest groups in 'Brussels' all of which try to shape the policy-making process according to their own advantage (Mazey and Richardson 2006: 248).

There is much research on the strategies of the tobacco industry for influencing EU policies (see for example Poetschke-Langer and Schunk 2001; Bitton et al. 2002; Neuman et al. 2002; Hiilamo 2003; Muggli and Hurt 2003; Hafez and Ling 2005). We do not want to duplicate this research here, nor is our goal to pursue an in depth study of interest representation on the tobacco advertising ban as such. The main objective of this chapter is to present the results of an empirical analysis of the impact of formal and informal institutions on interest representation. For this purpose we use an actor-centred institutionalist framework (Scharpf 1997). Our focus is upon the relation between institutions and strategic behaviour of interest groups. Institutions – defined as a system of formal and informal rules that structure the courses of action that actors may choose (Mayntz and Scharpf 1995) – constrain or facilitate actors' strategic options, but do not determine them (Héritier 1999: 13).

In this study we analyse how the formal and informal institutional structures create opportunities for strategic behaviour of interest groups. For this analysis, we performed an extensive document analysis, including the archive of the Dutch Ministry of Health and policy documents accessible through the EU website. Furthermore, we analysed documents from the European Bureau for Action on Smoking Prevention (BASP) and the European Cancer Leagues (ECL). Tobacco industry documents were available on the internet as a result of the 1998 Master Settlement Agreement.¹ Finally, over the period April 2005–March 2006, we conducted in depth interviews with nine persons who had participated in the policy-making process (see Annex). Two of them were involved in public health interest representation.

We do not claim to have full information on all activities concerning interest representation. As one respondent told us, 'the advertising directive literally involved hundreds of different actors over the years and they all had their own angle on it' (*interview #5*). Institution-based information offers us an explanation about how interest groups use the institutional structure without having to collect empirical data on all actors (Scharpf 1997).

11.2. Institutional structure and interest representation

Interests always turn to where the power is. Therefore, it is no surprise that the central position of the EU in many policy areas has triggered interest groups to influence the policy-making process in the European policy arena. However, interest representation is not only an important policy instrument for interest groups to express their ideas but also for EU actors themselves. The Commission often deliberately encourages interest group cooperation by initiating networks and providing financial support (Kohler-Koch 1997; Greenwood 2003).

Interest groups at the European level include a variety of private and public companies, national interest groups, and eurogroups (Nugent 2003) that operate as umbrella organizations as well as sector and branch associations representing business interests (Pijnenburg 1998). They seek to affect the policy-making process via the European or national route (Greenwood 2003: 31). We distinguish among outsider (voice) and insider (access) strategies. Insider strategies concentrate on direct involvement in the political discussion, whereas outsider strategies focus on the media and the public in order to represent interests (Eising 2005). In addition to interest groups, the Commission is surrounded by a formalized structure of advisory committees, consisting of expert committees with national officials and specialists, and consultative committees composed of representatives of sectional interests without reference to the member states. These committees also provide a route for interest representation (Greenwood 2003: 55–6).

The policy-making cycle with its shifting competences and rules of the game provides multiple chances to lobbyists. Table 11.1 gives an overview of the main EU actors, here conceptualized as points of access for interest groups, and their relation to formal and informal institutions. Formal institutions are defined as procedures reflecting the official rules of the game. Informal institutions lack a formal foundation. On the one hand, they add dimensions to the formal ones by filling in gaps or complementing them. On the other hand, they may also run against formal institutions by contradicting or superseding them (Wallace 2000: 62; Stacey and Rittberger 2003: 858–60).

It should be noted that the points of access are presented here as monolithic entities. We will use the concept of composite actors, because in most cases

Table 11.1. Overview of the formal and informal institutions in relation to interest groups' main points of access

Points of access	Institution	
	Formal	Informal
Commission	Right of initiative	Network building
Council of Ministers	Voting rules	Impartiality norm (presidency)
European Parliament	Decision-making procedures	Intergroup creation
ECJ	Preliminary reference	–

individual self-interest as such would not be a useful predictor of role-related action. In law and in fact, individuals often act in the name of and in the interest of an organization with structured responsibilities and competencies. Therefore, we assume that in the political process, most relevant actors are acting in the interest and perspective of larger units rather than for themselves (Scharpf 1997). Access to the Economic and Social Committee will not be analysed here because of its marginal importance in the process on the tobacco advertising ban. In the following sections we will analyse the impact of the formal and informal institutions on interest groups' behaviour. It should be noted that our focus is on strategies, not influence.

11.3. The European Commission: A two-track way of interest representation

The Commission's power to initiate and draft legislative proposals generally results in a two-track way of interest representation. Firstly, as an agenda-setter and relatively small bureaucracy, the Commission has a need for information, especially in highly technical areas. In addition, interest groups are an important source of support (Mazey and Richardson 2006: 248–9).

Secondly, the possibility to influence the identification and framing of European policy problems attracts interest groups. One respondent emphasized the importance of an effective insider strategy as follows: 'The lobbyist job is half done if you can influence the way in which the proposal is written before it has been published. . . . So a very fundamental part of the job is trying to understand what the officials are doing, what their work programme is, what they are intending to write proposals about, what angle they are going to take, what issues they have to take into account' (*interview #5*).

In the following section we will study how the Commission's right of initiative influenced interest representation. Although the main focus of this chapter is on how interest groups use the institutional setting, we also assess how the Commission, in its need for support and information, influenced interest representation.

11.3.1. *Tobacco advertising on the European agenda: The Commission's right of initiative*

In 1984, the European Council asked the Commission for the development of new policy areas closer to the concern of European citizens. The Commission Communication on 'the cooperation at Community level on health related problems' (COM (84) 502 final) suggested the fight against cancer as such an area. In 1985, the European Council requested the Commission to launch a programme against cancer. The Commission was authorized to set up an ad-hoc committee of cancer experts to develop the first EAC programme. One of its central elements was the fight against tobacco (*interview #2*).

In 1989, the Commission tabled a proposal restricting tobacco advertising.² This proposal was a product of Commission officials within the EAC programme and the cancer experts committee. The role of this committee was important, since it explained the content and necessity of the proposal to the College of Commissioners (Aspect Consortium 2004). In addition, national cancer leagues sought to influence the experts (*interview #2*).

In order to collect information, the Commission also funded a tobacco information service in 1989. This was the European BASP (Aspect Consortium 2004). When the Commission put forward its second more radical proposal to ban tobacco advertising in 1991³, BASP provided information and argumentation that was used by the Commission to support its revised proposal (*interview #2*).

The EAC programme provoked an immediate reaction from the tobacco industry, which started to set up offices in Brussels. Furthermore, the Confederation of European Community Cigarette Manufacturers, which already existed, was provided with extra financial resources. Of course, this reaction was not surprising as one interviewee explained, 'It was quite clear that if you really want to deal with cancer, tobacco related cancer is the biggest topic area that you could target. That meant inevitably you were going to attract the tobacco industry' (*interview #5*). The tobacco industry saw itself confronted with the problem of how to target the small group of civil servants working on the proposal within the framework of the EAC programme who were not likely to take its arguments into serious account. However, the Commission's functional structure provided the industry with different points of access.

Not only the tobacco industry reacted to the EAC programme. The network of national cancer leagues (see Section 11.3.2) felt it necessary to influence EU policy-making, because 'the Community actors were making proposals, the industry was lining itself up to oppose them, but there was no one who was going to give the health arguments in response to the industry's arguments' (*interview #5*). For that purpose, it established an office in Brussels in 1990 which was financed by the International Union Against Cancer and the

European Cancer League. The European Cancer League became the first European public health organization to support the Community in its anti-tobacco policy. Note that it did not play a role in drafting the tobacco advertising proposal since that had already been tabled at the moment the anti-tobacco advocate in Brussels was appointed.

11.3.2. *Creating interest representation: The informal rule of network building*

Because contacts with supportive interest groups could strengthen the Commission's position 'in relation to national governments and opposing interest groups' (Fairbrass and Jordan 2003: 109–10), one of the measures of the first EAC action plan (1987–9) concerned 'information exchange in the struggle against smoking' (Aspect Consortium 2004: 109). Resistance to tobacco-control policy could be counteracted by involving a wide range of interests. Whereas the tobacco industry already was a well organized opponent (Christiansen 1996), the European health lobby still had to develop. Furthermore, medical and health communities at national level were rather inactive in their opposition against smoking (Duina and Kurzer 2004: 59). The Commission, therefore, helped to develop the landscape of pro-European health interest representation (Theofilatou 2000: 167) by providing resources to establish and sustain interest groups and asking them to undertake functions on behalf of the Commission, such as supplying information (Greenwood 2003).

One of the first measures was providing the European BASP with financial support. BASP assisted advocates of the ban with documents, such as a quarterly newsletter on national and international developments on tobacco-control policy and thematic reports. Within a few years, it evolved as the number one target of the tobacco industry (Neuman et al. 2002).

The Commission also coalesced with national organizations by subsidizing national cancer leagues and anti-smoking organizations. They were involved in spreading the message of the EAC programme (*interview #2*). Meetings with cancer and anti-smoking organizations were held every six months. As a result 'the individuals concerned got to know one another quite well, sharing good and bad practice, learning from one another. So gradually what was building was a sense of identity within the health community across the member states' (*interview #5*). These networks were consulted regularly with regard to legislative proposals. In a tobacco industry document it was mentioned that 'the degree to which the antis have penetrated the fabric of the European Community and the major international non-governmental organisations is quite remarkable. . . . The relationships between individuals and organisations are almost incestuous, but serve to consolidate a common view and strategy for smoking control throughout the region' (Anonymous 1993).

In 1994, the Commission evaluated these semi-annual meetings. The evaluation resulted in the creation of two pan-European networks: the European Network for Smoking Prevention (ENSP) and the European Network on Young People and Tobacco (ENYPAT). Another consequence of the evaluation was to stop funding the European BASP, which according to Germany, the United Kingdom, and the Netherlands had become the leading anti-tobacco lobby in Europe. The Commission therefore replaced BASP with ENSP and ENYPAT which received fewer financial resources and had a more restricted mandate than BASP (Bitton et al. 2002). Their main goal was to create synergy between the member states, not to lobby—which was excluded from their mandate (*interview #2*).

The informal rule of network building, offering the Commission the opportunity to organize interest representation, influenced the lobby on the tobacco advertising ban. The Commission used the possibility within the EAC programme for information exchange to strengthen the public health lobby at the national and European level. However, the experience with BASP suggests a limit to the informal rule of network building. It may be one step too far when an EU subsidized organization develops into an activist agency in a highly contentious EU policy arena.

11.4. Lobbying the council: The national route

Of all EU actors, the Council is least accessible for interest groups. It is not a forum for public debate, nor does it represent citizens directly (Beyers 2004). Most interest groups therefore follow the national route for interest representation. Two rules of the game related to the Council are relevant in analysing their strategic behaviour: the voting rule and the role of the presidency. In the following section, we will demonstrate how the tobacco industry used the Council's institutional structure. We will also explain why the public health lobby had more difficulties in carrying out its message successfully.

11.4.1. *The impact of qualified majority voting*

The tobacco industry tactic was to block the passage of the proposal (Bitton et al. 2002). Thus, Germany with ten votes in the Council was a strong ally in the industry's opposition against the ban. However, because of the qualified majority voting (QMV) rule, one member state alone could not block a decision: a blocking minority required at least twenty-three votes (Peterson and Bomberg 1999: 48). Therefore, the industry concentrated on forging alliances with national policy-makers (Bitton et al. 2002). In particular, it sought contacts with political actors outside national Health Ministries, since they tended to support the proposal for a tobacco advertising ban. The result of the

industry's action was that several governments opposed the ban, despite the positive attitude of their Health Ministry. The German Chancellor Kohl and former Prime Minister Thatcher and the British Secretary of State Clarke from the United Kingdom supported the industry's opposition. Furthermore, there were contacts with high ranking officials in the Greek government (Bitton et al. 2002; Aspect Consortium 2004: 203). This was quite remarkable, as one respondent explained, 'It is very seldom that a Prime Minister mixes into a case like this. . . . However, Prime Ministers of several member states said "no" to the tobacco advertising ban' (*interview #1*).

In the Netherlands, the industry tried to preserve Dutch opposition by its contacts within the Ministry of Economic Affairs (Burson-Marsteller 1992). Tobacco industry self-regulation was an important strategy. Infringements of the so-called voluntary code on tobacco advertising were not sanctioned. Political as well as social support to strengthen measures against advertising hardly existed in the early 1990s.

The whole policy game played at different tiers. 'You had "the small administrators" level trying to get a government view with the different administrations' (*interview #1*). Civil servants from national Ministries of Health discussed the tobacco advertising ban in the health working group. Negotiations in this group are 'incremental, mainly based on common interest. The informal atmosphere, agreeing behind the scenes normally plays quite a big role. In this case it did not have a chance. . . . The second layer was the layer of highest political people saying what they wanted' (*interview #1*).

The industry also used third party alliances to promote their position without direct visibility. An illustration is the Danish coalition known as 'the Committee for Freedom of Commercial Expression' (Kaplan 1991). This Committee – created by the tobacco industry – appeared to be an independent third party with over fifty prominent Danes. It '(positioned) itself as the voice of commercial free speech. Members of government (including the Minister of Health) . . . regularly consult(ed) with Committee members, who (were) instrumental in securing the commitment and public declaration of the Minister of Health to oppose an advertising ban' (Kaplan 1991).

Also media and advertising groups were encouraged to raise their voices in the member states and at the EU level 'to fully (work) in lobbying the proposal and threats of blocking of cross-border press sales' (Burson-Marsteller 1992). One result was the launch of media campaigns in the early 1990s. A large number of European newspapers and magazines allocated space for messages against a tobacco advertising ban, pointing at the so-called domino-effect of the proposal: the tobacco advertising ban would result in subsequent bans on for instance cars and alcohol.⁴

Finally, the tobacco industry established a programme to strengthen the relationship with the Formula 1 media to encourage journalists writing against the proposal. Especially in the final stage of the policy process Formula 1 played

an important role. The May 1997 elections in the United Kingdom resulted in a new Labour government, which, contrary to its predecessor, supported the ban on tobacco advertising. Yet, only a month before the decisive Health Council in December 1997 took place, the United Kingdom asked to exempt sponsored sports from the ban. The background of this request was that the Labour party had accepted a large gift from Formula 1 Chairman Ecclestone in January 1997. Opposition in the United Kingdom called it a 'cash-for-access' affair (Cracknell 2004). According to the Commission, this complicating factor would undermine the negotiations at a very advanced stage. It would be very difficult to persuade other member states to accept such an exception (Agence Europe 1997).

The tobacco industry and its alliances used all kind of strategies to avoid a qualified majority. In one sense, it had a simpler task than the public health lobby. As van Schendelen (2002) argues, it is easier to block a proposal, because that requires only one effective barrier, than to push a development which often requires taking more than one hurdle. The public health lobby had to take several hurdles indeed. At the same time it was not as strong as the industry for several reasons. Firstly, public health interest groups did not have similar financial resources. At that moment, they became more active in the early 1990s, there were already massive communication campaigns organized by the other side. They did not have the means to oppose to such campaigns. In addition, the industry could for example organize lunches and dinner parties (*interview #5*).

Secondly, the public health lobby still had to organize itself at the European level. Organizations were not used to coordinate their strategies within twelve countries (*interview #5*). The first notion of a European competence in public health only came with the Maastricht Intergovernmental Conference. A lobbying network based in Brussels, the European Citizen Action Service (ECAS), took the initiative for a conference about the future of public health competence in the EU. 'Suddenly we had a groundswell of opinion becoming interested in health at EU level' (*interview #5*), which resulted in the establishment of the European Public Health Alliance (EPHA) in December 1992. EPHA had public health representatives from eleven European countries,⁵ 'from the health-related organisations that were already in the membership of ECAS and a whole host of new organizations that were never going to have a presence in Brussels physically but wanted somehow to connect to what was going on in the EU' (*interview #5*). In a press conference, the newly established organization stated that 'the health consequences of smoking are well demonstrated by many epidemiological studies performed over forty years. Smoking is a common cause of death in all countries represented by the EPHA. These well-demonstrated facts lead us to firmly advocate a ban on all direct and indirect advertising for tobacco in countries represented by the EPHA.'⁶

The third reason why the public health lobby was not as strong as the industry lobby was the lack of attention for European developments in national organizations. For example, the European Cancer League tried to activate their national member organizations to influence member states which did not give their support to the ban. However, some of them questioned whether it was correct to use public money donated to cure people of cancer or to fund research for a lobbying campaign. Several national member organizations – sceptical because of the political character and even more so the *European* level – were not willing to support a lobbying campaign against tobacco advertising. In principle they supported the proposal, but in practice they believed to have good reasons not to make too much noise about it at home. Their broader commitment to cancer care was more important for them than their specific commitment to a ban on tobacco advertising (*interview #5*).

The ambivalent position of national member organizations to tobacco control is well illustrated by the strategy of the Dutch Cancer Foundation, which created an ‘independent’ anti-smoking organization, ‘Stivoro’, together with the Heart Foundation and the Asthma Fund. Receiving by no means enough money to play an important role, the balance of power between Stivoro and the tobacco industry was unequal. As Bouma (2001: 288–9) argues, Minister Borst, responsible for public health, did not meet with Stivoro at all during the period 1994–9.

Stivoro therefore mainly focused on outsider strategies. An example of such a strategy is a press release from Stivoro and the Medical Alliance against Smoking, created by Stivoro, in which they asked the Dutch government to support the European ban during the Health Council meeting in December 1993 as a critical step towards a qualified majority. The Medical Alliance also offered a petition to the Secretary of Health and the Parliamentary Commission on public health stating that ‘the Netherlands hold the five decisive votes for a tobacco advertising ban at European level’.⁷

In other countries too, the public health lobby mainly used similar strategies: letters, resolutions, position papers, press releases, and conferences. This focus on tobacco influenced the debate at national level (Khanna 2001), resulting in an evolution towards more restrictions (*interview #4*). As one respondent said, ‘There was no way we were going to get the advertising directive approved until one of the two big governments, Germany or the UK, changed its position. . . . But you have to keep the momentum going’ (*interview #1*).

Only when the tide turned and a qualified majority seemed possible in the second half of 1997, did the public health lobby try to push political decision-making. The public health advocacy lobbied the Danish and Dutch governments very actively, since their votes were decisive. A huge number of letters from public health organizations throughout Europe were sent to both countries in order to convince them to vote in favour. Finally, in December 1997, a

qualified majority including the Netherlands but not Denmark accepted the ban on tobacco advertising.

The QMV rule was very important in the policy-making process on the tobacco advertising ban. Both the tobacco industry and its alliances and the public health lobby were very much aware of this. As we have shown, the industry tried to influence high-level policy-makers at national level to maintain a blocking minority at European level. These so-called insider strategies were supported by outsider strategies such as a media campaign trying to influence the public opinion on the issue of a tobacco advertising ban.

According to one public health lobbyist, interest representation at Council level was difficult, 'That is I think where we did not do as well as the tobacco industry did. I mean the industry quite clearly had in its fingers several key governments, Germany and the UK in particular' (*interview #5*). Public health interest groups neither had the number of people nor the financial resources to counterbalance the industry's tactics.

11.4.2. *The presidency: Searching for a compromise*

In the context of Council negotiations, the presidency plays an important role. Presidencies are expected to act as *honest* mediators who are subject to the impartiality norm (Metcalf 1998: 414). When negotiations are not progressing, the president might put forward a 'compromise from the chair' (Hayes-Renshaw 2002: 58–9; Matilla 2004: 34). This informal norm offers interest groups a possibility to influence the president.

According to a study by Neuman et al. (2002), the Confederation of European Community Cigarette Manufacturers focused on a compromise proposal based upon minimal harmonization as an alternative to the existing Commission proposal for a ban on tobacco advertising. This compromise proposal was presented by Germany, as the industry's main ally against the ban. The industry's strategy was to make optimal use of the German presidency in 1994. The compromise proposed by the German government⁸ was very similar to the industry proposal (Neuman et al. 2002).

Interest groups' awareness of the president's role is also illustrated by the June 1996 policy paper from the European Cancer League, asking the Irish government to keep the proposal 'on the table' and reject any movement towards a weak compromise, or even worse, a resolution during its presidency in the second half of 1996. The policy paper explicitly referred to the possible change of government in the United Kingdom in 1997, 'The likely policy switch in Britain has not been overlooked in Germany. The pressure on the German government to oppose the ban as such has not just come from the tobacco industry, but also from the advertising agencies. These sources are now pressing for German agreement to a compromise, in order to forestall a complete EU advertising ban.'⁹

11.5. Lobbying the European Parliament: The European route

The influence of the EP upon decision-making depends on the decision-making procedure. Initially, negotiations on the tobacco advertising ban took place under the cooperation procedure which was replaced with the co-decision procedure in November 1993. The latter gave the EP an effective veto. In case the Council and the EP could not reach agreement, they would enter into direct negotiations in a conciliation committee (Burns 2004). After a breakdown in the conciliation committee, the Council could reintroduce its common position which the EP could turn down with absolute majority.¹⁰ Due to the co-decision procedure, the EP's importance for interest representation has increased (Khanna 2001). Interest groups provide expert knowledge to exert influence upon members of the EP (MEPs). In addition, they contact MEPs to get insight in policy developments (Eising 2005).

In the following section, we will study the strategic behaviour of interest groups in relation to the cooperation and co-decision procedure. The increasing importance of the EP in the policy-making process resulted in strategies to maintain contacts with MEPs throughout the process. We will assess the importance of the informal rule of intergroup creation.

11.5.1. Cooperation and co-decision: Lobbying the European Parliament

The EP delivered its opinion on the first proposal restricting tobacco advertising in March 1990,¹¹ voting in favour of a ban. This resulted in a Commission proposal for a ban on tobacco advertising in 1991. The EP gave its opinion on this proposal in February 1992. It took until May 1998 before the EP could give its opinion on the Council's common position in second reading.

The European BASP attended the EP plenary meeting of March 1990. Because it had only been created in 1989, it could not effectively lobby the EP. However, for the 1992 vote, BASP provided the rapporteur of the Committee on the Environment, Public Health and Consumer Protection (the ENVI Committee) with information. Based upon what the rapporteur and other MEPs stated, the arguments BASP and the European Cancer League had provided were indeed used (*interview #2*). The EP confirmed its vote of March 1990 in support of a ban despite a massive lobbying campaign, described as 'the largest and best financed lobbying campaign ever mounted by tobacco and advertising companies. Dozens of tobacco and advertising lobbyists descended on the EP to try to persuade MEPs to change their vote.'¹² The industry argued to oppose the proposal because of freedom of speech, the lack of a relation between advertising and tobacco consumption, the effectiveness of voluntary agreements, and the claim that advertising did not recruit new smokers. It also questioned the legal basis of the proposal. During the debate, the rapporteur of the ENVI Committee said that 'the challenge today is to stand up to the most

intensive lobbying campaign that we have yet witnessed'.¹³ In an interview he claimed to be convinced that the tobacco lobby influenced several MEPs. 'When we first examined this text on advertising two years ago, there was, after all, a considerable majority in favour of a total ban. Two years later, the lobbies have done their job.'¹⁴ 'The enthusiasm that originally had been expressed had nearly evaporated' (*interview #5*).

In December 1997, the Council reached its common position, which again caused a massive lobbying campaign in the EP. Following the co-decision procedure, the EP could introduce amendments in second reading that had been proposed initially in first reading or that concerned modifications to the Commission's proposal by the Council in its common position. If the EP amended the common position, this would result in conciliation. The public health lobby wanted to avoid this, given the narrow qualified majority (62 out of 87 votes) in the Council. For instance, the European Cancer League published five newsletters from March to May 1998. MEPs were asked not to put forward amendments: 'any attempt to amend the directive will inevitably invoke the conciliation procedure. The German government has made quite clear that it will take the opportunity of conciliation to wreck the directive.'¹⁵ The tobacco industry tried to convince MEPs to propose improvements to the common position. This led to 'the situation that people pretending they were in favour of health (ran) around in Parliament saying vote for amendments and the health lobby (ran) around saying do not vote for the amendments. . . . The industry managed to lobby MEPs who normally were totally against a ban on tobacco advertising, who started suggesting amendments proposing improvements to the directive' (*interview #5*).

The rapporteur of the ENVI Committee, a Frenchman, also felt the common position had to be improved. He could not be convinced by the European lobby groups. Therefore they urged French public health organizations to convince the rapporteur not to propose amendments. The pressure from French cancer leagues as well as high level policy-makers eventually resulted in the recommendation to accept the common position as it was (*interview #5*). According to the rapporteur, the text was 'the best possible compromise, given current national legislation, between the need to ensure a general ban on the advertising of tobacco products and the need to take account temporarily of essential economic adjustments'.¹⁶

Another element of discussion in the EP concerned the legal basis of the ban. Many documents on the legal basis circulated in the EP. The International Union Against Cancer and the European Cancer League crafted a memorandum on the legality of the legal basis. In its newsletters, the European Cancer League claimed that the ban had a valid legal basis. In April 1998, the Confederation of European Community Cigarette Manufacturers published a report called 'A step too far: a call to the EP to protect the integrity of the EC Treaty'. The main goal of this report was to convince the EP to reject the common

position since a tobacco advertising ban had no legal basis (Khanna 2001: 118). Furthermore, copies of the Council's legal service opinion of December 1993 against the legal basis circulated anonymously in the EP to create confusion.¹⁷ Nonetheless, in May 1998, the EP voted in favour of the common position.¹⁸

11.5.2. *The informal rule of intergroup creation*

Intergroups are groups of MEPs from different political backgrounds who share a particular interest (Gillies 1998). Often, they are initiated and sometimes also supported by interest groups to create a platform within the EP.

The EPHA wanted to create such an intergroup. In 1994, it acquired the secretariat of the Health Forum Intergroup. It organized a whole series of meetings around health. At a critical time in the policy-making procedure, when it came to the second reading stage, the EPHA planned a meeting on tobacco advertising. The tobacco industry used the so-called Kangaroo Intergroup, concerned with breaking barriers to free trade, to oppose the ban. The industry claimed it was against freedom of expression and free trade. The Kangaroo group adopted that line, supporting the industry.

From the analysis of the lobbying strategies in the EP, we can conclude that access to rapporteurs and their committee is very important. The responsible committee for an advice to the plenary, in this case the ENVI Committee, was the main target for the public health lobby. Access to MEPs via intergroups was also important. Even though the tobacco advertising ban was not discussed in the EP from 1992 to 1997, these intergroups provided a platform to maintain contacts with interested MEPs.

11.6. The European Court of Justice: Litigation strategies

After lobbying strategies had failed to block the adoption of the tobacco advertising ban under the mode of joint decisions, litigation strategies were initiated by the industry. The Van Gend en Loos case ruling implied that Community law did not hold member states as its sole object, but private actors as well.¹⁹ They may bring cases to the ECJ through the preliminary reference mechanism (Bouwen 2004b). In September 1998, Britain's Tobacco Manufacturers' Association and a group of four tobacco companies appealed to the High Court of England and Wales,²⁰ asking for reference of the directive banning tobacco advertising to the ECJ.

Already in the early 1990s, the tobacco industry planned for legal action in case the directive was accepted (Neuman et al. 2002). Their lobbying strategies, amongst others, concentrated on convincing Germany to go to Court (Aspect Consortium 2004: 217). The industry focused on both national courts and the ECJ, respectively, to demonstrate that the ban would violate national laws

and to question its legal basis. According to Bouwen (2004b: 12), going to courts simultaneously is a way to signal the saliency of the issue. It was through the latter strategy that the ban was annulled by the ECJ in 2000.²¹

Several private actors, Salamander AG (Germany) owning the Camel boots trademark, Una Film (Austria) distributing cinema tobacco advertising films, Alma Media Group (Greece) selling advertising space in public places, and Davidoff (Switzerland) holding the Davidoff trade mark for tobacco products as well as products outside the tobacco sector, also challenged the tobacco advertising directive before the ECJ.²² However, the Court dismissed their cases because it did not recognize the applicants as interested parties. Interested parties are those whose legal situation is influenced directly by the consequences of the directive and the institutions which have given birth to the directive.

The public health lobby as an apparently neutral and independent observer could not defend the ban. As one respondent argued, 'We were not able to participate in the process at all. All we could do was to sit quietly on the sidelines and watch. Several of us, as individuals with contacts within the Commission, could say, "well why don't you think of this argument, why don't you think of that argument" and that would be fed through to the Commission legal services' (*interview #5*).

The industry's strategic behaviour was mainly targeted at decision-making in the Commission, the Council, and the EP. Litigation was the final possibility to influence the outcome of the policy-making process. Throughout this process the industry was aware of this option and part of its strategies indeed concentrated on what to do in case of adoption of the ban.

11.7. Conclusion

Different strands exist concerning the study of interest groups, such as studies concentrating on the corporate-pluralism debate, on the problem of collective action, on European governance, and the Europeanization of interest groups (see Woll 2006). Particularly the latter two strands perceive the EU as a *sui generis* case. Recently, more studies on EU lobbying have dealt with the subject as a general political phenomenon. Taking EU lobbying as a given and trying to understand 'the conditions that shape who lobbies where, how and to what effect' (Woll 2006: 460) implies identification of opportunities and constraints of the institutional structure for interest representation. Several studies indeed acknowledge the importance of the political opportunities for interest groups enshrined in the institutional structure. For example, authors have tried to show the power of the European Commission as a demand-side force that influences interest group activity (Mahoney 2004), what strategy of lobbying will be effective given the different phases of the EU policy-making process

(Crombez 2002; Eising 2007), different strategies of specific and diffused interests (Beyers 2004), and the logic of access of different organizational forms of business interest representation to the political actors (Bouwen 2002, 2004a, 2004b; Eising, 2005, 2007).

This chapter shares their view that EU lobbying cannot be understood without taking into account the formal and informal institutions regarding the main actors of the policy-making process, being the European Commission, the Council of Ministers, the EP, and the ECJ. Each of these actors is conceptualized as a point of access for interest representation. Following an actor-centred institutionalist approach, a key element of our analysis concerned the identification of a set of institutions (rules of the game) that facilitate interest representation as shown in Table 11.1.

Whereas other studies indeed showed the impact of formal institutions on (particular) interest groups, the focus of this chapter is on a specific policy-making process, showing in more detail *how* corporate lobbyists and non-governmental organizations at national and European level use both formal and informal institutions. This illustrates empirically that characteristics of the political system and the structures of policy-making to a large extent influence the nature of interest representation (Greenwood 2003: 73). In order to minimize surprises (Mazey and Richardson 2006: 249) and given the different roles played by the Commission, the EP, and the member states in the Council at different stages of the process, interest groups concentrate on more than one actor. The institutional setting creates a set of opportunities for interest groups at either side of the political spectrum. In line with Beyers (2004), our study shows that access and voice strategies are widely used and combined. However, for the public health lobby, access is different than for the industry lobby. The Commission's need for support results in better access for European-level public health lobbyists. People working for the EAC programme were not very interested in the position of the tobacco industry. The industry mainly concentrated on access via the Council. It succeeded in establishing contacts with national policy-makers with an interest in industry policy. This raises the question as to whether the functional differentiation of both the Commission and national governments influences access of different interest groups. Generally, the EP is open for all kind of interests and access strategies were possible for both industry and public health lobbyists. They both succeeded in using the EP's rules of the game. It is however remarkable that the public health lobby persuaded MEPs not to improve the common position.

This analysis shows that both NGOs and business lobbyists are aware of the importance of formal and informal institutions. However, for reasons explained below, there is a difference between these interest groups to the extent that they make use of the institutions. In particular, the lack of access at national level of the public health lobby implies that it is difficult to use the QMV rule to their advantage.

This might be explained by several other aspects influencing the strategic behaviour of interest groups. First of all, the costs of lobbying are important. These costs relate to the organization of interest representation, such as establishing an office in Brussels, mobilizing members, and the follow-up of policy-making processes. The financial resources an interest group has at its disposal are therefore decisive for the strategies it can follow. Not surprisingly, our case study demonstrates that combined access strategies both at national and European level are far easier for those interest groups which have the human resources to do so.

Next to these organizational costs, informational costs are relevant (Broscheid and Coen 2007). These costs relate to establishing expertise and credibility. In our case, the public health lobby at EU level still had to develop its expertise during the process on the tobacco advertising ban, whereas the tobacco industry already had a lot of experience with regard to interest representation in the United States as well as in the EU and at national level.

The informational costs may be reduced by the Commission. In addition to the supply-side forces that push interest groups to become active in the policy debate, there are also demand-side pressures (see Mahoney 2004: 442). The external force of the European Commission through financial incentives (in this case national cancer and anti-tobacco organizations and BASP) and through a formal arena of debate (BASP), the 'demand-side', can also influence interest representation. In this case, it has been the Commission providing access to the public health lobby.

The third factor that influences strategies of interest groups is related to these informational costs, namely credibility. The pro-tobacco lobby was perceived as aggressive by many and in addition to that, they did not provide honest and correct information, whereas especially in 'Brussels' the key to successful lobbying is information (Broscheid and Coen 2007). In the end, a lot of officials did not want to be associated with the tobacco industry and were not willing to offer them access any more. The industry therefore adapted its strategies, concentrating on third party alliances to provide the so-called independent opinions, and scientific and expert studies.

Our case shows the importance of an actor-centred institutionalist approach with the institutional structure resulting in multi-channel interest representation. In addition, interest groups' organizational and informational capacity, and related to this their credibility, influences their ability to exploit different venues according to their interests.

Notes

1. The greater availability of tobacco industry sources resulted in a stronger emphasis on the tobacco industry lobby than on the advertising industry lobby.
2. See the *Official Journal of the EC*, No. C124 of 19 May 1989, pp. 5–6.
3. See the *Official Journal of the EC*, No. C167 of 27 June 1991, pp. 3–5.

4. BASP Newsletter of 15 January 1992, p. 3.
5. Belgium, Denmark, Spain, Finland, United Kingdom, France, Hungary, the Netherlands, Portugal, Sweden, and Switzerland.
6. BASP Newsletter of 19 December 1992, p. 24.
7. Internal note to the Dutch Health Secretary, 1 December 1993, retrieved from the Dutch archive on tobacco advertising.
8. Minutes from the health working group meeting of 7 July 1997, retrieved from the Dutch archive on tobacco advertising (doc 10657/94 SAN 96).
9. UICC/ECL Submission on the continuing case for an EU Directive on tobacco advertising to Michael Noonan, TD, Irish Health Minister, and Pádraig Flynn, European Commissioner with responsibility for Employment and Social Affairs, Brussels, June 1996.
10. Since the Amsterdam Treaty (1999), no agreement in the conciliation committee means the procedure comes to an end.
11. See the *Official Journal of the EC*, No. C096 of 17 April 1990, pp. 49–98.
12. *The Guardian*, 12 February 1992.
13. BASP Newsletter of 16 March 1992, p. 6.
14. BASP Newsletter of 16 March 1992, pp. 7 and 8.
15. *S.To.P.*: Issue 1, March 1998.
16. See the *Official Journal of the EC*, No. C176 of 22 April 1998, p. 5.
17. *S.To.P.*: Issue 3, April 1998.
18. See the *Official Journal of the EC*, No. C176 of 1 June 1998, pp. 78–91.
19. ECJ 26/62, Van Gend en Loos/Administratie der Belastingen, 1963.
20. Case C-74/99 of 5 October 2000, *Imperial Tobacco Ltd and Others*.
21. Case C-367/98 of 5 October 2000, *Germany v. Parliament and Council*.
22. Case T-172/98, T-175/98, T-176/98, and T-177/98 of 27 June 2000.

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Annex: Interviews April 2005–March 2006

- #1 Former German civil servant, 26 April 2005
- #2 Lobbyist public health organization, 18 May 2005
- #3 Dutch civil servant, 1 June 2005
- #4 Dutch civil servant, 22 June 2005
- #5 Lobbyist public health organization, 19 July 2005
- #6 Dutch member of the European Parliament, 3 November 2005
- #7 Former French civil servant, 23 August 2005
- #8 Former British employee of the ENVI Committee, 4 November 2005
- #9 Dutch civil servant, 8 March 2006

Chapter 12

Politics of Food: Agro-Industry Lobbying in Brussels

Wyn Grant and Tim Stocker

The European agro-food industry is the third largest employer in Europe, with some 11 million still employed in agriculture and 4.1 million in the food and drink manufacturing industries. Food processing is the largest manufacturing sector in the European Union (EU). These figures do not encompass catering or food retailing. However, its interest in a volume of this kind does not arise primarily from its economic importance, but from the challenges it has faced in recent years and the ways in which it has responded to them.

12.1. From farm to fork

From being a relatively technical set of problems dealt with in closed policy communities, agro-food policies assumed a new political salience from the 1990s onwards, reflected in changes in the structure of the European Commission with DG Sanco acquiring extended powers for food safety and regulation that were moved from the Agriculture DG and elsewhere in the Commission. However, the Common Agricultural Policy (CAP) is still largely the responsibility of the Agriculture DG. It was under increasing criticism for over twenty years, especially because of its impact on the Community budget, and the creation of surpluses, but it received new challenges involving a new set of actors in the area of trade policy and in particular the CAP's impact on the Global South. Food safety assumed a new prominence in EU policy-making in large part because of scares over adulteration (the dioxin scandal) and animal diseases that are transmissible to humans (BSE). Indeed, 'Food scares may relate to animal diseases that have no direct relation with food safety themselves (foot and mouth disease, avian influenza)' (European Technology Platform 2005: 20). There were persistent concerns about chemical pesticides,

veterinary pharmaceuticals and allergens, while the controversy over genetically modified (GM) crops was vigorously pursued by a range of environmental groups. More recently, the industry has been challenged by the increase in obesity in the European population and its link with cardiovascular diseases, diabetes, and so on, although this is only one of a number of links being made between health and food, another example being allergies. Individuals are themselves responsible for what they eat, and how much exercise they take, but the food industry has been criticized for producing foods that contain too much salt, sugar, and so on. The industry argues that there is no such thing as good food or bad food, but good or bad diets. An underlying issue here is what constitutes an acceptable level of risk and who is responsible for making the assessment about acceptability: consumers, retailers, manufacturers, or government.

In addition, consumers have become increasingly preoccupied with the quality of food, a concept that includes the way in which it is farmed and processed (animal welfare considerations, organic production, etc.) The industry would argue that quality is a matter for the market rather than public regulation with consumers choosing the price-quality combinations that they prefer and indicating their satisfaction through repeated purchases. Nevertheless, it does enter into public policy, with the Commission's vision for the future of Community agriculture emphasizing Europe's comparative advantage in high quality, high value-added products that are also produced in an environmentally sympathetic way. In any event, even if food quality does not demand the same detailed intervention by public decision-makers as food safety, it forms an important part of the backcloth against which the industry operates. It represents a shift from a politics of production, in which the quantity of production driven by food security concerns was emphasized, to a post-Fordist system of production in which consumers' demands are more complex and diverse. This can be characterized as a shift from a politics of production to a politics of collective consumption (Grant 2000) but its effects have probably been more pronounced in the agro-food sector than many others. Consumers of food have become more politicized than consumers of motor cars.

Together with the global integration of food supply chains and the growing concentration of food retailers (Coleman et al. 2004) this has led to a new emphasis on the food chain as a whole, encapsulated in the notion of 'from farm to fork'. Any attempt at making a diagram of a food chain leads to something that is highly complex and it may be that knowledge exchange networks are a more appropriate model (European Technology Platform 2005: 29). Nevertheless, such an approach, emphasizing traceability and transparency, is seen as offering the best chance of protecting food safety. However, the structures of the industry have not fully adapted to these new demands, although steps are being taken in that direction. The industry has been divided

horizontally into different segments of the production process. The input suppliers, the producers of seeds, crop protection agents, farm machinery, veterinary medicines, and financial services have their own organizational structures that are divided according to the particular activity they are engaged in. Farmers have been a relatively cohesive group, who have enjoyed political influence beyond their economic weight, if not in every Member State, at least at the European level. However, they are distinct from the food manufacturers, who only formed a distinctive independent European organization in 1982 and have been characterized by their heterogeneity to the extent that van Waarden (1987: 80) claimed:

[It] is not really possible to speak of the food processing industry, Instead, there is a dairy industry, a brewery sector, a meat processing branch, a milling sector, and a fruit and vegetable processing industry. These sectors do not have much in common and not many economic relations exist between them. Their most important common characteristic is that they process organic material which is produced in the agricultural sector.

However, even this fact could lead to divergences of outlook. As far as the CAP is concerned, a chocolate manufacturer who imports cocoa from outside the EU has a rather different set of interests from a dairy processor who is close to the farm gate and may even be owned by farmers. Against this background of a mosaic of interests that simultaneously were shared, overlapped and were in conflict, it is not surprising to learn that 'Unlike many other sectors, agro-food has not previously developed a structure to bring all of its stakeholder communities together' (European Technology Platform 2005: 3). In the following discussion, we will focus on the leading organizations representing farmers and food processors at the European level with reference to the attempts of the latter to create a more integrated structure.

12.2. COPA: From core insider to oppositionist

The story of the Comité des Organisations Professionnelles Agricoles (COPA) is of an organization that started out as a core insider within the European Community, having been created at the instigation of the Commission itself, and by the 1990s found itself in an oppositionist position to the CAP where it was unable to defend its members by creating a constructive alternative to the Commission's reform proposals. By the time of the MacSharry reforms:

COPA was not consulted on the decision of the Commission to propose a CAP reform or on the substance of the reform proposals. In the first instance, COPA had no response to the type of reforms proposed or any proposals of its own. (Kay 1998: 155)

The first Community agriculture commissioner, Sicco Mansholt, provided EU level representative groups with an incentive to form by permitting them to

participate in the Stresa conference of 1958 that established the parameters of the CAP. 'The immediate significance of the Stresa conference lies in the way that Mansholt succeeded in adding a suprastructural layer to the politics of agriculture by creating the EEC-level agricultural interest groups' (Knudsen 2001: 157). 'In particular he encouraged a special relationship' (Knudsen 2001: 160) with COPA which was set up as a federation of national farmers' organizations. Other EU level federations have evolved towards a hybrid membership of associations and large firms, but no farmers are really large enough to inject that direct commercial representation.

Jones and Clark trace the deterioration of COPA's relationship with the Commission from a policy insider to marginalization. In the 1970s the CAP was effectively run by the French dominated DG-VI, as the Agriculture Directorate-General was then known, 'in collusion with COPA' (Phillips 1990: 50). This collusion reached its peak in the mid 1970s with the operation of the so-called 'objective method' for setting CAP prices which was arguably neither objective nor a method. However, it worked well for farmers, probably too well, creating a budgetary crisis that set the seeds of its own destruction. 'Farmers never got everything they requested but they did get significant price increases and were envied by other European lobbies as the most influential special interest group in the Commission' (Phillips 1990: 50). From there on, it was downhill as far as COPA's influence was concerned. It started to lose the ability to have a cohesive policy once the MacSharry reforms of 1992 weakened the system of target and intervention prices. Prior to those reforms, they had been very effective in ensuring that rigged market prices were maintained. They were always concerned that more direct and hence more visible public subsidies would become a political football. Before the introduction of arable area aids by MacSharry, they could hide behind high prices that were being paid for by consumers rather than taxpayers. 'Once a pivotal member of the supranational policy community of the EU-6, by the early 1990s COPA was merely one of a number of relatively important actors in a fiercely competitive policy community' (Jones and Clark 2001: 97).

A number of factors contributed to this decline in influence, mostly exogenous and beyond COPA's control, but also exacerbated by COPA's own response to the challenges that it faced. While the European Community was made up of relatively similar Northern European agricultures, their interests were not so divergent that they could not be aggregated into a common policy platform that was more than a lowest common denominator. Moreover, there was enough money in the system to make side payments to those who felt that their interests had not been met. Enlargement made this task of reconciling divergent positions much more difficult, particularly southern enlargement which brought in a number of new commodities (or increased the importance of existing ones) to make the CAP even more complicated, a complexity that was reflected in COPA's own long drawn-out internal decision-making proced-

ures that 'began to severely limit the organization's intrinsic value to the DG Agri' (Jones and Clark 2001: 87). Budgetary crises made it more difficult to let everyone have something, while a range of new actors with different and challenging demands in the areas of trade and environmental policy entered the policy-making process. This led to a new reform agenda, but 'COPA's unanimity principle left the Secretariat with considerable difficulties in reaching a common position among its membership on the CAP reform package' (Jones and Clark 2001: 91). A fundamental problem has been that strong national farm organizations have been unwilling to cede much of their autonomy and have seen themselves as the main channel of exerting influence on an intergovernmental Farm Council through their national ministries.

An insider group is only strong if it retains credibility with its public policy interlocutor and COPA lost its standing with DG-VI during the MacSharry reforms. A DG-VI official told Jones and Clark (2001: 87), 'COPA has lost its dominant position with us because of its archaic decision-making'. The Commission prepared its reform plans without informing COPA, leaving them without insider status. 'The MacSharry cabinet thought that the views expressed by the COPA presidium were "reactionary and conservative"; the reform proposals shattered the hard-won consensus that COPA had reached on the previous reform of the CAP in 1988' (Kay 1998: 111). It was evident even to COPA members that they were losing influence and the long-serving director general, Andre Herlitska, who had been in office since the organization's formation, left in 1994. His replacement, Daniel Guéguen, resigned unexpectedly in 1996. He later recalled: 'I'd been brought in to relaunch COPA, to make it a more dynamic organisation. But I soon discovered that the farming unions' willingness to carry out the necessary reforms was more theoretical than real' (Banks 2005: 10).

An internal report in November 1996 warned that unless COPA was modernized its 'future will at best be a decline into ineffectiveness, at worst a fall to the very bottom of the downward spiral and extinction' (*Agra Europe*, 8 November 1996: P/5). In addition, COPA lost its monopoly of representation in 1999 with the official recognition by the Commission in 1999 of the Confédération Paysanne Européenne (CPE). Formed as a federation of national and regional organizations in 1988, the CPE represents more peripheral, smaller scale, and alternative farmers (Moyano-Estrada and Rueda-Catry 2005: 248–9) and it therefore provides a distinctive voice to COPA although not really a rival one.

COPA did try to make use of the Commission's development of a 'European model of agriculture' to advance their vision of European agriculture, but their interpretation of it was unduly nostalgic (see Grant 2000: 98). Their stance towards reform continued to be oppositionist on the lines of 'our members cannot take any more'. COPA launched in 2002 an unsuccessful rearguard

action in defence of traditional farm policy insisting that no changes should be made before 2006, maintaining that 'The structure of farm policy was effectively set in stone by the 1999 Berlin agreement' and that reform could only be justified if 'budgetary expenditure was at risk of exceeding the ceiling set by the European Council in Berlin and/or there was a serious deterioration in the overall market situation' (*Agra Europe*, 8 March 2002). What was set in stone was COPA's stance and reform went ahead with features such as decoupling farm payments which they opposed. Thus, they had 'minimal influence over the timing or content of CAP reforms' (Kay 1998: 87) which if not the only game in town was certainly the most important one. COPA presents an interesting case of a well-resourced actor, with a staff of forty-five (although around a third of those are interpreters or translators) representing an important sector of the European economy that has seen a marked decline in its influence.

COPA has always set great store by its close relationship with the European Commission, even though its influence has declined, and this has perhaps not allowed it to adjust quickly to changing opportunity structures. It still does enjoy regular meetings with the Commissioner for Agriculture and Rural Development and its technical experts talk to their counterparts in the Commission. COPA has also placed great reliance on its presence in the various Advisory Groups involved in the detailed operation of the CAP, but their membership has been widened as a result of initiatives by Franz Fischler and now includes thirty-seven places for non-governmental organizations. The traditional character of its representational activities is perhaps revealed by its claim that 'Contacts between COPA and the European Economic and Social Committee (EESC) are particularly close' (http://www.copa-coegca.be/en/copa_objectifs.asp, accessed 7 June 2006). In relation to the Council, COPA still relies on the national or 'indirect' route as they call it, with member organizations contacting national ministries. As COPA admits, 'Such contacts, in order to be successful must be based on the joint EU-wide positions established in COPA' (http://www.copa-cogeca.be/en/Copa_objectifs.asp, accessed 7 June 2006). The difficulty is that because of the divergent interests and positions of national member organizations, they may not be putting across similar messages. When issues get to the Farm Council, politicians are interested in political equilibriums that can be established through large political packages but which may do damage to specific national interests. Although COPA claims that it is in regular contact with the European Parliament, and in particular with its Committee on Agriculture and Rural Development, it does not give as high a priority to these links as some other organizations, perhaps reflecting the fact that CAP guarantee expenditure is not subject to co-decision. COPA portrays itself as 'the dynamic force of European farmers', but in many respects the changing direction of policy has left it looking relatively isolated and overtaken by events.

12.3. CIAA: Increasing effectiveness

CIAA (the Confederation of the Food and Drink Industries in the EU) has increased its effectiveness by a proactive response to Commission initiatives and networking with other stakeholders. In the 1980s, it was not seen as a particularly effective organization by either of the authors of this chapter. Grant (1987: 15) noted that it had 'experienced a rather slow and uneven pattern of organizational development'. Stocker noted that direct contact between national associations and the Commission persisted as the 'CIAA is not always able to reach agreement, particularly on trading matters' (Stocker 1983: 114). It did, however, have more success in reaching consensus in dealing with more technical matters relating to food regulation such as additives, labelling, claims, and the like.

CIAA was established by UNICE in 1982 to replace their Commission of Food and Drink Industries. Rule changes made in 2000 allowed direct company membership giving CIAA a hybrid structure like many other EU industry federations. The large multinationals were forming ad hoc groups in order to get around impasses arising in CIAA and weakening the latter to the disbenefit of all concerned in the industry, thus assisting the pressure for change. For a long time, the constitution had not enabled multinationals to play the part in which their place in their market should have enabled them to play. The Cassis de Dijon decision by the European Court of Justice did much of the work for them, opening up the internal market and stopping the flood of restrictive draft standards, which had been the stock in trade of Commission officials. However, Cassis de Dijon was no thanks to anything that CIAA had undertaken.

CIAA brings together twenty-six national federations (including Norway, Croatia, and Turkey as observers), twenty-two major food and drink companies grouped in a Liaison Committee, and thirty-two EU sector associations ranging from ice cream to semolina. The voting structure in the General Assembly reflects the financial contribution of the different groupings: 51 per cent for national federations; 34 per cent for major food and drink companies; and 15 per cent for European sector associations. The organization is well funded with an approved income budget in 2006 of €3.737 million and a Secretariat, substantially renewed in 2005, of some twenty-two. Like all such associations, it is highly reliant on the input from experts drawn from companies and associations, with some 700 participating in committees and expert groups.

CIAA enjoys direct, high-level contacts with members of the Commission, MEPs, and EU presidency representatives, estimated at an average of fifty-one a week involving the president or the chairs or leading members of policy committees (CIAA 2005: 7). CIAA has placed considerable emphasis on building up links with the European Parliament and has a dedicated staff member to manage the relationship, reflecting its belief that 'The role and importance of the EP have significantly increased over the years' (<http://www.ciaa.be/>

pages_en/print.asp, accessed 7 June 2006). Parliamentary work is closely monitored to allow reports back to CIAA members and contact is maintained with relevant parliamentary committees, political groups, and individual MEPs. It also seeks to coordinate lobbying activities in the Parliament carried out by national federations, sectors, and companies. One device used is a European Parliament evening to raise CIAA's visibility. The 2005 event attracted 200 participants including MEPs, assistants, and staff and was sponsored by the rapporteur on the green paper concerned with a European strategy for the prevention of obesity.

A key element of CIAA's strategy is the building of networks with other stakeholders. Apart from its international network that links it with a range of international organizations, it has six policy focused networks involving other actors in the food chain, concerned with agricultural policy; diet, physical activity, and health; food additives and ingredients; food safety/traceability; GMOs; and packaging. For example, the network on diet and health links it downstream to the European Modern Restaurant Association (representing fast food outlets) and the European Vending Association and laterally to the Federation of the European Sporting Goods Industry and the World Federation of Advertisers. It is also involved in the Alliance for a Competitive European Industry made up of federations from twelve leading industrial sectors (e.g. automobiles, chemicals, electricity) which concerns itself with competitiveness issues including the Lisbon Agenda, and some aspects of regulation.

CIAA has, however, been most innovative in its venue shopping in responding to opportunities provided by new structures created by the Commission. As Mazey and Richardson (2006: 256) point out:

The Commission has not only been a 'purposeful opportunist' in terms of policy expansion. It has also been opportunistic in creating new institutions as a means of locking diverse interests into the *ongoing* process of Europeanisation. It has been a strategic actor in constructing constellations of stakeholders concerned with each of the EU's policy sectors.

One key device is the use of policy platforms, although these vary in their structure and purposes. For example, the European Food Safety Platform at the European Food Safety Authority (EFSA) is largely consultative, but those in which the Commission is involved are intended to lead to coordinated but autonomous action by different actors working together under its leadership. Thus, the objective of the EU Platform for Action on Diet, Physical Activity and Health 'is not primarily to deepen our common understanding of the challenge but to create a platform for concrete actions designed to contain or reverse current trends. The platform is for actors at European level, for those who can commit their membership to act' (http://ec.europa.eu/health/ph_determinants/life_style/nutrition/platform, accessed 8 June 2006). This is reminiscent of old style corporatism where implementation of public policy

was entrusted to approved actors in civil society, but the difference is that there is no prescription of mechanisms, but rather an encouragement of voluntary action to achieve stipulated goals.

Whilst the importance of the CIAA as an interlocutor in a broad policy-setting has increased, both out of institutional need and a growing recognition by the major companies of their commercial interest in participating in the political debates, the heterogeneity of the food and drink industries remains. Policies relating to diet, health and safety, as well as in agricultural policy, are often implemented by regulation, where the devil often lies in the detail. European level sector organizations come into their own on such occasions in order to paint commercial reality and requirement onto the broad canvas of political expediency, and to find a way forward which permits the former without apparently compromising the principles of the latter. Company budgets relating to such activities as government, public, and regulatory affairs are subject to considerable internal scrutiny, especially in such industries of high competition and generally low margins. Companies can spend large amounts of money on research and development and marketing, but are reluctant to spend on public affairs activity, which may be crucial to enabling a product to reach the market place. Tensions between the sectors and CIAA, in part resulting from the need to find common ground in order to have the industry as a relevant piece on the chequered board of policy determination, are fuelled by competition for company and national organization resources.

12.4. Europeanization

As interest groups have become more professional in their lobbying activities, particularly in their understanding of how the EU functions and has changed over time, so their activities have undoubtedly become more 'European'. However, this is too general an observation to have much real value in evaluating change in the lobbying process. The way in which interest groups have behaved, from the strictly national on the one hand to a fully fledged EU strategy on the other, has been largely related to the legislative and regulatory background against which that sector, or interest, has been working. As the original Treaty has been amended, not only to bring more activities within its scope, but also to amend the juxtaposition of power between the institutions, so have interest groups adjusted the geographic scope of their lobbying. Interest groups also need to understand fully what the Treaty says with regard to the powers of the Union in various policy arenas and what have been the relevant decisions of the European Court of Justice on any issue facing the lobbying organization. Many interest groups do not use all the weapons available to them or in some cases do not even know that they exist.

Companies too have often become more European and less solely one nation based in their structures. This, too, will have affected the transition to a lobbying strategy of increasing complexity. Some companies in the food industry, such as Unilever and Gervais Danone, have always used ownership as a basis for forging close national links, in the former case with the Dutch and British governmental systems, and in the latter case with the French. Having production units in other countries has enabled as many cards as possible to be played in them too. Those with a non-EU ownership base have not had the ability to be especially championed by a national government in the EU, but they too have played what EU Member State cards they could, as well as using the relationship of their home base country with the EU and/or its Member States to similar purpose.

The larger European food companies, together with some of the US owned companies, came to realize the complexities of European legislation and its making; and to understand that the detailed, but often crucial commercial ramifications of the regulatory systems required a stronger European collective organization. During the 1980s, in particular, there were tensions within CIAA between two main groups. On the one hand, there were those national delegations which were strongly influenced by the more progressive multinational companies in their membership. As organizations, they understood that, not only their current, but also their future influence, depended on supporting their aspirations, which included direct company membership of the EU member organization. On the other hand, there were those national delegations, which, for whatever reason—misplaced national pride or different industry structures—continued to believe in an EU organization made up entirely of national delegations. This latter group had an industry structure consisting primarily of small- and medium-sized national market orientated companies. It took more than a decade for structural changes in CIAA to take place which recognized the pan-European interests of the multinationals as well as the many sector organizations which make up the food industry, and which could assist in lobbying within the complexities of a Union with increased and changed institutional powers, and with a steadily increasing geographic size and spread.

Paradoxically, an event of 'Europeanization' took place, which, for a time, took some of the urgency out of the need for making structural changes in the interests of forming a stronger central EU organization. There had been tensions too within CIAA between those advocating a raft of EU compositional standards for almost every processed foodstuff imaginable and those who were of the opinion that provided the consumer was informed by adequate labeling and not misled as to the composition of a particular foodstuff all safe foods should be able to be marketed throughout the Union. The former advocates were stuck in the groove of standards harmonization which had been a strong policy feature of the Commission's food policy in the early days

of the EC. It was seen as a means of cementing the Community, where as in reality it was divisive, especially as the Community grew in numbers and complexity. The latter advocates realized this potential for divisiveness in a sphere of activity of sensitive and differing national tastes. They understood the potential of a more liberal Internal Market. The European Court of Justice's decision in the seminal *Cassis de Dijon* case provided the liberals with the succour they needed. A product, which is lawfully produced and sold in one Member State, must be able to circulate freely throughout the EU, provided that it is adequately labelled so as not to mislead the consumer. This was a step change in 'Europeanization' in the interest groups of the food industry, arrived at by means of a decision of the European Court of Justice.

In addition to the Treaty amendments broadening the scope of EU activity and introducing co-decision, Europeanization relates to the fact that much management of legislation, for example, product approvals for so-called 'novel food' and the approval of products subject to the new but potentially crucial biotechnology, is subject to regulation by qualified majority voting (QMV). What is being witnessed in such cases is a situation where national authorities and their ministers play a crucial role. So may the Commission. This is a simple example of a hybrid lobbying system both at a national level, albeit of one Community institution, the Council of Ministers, and at a 'central' European level of another Community institution, the Commission. In addition to the all-important relationship with the rapporteur country, contact is required with the other twenty-six Member States. Some are, of course, more relevant than others; they carry more votes. There are also countries which tend to be leaders, either because they are acknowledged for their technical expertise, or because of their strength of feeling about the new technology or a particular aspect of it, such as antibiotic markers. Other countries tend to be followers. Whatever the situation for any given product approval, an elaborate system of lobbying across the EU, both at technical and political levels ensues. The political considerations of the technology will often outweigh the amount of attention that a government will give to the commercial interest of the company concerned. Whilst companies may have established businesses in several EU countries, it is unlikely that they will have them in all, or in nearly all; and in many, the critical mass of political weight that the company can bring in terms of investment or market size or employment, will be small. This presents considerable problems of organization, expertise, and resource for the companies concerned.

In such cases, the EU Commission and the EFSA have to be lobbied too. They have to be encouraged to adhere to timetables; judgements have to be taken as to whether a vote is advisable at a particular time. Above all, the Commission, left 'holding the baby' when the Council fails to act, has to be persuaded that the correct decision, both politically and legally, is to approve the dossier. Here is an example of a more subtle form of 'Europeanization' than that sometimes

discussed in the literature. It highlights too the simple fact that the Council of Ministers, whilst being an EU institution, is an amalgam of the politicians, and for Comitology, the officials, of the twenty-five Member States. This interplay of national and European is equally true of the European Parliament (and to some extent of the Economic and Social Committee). It is even of some relevance in the Commission, which nominally forsaking allegiances to any one Member State is comprised of Commissioners and officials from all twenty-seven. There are considerable implications for the lobbyists, be they companies, environmental or consumer groups, or others representing elements of civic society: how they are structured, the skills of their representatives, and their resource allocation.

An important feature of much EU legislation is the use of 'safeguard' clauses, whereby is usually meant the ability of a Member State to opt out of permitting a product within its territory, at least for a period. An example of its use in the regulation of the food chain relates to its use in the field of biotechnology. A number of Member States have used the clauses to prevent the use of specific GM organisms within their territory. How legitimate have their actions been? The regulations, whilst acknowledging the ability of a Member State to take action, are in reality a prime example of how 'federal' some aspects of the EU have become. The ability to overturn the decision of the user of the safeguard clause, very often considered by the Community's expert scientific committees to have no validity, is also subject to the Comitology procedure or the use of the courts and ultimately to decisions made by the ECJ. Here is another example of the need to persuade the Commission to bring the issue to the relevant committee of Member States' representatives for a vote. As in the previous example, the Member States must also be lobbied to deliver a vote in favour of forcing the Member State invoking the safeguard clause 'illegitimately' to terminate its action. Here is an even more subtle example of 'Europeanization' where Member States are reluctant to vote to overturn the use of the safeguard by a fellow Member State. It is crucial for the lobbying entity to do its homework and not to encourage a vote if it is apparent that the Member States will deliver a QMV to reject the opinion of the Commission proposing the quashing of the safeguard use.

Organizations and companies which do not understand well what might be termed the 'constitution' of the Union are lobbyists with a handicap, especially in spheres of activity such as the food chain, which is subject to considerable amounts of legislation and regulation. It is crucial to understand the Treaty and the rulings of the ECJ as part of a good lobbying strategy: a further instance of 'Europeanization' of the lobbying process. In 2000, for example, the Italian government, by decree (known as the Amato Decree) banned on its territory the use in foodstuffs of several EU approved GMOs. It claimed that it had the evidence that their use had been approved by the EU by an incorrect procedure relating to the Novel Food Directive of the time. In essence these

'products', maintained the Italian Government, should not have been subject to what was known as the 'notification procedure', but to a full approval system of Comitology. Three companies took the issue to the Italian courts with the knowledge that a reference by the courts to the ECJ for an opinion was likely. This indeed was the case. The ECJ ruled that whilst a Member State had the right to safeguard the health of its citizens it had to prove that a deviation from the *acquis communautaire* was required for that purpose. In this case, there had been no irregularity of procedure. The Italian court ultimately found in favour of the three companies. This is one more illustration of the interplay of national and European: a complaint brought to a national court that the State had acted improperly in the context of European legislation, followed by the invoking of a European institution, the ECJ, as a fundamental part of the decision-making process of the Italian court.

A further example of the complexity of the relationship between the Member States and the EU, and its implications for lobbying, is to be found in the seeds legislation, somewhat esoteric and little known outside the seed industry itself, but a fundamental element in the food chain. A seed variety is approved, after a complex system of registration, initially in one Member State. It is then normally placed on the 'Common Catalogue' of the EU for potential use throughout the EU, or, at least, in those countries where its use would be suitable. The system is similar for seeds which have been genetically modified by including within them an approved GMO. Seed companies seek to ensure that one Member State where the variety is suitable for its agriculture will register the variety. The Commission then has to be convinced that it should be placed on the 'Common Catalogue' although it has an apparent obligation to do so. Other EU Member States have then to be dissuaded from forbidding the variety on their territory. If they do, the Community institutions which can remedy this likely illegality have to be brought into play. The juxtaposition of, and importance of, both national and EU institutions is again in evidence.

For products such as GMOs for agriculture, feed and food which are subject to immense political pressures as they are introduced into the market place, companies seek opportunities to move the technology forward where they can. It is vital to their commercial interest to use the totality of the possibilities which are inherent in the Treaty and the legislation based on them, to keep the market place alive in parts of the EU while other parts do their utmost to block its development. Changes of government in the Member States can, over a period, change the balance of willing and unwilling within the Union. Here is 'Europeanization' par excellence, not a choice between Union and national lobbying, or even a straightforward combination of both, but a complicated chess game played on the board of the EU.

Decisions about legislation, regulatory content, and product approval are all made in a context of public policy. All the players, be they drivers of the economy, other components of civil society, governments and their officials,

or elected representatives and others, all have to interact. Policy issues such as food supply, food safety, diet and health, whilst constantly changing in detail, are ever present. Major incremental or changed legislation can be proposed. Media campaigns may be conducted. International agreements for trade may be concluded. They will all have important implications for product markets, old and new.

Companies and other interest groups need to build effective European teams, orchestrated by an expert Government and Public Affairs function, to work both in the 'central' capitals of Brussels, Luxembourg, and Strasbourg, and indeed anywhere else where the Union has situated its relevant agencies, as well as in the Member States. However much 'Europeanization' has taken place, the political reality is that the twenty-seven Member States each has its own government, media, and public influencing networks. Strategies, actions, and messages must be developed which are to be used throughout the Union, suitably tailored to national usage: national issues have to be dealt with in accordance with these strategies. National governments themselves are crucial lobbyists in the EU. Alliances need to be formed both at the European level and nationally. European associations will coordinate pan-European lobbying on behalf of groups of like-minded organizations and seek out prospective coalitions from within the food chain and elsewhere.

12.5. Revision of Directive 90/220/EEC. An abridged case study. The role of Europabio

A case study of some of the elements of the role of the EU biotechnology industries' association, Europabio, in leading and coordinating the industry's EU-wide lobbying of the revision of Directive 90/220, 'Deliberate Release of Genetically Modified Organisms into the Environment' is illustrative of a pan-European exercise to bring influence to bear on a crucial piece of legislation regulating fundamental aspects of the biotechnology industry and usage of the new technology in the food chain, pharmaceutical, and other bio-based industries.

Europabio formed a 90/220 Task Force to drive policy-making and action for regulatory change. It first met in February 1997 (chaired by one of the co-authors of this chapter). This Task Force had the benefit of being able to draw on the new EU industry association structure of company and national biotechnology association membership and report to the policy committee (EPOC) and the Council. There was a bringing together of the technical and the political, company and association representatives. By this mechanism, Europabio was able to orchestrate the industry's lobbying effort and to dialogue with the Commission and the European Parliament and, to the extent that structure allows, with the Council, at the European level. At the same

time, through both company and associations, it could reach into national activities and so, by another route, to the Council and European Parliament Members and national governments as lobbyists in their own right. It could also establish, and did, ad hoc alliances with other EU-based organizations, for example those representing parts of the food chain, and be in touch with Brussels-based media and other EU stakeholders such as the consumer and environmental movements. Through their national activities, similar stakeholders could be engaged at the Member State level. Some Member States could be more readily engaged than others, there being large companies with biotechnology interests especially in Germany, the United Kingdom, France, Denmark, and the Netherlands.

External circumstances were changing rapidly and unfavourably for the industry. The first companies with GMOs to market in Europe had little experience and understanding of the food chain. They had not given sufficient thought to reactions from the public at large and food consumers. Nor had they bargained for the way in which organizations such as Greenpeace and Friends of the Earth would manipulate food safety concerns in order to stop the technology in its tracks, at least as far as its use in agriculture and the 'open environment' was concerned. And then 'mad cow disease' struck. BSE became such an issue that other food safety questions were put under the microscope. Add a dash of anti-Americanism, anti-science, anti-multinationals, and the going was looking tough for the biotechnology industry.

As one of its first jobs, the Europabio Task Force had to consider its position in relation to a revised Directive. By February 1997 it decided, not least because of the co-decision procedure and the make up of the then European Parliament, that it would support the use of any flexibility that could be found within 90/220 to improve product approval progress. It no longer supported a new Directive; at least not for the time being. Discordant voices became louder. A GMO, BT 176, with an ampicillin antibiotic marker gene was approved by the Commission, on scientific advice, but against the wishes of all but one of the Member States; several Member States declared that they would not permit further approvals until labelling provisions were improved. Commissioner Bjerregaard made an amendment to the 90/220 Directive. Finally, the Commission published in 1998 (COM(98)85), a proposal for amending Directive 90/220. Bearing in mind the public policy climate in which it was made, the proposal was not, by and large, unfavourable to the technology's introduction in the EU. Close dialogue with the Commission's officials had been beneficial. Europabio had gained respect for its knowledge of the technology, the regulatory systems worldwide, and the shortcomings in the EU system. Improvement in the procedures for product approval were proposed – clear and more rigorous time lines, different product categories so that simplified procedures could be introduced, and so on.

Due to the way in which GMOs had been introduced into the food chain – without sufficient public explanation of practice and technology – industry was largely on the back foot. In all its lobbying activities, Europabio had to consider the crucial element of trust. It had already changed its labelling policy. It had seen how Zeneca had introduced a GM tomato concentrate, duly labelled, and understood the crucial nature of requiring political support, both in Council and the Parliament, which, when the revised legislation was introduced, had a centre-left majority. It recognized the need to gain public confidence. Europabio understood the extreme sensitivity of the labelling issue: informed consumer choice. It had done its homework as to where the majority of Member States lay on the issue, and the European Parliament too. It was a deal breaker. Quite simply: no labelling, no GMOs. Industry and commerce were also concerned not to delay the passage of the revised Directive. A sufficient number of governments had made up their mind that they were not going to permit release of GMOs into the environment if there were no satisfactory labelling provisions.

However, there were some Commission proposals which bothered Europabio considerably. One came to be known as Time Limited Consent. A GMO was only to be given approval for seven years, renewable. This time period was a ‘lift’ from the agricultural chemicals legislation, the same officials in the Commission being responsible for both that and ‘release into the environment’ legislation. The proposal ignored the reality of plant breeding and seed registration procedures. The GMO as such had no application on its own. It had to be incorporated into germplasm and trialled. The resulting seed variety required registration. The registration trials could not proceed until the GMO had ‘placing on the market’ approval, even though it was not yet placeable on the market. Seed varieties are improved year on year, whether they are GMO or not. A seven-year time period was unworkable and uneconomic. Here was an area where complicated processes had to be explained. Only the biotechnology and seed industries could do this. Much effort was therefore spent on this issue.

Europabio had also felt that the EU’s product approval system required radical change to one of ‘centralization’. A system of rapporteurship by one Member State, followed by Comitology, meant that even at the technical level politics entered the decision-making process. There was no opportunity for solid science to dictate the outcome of what should have been technical discussions. Only at ministerial level should more political decisions come into play: so much the harder for politics to enter the debate if the safety issues had been dealt with in a non-political way at expert level. The Commission recognized the difficulty, but other than proposing that it would put all dossiers to a relevant EU scientific committee, it made no other fundamental changes. Europabio wrote to Commissioner Wallstrom in April 2000: ‘We firmly believe that a centralised procedure where the “best and complete” science is done first in conditions of consensus building and advice is then given to risk management decision makers, will not only provide for a more

predictable procedure for applicants, but will also provide a process in which the public can trust.'

The Commission also combined consent with monitoring, another contentious issue which became more difficult as discussions continued in the Council and the Parliament. Having had its fingers burned over approval of BT 176 the Commission also proposed a voting system based on a simple majority. Thus, if a product were voted on in Council and a simple majority were opposed, the Commission would not be in the awkward position of having to make a decision, maybe against the will of the majority of Member States. If this proposal had remained, the EU would now be in considerable difficulty to approve any GMOs.

The Commission proposal became the subject of intense lobbying in Council and in Parliament. Industry and its allies fought for survival, the environmental groups, and their allies attempted to strangle the baby at birth. The Europabio Task Force and the Secretariat became the hub of an intense lobbying period: briefs were prepared for use throughout the EU; information was garnered from Member States; Commission officials were held in close contact; the European Parliament was kept under close surveillance and contact.

The parliamentary committee responsible for a first Report to be voted on by Plenary was the Environment, Public Health, and Consumer Affairs Committee. There is a huge difference between the make-up and remit of one committee and another. From the point of view of industry, to be the subject of the deliberations of this committee was not helpful. Contacts were made with parliamentary officials, key MEPs and their staffs, EP party officials and in particular the rapporteur, David Bowe (PS), and the shadow rapporteur, Pieter Liese (EPP). Voting lists were prepared and circulated, amendments proposed, briefing papers written. An intimate understanding of parliamentary procedures was crucial, as was the ability to respond quickly to amendment proposals, both in committee and at Plenary, necessitating the ability of Europabio to write correct amendments, understand the implications of others, and place its activities in a judicious political context. On one occasion, for example, a voting list of some hundred-plus amendments had to be prepared in half an hour. Who was doing deals with whom, which governments were attempting to brief their MEPs, and how, were all part of the intelligence gathering.

It was crucial to understand what would break the technology and what would make life difficult but not untenable. In one parliamentary committee hearing it had to be made clear to the rapporteur that if the Parliament accepted certain amendments the new technology could not survive in the EU. Quite apart from any international trade implication, if the Parliament wanted to insert the concept that gene flow should not take place at all then it should be understood by those making the decisions what the implications

were. They would need to take the responsibility for the consequences of there being no agricultural biotechnology industry in the EU.

The Council's Common Position was established in November 1999, and after First Reading in the European Parliament it was clear, as had been expected by Europabio, that this Directive proposal was no longer a risk assessment procedure for dealing with the release of GMOs into the environment. It had become a Christmas tree on which were hung all kinds of baubles relating to public policy issues on biotechnology. They included *inter alia* labelling and, now, traceability, imports and exports, environmental liability, public registers of all GMO sites, and pharmaceuticals for human use.

Parliament's Second Reading took place in early 2000 with a vote in committee in March and in Plenary in April. Before the Plenary session, an important dinner debate was organized for MEPs, especially the new ones, as there had been an election since First Reading. Speakers such as Sir Roger May, the Chief Scientist in the United Kingdom spoke at this debate. Plenary, where a more balanced opinion had an opportunity to prevail, had to be regarded as an antidote to the Environment Committee. The new Parliament had been elected with a move in its political leaning somewhat to the right. The Liberal Party had become of considerably more importance and had to be lobbied as a priority too. It was not an easy task as such a party has a very broad church of opinion within it.

Close contact was also maintained with the Commission including a meeting with Commissioner Wallstrom in February 2000. The Commission still had an important role to play. For example, the Commissioner would be called upon to inform the Parliament at Plenary as to which amendments were acceptable and which were not. The Commission would also have an important role to play should Conciliation be required after the Council of Ministers deliberated on the outcome of the Second Reading. The Permanent Representatives of the Member States were also revisited as a further way of influencing the Council. It was also vital to lobby non-environment ministers in the Member States, such as those dealing with economic affairs and trade. One of the difficulties all along had been that this piece of legislation of such crucial importance to the industry was being dealt with by the environmental 'enclave' which considered bodies opposed to GMOs as their special clients – in Parliament, in the Commission, and in the Council.

After Second Reading, the outlook was much improved for Europabio and its members. Support for biotechnology specific environmental liability legislation had been replaced by an amendment to bring in EU-wide rules for all activities, including GMOs, but no longer singling them out. The vexed question of gene transfer was to be related to the risk assessment, where it properly belonged. Recognition was given to the fact that not all antibiotic resistance markers were an issue for human and animal health and did not require immediate phasing out. GMOs for pharmaceuticals for human use should be

regulated under the relevant pharmaceuticals legislation provided that the risk assessment and other matters such as labelling were in conformity with this deliberate release legislation. Traceability provisions for Part B trialling were struck out. Some of the onerous trade provisions were removed, although export consent (in addition to import consent) was still to be required for GMOs. The Parliament had special concerns about the implications for developing countries.

The Parliament also voted in favour of a centralized approval procedure similar to that for medicines. It increased the time limit for consent to ten years from the first registration of a seed variety containing the GMO, and by virtue of this latter concept therefore added several years in addition to the increase from seven to ten. An approval for release for trialling purposes (Part B) was to be given in ninety days, instead of the 120 in the Common Position, thus enabling the seed industry to undertake trials the year after the seed became available, rather than wait for another year. A differentiated procedure for placing on the market (Part C) approvals based on the familiarity principle was re-introduced. However, the problematical monitoring for accumulated long-term effects remained: an issue which continues to remain controversial until the present day. And, another continuing controversial subject, the maintaining of a public register of all GMO locations was back. The Commission indicated that it had problems with the centralized procedure, the wording of the ten year amendment, the differentiated procedure, and export permission.

The Council deliberated and disagreed with the Parliament's amendments to the Common Position on a number of matters. Conciliation became inevitable. Europabio's concern now was that so much which had been gained in Second Reading could be lost. It therefore opted for a policy of recommending to the tripartite players, the Commission, Parliament, and Council, that Conciliation should focus on getting textual clarity and legislation which was in conformity with the Union's international obligations. It was, on balance, prepared to forsake desirable modifications to the export permission and the public register requirements. Above all it wished to avoid a situation whereby Conciliation proposals were rejected either by the Council by qualified majority or by Parliament on a simple majority of the votes cast. In such a scenario there would have to be another co-decision proposal from the Commission and the whole procedure would have had to be begun again. There would have been untold delay in obtaining further product approvals and an uncertain outcome to the exercise.

However, several difficult issues were reopened during Conciliation. Council, supported by the Commission, was not prepared to go further in trade issues than was required by the recently agreed international Biosafety Protocol; the Commission was to bring forward trans-industry legislation proposals on environmental liability before the end of 2001, to include GMOs; Council would not agree to any centralized procedure provision going beyond an

invitation to the Commission to study the matter 'particularly focussing on a centralised authorisation procedure for placing on the market of GMOs within the Community'. The controversial question of an exemption for pharmaceuticals was resolved with an exemption for the Part B provisions and for Part C in the way already described above. Council recognized that the use of some antibiotic resistance markers may not have adverse effects: those that did, should be phased out by 2004, except for trialling purposes where they could remain until 2008. There was some trading off between simplified procedures and the public register such that the legislation allows for proposals for differentiated procedure, but does not specifically allow them. The public register provision gives some degree of subsidiarity to Member States, but has remained a contentious issue whereby, in some Member States, there has been considerable destruction of GMO trials by opponents largely because it is so easy to know where the GMO plots are and it is difficult to 'defend' them.

For the Third Reading in Parliament, Europabio sent a short, straightforward note to MEPs urging them to turn out to vote and to vote positively on the agreement reached in Conciliation. After the vote in Parliament on Valentine's Day 2001 Europabio stated:

the Directive at last leads the way to establishing a more vigorous and coherent framework for the regulation and market supervision of biotechnology in Europe. For Europabio and its members, the safety of biotechnology products for humans, animals and the environment remains an absolute priority. The European Biotechnology Industry Association has always advocated rigorous regulations, based on thorough scientific evaluation carried out in a transparent and coherent manner. Europabio believes the amended Directive will further strengthen the already stringent assessment process, help to establish consumer confidence in the regulatory process and convince investors that there is a future for agro-food biotechnology in Europe.

The next morning the headline in *Le Monde* was 'Europe dit oui a la biotechnologie'. And several Member States wrote into the Council minutes that they would suspend further product approvals until there was new legislation on traceability and labelling (especially), environmental liability, and the ratification of the Cartagena Protocol on Biosafety!

A number of conclusions can be drawn from this case study, although in many cases they reinforce what we already know from the literature. Direction and coordination must be pan-European: it must work holistically at both the European and national levels. Lobbying which does not recognize political realities is wasteful and can be counterproductive; for example, to have continued to fight against the principle of a labelling provision would have achieved nothing, but would have prejudiced efforts relating to other issues by casting the industry in a negative and untrustworthy light. Interest groups can make important differences to legislation where there are matters of

complex reality as to the practical effects of proposals to be examined. Persistence and receptive audiences, carefully chosen, are required.

Alliance building is crucial, as is the gaining of respect from those being lobbied for practical knowledge and wisdom about political reality. Intelligent determination against opposition has to be matched with ability to perceive where a deal cannot and will not be achieved. Changes in the political composition of governments at Member State level and of the EU institutions will lead to very different outcomes. For example, after the EU Parliamentary elections, the vote in Plenary at Second Reading gave outcomes different to those from First Reading. Some would have been unlikely to have been achieved without the change in the make-up of the Parliament, however skilled the lobbying.

It is necessary to identify key players and stay close to them throughout the long law-making process. Capability to write amendments, which can be used in legislation without further rewording, is important. Many attempts by those lobbying fail due to badly written or ill-judged amendments. What is likely to happen to any proposal before it is put into the arena is a question which must be asked. For example, can it be used by opponents and turned against the lobbyist's interests? The making of EU legislation by co-decision is highly complex. To enter the lobbying arena requires high levels of professionalism and expertise, together with adequate resources.

12.6. Conclusions

What can be observed in the food sector over a period of some twenty-five years has been a shift of power both within the sector and in its relations with the external environment. Within the food sector, power has flowed away from farmers down the food chain. This is exemplified by the relative decline in the influence of COPA. Although it is still an important actor in the policy process, it does not enjoy the influence it exerted when the CAP itself was less contentious and not undergoing a process of reform. COPA was perhaps too insistent on the defence of existing subsidy arrangements, rather than seeing how emerging policy narratives related to the environment might open up new opportunities for farmers. Given the diversity of farming practice within the EU, and hence to extent to which interests differ by Member State or even by region, successive enlargements presented a particular challenge to COPA.

In broader terms what has been happening is a shift from a politics of production to one of collective consumption (Grant 2000). The interests of the consumers of food have assumed a new importance in relation to those of producers. This is not just in terms of the food itself, but how it is produced and its impact on the environment and animal welfare. Food thus becomes a bundled good for many consumers who are not just buying the

product itself but also buying into its mode of production. This does, of course, offer opportunities to create higher value-added niche products. The long-term strategy for the CAP could be interpreted as one that sees Europe as producing more high value-added, speciality products to satisfy the requirements of discerning consumer markets. More generally, all the representational activities discussed here take place against a background of many important aspects of public policy such as trade, environment, consumer affairs, economic development, and foreign policy. In order for there to be success, for example at the level of lobbying on new EU regulations, there has to be media and public affairs work undertaken to create the right climate within which politicians and senior officials can make their decisions.

Although attempts are made from time to time to revive them, food security narratives have lost the dominance they enjoyed when the CAP was established. There is increasing emphasis on the role of farming in producing environmental benefits and other public goods. Both farming and food processing have been subject to increased scrutiny as a result of the BSE episode and other food scares, and food safety, along with more general food quality issues, have moved up the EU agenda. NGOs have made a considerable impact in relation to issues such as GM crops. The food processing industry in particular has been required to respond to the challenge of taking measures to make its contribution to policies designed to tackle obesity. As the challenges facing food processing have increased, CIAA has developed as a far more effective organization.

As our case study shows, what is often required is the more sophisticated and continually updated deployment of traditional techniques of exerting influence on the institutions. The content of the agenda changes, adaptations have to be made to the growing influence of the Parliament, but in a system of multi-level governance, there is still a need, not always easily realized, to coordinate actions at the Member State and EU levels. The Member States are important participants in the decision-making process at the EU level. Hence, as well as maintaining a sophisticated government operation in Brussels, firms and industry associations need to be aware of developments at Member State level and how this might affect stances taken at the EU level. Such sophistication is particularly important in a sector such as food which has changed from a relatively closed policy community with a limited range of actors engaging in principally technical discussions to a more open set of policy networks with more varied participants, greater public attention, and an agenda that is more politicized and more susceptible to change.

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Chapter 13

Bargaining and Lobbying in EU Social Policy

Oliver Treib and Gerda Falkner

13.1. Introduction

Social policy has long led a shadowy existence in the process of European integration. The founding treaties clearly subordinated social policy to economic integration. Subsequently, however, several major treaty revisions gradually expanded the legislative competences and the scope of qualified majority voting in social policy. This has facilitated the adoption of binding legislation, especially in the areas of occupational health and safety, gender equality, and general working conditions. With regard to the field of social security, in contrast, Majone's (1993: 155) assessment that the European Union (EU) is a 'welfare laggard' still holds true, although areas such as pensions, health care, and social inclusion have recently been addressed through the soft governance mechanisms offered by the Open Method of Coordination (OMC).

For business and labour, the expanding policy agenda in EU social policy has increased the significance of having a say in the EU's decisions in this policy area. In contrast to what some observers seem to consider the general macro-level model of interest intermediation in EU politics (see e.g. Streeck and Schmitter 1991; Wessels 1997: 36; Mazey and Richardson 2006), however, the meso-level style of public-private relations in social policy has not evolved into a pattern that resembles US-style pluralism. Instead, EU social policy is marked by a system of sectoral corporatism in which the peak associations of management and labour play a privileged role. At the heart of this system is the 'bargained legislation' procedure introduced by the Maastricht Treaty. Under this procedure, the EU-level social partners act as co-legislators who may negotiate agreements that are then transformed into collectively binding EU legislation.

This chapter analyses the logic of interest representation under these institutional conditions. Section 13.2 gives a short overview of how the current

institutional framework in EU social policy came into being. In Section 13.3 we present the main interest groups in terms of their roles in EU social policy and the organizational resources at their disposal. We argue that the three largest groups, BusinessEurope (or UNICE, as the organization called itself until 2007) the European Centre of Enterprises with Public Participation (CEEP), and the European Trade Union Confederation (ETUC), hold a privileged position that sets them apart from the wider network of stakeholders in EU social policy. In Section 13.4 we discuss the different venues for interest groups to influence the policy process in EU social policy. Looking more closely at the phase of policy formation (section 13.5), we then show that the social dialogue route presents a unique opportunity structure for the interest groups involved. However, given the preferences of employers' organizations, the substantive results are highly dependent on the likely outcomes to be reached in the legislative arena. So far, the 'bargaining track' has thus been an instrument to satisfy the employers' policy interests in avoiding or at least softening binding EU regulations and the unions' industrial relations interests in creating a system of collective bargaining at the European level. Section 13.6 concludes with some speculations on the prospects of interest intermediation in EU social policy.

13.2. The evolution of EU social policy: An overview

When the European Economic Community (EEC) was founded in 1957, social policy certainly did not belong to its core activities. The dominant philosophy of the Treaty of Rome was that welfare would be provided by the economic growth stemming from the economics of a liberalized market. Welfare was not foreseen to arise from the regulatory and (re-)distributive capacity of a public policy at the European level and therefore social policy was at best of second order importance. However, the Treaty contained a small number of concessions for the more 'interventionist' delegations. These were mainly the provisions on equal pay for women and men and the establishment of a 'European Social Fund'.

For a long time, therefore, the EEC (and later the EC) possessed no explicit legislative competences in the field of market-correcting social regulation. It was only due to the existence of so-called 'subsidiary competence provisions' that intervention in the social policy field was, implicitly, made possible, but only if it was considered functional for market integration (most importantly, Articles 100 and 235, EEC Treaty). From the 1970s onwards, these provisions provided a loophole for social policy harmonization at the European level. The unanimity requirement in the Council, however, constituted high thresholds for joint action.

During the early years of European integration, social policy consisted almost exclusively of efforts to secure the free movement of workers, the only explicit Community competence in the field of social policy laid down in the Treaty of Rome. In a number of EEC regulations, national social security systems were coordinated with a view to improving the status of internationally mobile workers and their families. During the late 1960s, however, the political climate gradually became more favourable to a wider range of European social policy measures. At their 1972 Paris summit, the Community heads of state and government declared that economic expansion should not be an end in itself but should lead to improvements in more general living and working conditions. They agreed a catalogue of social policy measures that were to be elaborated on by the Commission, the Social Action Programme (OJ 74/C 13/1). This was confirmation that governments now perceived social policy intervention as an integral part of European integration. Several of the legislative measures proposed in the 1974 Social Action Programme were adopted by the Council in the years that ensued, and further Social Action Programmes followed the first one.

One major focus of Community legislation in this period was the field of gender equality. On the basis of ECJ judgments and under the shadow of forthcoming judicial review (all triggered by two courageous women, the lawyer Eliane Vogel-Polsky and the stewardess Gabrielle Defrenne who had been discriminated against by the airline SABENA, see Falkner 1998: 61), the general treaty principle of equal pay was after many years of non-respect finally accompanied by Council directives on equal treatment with regard to working conditions, statutory and occupational social security systems, and on equal treatment of self-employed persons. These legislative measures were later again accompanied by extensive case law by the European Court of Justice, with further upgrades to the Community's gender equality policy.

Still, all legislative initiatives outside the area of the free movement of workers required the agreement of all member state governments to be adopted, which seriously constrained the quantity and regulatory significance of common legislative action. In 1987, the Single European Act provided a first escape route out of the unanimity requirement. Article 118a of the revised Treaty introduced an explicit competence to enact legislation in the field of occupational health and safety, and, for the first time in European social policy, it allowed directives in this area to be passed by qualified majority voting. This reform was only possible because issues of health and safety were seen to be closely connected to the single market, which secured agreement by the British Tory government, which was otherwise fiercely opposed to European harmonization in the field of social policy.

Governments did not expect this 'technical' matter to facilitate social policy integration in the significant way that it would in the decade to follow. The rather loose wording of Article 118a enabled the Commission to play what has

come to be known as the 'treaty base game' (Rhodes 1995). Strategically employing the new qualified majority provision, the Commission succeeded in getting not only a raft of 'real' health and safety measures enacted, but also a number of directives on working conditions in a wider sense. These would have otherwise foundered on the opposition of the British government.

The most far-reaching reform of the institutional framework governing EU social policy was negotiated at the Intergovernmental Conference (IGC) leading up to the Maastricht Treaty. Although all other governments had wanted to extend the social chapter of the Treaty, the new social provisions could not be included in the Treaty itself due to strong opposition from the UK government. At the end of extremely difficult negotiations, the United Kingdom was granted an opt-out from the social policy measures agreed by the rest of the member states. The new rules were incorporated into a protocol that was annexed to the Treaty and only applied to the eleven member states without the United Kingdom.

The protocol significantly extended Community competences to a wide range of social policy issues which had during the preceding years already been activated under the Commission's strategic treaty base game. Trying to calm the British and some other special concerns, however, some issues were explicitly excluded from the scope of minimum harmonization under the Maastricht social policy provisions: namely, pay, the right of association, the right to strike, and the right to impose lockouts. At the same time, qualified majority voting was now formally extended to issue areas such as the information and consultation of workers, the broad field of working conditions, and gender equality. Yet, unanimity remained the decision rule for the most contentious issues, including social security matters, dismissal protection, and co-determination.

The Maastricht reforms also meant a major breakthrough in terms of interest group involvement in the policy process. They provided for several layers of participation in the policy process by management and labour:

- The Commission has now a legal obligation to consult both sides of industry twice *before* submitting proposals in the social policy field – initially on the general principles and later on the details of a policy proposal.
- Management and labour may, on the occasion of such consultation, inform the Commission of their wish to initiate negotiations in order to reach a *collective agreement* on the matter. This would bring conventional decision-making to a stand-still for at least nine months.
- Such agreements can, at the joint request of their signatories, be incorporated in a 'Council decision' (usually a directive), which transforms the social partner text into binding EU legislation to be implemented by the member states.

- Alternatively, the signatory parties may also take care of the implementation of their agreements through their own member organizations.
- In any case, a member state may entrust management and labour, if they so jointly request, with the national implementation of European directives. This had already been practised before the Maastricht Treaty.

Since Maastricht, the EU-level social partners have thus become formal participants in social policy legislation. In fact, the EU's social policy procedures fit the classic formula for corporatist concertation, that is 'a mode of policy formation in which formally designated interest associations are incorporated within the process of authoritative decision-making and implementation' (Schmitter 1981: 295). Since this specific style of public-private cooperation is restricted to one policy area only, it seems preferable not to speak of 'Euro-corporatism' (Gorges 1996) but rather of sectoral corporatism or of a 'corporatist policy community' (Falkner 1998).

Most notably, the new procedure of 'bargained legislation' was proposed by the European-level social partners themselves. Following an initiative by the European Commission (Cassina 1992: 13), the three major peak associations UNICE, CEEP, and ETUC sat down with the Commission (Schulz 1996: 86) to formulate their own reform proposals on EC social policy-making to the IGC. At their meeting of 31 October 1991, the three organizations actually reached an agreement on how to strengthen the role of the social partners in the new treaty. The social partners' text became a basically 'non-negotiable component of the social policy dossier' (Forster 1999: 89) and was thus incorporated into the Maastricht Treaty without substantive changes.

This move came as quite a surprise. Up until then, UNICE had strictly refused to enter into real negotiations with the unions at the European level. For this reason, the 'tripartite conferences' of the 1970s, which brought together representatives of the Council, the Commission, and both sides of industry to discuss issues such as full employment, inflation, and fiscal policy, remained a talking shop without tangible results, which is why ETUC finally pulled out of the talks (Gorges 1996: 130). In the same vein, the 'Val-Duchesse social dialogue' between the Commission and the three peak associations of business and labour, initiated by the Delors Commission in 1985, did not result in any binding agreements. What changed the mind of the employers' organizations is that the IGC was very likely to heed the calls of France, the Benelux countries, and a number of other member states to expand qualified majority voting in social policy. Active participation in law-making together with the unions thus seemed to be the lesser evil compared to an increase of social legislation imposed by the Council.

The new institutional arrangements of the Maastricht Treaty facilitated the adoption of a number of directives that had long been blocked by the UK's veto. Some of these proposals were also transferred to the social partners'

'bargaining track', resulting in several agreements that were then transformed into binding European directives. In sum, the new rules paved the way for a more active role of the EU in social policy. The 1990s thus became the most active decade in terms of legislative output (Falkner et al. 2005: 47–8).

This institutional framework has remained largely unchanged since Maastricht. After a change of government in the United Kingdom in 1997, from the Conservatives to Tony Blair's Labour Party, the United Kingdom agreed to end its opt-out in social policy. As a result, the IGC leading up to the Amsterdam Treaty succeeded in incorporating the Maastricht social protocol into the regular Treaty. Apart from this, the only significant innovation was the new employment policy chapter, which, however, only provided for soft, intergovernmental policy coordination along the lines of what later came to be known as the Open Method of Coordination. Furthermore, a new Article on Community action against discrimination was inserted. On this legal basis, a couple of important new directives to combat discrimination on grounds of gender, race, ethnic origin, belief, disability, age, and sexual orientation have been adopted in recent years. The Nice Treaty of 2001 only brought about a slight modification of the decision-making procedures in social policy. In some fields that were hitherto subject to unanimity, the Council may now decide unanimously to use qualified majority voting instead. At the time of writing, however, no such decision has been reached yet.

In sum, social policy has developed from a neglected 'stepchild' of the European integration process (Bellers 1984: 246) into one of the more important fields of market-correcting EU activity. Community legislation meanwhile covers important aspects of gender equality and non-discrimination on grounds of race, ethnic origin, belief, disability, age, sexual orientation, occupational health and safety, and other working conditions. Yet, the whole area of social security has been left almost completely untouched by binding legislation. To the extent that these issues are addressed at all, they are subject to the soft, non-compulsory mechanisms offered by the OMC. Besides employment policy, these OMC processes meanwhile also cover pensions, social inclusion, and health care (for an overview, see de la Porte and Pochet 2002, 2003; Zeitlin and Pochet 2005).

13.3. The main interest groups: Roles and resources

After this overview of the policy area, the following section discusses the roles and resources of the main interest groups involved in EU social policy. The web of interest groups that actively take part in the making of EU social policy essentially consists of two layers. A relatively large and open network of groups form the first layer. These associations are regularly consulted by the Commission on new policy initiatives, as laid down in the Treaty. In a recent communication,

the Commission listed seventy individual groups that are regularly consulted on new initiatives (CEC 2004: Annex 5). The bulk of these groups are smaller sectoral employers' and trade union organizations. This list is based on a set of criteria for representativeness that were drawn up by the Commission in a communication in 1993 (CEC 1993). According to these criteria, which were confirmed by a communication in 1998, the groups to be consulted 'should (a) be cross-industry or relate to specific sectors or categories and be organized at European level; (b) consist of organizations which are themselves an integral and recognized part of Member States' social partner structures and with the capacity to negotiate agreements, and which are representative of all member states, as far as possible; (c) have adequate structures to ensure their effective participation in the consultation process' (CEC 1998: 6).

Given the relatively vague wording of the criteria and the large number of organizations that currently pass the official representativeness test, we can conclude that the early stage of the policy process is highly open to all kinds of groups. This is also corroborated by the fact that the number of consulted organizations has more than doubled since the first communication in 1993 and that there are no reports about 'outsider' groups who were not included in the Commission's consultation list.

Exclusiveness begins as soon as we move on to the 'bargaining track' at the level of cross-industry negotiations. The second layer of interest groups consists of a small group of organizations that have successfully monopolized the prerogative to negotiate cross-sectoral agreements.¹ This group essentially comprises the 'big three', BusinessEurope, CEEP, and the ETUC. Although there is no formal 'licensing' procedure that would guarantee the three groups an exclusive status as recognized social partners, the Commission and the Council have in practice confirmed the privileged status of the three traditional Val-Duchesse partners. The Commission repeatedly stopped the traditional legislative processes on their request and allowed them to enter into negotiations. Furthermore, both the Commission and the Council acted according to the wishes of the three peak associations each time the social partners asked them to transform their agreements into binding directives.

On both sides of industry, smaller interest groups have in the past protested against the three major federations' *de facto* monopoly on negotiating as cross-sectoral social partners. The European Association of Small- and Medium-sized Enterprises (UEAPME) even filed an unsuccessful lawsuit against the Council.² The Commission was eager to find a way to satisfy these groups so as not to endanger the legitimacy of the new corporatist decision mode, for example by encouraging the small associations to link up with the major groups. Since then, several Euro-groups on the employer side were included in the social partner negotiations on an observer basis. In 1998, UEAPME concluded a cooperation agreement with UNICE. According to the agreement, UEAPME may take part in negotiations as part of the employer group and has

the right to be consulted before UNICE represents employer positions in the social dialogue, but it does not have a veto right. A similar cooperation agreement was reached in 1999 between the ETUC (through its affiliate Eurocadres) and CEC, a smaller union representing executives and managerial staff. Thus, while the representativeness of the negotiation procedure has been improved, the 'big three' have successfully kept their negotiation prerogatives intact.

In terms of membership and organizational capacities, BusinessEurope, CEEP, and the ETUC belong to the largest and most powerful European interest associations. Although their interests in taking part in the European social dialogue are quite different, they have all adapted their internal rules and procedures so as to be able to meet the organizational challenges of participating in European-level negotiations.

At the time of writing, two ETUC's membership comprises eighty-two national trade union federations from thirty-six countries as well as twelve European industry federations. It claims to represent a total of 60 million employees. Among the big three peak associations, the ETUC is supported by the largest secretariat. About forty members of staff are currently working in its Brussels office.³ From its foundation in 1973, the ETUC's infrastructure has been heavily supported by financial contributions from the European Commission (Dølvik and Visser 2001: 14–6). Meanwhile, it has a relatively strong standing vis-à-vis its national member organizations. Above all, decisions within the ETUC are taken by a two-thirds majority. The relative strength of the organization largely followed a 'logic of influence' (Streeck and Schmitter 1981/1999), through reforms that were meant to enable the ETUC to become an effective player in the European social dialogue. In fact, the ETUC was the first to adapt its structure with a view to enhancing its negotiating capacity at the European level. In 1991, voting rules were reformed with a view to unblocking the internal decision-making process and to allocating the voting rights according to size of membership; the European industry committees were allowed to vote, except in financial and statutory matters, and the financial resources and staff were increased (Ebbinghaus and Visser 1994: 239; Gorges 1996: 101ff.; Greenwood 1997: 167). Further amendments to the ETUC constitution were adopted at the May 1995 congress. These reforms were directly aimed at adapting the internal procedures to the new collective bargaining track provided for in the Maastricht Treaty. The executive committee was assigned the duty to 'determine the composition and mandate of the delegation for negotiations with European employers' organizations' and to 'ensure the convergence at European level of the demands and contractual policies of affiliated organizations' (Article 11).

The rule of qualified majority voting means that decisions to enter into negotiations or to approve agreements with the employers may be taken even against the will of influential members. This gives the ETUC more room for manoeuvre in the negotiations than its two counterparts on the employer

side. In the case of the part-time work agreement, for example, the draft agreement was approved by the ETUC against the votes of several member organizations: both German member organizations at the time (Deutscher Gewerkschaftsbund (DGB) and Deutsche Angestelltengewerkschaft (DAG)), the French Force Ouvrière, the Christian-Democratic Luxembourg Union (LCGB), and the European industry federations of railway and construction workers all voted against the agreement (according to an interview with an ETUC official, July 1997). Various other industry committees abstained. This may be seen as an indicator of the de-facto supra-nationalization of the ETUC, an organization that was for a long time not able to 'afford to antagonize its larger member organizations' (Ebbinghaus and Visser 1997: 205).

BusinessEurope currently represents forty member federations from thirty-four countries, most of which are the main cross-industry employers' organizations in their respective countries. The Brussels secretariat of BusinessEurope employs approximately forty-five members of staff.⁴ Like the ETUC, BusinessEurope has adapted its internal procedures so as to meet the requirements of the new social dialogue. A change in the organization's statute in June 1992 formally assigned the federation the task of representing its members in the dialogue between the social partners (Article 2.1 of the statute). The Council of Presidents was put in charge of defining the positions to be taken in the social dialogue. Unlike CEEP and the ETUC, BusinessEurope still decides by unanimous vote whether to enter into negotiations and to approve draft agreements. There were internal debates about the unanimity rule after the member organizations had failed to agree on entering into negotiations about the issue of national information and consultation (EIRR 298, November 1998: 2), but these debates have so far been without effect.

CEEP's members currently include some 500 enterprises and employers' organizations from the public or semi-public sector in twenty-one countries. It claims to represent a quarter of the EU workforce. Its membership is thus much smaller than that of BusinessEurope or the ETUC. This is also true for the secretariat in Brussels, currently employing only thirteen members of staff.⁵ Despite the lower organizational capacities, the smaller partner on the employer side also adapted its internal rules so as to be able to effectively participate in the new bargaining procedure. In 1994, CEEP was given the task of exercising 'all the prerogatives and obligations relating to its status as a social partner which arise in particular from the social protocol attached to the Treaty on European Union' (Article 3 of the CEEP Statute). Two years later, the CEEP Rules of Procedure were amended so as to lay out the internal procedures to be followed in the case of EU-level social partner negotiations. In particular, the General Assembly was entrusted with the approval of draft agreements (Article 46 of the CEEP Statute). Unlike BusinessEurope, CEEP may decide on such agreements by a simple majority of its members (Article 49 of the CEEP Statute). Like the ETUC, the majority voting rule makes CEEP much

more supranational, and guarantees its secretariat much more room for manoeuvre in negotiations than BusinessEurope.

In sum, there is a double-layered structure of interest representation in EU social policy. A relatively large and open network of Euro-level associations is regularly involved in a two-phase consultation procedure in which they may express their views on new Commission initiatives. In contrast to other policy areas, the treaties formally require the Commission to carry out these consultations. A small group of three peak associations of management and labour forms the corporatist core of this network. BusinessEurope, CEEP, and the ETUC have successfully monopolized the prerogative to negotiate cross-sectoral agreements that may then be turned into binding directives, as laid down in the Treaty. These three organizations, together with two smaller interest groups that have succeeded in being included in the exclusive bargaining club, thus play the role of powerful co-legislators that may decide on the substance of new EU-level social policy legislation on their own.

13.4. Venues of influence in the policy process

EU social policy offers multiple venues for close involvement of interest groups in policy-making. We will discuss these venues according to the different phases of the policy process: agenda-setting, policy formation, and policy implementation.

At the *agenda-setting stage*, consultation of a wide variety of EU-level interest associations guarantees non-state actors early information about future policy proposals and offers them the opportunity to express their views on the shape of the proposed actions. Unlike most other consultation procedures, in other EU policy areas or at the domestic level, consultation in EU social policy is formally anchored in the Treaty, and it is conducted at a rather early stage of the policy process. While consultations usually seek the views of non-state actors on a rather elaborate piece of draft legislation, which implies that the cornerstones of the envisaged policy have already been settled at an earlier stage, consultation in EU social policy actually belongs to agenda-setting. According to the Treaty, the Commission is required to carry out a two-stage consultation. The first stage is meant to cover the general principles of future action; the second stage is on the details of the envisaged policy proposal. In other words, especially the first-stage consultation documents of the Commission are much less detailed than most of the proposals sent out for consultation in most legislative processes at the domestic level (e.g. in Germany or the United Kingdom), which leaves interest groups more room to influence the shape of upcoming proposals.

At the stage of *policy formation*, two alternative venues of influence need to be distinguished. The *regular legislative procedure* offers interest groups various

formal and informal channels to influence decision-making. Following the Commission's consultation, interest associations may use their ties with the Commission, the European Parliament, and the governments in the Council in order to push through their interests. In this respect, lobbying in EU social policy is not very different from the patterns observed in many other policy areas. The following three characteristics are significant. First, although the regular legislative procedure does not involve formal differences in the opportunity structures of the wide array of stakeholders in EU social policy, the size and resources of the 'big three' peak associations, BusinessEurope, CEEP, and the ETUC, allow them to be more active in lobbying and gives their positions more weight than the views expressed by some smaller sectoral organizations.

Second, following the extension of the co-decision procedure to all social policy areas covered by qualified majority voting, influencing the European Parliament, which in this procedure acts on equal footing with the Council, has gained importance (for the increasing importance of the EP as a target of lobbying, see Kohler-Koch 1997; Mazey and Richardson 2006: 260–1). Traditionally, MEPs have tended to be more favourable to supranational regulation in social policy than the Council. Therefore, the growing influence of the EP in the legislative procedure seems to benefit the interests of labour more than those of the employers' side.

Third, despite the growing importance of the European Parliament, lobbying national governments is still one of the major venues of influence at the stage of decision-making, especially in those areas still subject to unanimity, where the Parliament has only a consultative function. Lobbying governments is still most effectively done via the national route, by domestic interest associations (Hayes-Renshaw and Wallace 1997: 229). Hence, it is primarily a matter for the national unions and employers' associations in each member state, rather than for the respective European peak associations, to influence the governments' positions vis-à-vis a draft social policy directive discussed in the Council. The success or failure of this type of lobbying thus depends to a large extent on the influence the respective domestic interests have on their governments.

Besides the regular legislative route, the three major cross-sectoral social partners, BusinessEurope, CEEP, and the ETUC, have the privilege of using the *bargaining track*.⁶ During the Commission's mandatory consultation, they may decide to enter into negotiations on the contents of an agreement. This puts the normal decision-making process on hold for at least nine months.⁷ Should they reach an agreement, they may ask the Commission and the Council to transform it, without changes, into binding EU legislation. Alternatively, they may decide to take care of the implementation of their agreement themselves, through domestic agreements to be negotiated by their respective national member organizations. As Section 13.5 will outline in

more detail, the two arenas of policy formation are closely linked, which makes for a very peculiar logic of interest representation in EU social policy.

At the *stage of policy implementation*, finally, the extent of interest group involvement is again strongly determined by domestic traditions. Yet, the EU provides a number of incentives and constraints for domestic social partner involvement. On the one hand, the Treaty explicitly encourages governments to entrust their domestic social partners with the task of implementing EU social policy directives (see above). Moreover, a number of recent directives, especially those that originated from EU-level social partner agreements, included further incentives for giving management and labour a greater say in implementation. On the other hand, the European Court of Justice has defined very restrictive conditions for the implementation of EU directives through collective agreements.⁸ In particular, implementation via corporatist deals has to secure full coverage of the workforce, which makes certain forms of autonomous social partnership in the domestic implementation of European directives unlawful.

In a recent project on the implementation of six EU social policy directives in fifteen member states, which we conducted in collaboration with two colleagues, Miriam Hartlapp and Simone Leiber, we also studied the type of social partner involvement in domestic implementation processes and possible changes induced by the EU. The results of this project have thus provided us with information on the way interest groups are involved in the final (domestic) stage of the EU policy process in social policy. They demonstrate that the effects of the various European impulses on domestic public–private relations were not revolutionary, but nevertheless brought about some changes that add up to a slightly convergent development towards a moderate social partnership model (Falkner et al. 2005: chapter 12; see also Leiber 2005).

In ten out of the fifteen ‘old’ member states studied, the general pattern of interest group involvement in domestic policy-making in the area of labour law was *consultation*, where the social partners have an opportunity to express their positions but there is no negotiation and no common decision-making process between the state and the two sides of industry. This was also the main pattern observed in the implementation of the six selected EU directives. However, some countries with very weak traditions of involving non-state actors in policy formation, such as Greece or the United Kingdom, have shown slight tendencies towards strengthening social partner participation, and there were individual experiments with more far-reaching types of social partnership.

In three countries (Austria, Finland, and Sweden), the general pattern of interest group involvement in labour-law decision-making was found to be *concertation*, where public authorities and both sides of industry enter into a joint process of tripartite decision-making. This type of social partner involvement was also the dominant pattern in the implementation of the six social

policy directives. In one member state, Belgium, both the general pattern of state–society relations in labour law and the pattern observed in the implementation processes was *complementary legislation*, which means that the social partners negotiate and the state then gives *erga omnes* effect to their agreements.

Denmark, finally, has a strong tradition of *social partner autonomy* in the field of employment conditions, where important issues are exclusively regulated by collective agreements, without any further state intervention. This specific model proved incompatible with the European legal requirement that transposition measures need to ensure full coverage of the workforce. In several cases within the ‘Europeanized’ parts of labour regulation, Denmark was thus compelled to deviate from its traditional model of social partner autonomy and rely instead on *complementary legislation*.

In sum, EU social policy is marked by intensive involvement of private interests at all stages of the policy process. At the agenda-setting stage, EU-level interest associations are consulted intensively. In policy formation, the ‘big three’ associations may even act as sole policy shapers through the bargaining track, or they may use their informal lobbying resources to influence the shape of policies on the regular legislative track. This also involves lobbying national governments through established national routines. At the implementation stage, social partner involvement is again largely determined by domestic traditions, with some modifications due to EU incentives and constraints. For the fifteen old member states, we observed that interest groups are involved at least through consultation procedures. At the same time, a few countries stand out with more corporatist patterns of concertation or complementary legislation.

This also underlines that interest representation in EU social policy is a multi-level and multi-arena affair, which offers many opportunities for ‘venue shopping’. This is especially true for the decision-making phase, where the three major associations of management and labour have the choice between bargaining in the social partner arena or lobbying in the legislative arena. It is the aim of the following section to explain the logic underlying the choice between these two interrelated arenas.

13.5. Bargaining or lobbying? The logic of venue shopping in the policy formation process

Since the Maastricht Treaty, the three major interest associations of management and labour have the exceptional option to decide whether they should negotiate on a particular proposal laid before them by the Commission or whether they should use their lobbying resources to influence legislative decision-making between the Commission, the Council, and the European

Parliament. In order to elucidate the linkages between these two arenas, the following section gives a short overview of the major issues dealt with under either procedure and identifies three factors that influence the choice for one or the other arena.

The first application of the new procedure saw no formal negotiations but only 'talks on talks' (Gold and Hall 1994: 181) on a collective agreement between the two sides of industry. After the British employers' association CBI had pulled out of the talks, the first attempt to use the bargaining track broke down. Instead, the Council enacted a traditional Council directive on European Works Councils soon thereafter.⁹ The second decision-making process under the new social policy regime did lead to agreement among the three major federations. On 14 December 1995, UNICE, CEEP, and the ETUC adopted a framework agreement on parental leave,¹⁰ providing an individual the right to a minimum of three months time off while employment rights were maintained. Through a Council directive, the agreement was made binding on the member states. Further collective negotiations concerned atypical work and led to a second European-level agreement, on part-time work, in 1997, and on fixed-term employment in 1999. Both agreements were also transformed into binding directives.

The three most recent agreements, on tele-work (2002), work-related stress (2004), and on harassment and violence at work (2007) are of a different nature: the social partners did not request the incorporation of these accords into binding legislation, but decided to implement them through their own member organizations (for the politics behind this, see below).

There were two more issues where bargaining was seriously considered, but did not actually lead up to the opening of negotiations, or was terminated unsuccessfully. In the case of *information and consultation of employees at the national level*, a minority of UNICE members believed that there would be a blocking minority within the Council and that it was thus not necessary to negotiate (EIRR 291, April 1998: 3; EIRR 295, August 1998: 2; EIRR 298, November 1998: 2; see also Branch and Greenwood 2001: 61–2). The strategy of the employers, however, did not succeed in the end. After the social partners had refused to negotiate, the Commission swiftly tabled a draft directive, which was finally adopted by the Council in 2002.

With regard to the issue of *temporary agency work*,¹¹ negotiations were actually taken up, but soon foundered on the diverging policy interests of UNICE and the ETUC. The main bone of contention was the question of the type of comparator to choose in order to establish possible discriminations of agency workers. The ETUC insisted that agency workers should be entitled to the same wages and working conditions as workers in the user enterprise. UNICE, in contrast, wanted to ensure that the comparison could also be made with similar workers employed by the same agency (Broughton 2001). This would have ruled out only discrimination of similar types of workers employed by the

same agency, but not less favourable treatment of agency workers compared to workers in the user company. In essence, it would have considerably reduced the costs associated with introducing the principle of equal treatment in countries like the United Kingdom, Ireland, or Germany, where at the time of the EU-level debates there existed no statutory obligation for agencies to grant their employees the same working conditions as comparable workers in user enterprises, which meant that agency workers often received considerably lower wages and had to accept less favourable working conditions as their colleagues in the user enterprise (Storrie 2002: 43–57). This time, the strategy of UNICE seemed to be crowned by success – at least initially. Although the Commission soon tabled a draft directive, the Council failed to reach an agreement on the issue for many years. In 2008, however, the British government finally dropped its opposition and allowed the directive to be passed.

The other proposals tabled by the Commission since Maastricht (e.g. the reversal of the burden of proof in sex discrimination cases, sexual harassment at work, and a number of issues in the field of occupational health and safety) were generally perceived not to represent ‘appropriate’ issues for collective negotiations by the European-level peak associations since these are usually governed by state legislation even at the national level.

In sum, the choice between the two different venues of influence is shaped by three crucial factors: (a) the perceived appropriateness of the topic for social partner negotiations; (b) the likeliness of Council legislation in case of failure; and (c) the strength of industrial relations interests on the part of the Euro-associations.

a. The issues where the European-level peak associations actually entered into negotiations or at least seriously debated the conclusion of a European collective agreement only cover areas that are frequently subject to collective bargaining at the domestic level – at least in countries where collective bargaining is an important instrument of labour market regulation. Some of the themes addressed in EU social policy are thus perceived as simply not belonging to the sphere to be regulated by both sides of industry. For example, the Commission could not find any national collective agreement on the issue of burden of proof in sex discrimination complaints. That this issue falls outside of the traditional field of labour law was indeed UNICE’s main argument when it rejected collective negotiations at the EU level.

b. The most important factor determining whether the European peak associations choose the bargaining track is the likeliness of legislation in the absence of negotiations. There is no doubt that, so far, negotiated legislation at the EU social policy level took place ‘in the shadow of the law’ (Bercusson 1992: 185). There are many indicators that a high probability of Council action on a matter represents a spur for industry to actively look for a compromise with labour. If the governments (and the Commission) put pressure

on management by expressing their readiness to otherwise adopt social regulation themselves, the employers are visibly and admittedly more ready for compromise. Just like at the national level, corporatist negotiations thus need some backing from 'the state'.

This is also relevant with the specific bargaining power of the various Euro-groups in particular collective negotiations in mind. If there is a high probability that the Council will not be able to adopt a directive autonomously, or if the level of compromise between the governments will presumably be very low, the ETUC's ability to decisively influence the content of collective agreements is impaired. Contrary to that, BusinessEurope has shown itself to be more flexible in negotiations when a compromise in the Council is in sight and the alternative to negotiated agreement therefore seems rather less attractive than striking a deal with labour.

We should not forget, however, that the decision to enter into negotiations or to strike a deal takes place under a considerable amount of uncertainty. The employers cannot be absolutely sure whether or not a majority in the Council would be able to agree on a piece of legislation that would be worse than what could be achieved through collective negotiations. There are at least three cases where the employers' calculus did not work out: UNICE's decision not to enter into negotiations in the cases of European Works Councils and information and consultation of workers at the national level, and its intransigence in the failed talks on temporary agency work, were 'punished' by the adoption of directives afterwards.

In general, the pressure of imminent legislation is only strong enough if decisions in the Council may be taken by qualified majority voting. Even then, however, reaching a sufficient majority for social policy proposals that are substantively meaningful is a very demanding task. Since Eastern enlargement, the 'shadow of the law' has become much shorter. Due to the economic and regulatory conditions prevalent in most of the accession countries from Central and Eastern Europe, many of the new partners have serious reservations about progress in social policy. As a consequence, the camp of sceptics, which hitherto included the United Kingdom and Ireland plus some other countries, depending on the issue at hand, has grown considerably as a result of the recent round of enlargement. Therefore, the employers have gained bargaining power and are increasingly able to push through their preferred policy options, which favour non-regulation, voluntary accords, and agreements with a maximum of flexibility at the implementation stage. In fact, all that the social dialogue has produced in recent years is a number of non-binding agreements, and two deals that were not transformed into binding Council directives, but are being implemented by the national member organizations themselves. Given the heterogeneity of interests among both sides of industry in many countries and the lack of hierarchical oversight of the

European peak associations, it is not hard to imagine that these agreements will have a rather limited impact at the domestic level.

c. Tactical industrial relations considerations also matter when the Euro-level peak associations decide whether they want to engage in collective negotiations or not, and even more so when they decide how far to compromise. It seems that in several cases, sacrifices in substantive standards were accepted by labour in exchange for greater involvement of the 'social partners' in all layers of the European multi-level system. This refers above all to the continued existence of the 'negotiated legislation track' towards EU social policy. In the parental leave case, both sides of industry were keen on striking a deal in order to demonstrate that the new procedure introduced in Maastricht was actually workable. The deal came just in time to erase any doubts among member state governments as to whether the new procedure should be incorporated unchanged in the Amsterdam Treaty. The two ensuing cases of successful negotiations were also heavily driven by the will of the EU-level peak associations (and especially by the ETUC) to demonstrate that the procedure is not just an empty shell, but is actively used to reach collective agreements (for details, see Falkner 2000).

The recent experiences in the EU-level social dialogue indicate that the importance of these industrial relations considerations is fading away. The bargained legislation procedure was incorporated in the treaties in Amsterdam, and there have been no calls for eliminating it again. After all, abandoning the procedure would require the unanimous agreement of all twenty-five member states, which makes such a move highly unlikely. Moreover, the readiness of the ETUC to accept more or less any policy solutions in order to reach agreements with the employers has decreased considerably in recent years. Both the part-time and the fixed-term work agreements were already criticized by some ETUC members for their lack of substance. The temporary agency works case then showed that the camp of critics has become increasingly important within the ETUC. It seems that the German unions, who had been among the most vociferous critics of earlier agreements, this time were determined to stand firm on their policy goals. But they were certainly not alone in this. In the end, the ETUC refused to accept the employers' compromise proposal, which would have considerably diluted the substance of a possible agreement.

In sum, the venue shopping game played in EU social policy has increasingly become determined by the question of whether the issues at stake are being considered suitable for collective bargaining and, most importantly, by the likeliness and probable shape of an agreement in the legislative arena.

13.6. Conclusions and outlook

Since the marginal role social policy was assigned by the Treaty of Rome, the field has developed into one of the more important areas of market-correcting EU activity. In terms of interest representation, EU social policy is marked by intensive involvement of private interests at all stages of the policy process. At the agenda-setting stage, a relatively large and open network of groups is involved in a process of mandatory consultation on new legislative activities. At the policy formation stage, the 'big three' organizations, BusinessEurope CEEP, and the ETUC, play a crucial role. Since the Maastricht Treaty, they have had the choice between acting as sole policy shapers in the bargained legislation arena or as privileged lobbyists in the regular legislative arena. At the implementation stage, member state governments also intensively involve both sides of industry in the transposition of EU social policy directives, at least in the fifteen old member states of the EU.

Looking more closely at the process of policy formation, our analysis reveals that the venue shopping game between lobbying in the legislative arena and bargaining in the social partner arena is determined by the question of whether the issue at hand is perceived as being appropriate for social partner negotiations in general, by the likelihood of Council legislation in the case of failure, and by the strength of industrial relations interests, especially on the part of the unions. Thus far, the dominant characteristic of the bargaining track has been marked by a trade-off between the employers' policy interests in mitigating EU policies and the unions' industrial relations interests in creating an EU-level system of collective bargaining. Yet, Eastern enlargement has considerably diminished the likelihood of agreement on legislative proposals in the Council. At the same time, the industrial relations interests on the part of the unions have decreased, with more and more ETUC members insisting on meaningful policy outcomes for their members rather than symbolic industrial relations benefits for the supranational peak association. We should thus not expect the 'bargained legislation' procedure to yield many results over the years to come. Instead, interest groups are more likely to use the lobbying resources they have in order to influence the Commission, the member state governments, and the European Parliament in the framework of the regular legislative procedure. Unless employers and unions find issues of mutual interest (probably related to the promotion of employment), the future of interest intermediation in EU social policy is likely to be characterized by lobbying rather than by bargaining.

Notes

1. The bargaining track is also open to sectoral interest associations. In recent years, the Commission has in fact stepped up its support for the development of the sectoral

- social dialogue. At the time of writing, sectoral organizations have produced three agreements that were subsequently transformed into binding law (CEC 2004). Due to the limited significance of the material scope and the groups of workers affected by the three agreements (they pertain to the organization of working time of seafarers, mobile workers in civil aviation, and railway workers on cross-border trains), we will not go into more detail on the sectoral level here. For further information on the sectoral social dialogue see e.g. Weber (2001), Keller (2005), and Pochet (2005).
2. The argument that the signatory parties to the parental leave agreement were not representative was rejected by the European Court of Justice (case T-135/96 decided on 17 June 1998).
 3. Information taken from the ETUC's website at <http://www.etuc.org/r/13> (accessed 22 January 2009) and from the ETUC's latest Activity Report (2003–2006) available at <http://www.etuc.org/a/3687>.
 4. Information taken from BusinessEurope's website at <http://www.businesseurope.eu/content/default.asp?pageid=414> (accessed 22 January 2009).
 5. Information taken from the CEEP Activity Report 2007, available at http://www.vkoe.at/files/dl/news_ceep1/ceep_activityreport_2007.pdf.
 6. On the availability of the bargaining track at sectoral level, see note 1.
 7. The Commission and the social partners may jointly decide to extend this period.
 8. See, for example, Judgment of the Court of 30 January 1985, *Commission of the European Communities v. Kingdom of Denmark*, Case C-143/83, European Court Reports 1985, p. 427. For an overview of relevant case law regarding the implementation of EU directives via collective agreements, see Adinolfi (1988).
 9. For details, see Falkner (1998: 97–113).
 10. For details, see Falkner (1998: 114–28).
 11. We thank Eric Miklin for his valuable assistance in reconstructing this case.

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Chapter 14

Trade Policy Lobbying in the European Union: Who Captures Whom?

Cornelia Woll

14.1. Introduction

Trade policy is a classic field for the study of private influence on policy-making. Firms and industries can gain clear advantages by protecting their markets from foreign competition or by gaining access to other countries. A large portion of the literature on international political economy therefore explains policy choices with reference to the demands of constituent interests (see Frieden and Martin 2002). For anybody interested in business lobbying, trade policy would seem to be the most appropriate place to start.

And yet, comparing trade policy lobbying in the United States and the European Union (EU) leaves many observers surprised. Aggressive business lobbying on trade issues is much less common in Brussels than it is in Washington, DC (e.g. Coen 1999; cf. Woll 2006). Shaffer (2003: 6) underlines that US firms and trade associations are very proactive in business–government relations on trade policy. This ‘bottom-up’ approach contrasts with the ‘top-down’ EU approach where public authority, in particular the European Commission, plays the predominant entrepreneurial role. ‘While the U.S. Trade Representative responded to onslaughts of private sector lobbying reinforced by congressional phone calls and committee grillings, the Commission had to contact firms to contact it’ (Shaffer 2003: 70).

Indeed, the European Commission has made a concerted effort to integrate firms and other private actors into the trade policy-making process in order to gain bargaining leverage not simply vis-à-vis third countries, but also over its own member states (Van den Hoven 2002; Elsig 2007). By helping to elaborate policy solutions, interest group participation increases the legitimacy of the Commission on external trade issues.

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This reverse lobbying is not without consequences. While firms do increasingly seize the opportunities available to them at the supranational level, EU trade policy lobbying is marked by a particular logic. Firms face a trade-off between pressing for immediate advantages and responding to the interests of the European Commission, which promises them access to the policy-making process (Broscheid and Coen 2003). Since the Commission is not immediately accountable to constituency interests, it can select interest groups and firms that it prefers to work with and ignore others (Grande 1996). In selecting private partners, the Commission follows two objectives. First, it requires technical expertise to develop its policy proposals (Bouwen 2002). Second, and on trade issues in particular, it is interested in finding pan-European solutions to prevent disputes between the member states that would risk stalling trade negotiations (Shaffer 2003: 78–9). When protectionist measures depend on national boundaries, industry privileges are likely to conflict with the Commission's goals. Firms therefore have to decide between lobbying for their immediate advantage at the risk of being ignored, and framing their demands in terms of a pan-European interest even if they are not certain of obtaining an advantage.

This logic creates two distinct channels for trade policy lobbying in the EU. A firm or industry interested in classic protectionism is most successful when it uses a national lobbying strategy directed at the member states and ultimately the Council of Ministers. Supranational lobbying, in turn, requires framing demands to include pan-European dimensions. Lobbyists thus have to find ways of proposing pan-European protectionism, most commonly in the form of pan-European trade regulation (Young 2004). Alternatively, they can lobby for trade liberalization in order to establish or maintain contacts with the European Commission and then hope to integrate more precise demands in the details of trade regulation or the implementation of agreements.

By studying the Europeanization of trade policy and the instruments firms employ to affect EU trade policy, the first part of this chapter underlines the complexity individual firms have to manage in order to influence the Community stance on international trade negotiations. As an illustration of the EU trade policy lobbying logic, the second part then turns to concrete policy examples and compares the protectionist lobbying on agriculture and textiles and clothing with the lobbying on service trade liberalization in financial services and telecommunications. The conclusion discusses the extent to which the findings on business lobbying have implications for other actors seeking to affect trade policy, most notably NGOs or public interest groups.

14.2. Trade policy lobbying in the multi-level system

Trade policy is one of the most integrated policy areas in the EU, and yet the struggle over the competence distribution between the supranational

institutions and the member states is crucial for understanding lobbying in this domain. Before turning to the key instruments for corporate lobbying on EU trade, it is therefore necessary to understand the Europeanization of trade policy and the history of competence delegation from the member states to the EU institutions.

14.2.1. *The integration of trade policy-making*

The common commercial policy is as old as the European Economic Community itself. With the Treaty of Rome in 1957, member states agreed that a customs union requires a common external tariff, common trade agreements with third countries, and uniform application across member states (Elsig 2002; Meunier 2005). They granted the European institutions the right to speak on their behalf on these issues in external trade negotiations.¹ Initially, this authority applied to tariff rates, anti-dumping, and subsidies, which were indeed the main stakes in early multilateral trade negotiations under the General Agreement on Tariffs and Trade (GATT). During the Tokyo Round of GATT (1973–9) and especially during the Uruguay Round (1986–94), non-tariff barriers to trade started to gain importance, including health, environmental, and social aspects of trade policy, and the domestic regulatory issues applying to the trade in services. European trade authority did not apply to many of these issues, which pushed the Community to redefine trade competences and the degree of delegation from the member states to the EU. In particular, it stirred up a debate over which issues should fall under ‘exclusive’ or ‘mixed’ competence (Meunier and Nicolaïdis 1999; Meunier 2000a).

Mixed competence means that trade authority is delegated on an ad hoc basis to the Community. The setting of objectives and the ratification of the negotiation results are subject to a unanimous vote by the Council, whereas both require only a qualified majority under exclusive competence. Over time, many areas of mixed competence have been dealt with pragmatically at first, by letting the Commission negotiate without fully resolving the competence dispute. For the results to be adopted, however, the legal competence question has become pressing. When the European Court of Justice decided effectively against an automatic expansion of trade competences in 1994, the Commission and the member states first agreed on a code of conduct and later adopted a special competence transfer procedure in 1996 (Meunier 2000b: 338–40; Elsig 2002: 90–101). It was not until 2003 that the Treaty of Nice finally amended Article 133 and provided for the exclusive competence over services and intellectual property rights, with the exception of cultural and audiovisual services. The struggle underlines how heavily disputed the transfer of authority is. Delegation is a delicate matter, even in this highly integrated policy domain, and control mechanisms employed by member states are tight (De Bièvre and Dür 2005).

The various control mechanisms become evident when one considers the different stages in the trade policy-making cycle. Woolcock (2000) distinguishes between (a) the setting of objectives, (b) the conduct of negotiations, and (c) the adoption of results. The negotiation objectives are decided by the General Affairs Council of foreign ministers on the basis of a Commission proposal. Long before the formal adoption of a mandate, the Commission submits the proposal to the member states or, more precisely, to the national trade officials representing their governments on the Article 133 Committee (see Johnson 1998). Discussions during this phase are crucial, since the Commission can use the Article 133 Committee 'as a sounding board to ensure that it is on the right track' (Shaffer 2003: 79). Trying to achieve a consensus on the mandate, the Article 133 Committee examines and amends the proposal before handing it to the Committee of Permanent Representatives (COREPER) and eventually the Council. Neither the European Parliament nor the general public participate formally in these early negotiations, which take place behind closed doors in order to shield the negotiation objectives from the trading partners. Woolcock (2000: 380) underlines how sharply the role of the European Parliament contrasts with the role of the US Congress. Indeed, constituents lobbying their representatives have more direct control over the negotiating mandate in the United States, where Congress can grant or withhold negotiation authority.

The conduct of negotiations is the responsibility of the Commission, but even in areas of exclusive competence, consultation with the member states is crucial. The Article 133 Committee closely follows negotiations and the EU negotiation team meets daily with member state representatives. On sensitive issues such as service trade liberalization, trading partners have jokingly remarked that the Commission negotiates more with the member states than with the rest of the world (Woll 2008: 90). The Commission, furthermore, tries to keep the External Economic Relations Committee of the European Parliament informed, even though the Parliament has no speaking rights during negotiations. Results are adopted by the General Affairs Council either by qualified majority voting under exclusive competence or by unanimous decision under mixed competence. In practice, however, consensus decisions are the norm (Woolcock 2000: 384).

The importance of consensus between the member states applies equally to dispute settlement procedures. The most common way to bring a dispute to the World Trade Organization (WTO) is for the Commission to initiate a case after consultation with the Article 133 Committee. Formal procedure requires conflictual issues to be transferred to COREPER and subsequently to the Council, should all other instances fail to resolve the dispute. In all the time the WTO has employed the dispute settlement procedure; this has only happened once.² According to Shaffer (2003: 80) 'neither committee members nor the Commission wish to transfer decision-making authority on trade matters from

themselves, who are trade experts, to the Council, which consists of foreign affairs ministers’.

To summarize, all stages of trade policy-making are characterized by an explicit desire to achieve and maintain consensus between the member states. The Commission cannot negotiate effectively if the EU member states are not behind the Community objectives. The interlocking of member state control and Commission authority are thus the two important dimensions of trade policy-making that interest groups and firms need to take into account if they wish to lobby effectively.

14.2.2. *Instruments and venues for corporate lobbying*

Consultation with private actors happens at various stages of EU trade policy-making. Business interests, furthermore, affect the use of instruments of commercial defence with which the Community tries to ensure equal competition for European and foreign firms. During trade negotiations and with respect to instruments of commercial defence, the solicitation by the Commission plays a key role in shaping the access of private actors to the policy-making process.

14.2.2.1. TRADE POLICY CONSULTATION WITH PRIVATE ACTORS

Even though discussions between the Commission and the Article 133 Committee on negotiation objectives are not public, the Commission consults extensively with firms, interest groups, and NGOs in order to define specific stakes in its proposal. The EU consultation procedure is less formal than the system of Trade Advisory Committees in the United States, but the Commission DG Trade and DG Industry maintain stable relations with groups such as the Union of Industries of the European Community (UNICE) or sectoral business associations. In 1998, the Commission tried to formalize its consultation and include a broader range of interest groups by instituting a Civil Society Dialogue on the upcoming round of negotiations (Van den Hoven 2002; De Bièvre and Dür 2007). Both business interests and public interest groups now participate in the Civil Society Dialogue. However, unlike the US advisory system, the Commission is under no legal obligation to consult with the Civil Society Dialogue or to take its reports into consideration.

Yet input from interest groups is valuable to the European Commission because it can help strengthen its negotiation stances vis-à-vis the member states and its trading partners. During the Uruguay Round, American negotiators cooperated closely with US industry representatives. By contrast, the European business community was largely absent from the negotiations, despite the importance of multilateral trading stakes. Only UNICE declared in favour of the Commission position, and Jacques Delors complained openly about the lack of business support (Grant 1994: 83–5; Van den Hoven 2002: 10).

Integrating business interests into the formulation of trade objectives therefore became an important goal for the European Commission in the 1990s. One of the most noted initiatives was the Transatlantic Business Dialogue (TABD), founded by the US Secretary of Commerce Ron Brown and European Trade Commissioner Sir Leon Brittan in 1995. The aim of the TABD was to bring together CEOs of American and European companies so that they could 'pre-negotiate' issues relevant to transatlantic trade (Coen and Grant 2000; Cowles 2001). Similarly, the Commission encouraged the creation of other consultative associations, such as the European Service Forum, launched in January 1999. Initiatives such as the Civil Society Dialogue, the TABD, or the European Service Forum illustrate the extent to which the Commission solicits participation from private actors and is willing to listen to their suggestions.

However, individual groups have few means of putting direct pressure on the Commission to ensure that their demands will be taken into account. Within each member state, they can try to lobby their governments to affect the consensus between member states and the Commission during all phases of the policy cycle. They can also contact the European Parliament, which holds hearings and produces reports on trade issues, but this will do little more than shape the atmosphere in which EU objectives are determined and monitored (Woolcock 2000: 380). During the adoption phase, national parliaments and the European Parliament may play a greater role in the future, given that co-decision has been extended by the Treaty of Amsterdam, but lobbying on trade policy still concentrates on the interchange between the Commission and member governments.

14.2.2.2. INSTRUMENTS OF COMMERCIAL DEFENCE

In addition to ongoing trade negotiations, business lobbying can also target separate administrative procedures to ensure protection against 'unfair' foreign competition. These instruments of commercial defence include anti-dumping and countervailing duties and the Trade Barriers Regulation of 1994. All of these administrative instruments require the identification of unfair competition practices, for which firms often have better information than governments. Over time, the EU has therefore tried to facilitate business input, so as to identify the greatest possible number of trade barriers or obstacles to competition.

Anti-dumping measures, by far the most commonly used instrument of commercial defence, seek to punish exporters who sell their goods in the EU below the cost of their domestic production. The procedure begins with a complaint filed by industry representatives, which the Commission then decides to pursue or not. In the event of an investigation, the Commission studies in consultation with the national authorities whether there is evidence

of dumping or injury to a European industry and seeks proof that the imposition of duties would be in the 'Community interest'. Hearings are held to define the Community interest and to make it difficult for narrow protectionist interests to pursue anti-dumping actions (Woolcock 2000: 389–90). In fact, petitioners need to represent 50 per cent of the injured industry, which makes it hard for individual firms to file a complaint (De Bièvre 2002: 86). After the imposition of a provisional duty by the Commission, the Council can decide by simple majority to reject the duty or to impose definite action.

Until the beginning of the World Trade Organization, which replaced GATT in 1995, the commercial policy of the EU was relatively defensive. European trade officials had to simultaneously respond to demands for protection through anti-dumping measures and to face the United States, which actively sought to dismantle European trade barriers. Faced with 'aggressive unilateralism' from the United States (Bhagwati and Patrick 1991), the EU had sought to create a New Commercial Policy Instrument in 1984, which tried to emulate US business–government cooperation in identifying trade barriers. Unlike the US model, the European procedure was marred with difficulties. In its ten year history, European firms filed only seven petitions (Shaffer 2003: 84–94). In December 1994, the instrument was replaced by the Trade Barriers Regulation, which supporters were hoping would have more teeth. Innovations included the right of individual firms to petition the Commission directly, as may member governments. Furthermore, the petitioner no longer needs to provide proof of injury in order to file the complaint. The Trade Barrier Regulation requires the EU to exhaust all available multilateral dispute settlement procedures before resorting to unilateral action, which means that the procedure serves mostly as a means of identifying potential WTO dispute settlement cases.

Indeed, soliciting industry help in identifying such cases was one of the main motivations behind the Trade Barrier Regulation. Traditional international trade disputes were initiated by the Commission in consultation with the Article 133 Committee. Lacking close cooperation with business interests and trade associations, the EU was much less able to exploit the WTO Dispute Settlement Body when it was first established in 1995. The United States, by contrast, brought several high-profile cases against the EU, and filed eight of the first fifteen complaints resulting in panels.³ Commission officials felt that they needed to show more initiative and started to work actively to gain industry support and industry's technical expertise on existing trade barriers.

In February 1996, the Commission launched a new Market Access Strategy, tactically announced by Sir Leon Brittan as 'D-Day for European Trade Policy' to an audience of major exporting companies (Shaffer 2003: 68). Within DG Trade, a Market Access Unit was established, the primary role of which was to

interact with business actors to gather information on existing trade barriers. A central pillar of the work was the maintenance of a Market Access Database (see De Bièvre 2002: 96–100).⁴ By centralizing information on trade barriers and involving firms in the collection of information, the EU was hoping to be able to counter the aggressive private–public partnerships of US trade policy. As the administration of instruments of commercial defence shows, the Commission explicitly urged business participation in instruments of commercial defence in order to gain leverage over its trading partners.

14.2.3. *Trade-offs in multi-level trade lobbying*

The study of trade negotiations and of the administration of instruments of commercial defence illustrates how important business participation is for the internal and external negotiations of the European Commission. The solicitation is based on the Commission's hopes of increasing its technical expertise, its legitimacy, its ability to maintain consensus among the member states, and its leverage in trade negotiations. However, since Commission officials do not depend on re-election by constituency interests, firms cannot exert direct pressure on European officials to reinforce their demands. Therefore, business access is not automatic; it depends on the degree to which private actors can offer the elements the Commission is interested in. Business lobbying on trade is thus marked by a particular exchange logic, where firms provide expertise and support in order to gain access to the policy process (Bouwen 2002; Mahoney 2004).

The selective access at the European level creates a two-channel logic for business lobbyists, which specifies different routes according to the content that firms seek to defend. Classical protectionism is easier to achieve in interaction with national governments, while cooperation on the elaboration of pan-European solutions promises an excellent working relationship with the European Commission. Pan-European trade policy lobbying can be in support of liberalization, but it can also consist of regulatory protectionism that does not discriminate on the grounds of nationality but appeals instead to a greater Community interest.

In fact, the tendency of the EU to defend a rather liberal external trade policy is relatively recent. Hanson (1998) argues that member states maintained national levels of protection in sensitive sectors throughout the 1970s and 1980s, despite the fact that a common commercial policy was enshrined in the Treaty of Rome. However, through the completion of the internal market, member states lost their ability to use national policy tools, in particular due to the legislative instruments available to the Commission in enforcing market integration (Schmidt 2000). Moreover, EU voting rules make it difficult to replace national policies with protectionism at the EU level (Hanson 1998: 56). Consensual decision-making on trade policy means that measures favour-

ing the sensitive industries in only a few countries will be vetoed by other countries.

Yet, even if the Commission is more liberal than many of the member states, supranational trade policy initiatives are not always aimed at reducing trade barriers. In fact, the Commission does not have an a priori tendency to liberalize; it merely seeks to develop pan-European policy solutions that do not create cleavages between member states in order to avoid deadlock. Liberalization happens to be a pan-European solution, but pan-European regulation is also possible. Many have noted that the liberalization objectives of the EU often appear like an exercise in international regulation rather than the complete abandonment of all trade barriers (Cremona 2001; Winters 2001). Alasdair Young (2002) argues that EU external policy is most accurately described as an attempt to extend European cooperation to third countries. Moreover, regulatory harmonization within the single market infrequently creates 'regulatory peaks', as many of the prominent trade disputes between the EU and third countries illustrate (Young 2004). In other words, even though we should expect protectionist lobbying to employ national routes and firms supporting liberalization to develop partnerships with the European Commission, we might also find lobbyists defending new kinds of regulatory protectionism that applies equally across member states.⁵

14.3. Lobbying for protectionism or liberalization

What does this mean for industry lobbyists and why is it relevant to distinguish between classic protectionism and pan-European regulatory protectionism? With few exceptions, European trade policy applies to all industries alike, so we should expect producers and firms to move their lobbying efforts to the supranational level. Surprisingly, this is not the case. By comparing lobbying in agriculture and textiles and clothing, we can see that protectionist lobbying is only successful when it is supported within the member states, which is why lobbyists eventually have to concentrate their efforts on the domestic route. Tellingly, lobbyists targeting the Commission to maintain import restrictions on textiles and clothing were ignored in the absence of member state pressure. By contrast, a study of the service trade shows how business lobbyists have been able to influence the European Commission's objective once they embraced liberalization as a policy objective. This was easy for the exporting companies in financial services, but required an important redefinition of policy demands in telecommunication services, where firms were not naturally inclined to support liberalization. Distinguishing between the types of demands can thus help to explain the success or failure of trade policy lobbying in the EU.

14.3.1. *Resistance to foreign competition: Agriculture and textiles*

14.3.1.1. AGRICULTURE

The agricultural market, one of the most integrated markets in the European Union, is characterized by a highly centralized structure of interest representation at the supranational level: the Comité des Organisations Professionnelles Agricoles (COPA), founded in 1958. Despite the close, traditionally quasi-corporatist relations between COPA and the EU Institution on the Common Agricultural Policy (CAP), lobbying on multilateral trade issues has, most importantly, passed through national channels. Starting in the 1980s, the crisis of CAP dissolved the consensus between national agricultural organizations and left space for a more pluralist organization of agricultural interest groups. Several unified demonstrations in Brussels notwithstanding, the diversification of interest representation implies that interest representation on external trade is mediated by the member states (Delorme 2002).

Indeed, during the first years of the Uruguay Round, national farmer organizations, most notably in France and Germany, lobbied heavily to ensure that their governments did not cede ground on agricultural liberalization. In December 1990, strong internal divisions between the EU member states led to a rejection of the settlement on agriculture that was supposed to conclude the Uruguay Round. The Commission hoped to strike a compromise by tying the multilateral negotiations to a reform of CAP. At the beginning of the CAP reform process, the Commission had tried to consult with national farmers' unions, but eventually abandoned its contacts when it realized that farmers were not willing to move away from the status quo (Vahl 1997: 149). As a consequence, the Commission negotiated directly with the member states and isolated itself from the critical farmers' union. In reaction, 'farmers' unions simply intensified their lobbying activities at the member state level' to block CAP reform and concession in the GATT negotiations (Van den Hoven 2002: 11). Once the Commission succeeded in negotiating a compromise with the United States at Blair House in Washington, DC in 1992, it was again the French government which threatened to veto the agreement. Since Germany had shifted its position to support the Blair House Accord, France ended up in an isolated position and did not carry through its threat (Balaam 1999: 60).

During the new round of trade talks, opposition to liberalization was also channelled through national routes. France and Ireland publicly criticized the Commission's negotiating position during the Doha ministerial meeting, arguing that the defence of CAP ought to be the EU's priority for negotiations (Van den Hoven 2002: 19–20). Until the time of writing, member state disagreement has severely constrained the Commission's room for manoeuvre in the current negotiations. It is thus member state opposition, not agricultural lobbying, that explains development in agricultural trade negotiations. For

the Commission, successful negotiations require neutralizing member state opposition, not resisting protectionist lobbyists at the supranational level.

14.3.1.2. TEXTILES AND CLOTHING

As in agriculture, protectionism in textiles and clothing was achieved through national strategies. Inversely, when interest groups had to start interacting with the European Commission, lobbying for protectionism became increasingly difficult. Protectionism in textiles and clothing dates was enshrined in four successive Multifibre Arrangements (MFA) from 1974 to 1994 and ended with a Uruguay Round Agreement on Textiles and Clothing, which stipulated that the MFA will be phased out over a ten-year period.⁶

Throughout the MFA period, the orientation of the respective arrangements resulted from intense intergovernmental bargaining. The relatively moderate EC policy on MFA I (1974–6) was influenced by the liberal German and Dutch approach, which resisted US calls for strict protectionism. Since the European industry had not yet lost its comparative advantage, the Commission did not want to intervene. Once the textiles and clothing trade balance deteriorated, the Committee for the Textile Industries in the European Community (COMITEXTIL) lobbied heavily in Brussels to draw attention to the dramatic fall in employment in the sector. Unimpressed and doubting the reliability of the figures, the Commission maintained that it would be wrong to give in to these protectionist demands. But things were different in the Council. Member states felt concerned about the health of their textiles and clothing industries and announced that the Community policy should be centred on voluntary export restraints (Ugur 1998: 660). In the difficult economic times of the late 1970s, the United Kingdom had joined France and Ireland's strict protectionist demands, supported also in Italy. Moderate countries seeking a simple renewal of the MFA were eventually outnumbered (Aggarwal 1985: 146). Faced with insistent member states determined to protect what they considered to be their national interests, the Commission had to switch to a protectionist trade policy during MFA II and MFA III (1977–85).

The shift towards gradual liberalization under MFA IV (1986–94) was tied to the desire of developed countries to open up trade in services and other new issues (Woolcock 2000: 378). Yet protectionist lobbying at the European level had not ceased in 1985. COMITEXTIL worked hard to draw attention to the difficult situation in the sector. In spite of this tactic's previous success, the industry's difficulties were seized on by opponents of textile protection to show that earlier measures had not left the industry better off. As European countries turned away from Keynesian demand management, member state support faded. Despite intense lobbying from COMITEXTIL, trade unions, and other textile associations, national representatives on the Article 133 Committee and COREPER were able to work out a compromise in favour of gradual

liberalization. In 1989, moreover, the Commission accepted the midterm review of the Uruguay Round, against the insistence of the textile industry association (Ugur 1998: 663). The Commission later issued a communication stressing that restructuring was appropriate for the industry and Sir Leon Brittan announced to a shocked industry audience that 'the textile industry is a normal industry' (cited in Scheffer 2003). Without the backing of the member states, protectionist lobbying in textiles and clothing at the EU level was a failure.

In a last attempt to secure special treatment in EU trade policy, industry representatives formed a new coalition in the early 1990s, the European Textile and Clothing Coalition, to avert the dangers of the new policy orientation. Simultaneously, the European Trade Union Committee for Textiles began to organize meetings and demonstrations. All of these efforts were largely ignored by the Commission, which insisted that the industry's problems had to be resolved by securing market openings in third countries (Ugur 1998: 664–5). At the conclusion of the Uruguay Round, the EU had endorsed the WTO's Agreement on Textiles and Clothing, which was to phase out all protection by January 2005.

Faced with this new reality, the textile industry had to reorganize. COMITEX and other textile associations founded a new European association in 1995: the European Apparel and Textile Organization (EURATEX). Needing to work with the Commission in order to influence or delay the integration of sensitive categories into the WTO agreement, EURATEX launched a review of its strategy (Scheffer 2003). In contrast to the unsuccessful pressure lobbying that had characterized earlier protectionist demands, European industry representatives decided to engage in a more cooperative manner with the European institutions.

As Jacomet (2000: 307) underlines, the new 'interactive lobbying' during the WTO negotiations in the early 1990s had differed sharply from previous activities because lobbyists had to accept a trade-off in the policy demands they could voice: they exchanged the elimination of the MFA for market access in third countries. Only by embracing a policy stance centred on market access did textile lobbyists maintain their contacts with the European institutions. Indeed, the selection logic of the EU institutions forcing European industry representatives to reframe their demands helps to explain why the EU textile industry became supportive of foreign market access while its American counterpart continued to press for strict protection. The need to supply a specific kind of lobbying at the supranational level also becomes clear in the reorganization of EURATEX. As a result of its internal review, EURATEX decided to develop a more comprehensive policy 'in order to be seen as relevant partners for policy-makers' (Scheffer 2003: 108). Faced with very heterogeneous demands from its national associations, EURATEX now aims not to counteract national lobbying, but to promote synergies between domestic and European efforts. After the lobbying failures of the past, EURATEX's approach today

is to focus on pan-European stances to maintain its leadership role at the EU level.

At the end of the Agreement on Textiles and Clothing's transition period in 2005, European companies complained vigorously about Chinese competition. Still, they acknowledged that the abandonment of the quota system was beyond their control. Whether they liked it or not, 'the affected companies had to accept the new logic in order to be able to influence the calendar, the modalities of the new measures or the transition aid' (Jacomet 2004: 5). In the absence of member state pressure for protection, successful business–government relations at the supranational level required going along with the liberalization objective of the European Commission.

14.3.2. *Developing pan-European policy solutions: Trade in services*

The multilateral General Agreement on Trade in Services (GATS) that entered into force with the founding of the WTO in 1995 is often cited as a prime example of business influence over trade policy. According to many observers, the American financial service companies and its Coalition for Service Industries played a key role in bringing the issue onto the international negotiating table (Drake and Nicolaïdis 1992; Sell 2000; Woll 2008). On the European side, firms were much less in evidence during the service negotiations in the Uruguay Round and the sectoral negotiations that followed GATS. However, the European Commission did consult extensively with industry representatives in two sectors: financial services and telecommunication services (Van den Hoven 2002: 10).

14.3.2.1. FINANCIAL SERVICES

At the conclusion of the Uruguay Round, countries agreed to continue sectoral negotiations on financial services to obtain more detailed liberalization commitments. By the initial deadline in 1995, the United States declared itself unsatisfied with the existing offers and walked out of the negotiations. Behind the position of the US government was the frustration of the US private sector, which had helped to put services on the WTO agenda and now felt that it was not achieving sufficient market access in foreign countries (Woolcock 1998).

Faced with the US refusal, the EU assumed the leadership in the financial service talks and encouraged WTO members to negotiate an interim agreement without the United States in 1995 and to extend the talks until December 1997. Over the next two years, the European Commission went out of its way to gain the support of European financial service firms so it could counter the influence of the US private sector. Indeed, representatives of 'Citicorp, Goldman Sachs, Merrill Lynch and the insurance companies – particularly the American Insurance Group and Aetna – established command posts' near the WTO headquarters and conferred with American negotiators throughout the financial service talks (Andrews 1997).

Business lobbying comparable to the activities of the US Coalition of Service Industries was only common in the United Kingdom, where financial service firms had founded British Invisibles in 1986, an association to promote the interests of its members, which later turned into International Financial Services London. Part of British Invisibles was the working committee LOTIS (the acronym for Liberalisation Of Trade In Services), which dates back to the early 1980s (see Wesselius 2001). For the European Commission, working with these private sector associations was crucial, because they felt that European firms could best engage the US private sector in a continued dialogue. Transnational business negotiations began at the World Economic Forum in Davos, Switzerland in 1996. US, UK, and European financial service representatives met in the office of British Invisibles and eventually formed the Financial Leaders Group to promote the interests of the affected firms on both sides of the Atlantic (Sell 2000: 178).

The European Trade Commissioner, Sir Leon Brittan, welcomed the creation of this group and worked closely with its European chair, Andrew Buxton of Barclays Bank (Wesselius 2002: 7). For the EU negotiators, the Financial Leaders Group was an important channel through which they hoped to moderate US expectations, in particular by addressing the concerns of the US private sectors, which had previously brought the talks to a standstill (Woolcock 1998: 33). Sir Leon Brittan had long been frustrated with the lack of support among European companies and tried to encourage them to mobilize around the issue of international trade liberalization. A representative of the European service sector remembers: 'At one occasion, he finally invited a series of CEOs for dinner and said something to the effect of "either you will get organized, or I will take the decisions single-handedly"'.⁷

In contrast to the aggressive lobbying of US financial service firms, European firms entered negotiations not so much on their own initiative but rather, in response to the active encouragement of the European Commission, which was looking for business support for the difficult financial service talks in the 1990s. The close business–government relationship that developed in the EU after 1996 was based on the shared aim of liberalizing the sector. After an unexpected change in the position of the Asian countries during the currency crisis in 1997, negotiators finally reached an agreement on 12 December 1997. Yet the cooperation between financial service firm leaders and the European Commission went even further than the Financial Service Agreement. In 1998, Sir Leon Brittan asked Andrew Buxton once again to create a select group of, this time, purely European business leaders. The European Service Forum, launched on 26 January 1999, today ensures the Commission's continued support for the liberalization of service industries and consequentially benefits from privileged access to trade policy-making at the supranational level. Had European firms not supported liberalization, it is highly unlikely that they would have been able to work so closely with EU policy-makers.

14.3.2.2. TELECOMMUNICATIONS

In telecommunications, the position of firms was more difficult. European network operators had long benefited from privileged positions as monopoly providers in their home countries. The WTO's sectoral negotiations on basic telecommunications liberalization from 1994–7 coincided with the liberalization of the internal EU market. While firms wanted to benefit from foreign market access once telecommunication markets were liberalized, they were also concerned about protecting their home market positions. Solicited by the European Commission, European operators therefore adopted a pro-liberalization stance in the mid-1990s, which allowed them to follow and influence the content of the multilateral negotiation in the WTO while still maintaining close ties to their home governments in order to defend national interests on specific issues.

In fact, the project of European telecommunications liberalization had met with very different echoes in European member states. The United Kingdom and the Nordic countries had introduced competition in their home markets and pushed actively for Europe-wide liberalization. Germany, France, and the Benelux countries had initiated more moderate reforms, but had their reservations about complete liberalization. However, the Southern countries – Italy, Greece, Spain, and Portugal – were not interested in changing their telecommunication systems (see Noam 1992). The struggle between the European Commission and the member states over internal telecommunications liberalization began in 1987 and is recounted elsewhere in great detail (e.g. Sandholtz 1998; Eliassen and Sjøvaag 1999; Thatcher 1999b; Holmes and Young 2002). After some judicial wrangling over EU competences, the Commission was able to propose the liberalization of telephone services in 1993 and infrastructures in 1994. In 1996, member states reached agreement on implementing liberalization by 1 January 1998. What is important for an understanding of the WTO involvement of European network operators is the consultation efforts made by the European Commission during the internal liberalization project.

Trying to gain support in the face of member state resistance, Martin Bangemann, European Commissioner for Industry, Information Technology, and Telecommunications, called together a group of 'wise men', leaders from the telecom industry and user companies, in order to prepare a communication on the international competitiveness of European telecommunications. The consultation procedure is noteworthy because the Commission dealt with the senior officials of the national operators directly and encouraged them to evaluate their position in the internationalizing market. Under pressure from user companies and competition from liberalized countries attracting telecommunications-based firms, operators in France and Germany began to concentrate on reform and internationalization, and therefore supported the

EU liberalization (Thatcher 1999a). With the backing of the leading European telecommunications providers, the report issued by the senior official group, the so-called Bangemann report, was important for encouraging member states onto the route of liberalization (High-Level Group on the Information Society 1994).

Lobbying on multilateral liberalization was closely connected to internal liberalization. Before 1996, European network operators were not involved in the sectoral negotiations that had begun in 1994 (Woll 2008). With the announcement of the 1998 deadline, the European Telecommunication Network Operators Association (ETNO), founded in 1992, was able to gather support for multilateral liberalization as well. A member of the WTO working group recalls: 'We had good relations with the European Commission. There was no opposition: the Commission works for Europe and we work for Europe as well.'⁸ ETNO fully supported the multilateral negotiations and helped the Commission negotiate the Basic Telecom Agreement in 1997.

Indeed, most operators affirm having been in support of the 1997 agreement and having engaged actively through their European association throughout the talks. Despite these declarations, many operators had concerns about losing their national privileges and so used their national ties to maintain a degree of control over access to their home markets. Telefónica, the Spanish operator, for example, insisted on restricting non-EC investment to the Spanish market, despite the fact that it had become an important overseas investor in Latin America. When the United States criticized the Spanish position, negotiations over the case turned into bilateral talks between the Commission and the Spanish government, which had taken up the highly politicized issue (Niemann 2004: 399). Similarly, network operators in other countries tried to guarantee national privileges through the implementation of the EC regulatory framework. Member states and their regulatory agencies enjoyed immense freedom to determine interconnection terms and tariffs between networks or to impose universal service conditions. In contrast to British Telecom, which received no extra funding for universal service, France Télécom had the right to obtain compensation (Thatcher 1999a). At the same time that ETNO was lobbying for reciprocal liberalization of basic telecommunication services through the WTO, national operators were seeking to maintain regulatory advantages, i.e. restrictions to foreign market access, through their national governments.

14.4. Conclusion

The comparison between agriculture, textiles and clothing, financial services, and telecommunication services shows that trade policy lobbying in the EU is marked by a two-channel logic. Protectionism (agriculture) is best defended through the national route, while lobbying in support of liberalization

(financial services) happens at the supranational level, in particular through contacts with the European Commission. Companies that seek both foreign market access and restrictions to competition in their home markets therefore tend to adopt an ambiguous position: they choose to support liberalization 'in general' in order to stay in contact with the European Commission, but also work through their member states to maintain national restrictions (telecommunications). Without the backing of their home governments, protectionist lobbying that impedes European market integration is unsuccessful at the supranational level (textiles and clothing). In trade policy, firms thus face a trade-off. If they want to maintain good relations with the European Commission, they have to frame their demands in terms of pan-European solutions, which often means moving away from their immediate interest.

The entrepreneurial role of the European Commission in creating public-private contacts on trade policy has several implications. First of all, not just businesses but also other interest groups, such as environmental or social NGOs, can be solicited for input into the European trade policy process. As current consultation demonstrates, the Commission has indeed made an effort to include an ever broader range of actors in order to increase its legitimacy and work towards a policy consensus (Woolcock 2000). The increasing importance of NGO consultation on trade issues means that firms are now obliged to work on their public image. One business representative of a petroleum company even estimated that 80 per cent of his public affairs responsibilities concern contacts with NGOs, not governments.⁹ However, firms remain the principal source of expertise on trade barriers and will therefore come into their own whenever the EU seeks to increase its leverage vis-à-vis trading partners such as the United States. While NGOs may affect the atmosphere of trade negotiations, it is important not to overestimate the direct influence of public interest groups, even though the Commission tries to take their opinion into account through the Civil Society Dialogue (De Bièvre and Dür 2007).

Second, the complexity of the strategic interactions in European trade policy caution against superficial analyses of trade policy demands in the EU. Because of the two-channel logic, we should expect to find many firms declaring themselves in favour of trade liberalization, simply because this ensures them greater access to the EU trade negotiators. A study of trade preferences thus needs to distinguish between the strategic positions of firms and their underlying preferences, which might be much more ambiguous than the official declarations would lead us to believe.

Finally, the comparison between the various business-government relations shows that European trade policy lobbying is complex. To assume that trade policy simply reflects producer demands, as many have suggested in the case of the United States, would be to miss important aspects of public-private relations in the EU. While firms might capture their government's positions or even the supranational agenda in certain cases, the Commission also instrumentalizes

European firms and this even affects the content of their lobbying demands. This runs counter to the common assumption that industry demands and governments simply execute trade policy. Such a demand-side conception of policy-making runs through classic trade theory, international political economy, and the economic analysis of business–government interactions. This chapter has tried to demonstrate that it is inappropriate for an understanding of European trade policy. The EU’s common commercial policy results as much from producer demands as it does from the complex decision-making procedures, the institutional self-interest of public actors, and the power struggles created by their interaction. Considering the EU institutions as the passive supplier of trade regulation obscures some of the most crucial mechanisms of this policy process.

Notes

1. Articles 131–135 (ex 110–116) of the Treaty on European Union. Article 300 (ex 228) provides the supranational institutions with powers to conclude trade agreements with third countries.
2. The EU complaint concerned the Helms-Burton Act, a US law sanctioning European foreign investors in Cuba.
3. The EU, in turn, brought only two, both jointly with the United States, against third countries (Shaffer 2003).
4. Available from within the EU at <http://mkaccdb.eu.int>.
5. Regulatory protectionism can be especially successful if elaborated in cooperation with directorate-generals specialized in a particular sector of economic activity. While DG Trade might push for trade liberalization, DG Agriculture, DG Industry, DG Transport and Energy, or DG Information Society will be more likely to elaborate sector specific regulatory arrangements that enshrine advantages for European industries in world markets. I thank Manfred Elsig for raising this point.
6. For an historical overview, see Aggarwal (1985) and Hoekman and Kostecki (2001).
7. Interview with the author in Brussels, 13 November 2002.
8. Interview with the author in Brussels, 3 September 2003.
9. Cited by Dominique Jacoment, board member of EURATEX, at a book conference on ‘Interest groups and the State in France’, CEVIPOF – Sciences Po, Paris, on 11 January 2007.

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Chapter 15

Regulating Lobbying in the European Union

*Daniela Obradovic**

15.1. Introduction

Lobbying is not regulated in the European Union (EU) in a uniform or coherent manner. While the European Parliament (EP) has had a registry and code of conduct for lobbyists (European Parliament 2005: Article 3 of Annex IX)¹ for a considerable period of time, the European Commission has moved more slowly from the open access policy for lobbyists towards the adoption of regulatory standards for this activity. It recently decided to introduce registration for lobbyists (Commission of the European Communities 2007a, 2008a). The other EU institutions, with the exception of the European Economic and Social Committee (EESC), do not have any specific rules governing their relations with lobbyists, apart from the general EU Staff Regulations (2004) and good administrative standards (The European Code of Good Administrative Behaviour 2005). The EESC has developed representativeness criteria for the purpose of selecting groups that have applied for membership in its Liaison Group with European Organizations and Networks indented to bring representatives of EU-wide NGOs into its structure (European Economic and Social Committee 2004, 2007: 7).

The objective of this chapter is to assess the evolution of the rules for regulating lobbying directed towards the Commission² and in particular to examine the main features of the recently introduced register for lobbyists (Commission of the European Communities 2007a). We investigate whether the new rules for lobbyists will eventually restrict the access of interest groups

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to the Commission. Lobbyists are quite concerned with this development,³ because, as it is very well documented in literature (Mazey and Richardson 2001, 2006; Coen 2007a: 336), European legislation can be influenced in the most efficient manner in the pre-drafting stage to which the rules for lobbyists apply. In that respect, it is also very important to explore the probability of establishing a common lobbyists' register in the EU that will be embraced by all of its institutions.

15.2. The Commission consultation standards

Although civil interest groups have been involved in the governance of the EU since its creation, their structured incorporation into the European policy formation process is relatively recent. The Commission has formalized the dialogue with civic (including producers') groups by adopting general principles and minimum standards governing the process of consultation with interested parties (hereafter the minimum standards) (Commission of the European Communities 2002a). They have been applicable since January 2003. The Commission defines consultations as those processes through which it wishes to trigger input on policy from interested parties prior to issuing its decisions (Commission of the European Communities 2006a: 11). 'Interested parties' means any profit or non-profit organization or a private citizen wishing to participate in consultations run by the Commission (Commission of the European Communities 2006a: 11). National- as well as EU-level associations are eligible to take part in these consultations. These consultations are open not only to EU nationals, but also to natural and legal persons having legal residency in the Union or foreign nationals residing outside the EU. However, consultation may be restricted to a specific category of stakeholders or limited to a set of designated individuals/organizations (Commission of the European Communities 2005a: 10, 2008b).

The choice of consultation tools largely depends on who needs to be consulted, on the particular topic, and on the available time and resources (Commission of the European Communities 2005a: 10, 2008b). These tools include consultative committees,⁴ expert groups (Commission of the European Communities 2002b),⁵ open hearings, ad hoc meetings, Internet consultations, questionnaires,⁶ focus groups, seminars/workshops, and so on. Open public consultations are published on 'Your Voice in Europe',⁷ the Commission's single access point for consultations.

The Commission mentions the following general principles, which should apply to the consultation process: participation, openness, accountability, effectiveness, and coherence (Commission of the European Communities 2002a: 16–18). It gives a very brief indication of the content of these principles. The Commission goes on to set out the following five minimum stand-

ards for the consultation process: (a) Clear content of the consultation process: all communications relating to the consultation should be clear and concise, and should include all necessary information to facilitate responses; (b) Consultation target groups: when defining the target group(s) in a consultation process, the Commission should ensure that the relevant parties have an opportunity to express their opinions; (c) Publications: the Commission should ensure adequate awareness-raising publicity and adapt its communication channels to meet the needs of all target audiences. Without excluding other communication tools, open public consultations should be published on the website 'Your Voice in Europe';⁸ (d) Time limits for participation: the Commission should provide sufficient time for planning, responses to invitations, and written contributions. The Commission should strive to allow at least eight weeks for reception of responses to written public consultations and twenty working days notice for meetings; and (e) Acknowledgement and feedback: receipt of contributions should be acknowledged. The results of open public consultations should be displayed on the website linked to the Commission's site 'Your Voice in Europe' (Commission of the European Communities 2002a: 19–22). As a result of the application of these minimum standards, the involvement of all interest groups in the EU is contingent upon their compliance with the principles of good governance⁹: representativeness, accountability, and transparency.

The Commission claims that the principles and standards should enable all parties affected by the proposal to become more involved, and on a more equal footing, in the process of consultation preceding EU legislation formulation. Their involvement should become more transparent. These standards also should ensure that all the Commission's departments adopt a consistent approach to the consultation process (Commission of the European Communities 2002c: 6, 2004: 15). A second goal of the standards is to ensure the transparency of the consultations from the point of view of the bodies or persons consulted and the legislators alike. A third goal is to demonstrate accountability vis-à-vis the bodies or players consulted, by making public the results of the consultations to the maximum possible extent (Commission of the European Communities 2002d: 3). The Commission has emphasized that the aforementioned consultation standards are intended to ensure that all parties affected by or involved in policy implementation are properly addressed and consulted about the measures in question. The standards should also help the Commission to strike an adequate balance between the parties themselves, based upon consideration of their social or economic character, size, specific target groups, and state of origin (Commission of the European Communities 2002a: 19–20). The minimum standards are applied systematically to all major policy proposals listed in the Commission's Annual Work Programme.¹⁰ In essence, the standards should be regarded as a tool created by the Commission for the purpose of the operationalization of its commitment

to introduce an impact assessment analysis for EU initiatives that take into account the economic, social, and environmental impact of the proposal under consideration (Commission of the European Communities 2002c: 5, 2002e, 2005a, 2008b).¹¹

15.3. Lobbying and the Commission's consultation standards

Until recently, it was unclear whether the minimum standards applied to lobbying activities.¹² The Commission has not managed to implement a system of accreditation nor has it run a compulsory register of those organizations that have dealings with the Commission. Lobbying has been conducted in accordance with the 1992 voluntary and self-regulatory code of conduct, which sets only minimum standards (Commission of the European Communities 1992). The main features of these criteria are as follows: (a) lobbyists should act in an honest manner and always declare the interests they represent; (b) they should not disseminate misleading information; and (c) they should not offer any form of inducement in order to obtain information or to receive preferential treatment. Lobbyists were invited by the Commission to adopt their own codes on the basis of those minimum requirements. Only a handful of organizations of European lobbyists have thus far adhered to those minimum requirements and adopted voluntary codes of conduct. The most prominent are Society of European Affairs Professionals (SEAP)¹³ and the European Public Affairs Consultancies Association (EPACA).¹⁴ The codes were based upon common core principles agreed to by these two associations in 2007 (Society of European Affairs Professionals 2007: 5). However, the codes were drafted in very general terms. They do not specify the scope of the content of the adopted rules. For example, they neither provide precise definition for concepts such as 'improper influence' or 'undue pressure' nor do they indicate what constitutes financial inducement.

This Commission's voluntary code of conduct for lobbyists was adhered to only by public affairs consultancies. The organizations targeted by those codes covered only around 5 per cent of the approximately 15,000 lobbyists active at the EU level (Commission of the European Communities 2001), and the code has thus far failed to address the issue of facilitating greater transparency vis-à-vis the general public. Apparently, neither lobbyists who are permanent employees of interest groups nor other groups of interest representatives who occasionally engage in lobbying activities (e.g. law firms and think tanks) come within the scope of such voluntary codes of conducts. This code relies on self-discipline and internal sanction mechanisms. In sum, self-imposed codes of conduct have had few signatories to date and have thus far lacked serious sanctions (Kallas 2005a).¹⁵

By contrast, the EP has an accreditation system for all persons needing frequent access to this institution (defined as five or more days per year). It is very interesting to point out that while the EP has itself introduced an accreditation system in order to regulate its relations with lobbyists, it vigorously opposes the establishment of such a system for Commission consultation with interested parties during the drafting of its proposals (European Parliament 2002: para. 11(e)).

This system regulates physical access to the Parliament. The quaestors issue special passes that are valid for one year. These passes state the holder's name, the name of the firm that employs the holder, and the organization the holder represents. A register of accredited lobbyist is published on the EP website.¹⁶ It is simply an alphabetical list and only provides the names of the badge holders and the organizations they represent. No indication is given of the interests being promoted. Any entity seeking accreditation is under obligation to adhere to the EP code of conduct for lobbyists, which is part of the EP's Rules of Procedure (European Parliament 2005: Article 3 of Annex IX). Rule 2 explicitly stipulates that Members of Parliament shall not be bound by any instructions nor accept a binding mandate. To agree to vote in a particular way in exchange for whatever advantages a lobbyist may be prepared to offer would be tantamount to accepting a binding mandate. The Association of Accredited Lobbyists to the EP has adopted its own code with fairly strict sanctions for breach of its rules including expulsion from the association but only 100 of the approximately 4,500 lobbyists accredited by the EP have acceded to this code.¹⁷

The EESC has also adopted an accreditation system to govern its relations with civil society. It has established a set of representativeness criteria to be fulfilled by interest groups seeking membership status in its Liaison Group, a permanent forum facilitating the EESC's political dialogue with civil society. The group is composed of nineteen EESC members and fourteen representatives of civil society organized at the European level¹⁸ all of whom are required to (a) represent networks that form a *de jure* or de facto 'family' of associations that (b) have members in more than half of the EU member states and (c) are non-profit-making, (d) non-governmental, and (e) independent (particularly of political parties) bodies (f) engaged in activities that are not covered by the institutional framework for the social dialogue (the EU decision-making procedure stipulated in Articles 138 and 139 of the European Community Treaty pertaining European-level organizations of employers and trade unions) (European Economic and Social Committee 2007: 7).¹⁹ In addition to meeting these criteria, the members of the Liaison Group must commit themselves to strengthening internal dialogue among their associations.

The approach of the EP and EESC was not adopted by the Commission, which throughout the 1990s consistently rejected any accreditation system in the interest of preserving wide-ranging access. But since the adoption of its White Paper on Governance, the Commission has introduced a series of

measures intended to improve the democratic features of interest groups; these measures seem to be developing along the path of a de facto accreditation system (Commission of the European Communities 2001: 11).

Whilst still officially rejecting the group accreditation system for the sake of encouraging maximum possible access, the Commission established a database called CONECCS (Consultation, the European Commission, and Civil Society), which was used to ensure that each of the Commission's Directorate Generals could find the relevant partners with whom to discuss policy proposals.²⁰ It contained information on civil society organizations established at the European level as well as on the committees and other consultative bodies the Commission used when consulting organized civil society in an either informal or structured manner.²¹ More than 800 organizations were listed on the database. All of them were European level organizations. The Commission constructed this database as a follow-up to its directory of European non-profit associations published in 1996 (Commission of the European Communities 1996). This time, in addition to NGOs, private interest organizations, such as the World Federation of Advertisers, the European Demolition Association, and the Banking Federation of the EU, were also included. However, corporations and for-hire lobbyists who were very active on the Brussels lobbying scene were not included in this database. Consequently, the most influential business pressure groups, such as the Trans-Atlantic Business Dialogue (TABD) and the European Round Table of Industrialists, were not listed in CONECCS.

CONECCS became fully operational in June 2002. The index, which was compiled on a voluntary basis, was intended to serve only as an information source and not as an instrument for securing exclusive access to the Commission's consultative process. Although it formed a part of the organized consultative process based on the minimum standards, it did not represent a system for accrediting certain organizations vis-à-vis the Commission. It provided an overview of the advisory committees set up by the Commission and a non-exhaustive list of organizations active at the European level.

Organizations seeking inclusion in CONECCS were required to conform to a series of access criteria.²² 'These criteria revolved primarily around geographic representativeness and members' accountability, based on a blunt and problematic assumption about the properties of interest groups. This assumption clearly preferred groups of a certain type, that is representative groups with a defined membership constituency, over groups whose legitimacy stems more from their ability to articulate a given cause in public policy arenas, such as the welfare of those unable (or less able) to speak for themselves such as animals, prisoners, victims of human rights abuses, or the planet' (Greenwood 2007a: 45–6). The Commission reserved the right not to include an organization in the database if it did not satisfy the stated requirements, or to subsequently remove any organization that it discovered did not, or had ceased to, satisfy those requirements. Moreover, the Commission

opted not to include an organization that had – as its stated or actually pursued purpose – any activity that is contrary to the purpose or principles of the EU. CONECCS is now defunct.²³

The Commission has begun to unveil its plan to further regulate lobbying with the launch of its Transparency Initiative (Commission of the European Communities 2005*b*: 6–7),²⁴ which is one of the 2005–9 EU strategic objectives (Commission of the European Communities 2005*c*: 5). It has been considering whether to introduce a mandatory common code of conduct for all lobbyists approaching EU institutions (including interest groups taking part in its consultations) or to opt for the self-regulatory approach by encouraging all organizations and individuals listed in a voluntary or compulsory register to adhere to a common code of conduct.

After conducting an Internet-based consultation with stakeholders and taking on board the opinions expressed at the hearing organized by the Economic and Social Committee,²⁵ the Commission decided to introduce a register of interest representatives along with a code of conduct for lobbyists²⁶ and to link it to the aforementioned consultation process, with stakeholders governed by the minimum standards. The Commission's register of lobby groups is combined with the standard template for its Internet consultations.

Although this register will inevitably serve to further institutionalize the relationship between the Commission and interest groups, it certainly does not represent the decisive moment in this development because the dialogue between EU institutions and civil society is already heavily institutionalized (Obradovic 2006). A discussion on the reasons for this institutionalization exceeds the scope of this chapter.

15.4. The reasons for introducing the register

Some authors claim that the Commission set up the register of interest representatives in response to the mushrooming of individual lobbyists in Brussels (Coen 2007*b*: 5). It has been stated that the 'recent explosion of lobbying in the EU' is not attributable to the increase in traditional interest organizations, like trade associations or NGOs, but to individual lobbyists, such as companies and law firms. The proponents of this thesis cite recent empirical studies estimating that some 40 per cent of all interest representation at the Commission and the Parliament now appears to be individual actors (firms (24%), think tanks (4%), government/regional authorities (11%), law firms, public relations companies, etc.), rather than interest group organizations (Berkhout and Lowery 2008).

We contest this assumption. It is very unlikely that the Commission adopted the new interest representation rules in order to make its relations with the growing number of individual lobbyists in the EU more manageable. Individual lobbyists, such as companies, have been active at the Brussels scene for

decades and their involvement in the European policy process is not of recent origin. From its very beginning, the European Commission has been subject to the influence of individual companies (Coen 1997, 1998). On the other hand, commercial consultancies and for-hire lobbyists, whose numbers have indeed increased in recent years, act mainly on behalf of individual companies and traditional interest organizations, i.e. trade associations (Lahusen 2003: 199). Moreover, as we have shown above, the associations of professional lobbyists are only interest groups that have actually adopted the Commission's 1992 voluntary code for lobbyists. In addition, the Commission considers lobbying to be a legitimate part of the democratic system.

In our view, the reasons for the introduction of the Commission's register for lobbyists are of an entirely different nature. Namely, the register has become a part of the Commission's wider European Transparency Initiative intended to bolster citizens' trust in the Union's policy formation process and, accordingly, to increase its credibility.²⁷ In principle, public access to the Commission's consultations preceding the drafting of its policy proposals fosters the Commission's political accountability. However, the increased transparency of the consultative process is beneficial for the Commission only if its interlocutors are perceived by the public to be credible actors. This is why it submits that relations between the Commission and interest representatives must be open to outside scrutiny (Commission of the European Communities 2006a: 4). In the words of Mr Kallas (2005b), the Commissioner responsible for the launch of the European Transparency Initiative, lobbyists can have considerable influence on legislation, but their transparency is too limited in comparison to the impact of their activities and they must therefore be made more accountable. Thus, the Commission believes that the introduction of the register will preserve openness and prevent the accessibility of EU institutions from being abused by irresponsible lobbyists.²⁸ In this respect, it is worth mentioning that the European Ombudsman (2007a, 2007b) has on several occasions underlined the importance of guaranteeing an adequate level of transparency with respect to the people involved in lobbying activities. Consequently, the open access policy formerly deployed by the Commission in its relations with interest groups was modified on the grounds that 'with better involvement comes greater responsibility' (Commission of the European Communities 2001: 15, 17, and 18). In its view, the new register for lobbyists is one step towards the establishment of answerability for civil groups participating in the Union's policy-making process.

We can therefore conclude that the Commission set up this register in order to boost the legitimacy of its proposals rather than to manage the ever-growing number of lobbyists in Brussels. Actually, their number has not increased significantly since 1992 when the Commission declined to introduce stricter rules for interest representatives.²⁹ Indeed, it is not the communication introducing the register for lobbyists, but rather the Commission's previously

mentioned 1992 policy document that acknowledges the problem of 'overcrowding' in the lobbying environment.

15.5. Register of interest representatives

The online register of interest representatives (rather than lobbyists) was launched on 23 June 2008.³⁰ All organizations engaged in influencing the policy formulation and decision-making process of the European institutions are invited to register. Registration is voluntary. After one year of operation, the Commission will evaluate the system, in particular regarding participation. If it proves unsatisfactory, compulsory registration and reporting will be considered (Commission of the European Communities 2007*a*). The Commission will use the number of registrations as a measure of the voluntary system's success.³¹

15.6. The scope of the register

In the Commission's view, lobbying means 'all activities carried out with the objective of influencing the policy formulation and decision making process of the European institutions' (Commission of the European Communities 2008*a*). It therefore believes that a wide range of groups should enter into the register. The activities that constitute lobbying include contacting members or officials of the EU institutions; preparing, circulating, and communicating letters, informational material or argumentation and position papers; and organizing events, meetings or promotional activities (in official or other venues) in support of an objective of interest representation (Commission of the European Communities 2008*a*). Accordingly, lobbyists are defined as the persons carrying out these activities and working in a variety of organizations, such as public affairs consultancies, law firms, non-governmental organizations (NGOs), think tanks, corporate lobby units ('in-house representatives'), or trade associations (Commission of the European Communities 2006*a*: 5). Essentially, the Commission regards lobbying groups as bodies that attempt to influence policy and as multi-member or multi-supporter organizations seeking collective ends. The most important consequence of this approach is that a company can be seen as an interest group. This broad definition of lobbyist is in line with the Commission's loose notion of 'civil society organizations', which includes trade unions and employers' federations, non-governmental organizations, consumer groups, and organizations representing social and economic players, charities, and community-based organizations (Commission of the European Communities 2001: 14).³² Civil society is described as 'non-political, spontaneous, private and prior to politics' (Hirst 1996: 99), in spite of the fact that in its latest policy documents the Commission, similar to

the EECS,³³ favours a more politicized role for civil society in the EU (Commission of the European Communities 2007*b*, 2008*c*). This definition formerly served as a basis for entry into the Commission's voluntary database of European civil society organizations, CONECCS, which has been replaced by the new register. Whereas CONECCS contained only information on interest groups organized and operating on the EU level, the new register includes not only European entities, but also groups organized at the national, regional, or local level. However, the register of stakeholders participating in the civil dialogue with the Commission's Directorate General for Trade³⁴ remains fully operational notwithstanding that the area of its application also falls within the remit of the Commission's new register for lobbyists.

Certain activities do not fall within the scope of the register, including (a) activities pertaining to legal and other professional advice when they relate to the exercise of the fundamental right to a fair trial of a client, including the right to a defence in administrative proceedings, such as those carried out by lawyers or by any other professionals; (b) activities of the European-level representatives of management and labour when they act under the Articles 138 and 139 EC social dialogue procedures (Obradovic 2006); and (c) activities in response to the Commission's direct requests, such as ad hoc or regular requests for factual information, data or expertise, invitations to public hearings, or participation in consultative committees or in any similar fora. However, when the European level social partners engage in activities falling outside the role conferred on them by the Treaties, they are expected to register in order to guarantee a level playing field between all the interests represented.

Any entity, irrespective of its legal status, can register if it is engaged in lobbying activities as defined by the Commission (Commission of the European Communities 2008*a*: 3). This makes it possible for interest groups, umbrella networks, and platforms (such as the environmental group the Green 10, the Human Rights and Democracy Network, or the Civil Society Contact Group), that have an informal character and cooperate on specific issues but do not possess legal personality as an entity to register. The categories of entities expected to register are as follows: (a) professional consultancies and law firms involved in lobbying EU institutions; (b) 'in-house' lobbyists and trade associations active in lobbying; (c) NGOs and think tanks; and (d) other organizations such as academic organizations, churches, associations of public authorities with a private legal status, or any mixed private/public structure of which public authorities are a part if they are carrying out lobbying activities (although local, regional, national, and international authorities are not required to register), etc.

The register is limited to organizations and does not request the registration of the individual lobbyists working for them. This reflects the Commission's definition of stakeholders, which focuses on civic associations, i.e. 'organized civil society' (including companies), rather than on natural individuals (Commission of the European Communities 2001, 2002*a*, 2007*b*, 2008*c*). The

Commission endorses this mode of participation because it is best suited to serve the purpose of increasing the legitimacy of European policies (Obradovic and Alonso Vizcaino 2006).

15.7. Information required for registration

Registrants are required to supply the following information: (a) whom they represent; (b) their objectives and goals; and (c) how and by whom they are funded.

15.7.1. *The financial disclosure requirement*

One of the most important aspects of this register concerns the issue of financial disclosure. Interest groups should declare funding sources and major clients. This is supposed to ensure that the Commission as well as the public can identify and assess the driving forces behind the positions taken and the interests presented. However, a rigorous spending disclosure is not required. The financial disclosure requirements are adapted to the specific situation of the various categories of registrants.

(a) Professional consultancies and law firms involved in lobbying EU institutions are expected to disclose their turnover linked to lobbying these institutions, based on the latest annual account. This turnover should reflect the total revenue received from all clients for such activities. Registrants are then asked to list the clients for whom they lobby EU institutions. This list, established in decreasing order of contract value, is to be created according to a particular format: the registrant's clients should appear in boxes representing ranges either in absolute amounts (brackets of 50,000 euros) or in percentages (brackets of 10%). The registrant may choose either approach for stating revenue.

(b) 'In-house' lobbyists and trade associations are expected to provide an estimate of the total costs associated with the direct lobbying of EU institutions. This estimate has no legally binding effect. For registrants with an office in Brussels, this estimate could start from the overall budget for this office (personnel costs and expenditures on materials, office leases, memberships in associations, etc.), from which the cost of non-lobbying activities would be deducted. Organizations without an office in Brussels could provide a rough estimate of the percentage of time their employees spend on lobbying EU institutions and on this basis gauge the costs allocated to these activities.

(c) NGOs and think tanks as well as other organizations have to publish their overall budgets. Once this amount has been entered, the main sources of

funding, such as public (European, national, and sub-national) funding, donors, membership fees, etc., have to be indicated.

Thus, the register requests different types of financial information from different types of actors. While for-profit lobbying organizations are asked to report approximate figures related to their direct lobbying expenditures, NGOs and think tanks are required to declare total budget figures. Moreover, each registrant will largely have to decide by themselves what they consider lobbying/interest representation expenses and what is not. This means that the register will not provide comparable financial information to the public.

The operationalization of those requirements should be done in a way that is compatible with the Union's legislation on data protection, which applies to its institutions. According to Article 5(a) of Regulation 45/(2001), the Commission is authorized to make more data available, including those mentioned in its proposed register for lobbyists, if it deems it necessary to perform its tasks in the public interest. However, lobbyists must be informed about the potential of disclosure and other relevant circumstances when their data are collected.³⁵

This requirement was not introduced due to any fear that lobbyists are susceptible to fraudulent practice,³⁶ it is merely a part of the wider EU action intended to improve the transparency of Union finances.³⁷ However, some authors insist that given the rise of gongos, bongos, and dongos (NGOs organized by governments, business, and donors), financial accountability has become a particularly important element of their operations.

15.8. Incentives for registration

There are no privileges attached to registration. It does not constitute accreditation and does not entail access to any privileged information. Furthermore, it does not imply any form of official recognition by the Commission. In fact, if one considers the Commission's positions along with the fact that the register is voluntary, it appears that there is no incentive for civil society organizations to register. In order to encourage registration, the Commission currently provides two incentives for interest groups to comply with enrolment requirements. Lobbyists that sign the register are given an opportunity to indicate their specific interests; in return, they will be alerted to consultations in those specific areas. Secondly, the Commission will treat the contribution of non-registered groups as not representative of their respective sectors.

Registration in the CONECCS database, which has been replaced by the new register, was also voluntary and provided no incentives for civil society organizations. By the same token, there was no disincentive for not registering. However, since the Commission had announced that this database would be used in order to identify the appropriate mix of consultation partners,³⁸ it was

quite clear that interest groups that decline to make their details available in this directory ran the risk of being overlooked in the consultation process. The new register will be used for the same purpose.

Further, the importance of being registered is even more obvious when we consider the fact that the majority of impact assessments of policy initiatives are carried out through a combination of the forms of consultations to which the register applies: Internet-based consultations open to all interested parties and those targeted at specific stakeholder groups (The Evaluation Partnership Limited (TEP) 2007).

However, it is very questionable whether the mentioned incentives for signing up in the new register will be capable of serving their purpose, as discussed below.

15.8.1. *The automatic alert incentive*

The automatic alert function is a relatively weak incentive, particularly for Brussels-based interest groups that follow the Commission's activities on a daily basis. Moreover, all of the Commission's planned initiatives, i.e. its annual work programme and the impact assessment roadmaps, are accessible to the public well before the consultations take place.³⁹

Furthermore, it is very difficult to implement this incentive. If realized, it would create a privileged group of recipients of information held by the Commission. Such practices are prohibited by European laws guaranteeing equal access to information held by EU institutions to all EU residents (not only citizens), whether groups or individuals, without making the dissemination of this information conditional upon the fulfilment of particular requirements (Regulation (EC) No 1049/(2001)). Then again, the minimum standards do not require the Commission to provide all interested civil society organizations with individually issued invitations to participate in an EU consultation (European Ombudsman 2005). However, it is unclear whether those standards allow the Commission to alert certain designated potential participants but not others.

In addition, it is uncertain whether this approach will benefit the Commission. In its 1992 communication on relation with interest groups, it pointed out that its intention to be accessible to interest groups 'is in [its] own interest ... since [they] can provide the services with technical information and constructive advice' (Commission of the European Communities 1992). Moreover, the Commission also claims that it wishes to maintain an inclusive approach and not to erect hurdles or restrict access to the consultation process; the standards should not prevent lobbying (Commission of the European Communities 2002a: 13). In other words, it does not intend to create new bureaucratic obstacles that would limit the number of participants in the consultation process. Indeed, it provides assurances that 'every individual citizen, enterprise or association will continue to be able to provide the Com-

mission with input' (Commission of the European Communities 2002a: 11). The Commission does not want to limit the number of participants in consultations because they supply the Commission with the information, data, statistics, knowledge, and expertise necessary for discharging its responsibility to initiate law in the EU. It actually depends upon the information it receives from lobbyists because its in-house expertise is limited; information provided by private actors helps the Commission to offset the informational advantage of national officials (van Schedelen 1996: 26; Christiansen et al. 2003: 9). Thus, it relies to a large extent on private actors to supply it with information and to help it draft legislation (Crombez 2002; Bouwen 2006).

The policy of alerting only particular groups and not others will restrict the information generating capacity of the Commission's consultation process. This practice would contradict the Commission's 1992 claim that it 'has always wanted to maintain a dialogue which is as open as possible with all interested parties' (Commission of the European Communities 1992: 4). Similarly, a decade later the Commission echoed this assertion in stating that by adopting the minimum standards for consultation with interest groups it 'does not intend to create new bureaucratic hurdles in order to restrict the number of those that can participate in consultation processes' (Commission of the European Communities 2002a: 11). Now it seems to be using the very same standards to encourage civil groups to register, promising greater influence to those that comply with its enrolment rules, even though these are of a non-compulsory nature, than to groups that do not.

However, the Commission did manage to find the golden formula, which ensures that it will not be deprived from useful and necessary information as a result of the application of the registration rules. As we have already pointed out above, the registration requirements do not affect interest groups invited by the Commission to contribute on particular issues or to participate in public hearings, in consultative committees, or in any similar fora. Empirical research shows that those forms of consultations excluded from the ambit of the register are the source of the most useful information for the Commission (The Evaluation Partnership Limited (TEP) 2007: 75, 76).

Whether this will discourage organizations that are regularly invited by the Commission to comment upon its policy proposals in particular areas⁴⁰ from registering remains to be seen.

15.8.2. Mobilization for registration based upon the reward of the status of representativeness in the Commission's consultations

The second incentive, the non-recognition of representativeness of groups that decline to register, is not going to be examined in terms of whether the concept of representativeness, as developed by the Commission's minimum standards for consultation, is applicable to civil groups pursuing particular causes and not

acting exclusively on behalf of members or clients. This issue exceeds the scope of this chapter and has already been analysed in a comprehensive manner elsewhere in the literature (Obradovic and Alonso Vizcaino 2006).

This incentive is embedded in the Commission's minimum standards for consultations, which do apply in conjunction with the lobbying regulation rules as we explained above. They stipulate that 'if... information (on groups' representativeness – D.O.) is not provided, submissions will be considered as individual contributions' (Commission of the European Communities 2002a: 17). According to the consultation standards, the Commission gives more weight to submissions put forward by representative groups than to individual views. It considers an opinion expressed in the consultation process to be more relevant and useful if it is submitted by a group that is regarded as being representative of the sector. That is why the Commission needs to have at its disposal information concerning the degree of representativeness of the groups participating in consultations.

Mobilization for registration based upon the reward of the status of representativeness in the Commission's consultations is unlikely to be effective. Since the Commission is not under obligation to incorporate contributions submitted in the process of consultation into its proposals, there is no guarantee that the view of registered associations will be reflected in the relevant decision. The consultation on the Fundamental Rights Agency is very illustrative in this respect, since certain principles supported by a number of respondents to the public consultation – such as a desire for the Agency to begin dealing with individual complaints – were disregarded by the Commission (Fazi and Smith 2006). The same scenario occurred during the REACH⁴¹ initiative (Friedrich 2008).

This inducement will also not be very attractive for those groups lacking the resources to engage in expensive lobbying campaigns. It will certainly not serve to remedy the strong imbalance between different types of stakeholders, whereby big business is the prime interlocutor of the Commission's most influential Directorate Generals.⁴² This is because the minimum standards do not require the Commission to ensure the balanced participation of all interested parties, but only to give proper weight to the groups that put forward their comments (European Ombudsman 2005). The Commission itself recognizes that the representation of relevant stakeholders in consultations is felt to be unbalanced (The Evaluation Partnership Limited (TEP) 2007: 75; Commission of the European Communities 2007a: 6). In spite of the fact that it has acknowledged the need to ensure that a plurality of views and interests are expressed in the consultations (Commission of the European Communities 2007a: 6), business groups still hold the most sway with the Commission's most powerful Directorate Generals (Fazi and Smith 2006).

Empirical research also shows that the interest groups themselves do not consider participation in the Commission's public consultations to be an

effective mechanism for influencing European decisions; personal and informal contacts with institutional actors are preferred (Cammaerts 2006: 238; Bozzini 2007a: 106). Nonetheless, the public consultations are not regarded as totally useless (Bozzini 2007b: 9). Interest groups participating in the Convention on the future of Europe are of the opinion that the Internet is essentially a platform for disseminating information, communicating, interacting, networking, and debating, but not for influencing decision-makers. In their experience, more influence can be achieved via face-to-face contact with Commission officials than through the submission of comments in the process of Internet-based consultations. The same research shows that the resources and capabilities needed to navigate, process, and analyse the myriad of information in the consultation documents pose a major constraint for many groups to participate in those consultations (Cammaerts 2006: 240; Jesús Butler 2008: 581). If we add to this that independent researchers have found the output of public online consultations and consultations with specific target groups that are subject to the registration rules to be of little use for the Commission (The Evaluation Partnership Limited (TEP) 2007: 75) (due to insufficient representativeness and frequent misunderstandings vis-à-vis what information was actually sought), it is doubtful whether the aforementioned incentive will actually have any mobilizing effect.

On the other hand, it cannot be expected that mere registration would be sufficient to render an interest group as representative of the sector in the area of its activity. This is exacerbated by the Commission's failure to establish precise and unambiguous criteria of representativeness for the purpose of participation in its consultations (Obradovic and Alonso Vizcaino 2006).

15.9. Code of conduct

The applicants for the register have to adhere to a code of conduct (Commission of the European Communities 2007a: 5). Interested parties cannot sign up for the code without registering. Subscribing to the code is a requirement for all lobbyists wishing to be included in the new register. The code builds on the Commission's 1992 code for lobbyists.⁴³ It takes into account the existing professional codes of conduct, such as those developed by public affairs practitioners and the EP.⁴⁴ The code prescribes that activities of interest representatives approaching the European Commission should be guided by principles of openness, honesty, and integrity. It also formulates seven clear rules of behaviour that interest representatives should abide by. These rules stipulate that lobbyists must (a) comply with the identification requirement; (b) refrain from misrepresentation intended to mislead third parties of EU staff; (c) declare the interests they are representing; (d) provide unbiased, complete, up-to-date, and straightforward information; (e) not obtain information dishonestly;

(f) not induce EU staff to contravene rules and standards of behaviour applicable to them; and (g) observe the specific rules listed in the Staff Regulations⁴⁵ when employing former EU staff.

Observing other codes of conduct is not necessarily an obstacle to registration, providing that those other codes contain, in substance, the same commitments as those in the Commission's Code of Conduct.⁴⁶ Registrants must be prepared to submit those specific codes to the Commission for scrutiny if asked to do so.

The number of organizations participating in the public consultation on the establishment of a code of conduct for lobbyists suggests that issues such as conflicts of interest or revolving doors should be encompassed by the code (Commission of the European Communities 2008a: 4). In fact, the involvement of the Commission in the practice of revolving doors practice has frequently been alleged by interest groups (Friends of the Earth 2006: 25; European Ombudsman 2007b; Greenwood 2007b: 35). However, in the Commission's view, these issues do not fall within the scope of the European Transparency Initiative, of which the establishment of the code is a part. It contends that the problem of members of EU institutions with conflicts of interest is already covered by a number of existing safeguards.⁴⁷ However, it is doubtful whether those rules are sufficient now when the Commission actively encourages its staff to have more contact with the public and media⁴⁸ (Commission of the European Communities 2001: 5).

15.10. Public accessibility of information deposited in the register

All information entered in the register will be public. The Commission has no plans to publicize aggregate financial statistics or to provide an analysis of the amounts disclosed, but it will furnish information on the total numbers of registrants and the categories to which they belong.

The only exception to this public disclosure rule is the information concerning the contact person designated for the register's operation, which is to be used internally only.⁴⁹ However, the Commission may, upon request and subject to the provisions of the access to documents regulation (Regulation 1049/(2001)), have to disclose correspondence and other documents concerning the interest representatives' activities (Commission of the European Communities 2008a). This means that the Commission must reveal the names of contact persons to individuals asking for such information under Regulation 1049/2001, unless the privacy and integrity of the person concerned would be undermined by the disclosure.⁵⁰ In assessing the need for withholding such information, the Commission should observe the principles laid down in Regulation 45/2001 on the protection of personal data.⁵¹ But neither Regu-

lation 1049/2001 nor Regulation 45/2001 requires the Commission to keep the names of persons who communicate opinions or information to it confidential, even if these individuals have not granted permission for their names to be disclosed.⁵²

15.11. Monitoring of compliance

The Commission itself, and not an independent body, will monitor compliance and decide on sanctions. An investigation will be carried out if a complaint is issued by a third party or if the Commission has grounds for believing that there has been a violation of its code of conduct or that inaccurate information has been supplied by a registrant. However, all factual information in the register is provided under the sole responsibility of the registrant.

Registrants found to have either submitted incorrect information, infringed the code of conduct, or to have violated the EU values stipulated in Article 6 of the EU Treaty will firstly be called upon by the Commission to conform to the rules or to correct any false or misleading information in the register.

The Commission may initiate an administrative process for the purpose of deciding whether to impose sanctions. This process will respect proportionality and the right of defence. It is unclear whether the Commission's decisions taken within this procedure can be challenged by their addressees before the European Court of Justice. Only decisions producing legal effects upon third parties are susceptible to the Court review.⁵³ In principle, it is unlikely that measures ensuring compliance with a voluntary code of conduct come under this category. Nonetheless, those measures can be brought before the European Ombudsman which is empowered to hear claims involving the practice of maladministration conducted by EU institutions. Its decisions are not binding upon the institutions concerned but they often comply with the Ombudsman's recommendations (European Ombudsman 2008). The Commission may decide to apply the following sanctions in case of violation of the rules of the code.

- (a) Temporary suspension from the register for a set period or until correction of the situation by the registered entity. Suspension means withdrawal of all benefits of registration. This sanction has already been applied on 6 plus, a prominent Brussels consultancy, because it failed to disclose the identities of all its clients.⁵⁴
- (b) Expulsion from the register in case of severe and/or persistent failure to comply with the code.

The sanctions for regulatory transgressions stop short of public denunciation of unethical lobbying practices.

This is in line with the EP's code of conduct for lobbyists, whose breach could lead to the withdrawal of accreditation, including the possible suspension of physical access to the premises of the EP.⁵⁵ The existing voluntary self-regulatory codes of the EPACA and SEAP, which are based upon the Commission's 1992 minimum standards, do not stipulate specific sanctions for their breach, but rather refer to their initiation of disciplinary procedures by those associations in cases of non-compliance.

It seems that the Commission has opted for establishing reputational accountability of lobbying groups seeking engagement in the EU policy process. The registration of inaccurate or false information or breach of the code will not lead to any legal prosecution, financial penalties, or the prohibition of further lobbying activities, because non-registered organizations are not banned from lobbying EU institutions. However, the loss of credibility that would result from expulsion from the register might prove to be a very effective sanction. But the effectiveness of this sanction could be dramatically undermined if the Commission does not manage to rigorously control the information entered into register as well as monitor compliance with the code requirements. The experience of other international organizations in this area is not very encouraging. Only about half of the organizations that require interest groups to go through accreditation procedures review whether the registration criteria are being fulfilled on a regular basis (Steffek and Nanz 2008: 19). Moreover, the lack of an enforcement mechanism in the framework of the CONECCS database meant that the information available was frequently out of date.

15.12. Feasibility of establishing a common register for lobbyists in the EU

At present, the Commission, EP, and EESC conduct their own separate but parallel dialogues with interest groups according to three different sets of rules.

The Commission has clearly expressed its preference to develop the register and code of conduct for lobbyists together with the EP, the Committee of Regions, and the Economic and Social Committee. In principle, the EP endorses the Commission's intention (European Parliament 2008a: point 11). By the end of 2008, a joint working group between Commission, Council, and Parliament were to report on the feasibility of establishing a common lobbyists' register but this has been delayed.⁵⁶ Does this mean that there will be ethical standards for lobbyists applicable to all EU institutions in the future?

Although, the Commissioner responsible for the introduction of the Commission's register for lobbyists, Siim Kallas (2008), now thinks that there are very solid reasons for the Commission and Parliament to jointly develop a shared register, it is unlikely that all EU institutions in the near future will

agree on an *ius commune* for lobbyists. The obstacles to an inter-institutional agreement like this are considerable.

15.12.1. *Past initiatives*

Prior to the Commission's latest programme for setting up an interest representatives' register, efforts undertaken in the Union aimed at the creation of common European standards for regulating lobbying did not produce encouraging results. The Governance White Paper (Commission of the European Communities 2001: 17) called on the Commission, the EP, and the Council to review their practices and contribute to the general reference framework for consultation by 2004. The June 2003 inter-institutional agreement on the better law-making initiative urged the three institutions to improve the co-ordination of their preparatory work and to adopt a common methodology for carrying out impact assessments (IAs).⁵⁷ All three institutions have since endorsed the development of a common approach to impact assessment (Commission of the European Communities 2007*d*: 16). However, while the common approach prescribes the general rules and principles of IA, such as transparency (all IAs are to be published on websites) as well as consultation for IAs ('where reasonably possible and without causing undue delay in the legislative process'), and cooperation, it does not develop common methodology for carrying out IAs (Inter-Institutional Common Approach to Impact Assessment 2005). This common approach is made without prejudice to the decision-making role and autonomy of each institution. Thus, a standard protocol for consultations has failed to crystallize. The initiative for the adoption of the Statute for a European Association (EA), as part of a general approach to regulate the establishment of interest associations at the European level, has also proved to be unsuccessful (Commission of the European Communities 2005*c*).⁵⁸

The EESC is not party to the 2003 inter-institutional agreement on better law-making. It also does not officially participate in the pre-drafting phase of the EU legislative process, but delivers its opinion on the Commission's proposals *ex post facto*. Having found that the impact of the Committee's opinion on EU decision-making is minimized by this arrangement (Commission of the European Communities 2001: 15) yet convinced that the Committee should become 'an indispensable intermediary between the EU institutions and organised civil society,' the Commission signed a Protocol with the EESC entailing that the Commission would invite the EESC to issue exploratory opinions and rely on the EESC to deepen its relations with organized civil society (European Economic and Social Committee 2001). The rationale behind this Protocol is to reinforce the EESC's function as an intermediary between the EU institutions and organized civil society. This Protocol provides for the Com-

mission to consult the Committee on certain issues on an exploratory basis prior to drawing up its own proposals, allowing the Committee to play a useful consultative role at an earlier stage in the decision-making process. This means that civil associations organized at the national level and participating in the EESC's work are consulted prior to the drafting of EU law twice, once in their capacity as EESC members and again when they take part in the Internet consultations. On the first occasion, their representativeness should be judged against EU rules governing the EESC's activities, and in the second situation, the Commission's minimum standards the Commission's Register for Lobbyists and complementary code of conduct are applicable. Moreover, European-level interest groups holding membership in the EESC Liaison Group are supposed to meet the third set of representativeness criteria elaborated above.

15.12.2. *Reasons for the lack of common lobbyists' rules in the EU*

15.12.2.1. THE AUTONOMY OF EU INSTITUTIONS TO REGULATE THEIR INTERNAL AFFAIRS ACCORDING TO THEIR OWN OPERATIONAL RULES

The lack of common lobbyists' standards in the EU is primarily attributable to the founding principles of the EU institutional framework, which is based upon the principle of inter-institutional balance. This means that each institution has a degree of autonomy in regulating its operational rules (Jacqué 2007). That is to say, that the critical and essential feature of the EU's organizational design is the institutions' discretion to adopt their own internal rules and procedures. Consequently, they do not have an obligation to synchronize those conventions among themselves. For example, when the Commission formulates proposals that will eventually serve as the basis for an enhanced communication policy for the EU, it emphasizes that the new policy must respect the various institutions' autonomy. This appears to contradict its objective of strengthening coherence and synergies between their activities (Commission of the European Communities 2001: 4, 2007b).

The principle of internal institutional autonomy cannot be significantly restricted by virtue of inter-institutional agreements. As regulatory instruments those agreements are designed to structure relations in a non-hierarchical way by using cooperative means. Moreover, the inter-institutional agreement at hand is replete with abstract general content that is subject to a special legal regime. Although they can impose legal obligations on institutions when so intended by their drafters, inter-institutional agreements, as acts of institutions,⁵⁹ cannot alter Treaty principles such as the principle of internal procedural autonomy of institutions.⁶⁰

15.12.2.2. DIFFERENT ROLES AND TASKS ASSIGNED TO EU INSTITUTIONS

Not all EU institutions are equally attractive or receptive to lobbying activities. Their relations with lobbyists are predominantly determined by the role they play in EU decision-making. This is the reason why the rules that are appropriate for the regulation of lobbying activities in one institution might not serve the requirements of another. The EP recognizes that institutions have essential differences and might thus produce different requirements for lobbyists (European Parliament 2008*b*: 10).

Lobbyists are most interested in having unhindered access to the Commission because, as mentioned above, European decisions are most efficiently influenced at the pre-drafting stage, i.e. while they are still with this institution.

Furthermore, the new lobbying regulation rules apply in conjunction with the Commission's minimum standards for consultations,⁶¹ which pertain solely to the Commission's relations with interest groups. These rules do not apply to lobbying activities that take place in the EP or the Council. For example, the EP created its own civil society constituency called Agora Forum encompassing 500 civil society organizations that meet the EP lobbyists' requirements. EP members consult these organizations during the preparation of Parliamentary committees' reports.⁶² Thus, since lobbying conditions are not uniform throughout the complex EU institutional design, it remains questionable whether a single set of rules can govern very different lobbying situations.

15.12.2.3. DIFFERENCES IN THE COMMISSION'S AND EP'S APPROACHES TO THE REGULATION OF LOBBYING

At present, there are significant differences in the Commission's and the EP's approaches to regulating lobbying.

One of the crucial differences relates to the reasons for the introduction of the lobbyists' register. While the Commission (2001, 2007*b*, 2008*c*) and the European Economic and Social Committee (2006*a*: point 3.2.1; 2006*b*: point 7) created the register as a part of their campaign to increase civil society's participation in European decision-making in order to enhance Union legitimacy, the European Parliament (2002: para. 11(a)⁶³) does not consider the direct involvement of civil society in Union affairs to be the source of its legitimacy. Consequently, while the Commission sees the register as a potential instrument for increasing its legitimacy, the Parliament regards it as a tool for regulating the access of lobbyists to EU institutions (European Parliament 2008*b*: consideration 1). The contacts with interest groups are perceived by the Parliament to be useful sources of information for its members.

The most obvious difference, but not the most important one, is that the EP insists on mandatory registration, while for the Commission voluntary com-

pliance appears to be more appropriate. Since the lobbyists' access to the EP building and its members is conditional upon their registration, any common register of interest representatives in the EU would be de facto mandatory for lobbyists.

A more serious discrepancy between the two institutions lies in how they treat the financial disclosure requirement. Although both institutions call for the disclosure of financial interests and funding sources of lobbying organizations entering the register, their positions on the content of this requirement are not in concert.

The Commission is of the opinion that interest groups should declare funding sources and major clients. This is supposed to ensure that the Commission as well as the public can identify and assess the driving forces behind the positions taken and the interests presented.⁶⁴ The EP calls for 'full financial disclosure' without indicating the precise meaning of this request. It only asserts that the disclosure requirement should be equally applicable to all registered interest representatives (while the Commission's are not) and carried out within meaningful parameters, but does not require exact figures (European Parliament 2008a: points 22 and 23). Unfortunately, examination of the current Parliamentary rules on lobbying will not shed more light on the matter because they do not require accredited interest representatives to disclose financial information. Therefore, the rationale behind the Parliament's position remains very elusive. The EESC Liaison Group's participation criteria are silent about the disclosure issue.

Another subject on which there is no common position concerns the establishment of a body for monitoring the accuracy of the information submitted by registrars. Whether EU institutions will be able to establish a mechanism for this purpose is debatable; an earlier attempt to set up an Advisory Committee on Standards in Public Life (Commission of the European Communities 2000) failed due to EP opposition. The rejected model had no sanctioning powers as well as no oversight of the management and monitoring of registers of interest to EU officials. Is it now possible to establish a common monitoring structure to manage the new common register for lobbyists when previous efforts to create a public ethics monitoring body with only mild advisory competence have proven to be futile? The gravity of the problem is worsened by the fact that both the Commission and the EP insist that sanctions, such as the suspension of membership or even removal from the register, be imposed on groups that supply inaccurate information or breach the code of conduct. The body monitoring overseeing the lobbyists' register should presumably carry out this sanctioning regime.

Furthermore, there is no consensus among these EU institutions with respect to how their standards governing conflicts of interests among public officials should complement the ethics rules for lobbyists. While there are numerous and very strict rules on the disclosure of the financial interests of

the Commissioners,⁶⁵ the EP ethics regime⁶⁶ is relatively weak (Demmke et al. 2007: 60–6), even though it requires the EP members to declare their financial interests (European Parliament 2008a: point 5).

The incompatibility of the data collected in the two institutions' registers⁶⁷ is another issue that has to be addressed in any future attempt to establish a common register of lobbyists in the EU. While the EP's register contains data on individuals issued with passes for access to EP buildings⁶⁸ as well as on their respective organizations, the Commission's register neither requires individuals to sign in, nor does it make information on the contact persons of the registered organizations accessible to the public. However, while the Commission's and EP's registers are both open to EU, regional, and national or even foreign groups, including profit-making companies as well as those established in third countries, only non-profit European-level associations are eligible to take part in the EESC Liaison Group. It should be noted that although the purpose of the Commission's financial disclosure requirement is not to demonstrate the fiscal independence of particular interest groups from public authorities as a prerequisite for entering the register, a great number of EU-level civil interest organizations receive funding from European institutions (Greenwood 2003: 193). In contrast, the EESC stipulates the independence requirement as a precondition for Liaison Group membership.

An additional problem arises from the EP's insistence on the use of a 'legislative footprint', i.e. a list of the registered interest representatives who were consulted and provided significant input during the preparation of reports or EU policy initiatives (European Parliament 2008a: point 3). This list has to be attached to Parliamentary reports or Commission legislative proposals. Although the Commission publishes all contributions submitted during the Internet-based consultations prior to the drafting of its proposals,⁶⁹ it does not refer specifically to groups whose opinions have exerted significant influence upon its drafts in the explanatory statements accompanying its proposals. However, the Commission acknowledges the necessity 'to draw more systematically on feedback itself from citizens' (Commission of the European Communities 2005d: 8) and has pledged to provide better feedback, including explaining how and to what extent the comments are taken into account (Commission of the European Communities 2007a: 6).

15.13. Prospects for establishing a common lobbyists' register in the EU

It is very unlikely that a common lobbyists' register in the EU will be put into operation anytime soon. The obstacles are numerous, including the autonomy of EU institutions to regulate their internal affairs according to their own operational rules as well as dissimilarities in lobbying situations across differ-

ent EU institutions. To complicate matters, there are several differences between the Commission's and EP's approaches to regulating lobbying, manifest in the nature of their registration requirements (mandatory or voluntary) as well as in the content of their financial disclosure requirements. In addition, the two institutions do not assign the same scope of competence to the bodies charged with monitoring the registers; they also diverge on how and if to indicate which groups have decisively influenced the Commission's proposals or the EP's reports.

Nevertheless, we would like to point out several factors that could facilitate the adoption of a common approach to the regulation of lobbyists in the EU. For example, the Commission and the EP do agree upon the definition of lobbying⁷⁰ and see the need to sanction non-compliance with the register requirements. Furthermore, both institutions are amenable to publishing a transparent overview of the experts groups and advisory bodies the Commission has set up to assist in preparing its policy initiatives⁷¹ as well as a list of inter-groups the EP has established to support its committee work (European Parliament 2008a: point 6). However, the Commission and the EP can still decide entirely independently to what extent they will take account of opinion originating from civil society. In addition, because their codes of conduct are considered internal procedural rules, they cannot be subjected to judicial review. Finally, as we explained earlier, EU institutions have no common approach to the financial disclosure requirement, and it should be kept in mind that this requirement is not targeted specifically at interest groups and NGOs active at the EU level, but rather comprises part of the wider EU effort to improve transparency in EU finances. This suggests that EU institutions might be able to adopt a common position on the matter.

However, the most compelling reason to establish common regulatory rules for lobbyists in the EU is the lack of incentives for civil society groups to comply with the enrolment requirements of the Commission's register of interest representatives. Because interest groups have no real incentive to sign the Commission's current register of lobbyists, the Commission has called for the establishment of a common EU interest representatives' register. The Commission hopes that such an initiative will boost registration among civil society organizations.

15.14. Conclusions

Although the introduction of the Commission's lobbyists' register has the potential to reshape the existing lobbying practices in the Union, its impact should not be overstated. The capacity of the register to fulfil its main objective, the further improvement of Union transparency, is limited by the very nature of its structure. The data required for registration are of a very general

nature and are already available on the potential registrants' Internet sites. And the financial disclosure requirement, which does not mandate detailed spending reporting, lacks teeth. If the incentives for signing the register are very weak, the monitoring procedure is even more underdeveloped. There is no body dedicated to monitoring the accuracy of entered information; this task currently falls to the Commission, which is already overburdened with assignments. Even though individuals are entitled to alert the Commission to inaccurate data, this monitoring mode is not reliable because it can serve as a very powerful weapon against competitors rather than as a trustworthy mechanism for ensuring the compliance with the register requirements.

It is unlikely that the introduction of the register will restrict the access of interest groups to the Commission. On one hand, it is related to the forms of the Commission's consultations, which are not considered by interest groups to be very effective means of influencing the Commission. On the other hand, information collected through those consultations is generally regarded to be of little relevance or usefulness for the Commission.⁷² More importantly, the registration requirement does not extend to groups invited by the Commission to provide information, data, or expertise or to participate in public hearings, consultative committees, or any similar fora. Empirical research shows that the invitational approach provides the most valuable information for the Commission.⁷³

Further, other assessments suggest that the prospects for establishing a common register for lobbyists endorsed by all EU institutions are quite slim for a number of reasons: the autonomy of EU institutions to regulate their internal affairs according to their own operational rules, dissimilarities in lobbying situations across different EU institutions, and differences between the Commission's and EP's approaches to regulating lobbying. The latter two institutions have different positions regarding the nature of the registration requirement (i. e. whether it should be mandatory or voluntary), the content of the financial disclosure requirement, the scope of competence for the body assigned to monitor the lobbyists' register, and the issue of how to indicate which groups have decisively influenced the Commission's proposals or the EP's reports.

The most problematic facet of this register concerns the Commission's objective to improve its own legitimacy and credibility by exhibiting the commitment of its interlocutors to good governance principles. Warleigh (2001) has already demonstrated the incapacity of interest organizations to act as agents of political socialization and Europeanization; they are too elitist to allow their supporters a role in shaping policies, campaigns, and strategies.

Notes

1. A register of accredited lobbyists is published on the EP website, <http://www.europa.eu/parliament/expert/lobbyAlphaOrderByOrg.do?letter=U>.

2. On the development of the EP accreditation system for lobbyists see European Parliament (2003a).
3. See, e.g. the reaction of the Civil Society Contact Group on the launch of the Commission lobby register of 29 October 2008, available at <http://www.act4europe.org>.
4. The register of the Commission's ad hoc consultation committees is currently unavailable. It was part of the CONECCS (*infra*) database, which was permanently shut down on 1 January 2008.
5. The register of expert groups to which those guidelines are applicable can be found at <http://ec.europa.eu/transparency/regexpert/index.cfm>.
6. The Interactive Policy-Making (IPM) tool developed by DG MARKT is usually used for running structured questionnaires.
7. See http://europa.eu.int/yourvoice/consultations/index_en.htm.
8. See above.
9. The concept of good governance entails understanding that public decision-making and implementation thereof should be conducted in accordance with particular standards comprising an efficient, open, accountable, and audited public service (Commission of the European Communities 2001: 8; Harlow 2004: 59).
10. See http://ec.europa.eu/atwork/programmes/index_en.htm. The largest number of consultations up to now have pertained to agriculture and fisheries, employment and social policy, external relations, industry, justice and home affairs, transport and energy, environment, economic policy, information society and health, and consumer protection (Commission of the European Communities 2004: 3).
11. See also the Impact Assessment website http://ec.europa.eu/governance/impact/index_en.htm.
12. For an overview on the scholarship on lobbying in the European Union, see Woll (2006).
13. <http://www.seap.eu.org>.
14. http://www.epaca.org/code_of_conduct.php.
15. Siim Kallas is the Vice-President of the European Commission.
16. <http://www.europarl.europa.eu/parliament/expert/lobbyAlphaOrderByOrg.do?letter=U>.
17. See <http://www.eulobby.net/eng/desktopdefault.aspx?tabid=500> and <http://www.eulobby.net/eng/desktopdefault.aspx?tabid=429>.
18. They cover development, young people, gender equality, education and training, family life, the promotion of European ideals, consumer affairs, social service providers, cooperative movements, health insurance and social protection, culture and the arts, European citizenship, the protection and integration of people with disabilities, and rural development (European Economic and Social Committee 2007: Appendix 2, p. 6).
19. Those requirements are largely based upon the EESC proposal for all EU representativeness criteria to be fulfilled by civil society organizations intending to participate in the European civil dialogue. The Committee has stated that, 'In order to be considered representative, a European organization must meet nine criteria. It should: exist permanently at Community level; provide direct access to expertise; represent general concerns that tally with the interests of European society; comprise bodies that are recognized at member state level as representative of particular

interests; have member organizations in most of the EU member states; provide for accountability to its members; have authority to represent and act at European level; be independent and not bound by instructions from outside bodies; and be transparent, especially financially and in its decision-making structures' (European Economic and Social Committee 2006a: point 3.1.2).

20. http://europe.eu.int/comm/civil_society/coneccs.
21. CONECCS did not contain information on experts consulted by the European Commission. On the basis of its communication on the collection and use of advice from external experts (Commission 2002b), the Commission developed the interface between experts and EU policy-makers, i.e. a web communication platform called SINAPSE – Scientific Inform Action for Policy Support (<http://europa.eu.int/sinapse/sinapse/index.cfm>). By December 2006, more than 800 European and international scientific organizations were registered, together with 2,400 members. Several e-communities have since been created, including the European Science Advice Network for Health (EuSANH) (Commission of the European Communities 2007c: 6). In 2005, the Commission launched a register of approximately 1,200 expert groups advising it (http://europa.eu.int/comm/secretariat_general/regexp/index.cfm?lang=EN). The register covers formal bodies established by Commission decisions and informal advisory bodies that set up the Commission's services. It provides key information on those groups, such as the lead service in the Commission, the group's tasks, as well as the category of participants. The register also contains direct links to the Commission departments' website, where more detailed information is available.
22. 'Inclusion on the database is open to non-profit making representative civil society organisations established at European level, i.e. with members in three or more EU or candidate countries and which (1) are active and have expertise in the Commission's policy area(s) and capable of providing expertise and input; (2) are formally established; (3) have authority to speak for their members; (4) operate in an open and accountable manner; and (5) are willing and able to provide further information if asked by the Commission' (http://ec.europa.eu/civil_society/coneccs/help/help_reg.cfm?CL=en).
23. See below.
24. In a 2006 Green Paper it invited the general and professional public to discuss proposed action in lobbying (Commission of the European Communities 2006a: 5–10).
25. It is available at http://eesc.europa.eu/sco/events/11_07_06transparency/minutes-en.pdf.
26. *Supra*.
27. *Supra*.
28. The European Commission press release, IP/07/367, 21 March 2007, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/367&format=HTML&aged=0&language=EN&guiLanguage=en>.
29. In 1992 the Commission estimated, rather excessively, that there were about 3,000 interest groups (both national and European) active in Brussels and Strasbourg, employing around 10,000 people, among whom there were about 500 European and/or international federations (Commission of the European Communities 1992). In addition, it was generally agreed that there were more than 300 individual

- companies with direct representation or public affairs offices in Brussels. About 100 management consultancies and numerous law firms were found to specialize in EU decision-making procedures and European law. In 2000, about 2,600 interest groups had a permanent office in downtown Brussels. Of these groups, European trade federations comprised about a third, commercial consultants a fifth, companies, European NGOs, and national business or labour associations each about 10 per cent, regional representations and international organizations each about 5 per cent, and, finally, think tanks about 1 per cent (European Parliament 2003a: p. iii).
30. See at <http://ec.europa.eu/transparency/regrin/>.
 31. European Commission Press release MEMO/07/110. The European Transparency Initiative: Frequently asked questions, 21 March 2007, see <http://europa.eu/rapid/press-ReleasesAction.do?reference=MEMO/07/110&format=HTML&aged=0&language=EN&guiLanguage=en>.
 32. The Commission has adopted the Economic and Social Committee's definition of civil society (European Economic and Social Committee 1999).
 33. *Supra*.
 34. <http://trade.ec.europa.eu/civilsoc/search.cfm?action=form>.
 35. See Article 11 of the Regulation. See in particular European Data Protection Supervisor, (EDPS) Case 2006–95, Transparency and data protection: conclusions on releasing further information about lobbyists, 31 August 2006, available at http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Papers/BackgroundP/06-08-31_transparency_lobbyists_EN.pdf.
 36. Statistics do not show any disproportionate number of fraud cases involving NGOs as compared to other forms of undertaking. Indeed, out of 3,000 enquiries into different sectors benefiting from European funding investigated by OLAF (European Anti-Fraud Office) since 2001 and passed on to the competent authorities for legal prosecution, only ten concerned NGOs (F.M. Partners Limited 2005).
 37. European Financial Council of the European Union (2006) Regulation 1995/2006 and implementing instrument Commission of the European Communities (2007f) Regulation 478/2007 provide for annual *ex post* publication of the names of beneficiaries of monies received from the Structural Funds as of 2008 and of money received under the Common Agricultural Policy as of 2009. In the field of structural funds, Commission (2006b) Regulation 1828/2006 clearly puts the responsibility for collecting and publishing data about beneficiaries on the member states and the Commission. Council of the European Union (2005), Council Regulation 1698/2005, also requires the publication of lists of beneficiaries. In the field of fisheries of the European Communities Commission (2007e) Regulation 498/2007 stipulates the same requirement. In the area of agriculture the Commission of the European Communities (2007d) Proposal for a Council Regulation amending Regulation 1290/2005 stipulates that the member states are obliged to publish the list of beneficiaries. The Commission has itself already started publishing information on beneficiaries under the programmes it manages directly at http://ec.europa.eu/grants/beneficiaries_en.htm and beneficiaries of public contracts at http://ec.europa.eu/public_contracts/beneficiaries_en.htm.
 38. http://ec.europa.eu/civil_society/coneecs/question.cfm?CL=en and http://ec.europa.eu/governance/impact/practice_en.htm.

39. http://ec.europa.eu/atwork/programmes/index_en.htm.
40. For example, the European Social Platform is frequently called upon by the Commission to submit observations on the social implications of EU initiatives.
41. REACH is the new European chemical Regulation 1907/(2006) and stands for 'Registration, Evaluation and Authorisation of Chemicals'.
42. Statistics show that two thirds of all interest groups operating at the EU level in one way or the other advocate business interests in one way or another (Greenwood 2007a: 11). See also Schutler (2008: 236).
43. *Supra*.
44. *Supra*.
45. *Supra*.
46. The list of professional codes of conduct which have been declared by registrants as having rules comparable to the Commission's code of conduct is available at <https://webgate.ec.europa.eu/transparency/regrin/infos/code-of-conduct.do#comp>.
47. Article 213(2) EC, Article 287 EC; Staff Regulations of Officials of the European Communities (2004) Articles 11–8; Code of Conduct for Commissioners (2004), Chapter 'Independence and dignity', The European Code of Good Administrative Behaviour (2005) positions on 'Objectivity and impartiality'.
48. See in particular the Commission internal communication and staff engagement strategy referred to in Commission of the European Communities (2007b).
49. European Commission, Register of Interest Representatives, Data protection rules, <http://webgate.ec.europa.eu/transparency/regtin/infos/protection.do>.
50. Case T-194/04 *EDPS v Commission*, not yet reported, para. 110. The European Commission instituted the appeal against the judgment on 24 January 2008: Case C-28/08, OJ C79/21 of 29.3.2008. The appeal procedure is still pending.
51. *Ibid.* para. 102.
52. *Ibid.* paras. 137 and 157. See also European Ombudsman (2007a: para. 1.18).
53. See e.g. C-131/03 *Reynolds Tobacco* [2006] ECR I-7795.
54. See further at <http://www.euractiv.com/en/pa/brussels-firm-excluded-eu-lobbyists-register/article-178809>.
55. *Supra*.
56. See further at <http://www.euractiv.com/en/pa/single-en-lobbyists-register-faces-delays/article-178916> and <http://euroserver.com/9/27310>.
57. Inter-institutional Agreement on Better Law Making (2003: points 4 and 30).
58. The proposal for the EA statute has been withdrawn in spite of the fact that the Commission foresaw its adoption in its 2003 Action Plan for Company Law and Corporate Governance (Commission of the European Communities 2003: 22). For the latest version, see Council of the European Union (2003).
59. Case T-17/00, *Rothley v European Parliament*; ECR [2002] II-579; Case C-11/00, *Commission v ECB*, ECR [2003] I-7147.
60. For more on the legal nature of inter-institutional agreements see Hofmann (2006).
61. *Supra*.
62. Cf. <http://www.europarl.europa.eu/parliament/archive/staticDisplay.do;jessionid=B6683795ED13496D354F58374D8986C8.node2?id=66&language=EN>.
63. This paragraph reads as follows: '... organised civil society as the sum of all organisational structures whose members have objectives and responsibilities that are of general interest and who also act as mediators between the public authorities and

citizens, whilst important, are inevitably sectoral and cannot be regarded as having its own democratic legitimacy, given that representatives are not elected by the people and therefore cannot be voted out by the people.'

64. *Supra*.

65. Article 213(2) EC; Article 287 EC; Staff Regulations of officials of the European Communities (2004: Articles 11–8); Code of Conduct for Commissioners (2004: Chapter 'Independence and dignity'); The European Code of Good Administrative Behaviour (2005: positions on 'Objectivity and impartiality'); online permanent publication of the declarations of interests of Commissioners, available at http://ec.europa.eu/commission_barroso/interests/index_en.htm; public register of received gifts with a value of more than 150 euros available at http://ec.europa.eu/commission_barroso/gifts/gifts_fr.pdf; Note from the President and Mrs Kroes to the members of the Commission on the identification of actual or potential conflicts of interest concerning the Commissioner for Competition (SEC(2004)) 1541 of 1 December 2004 available at http://216.239.59.104/search?q=cache:i5nrSakhyEJ:ec.europa.eu/comm/commission_barroso/interests/kroes/interests_en.pdf+Note+from+the+President+and+Mrs+Kroes+to+the+members+of+the+Commission+on+the+identification+of+actual+or+potential+conflicts+of+interest+concerning+the+Commissioner+for+Competition&hl=nl&ct=clnk&cd=1&gl=nl; Ad hoc ethics committee on activities post-employment (in operation) established by Decision C (2003) 3570 of 21 October 2003 referred to in Commission of the European Communities (2008*d*).

66. Articles 189–201 EC; Article 2 of the Annex I and Article 9 of the European Parliament (2005) Rules of Procedure.

67. On the substantial and methodological difference between CONECCS and the EP register, see Berkhout and Lowery (2008).

68. However, the EP like the Commission perceives the concept of participation in terms of the engagement of civic associations, and not individual citizens, in Union affairs (European Parliament 2003*b*: consideration 7).

69. Cf. at http://ec.europa.eu/yourvoice/consultations/index_en.htm.

70. In both the EP's and Commission's view lobbying means 'all activities carried out with the objective of influencing the policy formulation and decision-making process of the European institutions'. Accordingly lobbyists are defined as persons carrying out such activities, working in a variety of organizations such as public affairs consultancies, law firms, non-governmental organizations (NGOs), think tanks, corporate lobby units ('in-house representatives') or trade associations. This wide definition of lobbyist is in line with the Commission's definition of 'civil society organizations' which is a wide-ranging concept including trade unions and employers' federations, non-governmental organizations, consumer groups, organizations representing social and economic players, charities and community-based organizations operating at the European, national, regional, or local level.

71. See <http://ec.europa.eu/transparency/regexpert/index.cfm>.

72. *Supra*.

73. *Supra*.

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Part V

Conclusion

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Chapter 16

Institutionalizing and Managing Intermediation in the EU

Jeremy Richardson and David Coen

Tell me and I will forget,
show me and I will remember
involve me and I will understand

(Chinese proverb quoted in the European Commission's paper on
Governance and the European Union)

16.1. Path dependency?

In the concluding chapter to their 1993 volume *Lobbying in the European Community*, Sonia Mazey and Jeremy Richardson quoted Heisler and Kvavik's seminal work on the nature of the policy process in Western Europe. Describing what they termed the 'European Polity' model, Heisler and Kvavik argued that Western Europe had developed 'a decision-making structure characterized by continuous, regularized access for economically, politically, ethnically and/or sub-culturally based groups to the highest levels of the political system i.e. the decision making sub-system' (Heisler and Kvavik 1974: 48). Crucially, Heisler and Kvavik saw access to policy-makers as regularized and structured, a pattern of co-optation noticed in Europe as early as the mid-1800s in Norway, for example. Mazey and Richardson saw this 'European model' as likely to be transposed to the level of the European Community (EC) and suggested that there were 'strong tendencies for co-optation of some kind. By a process of trial and error, decision-makers will learn which groups are capable of co-optation and which are not. Equally, groups will learn the basic rules of co-optation . . . As a result, more stable and manageable networks of policy-makers and groups will emerge' (Mazey and Richardson 1993: 257). Furthermore, they suggested that some form of institutionalization would take place in order to render the

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system of European-level intermediation manageable (Mazey and Richardson 1993: 254) and hinted that some kind of European Union (EU) level policy style might emerge over time. One of the key features of this policy style would be a system of regularized consultation and participation of groups with the main European level (at that time EC not EU) institutions. This reflected some kind of path dependency within the EC in that the leading actors in the Community's formation were well used to various forms of group integration in the public policy process, such as the form of 'concentration' practised by the Dutch, the corporatist or neo-corporatism familiar in Germany, and the integration of key interests in the Commissariat du Plan in France. As Mazey notes, some fairly stable policy networks involving European Coal and Steel Community (ECSC) officials and corporate interests were apparent as early as the mid-1950s (Mazey 1992). Similarly, Rittberger notes that Jean Monnet's experience in the French Economic Planning Commission gave rise to the Consultative Committee of the ECSC (Rittberger 2009). Monnet saw the function of the Consultative Committee as speaking for producers in the Community, reflecting his own national experience (Haas 1958: for a discussion of Jean Monnet's contribution see Featherstone 1994). Thus, there has been some kind of Euro-level lobbying system for over half a century now. It is ironic that today's functional equivalent of the Consultative Committee, the European Economic and Social Committee (EESC), should now be regarded as a weak institution. This is in large part because the principle of co-optation enshrined in the Consultative Committee is now so widely accepted by all other EU institutions that many, if not most, groups see no need for a specialized consultative institution and tend to ignore the EESC, despite its potential as another opportunity structure in the Brussels milieu (see Chapter 7).

As in all innovations in public institution building, there is a degree of borrowing from past/familiar experience and it is no surprise that 'consultation' should have been part of the model at the European level from the very beginning. Even when creating a *sui generis* international organization such as the ECSC, policy-makers did not start with a blank canvas. They brought with them past experience from working in existing national organizations. In addition to this path dependency, it was equally unsurprising that the 'logic of consultation and negotiation' between policy-makers and interest groups (Jordan and Richardson 1982: 80–110) should kick in once the European policy process got underway. This 'logic' virtually forces decision-makers, be they bureaucrats or politicians, to seek out the views (and ultimately support) of key interests in society as it is very difficult, if not impossible, to govern effectively without it. The phenomenon of some form of 'exchange relationship' between policy-makers and interests is very familiar. For example, it has long been argued that the underlying basis of policy communities is an exchange of mutual benefits between actors (see, for example, McKenzie 1975: 73; Jordan and Richardson 1982: 93–6; Chapter 2) as it is a perfectly natural

phenomenon. It would be very odd indeed (and certainly foolish) for any policy-maker to plough ahead with a proposal in total ignorance of how the affected interests might react or of whether there might be some practical/technical difficulties which could make the desired policy unworkable. To ignore the views and specialist knowledge of the affected interests would be akin to driving a car with one's eyes shut! The incentives to consult are *especially* strong at the EU level as the degree of uncertainty about conditions in the member states is rather high, especially after the recent enlargements. Moreover, for any one set of policy-makers not to consult merely risks the excluded actors shifting their resources to another institutional site as venue shopping is rife (see below). The question was not *whether* EU policy-makers should consult organized interests but *how* they should consult. Even for the Council, as Fiona Hayes-Renshaw shows, policy is not made in ignorance of what organized interests want. From the groups' perspective, they too are driven by an inherent logic which encourages them to deliver expertise and reliable information, and to be trustworthy and reliable.

The EU is, of course, a complex and unique policy-making system, especially the (somewhat unstable) mix of parliamentary democracy, intergovernmentalism, and judicialization. Yet, as our contributors demonstrate, onto this *sui generis* policy-making state, there is a grafted mode of policy-making which is very familiar to interest group scholars in Europe and beyond. What we see in this volume should occasion no surprise. The interest group intermediation system at the EU is pretty familiar elsewhere. For example, Jordan and Richardson, writing in 1979, described the British policy style in the following terms:

In describing the tendencies for boundaries between government and groups to become less distinct through a whole range of pragmatic developments we see policies being made (and administered) between a myriad of interconnecting, interpenetrating organizations. It is the relationships involved in committees, the *policy community* of departments and groups, the practices of co-option and the consensual style, that perhaps better account for policy outcomes than do examinations of party stances, of manifestoes or parliamentary influence. (Jordan and Richardson 1979: 43).

Similarly Rokkan, describing the Norwegian policy process in 1970, argued that the annual round of negotiations between the Norwegian Government and the representatives of the farmers and fishermen had come to mean more to the lives of Norwegian citizens than General Elections (Rokkan 1970).

Hecló's concept of the issue network perhaps best captures this modern policy style as follows:

looking for the few who are powerful, we tend to overlook the many whose webs of influence provoke and guide the exercise of power. These webs, or what I call 'issue networks', are particularly relevant to the highly intricate and confusing welfare policies... Increasingly, it is through the networks of people who regard each other as knowledgeable, or at least as needing to be answered, that public policy issues tend to

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be refined, evidence debated, and alternative options worked out – *though rarely in any controlled, well organized way.* (Hecló 1978: 102–3 emphasis added)

These observations, respectively on Britain, Norway, and the USA, could easily have been written about the EU today.

16.2. The EU's consultative policy style and the 'integration escalator'

The broad style of policy-making identified by these authors so many years ago more or less fits each of the case studies included in this volume. The setting is new, the institutional arrangements unique, but the basic phenomenon is not at all new. As many observers have argued, the EU has developed a possibly contradictory system of representation (for a review of the literature on this topic, see Rittberger 2009) but our volume demonstrates that in this 'mixed government' (Majone 2002: 320) a form of functional representation via group participation has come into being, albeit alongside other forms of representation, as Rittberger argues. As the Chinese proverb quoted (above) by the Commission suggests, the procedural ambition (almost ideology) is one of *involvement*, or even co-option of interests into the EU policy process. The more EU public policy there is, the more groups mobilize to try to influence the EU policy process (and, often, to secure yet more EU level public policy). The EU is now a mature policy-making system. It is also a very *productive* policy-making system. In a sense, there is a policy-making engine at work within the EU that continues to churn out a mass of EU level public policy which the member states then have to implement. Thus the EU is a 'policy-making state' (Richardson 2006). Even in relatively 'unproductive' periods when the output of formal EU legislation declines (as currently), we need to recognize that there is a continuous process of 'fine tuning' of past legislation. The feedback loop between policy-making and policy implementation is not broken in these less productive periods. Today's policy problems are often the result of past policies and this leads to a continuous process of incremental change as policy actors, including interest groups, seek to build on or amend what has gone before. This process is often about incremental change, of course, but these incremental changes are often crucial to groups. 'Fine tuning' of existing EU regulation can have quite big distributional consequences and can create a new set of winners and losers. Groups know that the devil is in the detail. The EU policy engine grinds on, sometimes in a very noisy, 'big bang' way which catches the headlines (such as Treaty reform), but often as a steady background 'hum' not noticed by the public at large. The briefest glance at *European Voice* (the only EU-level newspaper widely read) indicates how strong this 'integration escalator' is. For example, *European Voice* for 17–23 July 2008 reports the following initiatives at the EU level:

A plan by the Commission to switch €1 billion from the Common Agricultural Policy budget to developing countries affected by food price rises; France (occupying the Presidency) was trying to secure a compromise on the EU's biofuels policy; the EP was attempting to change the funding structure of a new EU Telecoms Regulator; France was trying to advance legislation that would grant new rights to long-term refugees and was also trying to secure agreement on divorce legislation (under the 'enhanced co-operation procedure whereby a minimum of eight member states can proceed, thus bypassing the unanimity rule); ministers were discussing plans for a scheme to share airline passenger information; France was revisiting neglected draft legislation on harmonized penalties for employers of illegal immigrants; MEPs were concerned that the list of possibly dangerous chemicals about which the EU's new Chemical Agency was consulting was too narrow; the Commission had proposed that more products would have to meet minimum environmental standards; the European Commissioner for Research had proposed tax breaks for super-computers, satellites and other cutting edge technology; the Internal Market Commissioner had unveiled downgraded proposals for reform of the EU's securities markets and had also threatened banks with regulatory action should they fail to devise a voluntary code of conduct on account switching; industry ministers had urged the Commission to step up its fight against counterfeiting and piracy; and France was pressing for a deal on climate change which would include ways of protecting domestic industries from international competition.

All or none of these initiatives might result in (loosely defined) EU 'legislation' yet for each of them there is a hinterland of interests who would be foolish to ignore them, hence so much of the lobbying resources are devoted to 'watching and gathering'. Even if a group cannot block, let alone influence an EU policy initiative, the principle of minimizing one's surprises still holds good and is sufficient incentive in itself to encourage groups to join the EU policy game. An added incentive, of course, is that if one's competitors have already joined the game, it is risky to stay at home. Also, one should not discount *fashion* as an incentive too. Thus, some actors might not make purely rational calculations about the allocation of lobbying resources. They might feel bad if they are not behaving like the herd. For example, local authorities within the EU might not be getting a positive pay-off from having a Brussels office, but it is certainly 'the done thing' to have one. Just as there are policy fashions, so there are behavioural fashions too.

Basically, the EU lobbying system is no different to most national lobbying systems (at least in Western and Northern Europe). The bulk of lobbying is more akin to long drawn-out trench warfare than spectacular Pearl Harbour type battles. The contestants in the EU policy process are often like the troops in the First World War, they are fighting over a narrow strip of territory which has no great interest to mankind as a whole but about which they care very intensely. We might all be fascinated by the likely consequences of the Irish 'no' vote on the constitutional referendum, but most interests are more concerned with, for example, the EU regulations governing domestic fridges or light bulbs than EU constitutional reform.

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Interest groups politics in the EU is generally about low rather than high politics, just as it is elsewhere.

Much of the criticism of the EU over the past decade (and part of the basis of the growing Euro-scepticism) has been centred upon the alleged 'excessive' policy-making role of the EU in general and of the Commission in particular. As Radaelli (1999) suggests, things began to change in the 1990s. Not just has the quantity of EU legislation been subject to challenge, but also its quality and the processes by which it is made. As he notes, the Amsterdam Treaty contains an entire title on the quality of EU legislation. Thus, 'good legislation requires consultation, regulatory impact assessment, and systematic evaluation of the results achieved by European public policies. But it also requires transparency' (Radaelli 1999: 5). As Radaelli argues, the push for better legislation actually *increases* the need to consult (underlining our earlier point that consultation has an inherent logic, even if it is only risk avoidance by policy-makers). Even if we were to have *less* EU legislation however, this would not reduce the need for groups to lobby in Brussels. Any change from the *status quo* will have distributional consequences. If the EU is (or is entering) some kind of the 'retreat of the state' phase, that will not decrease political activity. As groups found under Margaret Thatcher's reign, her central theme of governments 'doing less' actually resulted in governments doing more and her government turned out to be one of the most interventionist and activist since the immediate post-war period (Richardson 1994).

Any public policy-making retreat of the EU state would be hard fought, as it was in Britain, and we would expect to see some very broad (and strange) coalitions emerge to defend the EU's role if any widespread moves of repatriation of public policy to the member states were to occur. Those business interests who bemoan the 'excessive' burden of EU legislation are unlikely to support a shift back to purely national regulation. Moreover any 'retreat' would provoke yet more resort to litigation strategies (see Chapter 5). Even a simple slowing down in public policy output from the EU would be unlikely to reduce the amount of lobbying. The critical mass of *existing* EU public policy means that there is plenty of scope for group participation in the implementation game process. As Presman and Wildavsky commented very many years ago 'he who implements decides' (Presman and Wildavsky 1973) and groups are fully aware of this. Thus, not only do groups adjust to changes in the balance of power between EU institutions (see Chapter 3) but they can also adjust to the changing pace of EU legislative output as lobbying can be important at all stages of the policy process, including implementation. If resources are, indeed, shifted to this phase of the policy cycle, yet more lobbying venues emerge (often at the national level) at which the totality of EU public policy might be influenced.

Whether or not there is going to be some kind of 'retreat' from supranational policy-making in the EU, the fact remains that the EU level is now the level at

which a significant proportion of what used to be regarded as purely domestic policy-making has been made. Hix suggests that the EU sets over 80 per cent of the rules governing the exchange of goods, services, and capital in the member states' markets (Hix 2005: 4), although Moravcsik is more doubtful, citing one study which estimated that the actual percentage of EU-based legislation is probably between 10 and 20 per cent of national rule-making (Moravcsik 2005: 17). Moravcsik also argues that many policy areas are still untouched by *direct* EU policy-making, such as social welfare, health care, pensions, education, defence, active cultural policy, and most law and order (Moravcsik 2005: 17). In practice, it would be quite difficult to identify any significant area of public policy in Europe that was subject to *no* EU influence at all. The Europeanization of public policy exhibits radically different speeds across policy areas, but, even in very weakly Europeanized (as yet) policy areas such as health, group mobilization is quite advanced, as Chapter 10 illustrates. Moreover, once a small step of Europeanization has been taken, groups learn from observing the trajectory of already heavily Europeanized policy areas that there is a good chance that a more rapid process of change will follow. Rather like those escalators that are still until someone places a foot on the first step, the Europeanization escalator does not take too much to get it moving upwards. To ignore the first step on the escalator is risky. Seemingly, in all policy areas, a degree of Europeanization would benefit at least *some* interest groups, even though it might disadvantage others. Those interests who might benefit have an incentive to try to shift the locus of policy-making to the European level, no doubt encouraged by the apparent success of those groups who have already secured this shift. Thus, we should note a crucially important phenomenon (to which we now turn) of group mobilization in the EU, namely the capacity of groups to *learn and adapt* over time.

16.3. Interest groups as learning and adaptive organizations

This transference of power to a new venue (Baumgartner and Jones 1993) is the starting point for all studies of EU interest groups, even for those authors, such as Wyn Grant, who have tended to lean towards the view that the 'national route' is the main channel of EU lobbying for interest groups (Grant 2000: 106–15). In his contribution with Tim Stocker (Chapter 12), it is recognized that the activities of groups have become more 'European' and groups have adjusted the geographic scope of their lobbying.

The steady increase in the number of groups that are active in the EU policy process (either directly in Brussels or via the national route) simply encourages yet more groups to join the increasingly dense *mélange* of interests already 'Europeanized'. As Heinz et al. argued, lobbying begets more lobbying (Heinz et al. 1993). We simply do not know with any degree of certainty how

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effective this huge amount of lobbying for any one interest group or, more importantly, what the distributional outcomes of the totality of lobbying in the EU are. There are now many case studies of particular groups and particular policy areas (including this volume) which point to distributional consequences but it is exceedingly difficult to measure influence. In one of the few studies to attempt to assess degree of influence, Michalowitz argues that the key variables are type of interest, degree of conflict, and structural conditions (Michalowitz 2007). It is possible that if we could develop really robust measures of influence and set those against robust measures of resource inputs by groups, then we could make some assessment of the overall effect of this mass of lobbying. Suffice to say, for our purposes, that there has certainly been a huge mobilization of interest group lobbying within the EU (Coen 2007). The story from all of our contributors, both from the 'top down' perspective of the EU's institutions and from the 'bottom up' perspective of the groups themselves is consistent, namely that lobbying and how to manage it looms large on the Brussels agenda. We know that group mobilization is probably near saturation point when even Barbie goes to Brussels! In March 2000, the American company that manufactures the Barbie doll, Mattel, advertised the post of public affairs analyst 'in order to maintain close contact with various trade, government, and European union organizations in Brussels' (*European Voice*, 30 March 2000). Clearly, a multinational toy manufacturer such as Mattel has a very obvious interest in the EU as the Union has in place regulations governing the safety of children's toys. However, some very specific and, on the face of it, unlikely, interests also maintain a presence in Brussels. For example, in July 2008 a group of NGOs and activists advertised the post of Campaign Director for a three year campaign to end female genital mutilation in Europe. The person appointed needed 'to have proven capacity to engage at a high level with MEPs, media and policy makers' (*European Voice*, 30 July 2008).

The 1993 Mazey and Richardson volume focused rather heavily on the Commission as the main site for this consultative model, probably reflecting both the then balance of power between the main EC institutions and the weight of academic research on European lobbying.

Since then the balance of power between European level institutions has shifted somewhat, of course, and one of the main objectives of this successor volume has been to examine the changing roles of the institutions and the effects of these changes on the lobbying system. If the old adage that groups 'shoot where the ducks are' still holds true (and the evidence in this volume shows very clearly that it does) then we would expect group behaviour to reflect shifts in power quite accurately. Several chapters illustrate this *adaptive* character of groups wishing to influence European policy particularly well. For example, David Coen's study of business lobbying is a story of business groups adapting to a changing institutional environment in Brussels, from

developing new direct lobbying strategies and the increasing ability of firms to discount the costs of participation in one channel against improved access in another. Similarly Chapter 12 notes that CIAA has been most innovative in its venue shopping in response to opportunities provided by new structures created by the Commission. Another example of groups exploiting alternative venues is found in Chapter 11 on the ban on tobacco advertising where the European Public Health Alliance acquired the Secretariat of the Health Forum Intergroup in the European Parliament. Tony Long and Larissa Lorinczi's account of the green movement in Brussels is also replete with examples of learning and adaptation by groups (see Chapter 9). Thus, developments such as increasingly sophisticated coalition building, the use of cost-benefit studies, and the creation of new single issue organizations all illustrate that environmental groups are increasingly sophisticated actors in the EU policy process. Similarly, Cornelia Woll's study of trade politics illustrates that groups have learned the art of constructing new coalitions as the need arises and the art of 'interactive lobbying during trade negotiations'. The resort to litigation strategies, particularly repeat litigation, as described by Margaret McCown, is of course an outstanding example of groups learning and adapting to the opportunities presented by different venues in the EU. This learning and adaptive capacity, though widespread, appears not to be universal, however, as the study of the agricultural sector illustrates. It appears that, as Chapter 12 shows, COPA shifted from being a core insider to an 'opponentist' over time, and was, to a degree, outsmarted by new groups. The losers in the EU policy game appear to be the slow learners!

The increasing level of mobilization of and competition between groups has, as Chapter 15 demonstrates, led to long-standing calls for greater transparency and more 'regulation' of lobbying. In the early years of the Community, the group population was quite small. Thus, under-supply of lobbying (in the sense that business was over-represented in the group population and other interests, such as women and consumers, were under-represented) has probably shifted to an over-supply of lobbying over time (Mazey and Richardson 2006: 253). However, the increased lobbying of the EU institutions did not result in a uniform interest representation. In fact by the time of the European Governance white paper in 2002 the European Commission was aware that each of its directorates had developed its own mechanism and methods for consulting its respective sectoral groups and that there was large variance within directorates depending on the nature of the regulatory output (Commission of the European Union 2001; Broscheid and Coen 2007; Chapters 2 and 3). Consequently, the increasing numbers of interests, the growing inconsistency of interest consultation, and the democratic deficits and policy legitimacy debates led to renewed demands for some regulation, or more accurately, better *management* and greater *transparency* in the process of consultation. The EU level institutions, as Daniela Obradovic explains, have found

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it difficult to decide what to do by way of regulation and, as yet, have failed to agree on a common approach. In part this is because, as she argues, each institution has a slightly different set of incentives leading them to consult interests. However, the struggle to find a workable system of regulation is yet another illustration of the fact that the EU lobbying system presents quite familiar traits and problems. Thus, there appears to be a more general trend for public policy-makers to try to devise regulatory rules to govern lobbying. Interestingly Pross, in a report for OECD in 2007, argued that the '(increased) interest in lobby regulation reflects the globalization of lobby practices, which has disrupted long standing systems of relations between government and interests in a number of countries' (Pross 2007: p3; for excellent reviews of the 'state of the art' see both Pross 2007 and OECD 2008).

One of the problems in trying to regulate lobbying in the EU is that EU institutions, like the rest of us, are not exactly sure of the nature of the beast they are trying to regulate. They cannot get a clear picture of the 'lobbying footprint'. The EU lobby is so varied in nature and so vast in scope, that regulators might be forgiven for not quite knowing what to do in the face of an over-supply of lobbying. It is to 'the nature of the beast' that we now finally turn.

16.4. Conclusion: Chameleon pluralism?

The chapters in this volume have shown that it is dangerous to suggest *one* typology of EU interest intermediation. There are several reasons for this caution. Firstly, the EU policy process is still highly sectorized and segmented. Quite simply there is not one EU policy style, imposed on all policy sectors, other than the general predilection for consultation. Variations are still quite large (especially at the sub-sectoral level). We see little evidence to suggest that the organization of the interests or the type of relationship between and across sectors is always the same. Secondly, there is evidence that the interest group system in any one sector can change over time. A good example of this is to be found in Chapter 12 on agriculture. Here, we see a strongly entrenched group such as COPA being subject to strong challenges from new interests who have entered the sector. Similarly, Oliver Treib and Gerda Falkner (Chapter 13) found that balance of power in EU social policy has shifted over time. Power shifts can take place due to purely exogenous changes in the policy area, because existing entrenched groups get complacent, or because new groups enter the arena. Even if the new groups are not as well resourced they often bring new ideas to the debate which can act like 'policy viruses' (Richardson 2000: 1017–20), destabilizing existing arrangements. As Moore suggests, 'ideas matter because they establish the contexts within which policy debates are conducted... although related to existing political forces and institutions, they seem to

have a logic of their own, which sometimes unbalances or rebalances existing forces' (Moore 1988: 78). The notion of 'farm to fork' which Chapter 12 discusses is a classic example of new ideas and interests destabilizing what appeared to be a very stable policy community at the EU level. Corporatism it might have been but it does not look much like that now with a major 're-framing' of the EU's agricultural policy underway. Thus, elites can be successfully challenged when the constellation of groups expands over time.

Is the EU system of intermediation, then, best characterized as good old fashioned pluralism? At one level, it is tempting to say 'yes'. There is clearly a *plurality* of actors. There is clearly quite intense *competition* for influence. There are clearly few if any instances of one set of interests *capturing* a policy area or even *dominating* it over a long period of time. It is very clear that *access* is, as a general rule (but see below) not restricted, quite the reverse in fact. More controversially perhaps, it might even be claimed that sheer weight of *resources* (at least in terms of *financial* resources) is not the key variable in terms of influence. For example, environmental groups, as Chapter 9 illustrates, have had very considerable success, despite being poorly resourced by comparison with producer interests. So, probably pluralist of some kind would be the general verdict emerging from this volume.

However, without wishing to enter the arid debate about types of pluralism, we feel obliged to say a little more about what *kind* of pluralism we think our volume has uncovered. Chapter 9 by Tony Long and Larissa Lorinczi, both practitioners rather than academics, is refreshingly self-critical and points to the probable answer. They suggest that the explosion of possibilities for formal and informal participation by NGOs in the EU policy process might represent a form of pluralism reserved for elite NGOs, reflecting Greenwood's view that the most striking feature of the EU interest representation system is its elite nature, because of the lack of individual membership (Greenwood 2007; see also Warleigh 2001).

This expression of self-doubt hints that once an interest is mobilized and fully integrated into the (somewhat frenetic) EU policy process it might lose touch with its base of support, its members. The danger is that a group's leaders become professional policy entrepreneurs embedded in and absorbed by Brussels politics and risk not fulfilling the *representative* role that brought them to Brussels in the first place. They risk becoming part of a European level *policy-making elite*. Elitist tendencies are also indicated in David Coen's chapter on the business lobby and he suggests that the most significant development in EU lobbying in the past twenty years has been the development of elite pluralist arrangements where industry is perceived as an integral policy player but must fit certain access criteria. Broadening this definition to explain general interest consultation in the expanding EU policy-making forums and committees, he defined *elite pluralism* as 'a lobbying system in which access is restricted to the policy forums and committees to a limited number of policy

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players for whom membership is competitive, but strategically advisable. As such EU institutions in closed committees can demand certain codes of conduct and restrictions in exchange for access' (Coen 1997). Michalowitz also warns of the dangers of a system which might be '... prone to be exploited by those who can make the most professional and strategic use of public-private interaction' (Michalowitz 2007: 149). However, the ability of applying this elite forum politics definition to the whole EU policy process is limited as all of the institutions, with the possible exception of the Council, are permeable to interest groups (Coen 2007). However, the concepts of forum politics and elite pluralism do appear to have empirical robustness, especially when we accept that consultation, access, and influence are not necessarily the same. This is especially true when looking at technical standard-setting and regulatory issues where *policy legitimacy* may outweigh the *political legitimacy* considerations (see Scharpf 1999; Broscheid and Coen 2007; Chapters 2, 3, 8). Similarly, variance is observed by Oliver Treib and Gerda Falkner (Chapter 13) who identify a system in EU social policy which is not US-style pluralism but is a system of what they term *sectoral corporatism* in which the peak associations of management and labour play a privileged role. However, they conclude that lobbying in the more general sense rather than bargaining between privileged partners seems to be the future trajectory in social policy. It appears that there might well be more than one form of pluralism at large in the EU.

In addition to variance in interest mediation styles for different policy problems, an added complication is that we also need different labels to describe different stages of the EU policy process for any given policy problem. We might find a genuinely open and competitive pluralist system operating at the agenda-setting or pre-policy-making stage, but this might shift to a system of more restricted access at the stage where detailed proposals get hammered out and highly technical issues have to be resolved, thus taking on a more elite pluralist hue. For example, environmental groups were very influential in getting the issue of ozone depletion onto the EU's agenda, but were not directly involved in the detailed negotiations over the precise EU regulation which emerged regarding the manufacture of fridges. That was a very technical issue and access was quite restricted. Any given policy issue can be processed in a series of stages, starting with a very broad issue network of the type described by Hecló, through to the final negotiations over fine detail which looks much more like elite pluralism or insider politics. Thus the shift from often quite large numbers of participants to something akin to a small and tightly drawn policy community as an issue progresses to final decision is part of a natural process by which policy actors seek some kind of 'negotiated order' out of conflict and uncertainty. Thus, EU pluralism might be best characterized as a kind of *chameleon pluralism*, capable of changing its appearance over time during the policy cycle for a given policy problem or within a sub-sector over a longer period of time.

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