NESC

BACKGROUND PAPER

1. An Analysis of EU Governance and Policy Making

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An Chomhairle Náisiúnta Eacnamaíoch agus Shóisialta
National Economic & Social Council

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Abbreviations

CFSP
Common Foreign &
Security Policy

CE
Conformité
Européenne
[European
Conformity]

CIS
Common
Implementation
Strategy

COCOBU
Committee on
Budgetary Control

COREPER
Committee
of Permanent
Representatives

DG
Director General

ECOFIN
Economic and
Financial Affairs
Council

EEA
European
Environment Agency

EEAS
European External
Action Service

EFSA
European Food Safety
Authority

EMEA
European
Medicines Agency

EMSA
European Maritime
Safety Agency

EP
European Parliament

EU
European Union

IMPEL
Implementation
and Enforcement of
Environmental Law

JHA
Justice and
Home Affairs

NFP
National Focal Points

OMC
Open Method of
Co-ordination

OH&S
Occupational Health
& Safety

QMV
Qualified
Majority Voting

R&D
Research and
Development

REACH
Registration,
Evaluation and
Authorisation of
Chemicals

WFD
Water Framework
Directive

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An Analysis of EU Governance and Policy Making

1.1   Introduction

The Treaty of Rome (1957) set down the purpose of the European Economic Community as the establishment of a 'common market', based upon the free movement of persons, services, goods and capital. At the outset, it was assumed that this market could be realised through legal prohibitions on activities that restricted competition. Accomplishing this task has proved far more difficult than anticipated and has had many unforeseen consequences. Governance and policy within the European Union (EU) has been transformed as the EU has developed into an extensive co-operative venture between the member-states in areas such as migration, foreign policy and criminal matters which have traditionally been the preserve of member-states. The resulting division of labour between the institutions of the EU and member-states – who does what - is highly complex and indicates why the term 'governance' is used here to describe how the EU works rather than the more traditional term 'government'. Governance denotes a political arrangement in which authority is shared between actors rather than any single one – a government – resting at the top of a hierarchy. This system of governance or diffusion of authority inevitably makes policy-making quite intricate.

This chapter is concerned with describing and analysing this system of governance and policy-making delivered by the EU's development. At earlier times of great change for the EU, NESC produced reports that analysed the development of the EU and outlined the range of options available to Ireland. Reports were produced in 1989 in advance of the completion of the Single European Market and the prospect of further economic integration; and in 1997 when the issue was of more intensive integration in the form of monetary union and extensive integration through the offer of EU membership to former communist countries of Central and Eastern Europe. This chapter will briefly review how these two earlier reports analysed the governance of the EU in section 1.2. The main finding of these reports was that Ireland's relationship with the EU was formed through an interactive process in which neither member-states nor the EU was dominant. Instead, it is the combination of both EU institutions and member-states operating in tandem that explains the success of integration.

Profound developments have occurred within the EU since NESC's last report on the subject in 1997. In section 1.2, a brief overview of some of the most important developments since the time of NESC's last report in 1997 shows how the EU has become more involved in policy areas that have traditionally been the sole preserve of member-states such as foreign affairs and justice and home affairs. Member-states are formulating policies in light of the EU's increasing involvement in various

policy domains, a finding which reinforces the interactive perspective. This analysis is confirmed in section 1.3, where an analysis of the changing functions of various EU institutions is outlined. Enlargement is shown to have introduced added complexity as the EU tries to find common ground between 27 member-states. Section 1.4 undertakes a detailed examination of how the EU conducts its policy and distinguishes five distinct 'policy modes'. One overall lesson is that the policy functions of the EU have become less 'top-down' over time as the EU has become more diverse and the issues it addresses have become more complex and sensitive. Section 1.5 suggests that these distinct policy modes are increasingly converging upon a common architecture, labelled 'experimentalist governance', in which the EU lays down mandatory yet open-ended goals such as the achievement of good-water status by a certain date and allows national organizations the freedom to explore how to achieve this. In return, member-states benchmark against each other and overall policy is revised in light of the emerging lessons. Section 1.6 considers the implications of these developments for the idea that there exists a 'democratic deficit' within the European Union.

1.2 Earlier NESC Perspectives on the Development of the European Union and its Governance

Previous NESC reports on the European Union, in 1989 and 1997, attempted to set out an agreed understanding on the role of EU membership in Ireland's economic and social development and to derive from this a perspective on Ireland's strategic approach to the ongoing process of European integration.

In its 1989 report, *Ireland in the European Community,* NESC concluded that successfully completing the single market programme would depend on the closer co-ordination of national economic policies as well as more effective Community policies. In light of this, NESC considered that Ireland's strategic approach to the European Community lay in the creation of a genuine economic and monetary union which would suit Ireland's social and economic needs and aspirations (1989: 534). NESC's analysis reflected one of the most important insights to emerge in research on European integration: while textbook theories of economic integration emphasize the removal of customs and tariffs, the market integration of *mixed* economies — such as those in Europe — is unavoidably a political process.

In its 1997 report, *European Union: Integration and Enlargement,* NESC noted that, following the difficulties in the ratification of the Maastricht Treaty in the early 1990s, there was a widespread sense of uncertainty about the future of European integration. This uncertainty was reflected in disagreement on the future path of European integration and uncertainty on the nature and capacity of EU decision making.

Two broad perspectives on the next phase of European integration were identified. The first perspective analysed integration in terms of the bargains governments strike with each other in pursuit of respective national interests, the so-called intergovernmental position. Integration on this view is a product of trade-offs and the outcomes usually reflect what governments find least disagreeable, the lowest common denominator of policy options. The other perspective took a more expansive view of integration, believing that it reflected a spill-over effect from

earlier stages of development, the so-called functional or federalist view. As Europe converged on various stages of integration, these would necessitate further unity.

NESC (1997) argued that Ireland's options within an expanding union of states was neither exhausted nor even adequately explained by these two widely-held perspectives. NESC formulated a synthesis of these views, rejecting much of the intergovernmental view since it presumed that the interests of member states were fixed and formed prior to negotiations. Furthermore, it overestimated the extent of control which member-states have over the process of European integration and thus downplayed the role of the institutions of the EU such as the Commission, the European Court of Justice and various regulatory networks spread over the Continent. NESC concurred with elements of the functionalist view that there is a dynamic to European integration which alters the sovereignty of participating nations and introduces novel institutions and processes which affect how policy is formulated and conducted. However, NESC diverged from the functional view on the basis that integration is not inevitable, is not a uniform process and may be halted for a variety of reasons.

A new perspective began with recognition of the following features of European integration:

◆ Extensive cross-border links between firms and other organizations;

◆ Extensive cross-border contacts between governments and their agencies at levels other than the Council of Ministers and the European Council;

◆ Domestic policies and policy attitudes are, to a significant extent, shaped at European level;

◆ Significant areas of EU policy are shaped by policy networks which include not only member states and the Commission but an array of interest groups, experts and consultants;

◆ The distinction between domestic policies and foreign policy has weakened;

◆ Member states vary in ways which significantly shape their role in the EU and the use they and their citizens make of membership.

These facets of European integration led NESC to articulate a perspective that recognized that

> European integration has resulted in a complex, multi-dimensional, multi-layered collective decision-making system. It argues that integration has genuinely transformed policy making in European countries. It emphasizes the *interaction* between the member states and the Commission and the effects which this interaction has. This involves a co-habitation of national, supra-national, trans-national, and sub-national identities. This shapes the context within which national preferences are formed (1997: 15-16).

Below we argue that this *interactive* perspective retains its validity and should be adopted in analyzing Ireland's ongoing engagement with the European Union. In 1997, NESC's overall conclusion was that none of the issues surveyed in that report created an overriding concern that should lead it to revise its approach to Treaty revision or to European integration. Since Ireland's concerns were mainly institutional, it should promote those Treaty revisions which secured the necessary

institutional reforms. In particular, NESC advised that Ireland's interests would not be served by 'any institutional reform which diminished the Community institutions – either by revoking the Commission's traditional role or by rearranging Council procedures in a way which concentrated power in the hands of large member states' (ibid: 45)

NESC also reflected that changes within Ireland should not cause the country to reverse its approach to European integration. Even though Ireland was, in the late 1990s converging toward average EU income and would surpass it during the following decade, the Council argued that Ireland remained a small state even if it could no longer be considered a poor one. As such, it retained an interest in an economic integration process which is shaped by European institutions, governed by law and accompanied by common policies. Ireland had and has a continuing interest in the EU having the authority, capacity and legitimacy to harmonise member state actions and develop common policies on issues such as trade.

This desire for harmony amongst member states did not preclude Ireland being flexible in its approach to integration or retaining its capacity to effect change in particular policy areas. This flexibility is emphasized through a recognition of the diverse policy methods through which the European Union pursues change (see section 3 of this chapter).

NESC argued that the interactive perspective, new at the time, had practical relevance since it permitted a realistic assessment of possible and desirable developments in distinct policy areas – employment, enlargement – and in the more general area of European integration. As inter-governmentalism had proven defective in analyzing the evolution of the EU from 1957 to 1997 — the EU had already passed beyond the type of inter-state co-operation envisaged by it — it could hardly outline a reliable vision of the future. The federalist view was slightly more accurate but over-stated the extent to which 'EU policy developments transcend or undermine the nation-state and national policy influences' (NESC 1997: 21). Exaggerating the unilateral influence of the EU meant that the federalist approach offered an unhelpful vision of what Europe might become. NESC argued that the continuation of European integration will not:

> *replace* national government or policy with large federal structures, policies and administrative programmes. It will increasingly *embed* the national within the European, and the European within the national, and create European-level *interaction* not only between governments, but also between enterprises, trade unions, interest associations and social movements (ibid, emphasis in original).

Surveying the options, NESC argued that Ireland should not see itself forced to choose between deepening integration by lending greater control to the institutions of the European Union – federalism – or bargaining to maximize Ireland's preferences across several different policy areas through an inter-governmental approach. Articulating this perspective, NESC argued that wider and deeper European integration did not mean that power would automatically drift to the supra-national institutions of the European Union. But nor did it entail that governments could simply steer events according to their own perception of national interests and benefits. The validity of these arguments is confirmed in the next section where we consider some of the major policy developments within the EU since the 1997 report. Although NESC did not analyse developments in the areas of external security and justice and home affairs, over the following decade the EU has become increasingly involved in these areas. It

has done so not by displacing national activity, but by changing the context in which national foreign policy, asylum policy and justice policy take place, thus confirming NESC's analytical perspective.

1.3 European Integration in the Early 21st century: Developing a Presence

In this section, we provide a brief sketch of developments in the EU since the mid 1990s in two areas that would be considered core features of national sovereignty, foreign policy and security. The Maastricht Treaty distinguished between the different facets of EU business, dividing it up into three 'pillars'. The first pillar encompassed economic and social issues such as the single market and environmental policy governed by what is known as the 'community method' (see section 1.5); the second pillar referred to a Common Foreign and Security Policy (CFSP) which would facilitate the Union to assert itself internationally and the third related to Justice and Home Affairs matters.[1] The latter two pillars were largely managed by consultation between governments and their respective ministers, the so-called inter-governmental method, with limited input from the institutions of the European Union and common decisions were dependant on unanimity.

These fields of external and internal security respectively would have been considered core aspects of national sovereignty and thus unlikely to be affected by changes within the European Union. Prior to the late 1990s, this was indeed the case but matters have changed significantly since then. This section documents the growing presence of the EU in the second and third pillars to show the increasingly complex nature of European integration and the deepening interdependency between the EU and its member-states. The economic and social aspects of further integration are examined in later chapters.

1.3.1 The Second Pillar - Common Foreign and Security Policy

Prior to the Maastricht Treaty of 1992, foreign policy was firmly ensconced with individual states. The Maastricht Treaty established a Common Foreign and Security Policy and declared that this might entail the 'eventual framing of a common defence policy, which might in time lead to a common defence' (Art. J 4, Title V). Some member-states believed that the EU lacked the institutional resources to realize these aspirations and pressed for a permanent post to instill a continuity and presence to EU foreign policy. The Amsterdam Treaty provided for such a post, the High Representative for CFSP supported by a permanent secretariat.

In 2000, the Helsinki Council defined its primary foreign policy goal as the establishment of a military force capable of sustaining humanitarian, peace-keeping and crisis management for up to a year by 2003. In 2003 the EU took over a NATO operation in Macedonia and conducted its first ever military operation. This was followed by military and civilian operations in the Balkans, Africa, the Middle East and Asia. Embracing a security and defense policy allowed the EU to move away from an aspirational foreign policy and toward a more action-oriented

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1   A more detailed analysis of these two policy areas is contained in Background Paper 7.

one. Furthermore enlargement has brought distant conflict to the doorstep of the EU, forcing it to take an interest in struggles in countries such as the Ukraine and Belarus.

EU foreign policy may receive a further boost via the reforms contained within the Lisbon Treaty which creates a new position of *High Representative of the Union for Foreign Affairs and Security Policy*. This position bestows on one individual the existing function of High Representative for the CFSP, the Commissioner for External Relations and the current functions of the Presidency with regard to EU foreign policy. This new post may operate in tension with the European Council and Commission thanks to the difficulties of delineating where foreign policy begins and ends and deciding what constitutes and differentiates economic and development issues from foreign and security policies.

1.3.2   The Third Pillar – Justice and Home Affairs

Although the shift towards an EU identity might seem most pronounced within the field of foreign and security policy, it may well be that such a move will occur within Justice and Home Affairs in the years ahead. Although the Amsterdam Treaty (1997) moved the issues of free movement, migration and asylum to the first pillar, progress has been slow. But in more recent years, the EU has adopted a regional perspective and sought to influence the flow of asylum-seekers and migrants into individual member-states.

It has done so through a number of directives which have laid down minimum standards for certain procedures used in dealing with asylum-seekers and refugees (Ireland has only opted into some of these directives). Although they have been criticized for the minimalist orientation, they do represent a floor below which member-states will not be permitted to pass. For example, in January 2008 the Commission demonstrated its determination to ensure that these standards are met by referring Greece to the ECJ for failing to put into effect the Returns Directive (guaranteeing a substantive examination of asylum seekers returned from another member-state). Not only is the EU striving to harmonize individual asylum policies but it is also seeking to re-orientate migration policies toward a more comprehensive and holistic response that structures migration flows rather than simply reacts to them.

The tale of increasing EU involvement in the area of police and judicial co-operation has not been as pronounced as in the areas of foreign or asylum policy. However, the Lisbon Treaty dissolves the distinctions between first and third pillar, ensuring that all justice and home affairs matters will be governed through the Community method, although countries can choose to opt-out or opt-in and temporarily veto proposals that they find unsuitable. Thanks to the future prominence of the EU in JHA matters, it seems clear that member-states, whether they choose to exempt themselves or not, will have to take greater cognizance of an emerging EU position.

1.3.3   The Complex Nature of Policy-Making in the EU

In 1997, no-one could have predicted how involved the EU would become in areas that that were never envisaged in the original Treaty of Rome (1957). This only serves to emphasize the unpredictable nature of EU integration and development. If NESC did not foresee the scope of EU integration, its framework of analysis which transcends a dichotomy between inter-governmental and supra-national perspectives is still valid and useful for interpreting developments in the second and third pillars.

The EU does not undertake direct action itself and many of the organizations within the second and third pillars are funded by member-states and run by staff seconded from them. But this is not to say that the EU is simply a composite of member-state preferences. Through interaction with other member-states, each country may reconsider or be asked to consider their own position as consensus has become more important for the success of joint policies. The process of governance and policy-making in all spheres of action within the EU is thus becoming more complex, reducible neither to a federalist nor a strictly nationalist position. The next section demonstrates this complexity by examining the most important institutions that contribute to policy-making within the EU.

1.4   How the EU operates

1.4.1   Institutional Design of the European Union

This section focuses on the institutions that exercise the most power and influence on EU policy and politics, namely the European Commission, the Council of Ministers, the European Council, the European Parliament and the European Court of Justice. Understanding how these institutions function is vital for understanding how policy-making is conducted within the EU. After elaborating how these institutions operate, the following section examines how EU institutions have fared after the fifth enlargement. Moreover, comprehending how the balance of power between these institutions has shifted is important for understanding the relative rise or decline of particular modes of policy-making that are examined in Section 1.5.

The European Commission

The European Commission has been characterised as a hybrid organization, encompassing some of the tasks normally allocated to an executive and an administrative bureaucracy. Various EU Treaties endow it with several important functions: to initiate policy and represent the common interest of the EU; to act as the guardian of the Treaties; to ensure the correct application of the Treaties; and to manage international trade and co-operation agreements.

The term 'Commission' is used to refer to two distinct parts of the same body: the College of Commissioners — the executive part — and the administrative Commission — the bureaucratic part. The College is composed of a President, nominated by national governments and the European Parliament, and one Commissioner from each of the member-states. Commissioners are responsible for a directorate-general (DG) or department, which relates to the EU's policy areas such as competition. There are over twenty such bodies that cover the main policy responsibilities of the EU, from the environment to external relations. Despite the broad policy brief of the Commission, its numbers are relatively miniscule, as it has little over 24,000 staff to administer its functions. The Competition's power varies according to the policy domain in question. In the classical areas of Community co-operation, it enjoys a power of initiative which gives it the opportunity to be the agenda-setter; in others it has a less entrepreneurial role, constrained either by its limited brief and/or the reluctance of member-states to countenance a greater role for it. In addition, the Commission is limited by its lack of resources which necessitates collaborative working with national and local entities.

The Council of Ministers

Formerly known as the Council of the European Union, it is a forum at which ministerial representatives from each member-state come together and agree on legislation proposed by the Commission. The Council is actually composed of a number of distinct councils, dedicated to particular policy areas such as agriculture or competitiveness. The Council with the widest brief is the General Affairs and External Relations Council which brings together foreign ministers from each member-state. The Agricultural, foreign and economic/finance ministers (EcoFin) meet at least once a month, and other councils from one to six times a year.

Meeting of ministers are prepared by national officials operating in working groups of the Council. The most important of these is the Committee of Permanent Representatives or Coreper. This body is split in Coreper II, made up of permanent ambassadors, who deal with major political and institutional issues, and Coreper I, who deal with most other issues. These entities are supplemented by approximately 250 working groups, whose membership is often based within member-states, where approximately 70 per cent of Council texts are agreed, with another 10-15 per cent in Coreper and the remaining in the Council of Ministers itself.

Although the Council's original function is to decide policy on the basis of proposals from the Commission, the increasing prominence of common foreign and security policy (CFSP) and justice and home affairs has entailed a greater decision-making role for the Council. These areas have required a greater underpinning from the Council Secretariat with an expansion of its administrative capacity. Expansion of the role of CFSP has meant that the Secretariat has become more of a policy actor in its own right. This tendency will be emphasized by the introduction of the post of High Representative of Foreign Affairs and Security Policy, the role of which, as defined in the Lisbon Treaty, is to conduct the Union's foreign and security policy, as mandated by the Council, to represent the Union in political dialogue with third countries and to express the Union's position in international organizations.

Broadly speaking, qualified majority voting (QMV) has become the means by which decisions are reached in areas where EU regimes are fairly well-established. Unanimity is needed in areas where member-states have retained their prerogative in decision-taking such as tax-harmonisation. Habits of consensus-seeking are deeply-ingrained into the work of the Council and votes are explicitly contested on around 20 per cent of eligible decisions. Under the unanimity rules, governments are inclined to delay proceedings until their views can be accommodated. The Lisbon Treaty reforms the system of voting to reflect the relative size of a Member State's population within the EU. After a phase-in period from 2014 to 2017, a decision can be approved if voted for by Council members representing 55% of Member States, accounting for 65% of the EU's population

The European Council

The European Council began its life as an informal meeting between heads of state but has become more important in recent years, as governments have deliberated on significant issues and have tried to determine the future strategic identity of the EU. It has been chaired by whichever member-state holds the presidency of the EU. Under the Lisbon Treaty, the European Council has acquired a more permanent presidency, whose role is, in the words of the current incumbent (Herman Van Rompuy), to enhance a shared sense of direction amongst all its member-states.

The European Parliament

The European Parliament (EP) is another entity whose importance has grown. Originally conceived as a consultative assembly comprising national parliamentarians, it benefitted from direct elections for the first time in 1979. Since the 1980s, its powers have increased and these can be classified under three headings: supervisory, legislative and budgetary.

The Parliament exercises supervision over the Commission and the Council through its right to question, examine and debate the large number of reports produced by these two bodies. When a new Commission is nominated by the European Council, the EP must approve the nominee and appoint the Commission as a whole. Moreover, the Commission has the right to sack the entire Commission through a vote of censure.

The EP's legislative powers have been augmented significantly from the time it could give an opinion on Commission proposals for legislation prior to adoption by the Council. Under what the Lisbon terms the 'ordinary legislative procedure' (previously known as the co-decision procedure) no proposal can be adopted without the formal agreement of both Council and Parliament. This has meant that the views of the EP on proposed legislation are incorporated much more frequently than has happened in the past.

In terms of its budgetary powers, the Lisbon Treaty significantly strengthens the EP's powers. Previously, the Council had the right to the last word on compulsory expenditure, whereas the European Parliament had the right to the last word on non-compulsory expenditure. The former derives from direct result of Treaty application or of acts adopted in accordance with the Treaty. In practice, this mainly means spending on agricultural guarantees. Non-compulsory expenditure refers to all other categories of spending. Examples include spending on regional policy, research policy and energy policy. The EU's budget only comes into force once the President of the EP has signed it. The Parliament's Committee on Budgetary Control (COCOBU) monitors how the budget is spent, and each year Parliament decides whether to approve the Commission's handling of the budget for the previous financial year

The European Court of Justice

The role of the European Court of Justice (ECJ) is to ensure that, in the interpretation and application of the Treaties, the EU law is correctly observed and implemented. It is the final arbiter in disputes among EU institutions and between EU institutions and member-states. It is responsible for ensuring that EU institutions do not go beyond the responsibilities allocated to them through the various Treaties. In seeking the compliance of member-states with EU law, the ECJ can fine firms or member-states who have been found not to have observed the law.

The ECJ comprises 27 judges — one from each member-state — who are assisted by eight Advocate Generals who write opinions for the judges. The ECJ is supported in its work by the Court of First Instance, created in 1989 to assist with the growing workload of the ECJ. In 2008, nearly 600 new cases came before the ECJ, it handed down judgements in over 550 cases and had nearly 800 pending. In terms of the subject matter of the new cases, the greatest number pertained to issues surrounding the environment and consumers (94), followed by taxation (49), freedom of movement for persons (42), the area of freedom, security and justice (38), and intellectual property (36).

EU law differs from international law as individuals can seek remedy for breaches of it through national courts. This operates through what is known as a 'preliminary ruling system' which allows national courts to ask the ECJ for clarification of the implications of EU law. The effect of the ECJ has been profound and had led some commentators to speculate that European integration is being achieved more and more through law rather than politics. The influence of the ECJ will only increase through the abolition of the EU's pillar structure whereby police and judicial co-operation will, in future, be governed by the EU's customary mode of working. This means that the ECJ will have jurisdiction over all areas of EU activity, with the exception of foreign and security policy.

High Representative of Foreign Affairs and Security Policy

A New post of High Representative of Foreign Affairs and Security Policy has been created. Its function, as defined in the Lisbon Treaty, is to conduct the Union's foreign and security policy, as mandated by the Council, to represent the Union in political dialogue with third countries and to express the Union's position in international organizations. The High Representative is also a Vice-President of the Commission with responsibility both for external relations and the co-ordination of external action generally, and is supported by the newly-constituted European External Action Service (EEAS).

1.4.2   How the EU has fared after the fifth Enlargement

How has enlargement affected the functioning of EU institutions? Has it instituted a sea-change in the way business has been done or has it merely speeded-up developments that were already underway? Rather than analyse each institution on its own, composite lessons will be drawn and supported by reference to the particular institutions of the EU.

Drawing on the most recent research (Best at al. 2008: Peterson 2008), four findings about the effects of enlargement on the institutions of the European Union can be drawn. Before elaborating on these points, it is important to underline one of the most significant lessons of enlargement, namely that predictions of breakdown or stasis proved to be wide of the mark and the system has continued to function as before with some modifications. However, there have been some changes in how the EU functions but these were in line with adjustment already underway before enlargement took place.

1. Existing formal arrangements have been made more explicit and specific, and in some cases unwritten rules have become codified. Alongside this greater formalization of procedures, an additional trend towards an increased use of informal practices can be observed.

2. As a result of the rise of informal networking, the administrative domain of decision-making in the EU has become more important

3. Alongside the increasing level of informality, there have been increasing signs that the system is becoming more 'presidential', as those who lead institutions or chair meetings are assuming a stronger role.

4. The effects of enlargement became intertwined with reforms already mooted or tentatively underway.

Several EU institutions have streamlined their working procedures to take into account the greater numerical membership. In 2004, the European Council adopted rules of procedure designed to make better use of the limited time available and to ensure the 'business-like conduct of discussions' during meetings. Among the recommendations are those which limit the time during which participants may speak and others which encourage like-minded member states to nominate one representative to express a shared position. Other institutions such as the Economic and Social Committee and the Committee of the Regions have also 'tightened up' their internal procedures to either ensure or enhance efficiency. More regulated meetings put a premium on preparation beforehand. Aligning like-minded member-states and agreeing a common position before a Council meeting requires quite a degree of informal networking. Best et al. (2008: 246) conclude that across the EU institutions, one can observe

> how the relative weight of formal meetings gives way to informal arrangements, as the constraints of time, space and language increasingly limit opportunities for deliberation and decision-taking in such fora. 'Pre-cooking' of decisions has always been a feature of EU decision-making, but in the enlarged EU it is becoming more commonplace.

Research instances this kind of informality pertains not only to the Council but also in the European Parliament where there is a higher incidence of agreement being reached at first reading as a result of enhanced co-operation between representatives of the Parliament and Council.

As politics within an enlarged EU increasingly emphasizes negotiation prior to the formation of policy-positions within formal political arenas, this accentuates the importance of the quality of administrative networking and decision-making of officials. This is demonstrated within the system of comitology discussed in Box 1.2. Ostensibly one of the functions of national representatives within this system is to monitor the Commission but in reality their function may be seen as 'assisting' each other working on policy issues rather than 'checking' the Commission.

One reason why more populated institutions have not stalled is because those leading them have given a greater sense of direction and leadership. It has been argued that, for example, with 27 individuals populating the Commission, post-enlargement, the 'Barroso Commission risked outright paralysis and descent to the level of an intergovernmental bargaining committee without strong presidential direction' (ibid: 62). One example given of this tendency is the Commission's greater reliance on the Impact Assessment Board which is empowered to stop any Commission proposal which is not accompanied by a robust examination of its potential effects. The proportion of impact assessments that the Board asked to examine for a second or third time increased from 10 per cent in 2007 to over 30 per cent in 2008.

The European Council is another obvious example of the trend toward presidentialisation, made possible by the Lisbon Treaty whereby a President of the European Council has been appointed for a two and a half year term by a qualified majority vote of the European Council. Its function is to ensure the preparation and continuity of the work of the Council and to facilitate cohesion within it. Herman Van Rompuy, a former prime minister of Belgium, was the first person elected to this post in December 2009.

One other trend not explicitly elaborated by this body of research is the possible effect of enlargement upon policy-making. Enlargement may have made policy-makers more conscious of the need to craft policy suited to the needs of 27 and has made this task more difficult. Obviously this is extremely demanding and partly explains the recourse to non-legislative methods as the Commission acts as a sort of 'coxswain, trying to persuade governments to embrace policy reforms through peer pressure, league tables, policy transfer, and so on, and often to the exclusion of its role as the initiator of EU legislation' (Peterson 2008: 772). Recent research would suggest that those directing the institutions of the EU are increasingly aware of these problems and there are 'signs that the Commission has begun to accept that it must invest in assets that do not flow directly from its formal treaty powers, and that many of Europe's most important problems resist solutions through traditional Community legislation' (Peterson 2008: 774).

Even when the Commission does contemplate legislation, it would seem to be more attentive to its possible effects. One illustration is the example of the increase in resubmissions to the Impact Assessment Board. One long-serving EU official is quoted as reckoning that 'the biggest change that enlargement had rendered was much more need for impact assessment with 27' (Best et al. 2008: 62). Not only is there a demand for a kind of pre-emptive policy-making more attuned to diverse circumstances, there is also a perceived need for a form of implementation that was sensitive to this kind of variety.

The Lisbon Treaty has elevated the role of national parliaments and the capacity to scrutinize national developments. All Commission Green and White Papers, the Commission's annual legislative programme, and all draft legislation are to be sent directly to national parliaments. This will be done at the same time as they are being sent to the Council and to the European Parliament. This requirement for direct and simultaneous transmission is new. It is intended to give national parliaments more time for consideration of Commission proposals. The agendas for and outcomes of meetings of the Council of Ministers must also go directly to national parliaments at the same time as they go to the Member State governments.

If enlargement and the reforms introduced by the Lisbon Treaty require that EU policy-making be more attentive to a more diverse membership, the EU is also being impelled to craft common policies. The Lisbon Treaty collapses the distinctions between first pillar policies, defined as the prerogative of the European Community with a strong role for EU institutions, the third pillar, defined as activities of the European Union, which have been largely based on inter-governmental co-operation with little input from EU institutions and based on unanimity. Under the Lisbon Treaty what was the third pillar (Justice and Home Affairs) will be administered under the normal 'Community Method'. What was the second pillar – Common Foreign and Security Policy – will still be governed by unanimity rather than qualified majority voting but the force of external circumstances, for example climate change, may impel member-states to reach a consensus. This apparent simplification of governance methods under the Lisbon Treaty is complicated by the existence of provisions for enhanced co-operation among nine or more countries; an emergency brake provision in relation to social policy and criminal justice policies. This only underlines the difficulties of reaching consensus across a diverse EU. Issues of complexity and diversity also reoccur in how the EU carries out its policies.

1.5   Policy Making in the EU

Research on the EU has increasingly focused on the fact that there is no single 'method' for making and implementing EU policies. Different methods are used in various policy spheres. Although these can be categorised and analysed in various ways, one useful starting point is Helen Wallace's (2005) classification of five policy modes: the community method, the distributional mode, the regulatory mode, policy coordination and intensive trans-governmentalism. The growing prominence of some policy modes is linked to the wider and deeper integration with which the European Union is engaged. It is important to appreciate that these policy-modes themselves change over time as their environment becomes more complex. Although Table 1.1 below gives examples where each policy mode applies, it is important to appreciate that sectoral policies can be and have been conducted by several different policy modes. This insight will be developed in section 1.6 to demonstrate that there is increasingly a 'common logic' to European policymaking.

Table 1.1   Policy Modes in the European Union

Policy Mode	Sectoral example of policy mode
Community Method	CAP, Fisheries, Agriculture
Distributional Mode	Structural Funds
Regulatory Mode	Market Liberalisation
Policy Co-ordination	Macro-economic co-ordination, Employment Strategy, Lisbon Strategy
Intensive transgovernmentalism	Economic and Monetary Union, Foreign Justice and Home Affairs

1.5.1   The Community Method

In the early stages of European integration, there was a perception that 'a single pre-dominant Community method of policy-making', exemplified by the Common Agricultural Policy, had emerged buttressed by the principles of supremacy and direct effect (see box 1.1).

Box 1.1   Principles of Supremacy and Direct Effect

The principles of *supremacy* and *direct effect* provide the basis on which the Community method operates. *Supremacy* refers to the doctrine that the EU law takes precedence over national law in certain specified fields. This idea was first enunciated in the case of *Costa v Enel* (1964) where the ECJ ruled on the precedence of community law on the basis that Community law would be negated if member-states could unilaterally pass a law that nullified EU legislation.

The principle of *direct effect* was enunciated in the *Van Gend en Loos* case of 1963. This case involved the importation of chemicals from Germany to Holland which were subject to an import duty which had been raised subsequent to the ratification of the EEC Treaty. The company sought repayment of the duty on the basis that Art. 12 of Treaty of Rome specified that member-states shall refrain from introducing any new customs duty. The issue was whether EC law created enforceable rights for individuals, i.e. had a 'direct effect'. The ECJ ruled that EU law created individual rights which national courts must protect. It stated that 'the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member state but also their nationals' (cited in Craig and de Burca 2007: 273).

Other policy areas of competence over which the Community was given jurisdiction include competition policy, trade and fisheries. The Community Method has the following characteristics:

1. A strong role for the European Commission in policy design and execution and subsequent monitoring as it possess a monopoly on the right of legislative initiative;

2. An empowering role for the Council of Ministers through strategic bargaining. Decisions are reached through qualified majority voting and Commission proposals can only be rejected by unanimous decisions;

3. Locking-in of stakeholders by offering them better rewards than were available through national politics and that were channelled through pooled budgets;

4. National agencies operating as the subordinate partners of the commonly agreed regime;

5. A distancing from representatives at both national level and the European Parliament although the latter's influence has increased over time through the use of the co-decision procedure (Wallace 2005: 79).

Through this method, policy is transferred to a supra-national level 'with a centralised and hierarchical institutional process, with clear delegation of powers, and aimed at "positive integration"' (Wallace 2005: 80). Policy-making in this manner resembled something akin to what a federal government might do as 'community institutions have the power to legislate for the Union as a whole, without being required to refer back to the national parliaments' (quoted in Reiger 2005: 164).

To what extent this template ever accorded with the reality of policy-making is open to question. Wallace (2005) suggests that national politics determines outcomes as much as the Commission's initiative; in addition, national habits tend to determine how faithfully Community objectives are observed, as the differential enforcement of fishing quotas in various countries demonstrates (Lequesne 2005). Implementation issues further complicate the notion of a Community method through which the Commission has a dominant role. These issues have given rise to a system known as 'comitology' (see Box 1.2) which both empowers the Commission in terms of implementing secondary legislation and restricts it through the oversight powers of committees composed of national representatives. Scholarly consensus has rejected the view of comitology as either an intergovernmental or supranational entity; instead, it has largely acted as a forum for the co-ordination of viewpoints between Commission and member-states and amelioration of possible conflicts between the two. Such a system contributes to improving the implementation and application of EU law within member-states and without such a system the rate and quality of application would be much worse (Vos 2009: 28-29). Not surprisingly, the nature and implications of comitology is the subject of on-going research and debate (Christiansen and Larsson 2007).

Box 1.2   Comitology – Definition and Explanation

Regulations and directives might be loosely specified or may require to be updated. In the 1960s, the Council was faced with such difficulties in implementing the EU's agricultural policy through the enunciation of numerous technical regulations. Faced with the prospect of stasis, the Council decided to delegate certain discretionary powers to the Commission but proposed that a committee composed of national representatives supervise the Commission's deliberations. If the committee rejected the draft decision, the Commission had to refer the matter back to the Council. Under this procedure the Council retained its oversight powers, being able to reject or to adopt Commission measures on the basis of a qualified majority. The first committees operating according this mechanism were set up in 1962 relating to the common organisation of the market in cereals, pork, eggs, poultry and fruit and vegetables. The European Parliament was excluded from the process which has been the subject of much dispute. Vos (2009: 7) comments that the Commission 'tended to see comitology as an interference in its executive powers and deemed that it should be able to exercise these powers alone, but the Council was reluctant to confer such powers on it, being afraid to give away Member States' prerogatives'

Despite these tensions, the Comitology system has grown in importance with the extension of the EU's activities, especially since the Single European Act. It is estimated that there are about 250 implementing committees taking 2,500-3000 executive decisions annually. Recent research has disputed two visions of comitology: either as a mechanism of control over the Commission (the intergovernmental view) or as a supranational central implementation machinery headed by the Commission (the federalist view). One of the most authoritative recent studies concludes that the comitology system 'seems to be more inclusive and focused on finding solutions through reasoning not bargaining, at least when compared with many national governments'. It is 'a system which uses socialisation as an important tool in making politicians, experts and interest representatives from different nations agree on issues of common interest' (Christiansen 2007: 271).

Both the relatively small capacity of the Commission and the implementation issues discussed above have meant that the aspirations for the 'community method' have been toned down. Instead of operating through a 'centralised and hierarchical institutional process' (Wallace 2005: 80), the Commission works with multiple partners at national and local settings, a feature of the EU policy process which has become much more explicit in recent times. It is for these reasons that the classic 'community method' has fallen into disuse and that the work of the Commission is now tilted towards 'recognising much more explicitly the role of national or local agencies in operating Community policies' (Wallace 2005: 56). The recognition of national or local interests is much more explicit in the second model of policy-making identified by Wallace — the distributional mode — which became more explicit in the 1980s as the European Union paid more effort to sustain equality in the drive toward a single market.

1.5.2 Distributional mode

In its 1989 report on Ireland's place within the European Community, NESC expressed some concern about the divergence in incomes between regions of the European Union. These regional imbalances were usually addressed through what became known as structural funds, whereby money would be distributed to local and regional bodies to spend on training and employment. Allen (2005) claims that these payments acted as a compensation measure for certain countries and regions committing to the project of further European integration. Accordingly, the structural funds saw significant increases after the signing of the Single European Act (the Delors 1 package) and after the Treaty of Maastricht at the Edinburgh Council meeting in 1992 (the Delors 2 package). Delors 1 provided for a doubling of the structural funds by 1992 and linked them to the reduction of regional disparities; Delors 2 committed to increase the structural funds by 2/3 by 1999. By Delors 2, much of the available finance was distributed to countries such as Greece, Ireland, Portugal and Spain. This mode of policy-making has the following features:

◆ The Commission devising programmes in conjunction with local and regional authorities benefitting from such participation;

◆ Member governments agreeing to a budget with redistributive consequences;

◆ A European Parliament being an additional source of pressure for regional politics (Wallace 2005: 81).

The development of this form of regional politics via the structural funds has been characterised as 'multi-level governance' although the term is used more generally to designate the diffuse form of politics within the EU. Multi-level governance originally entailed that national central governments no longer monopolised contacts between a member-state and the European Union. Engagement with the European Union has helped to create and reinforce this form of sub-national or regional politics. For example, in 1988 the Commission introduced four principles for the implementation of structural funds. One of these principles was partnership which involved the closest possible co-operation between the Commission and the appropriate authorities at national, regional and local level in each member-state and at every stage in the policy process from preparation to implementation.

There has been some dispute about how extensive this 'new' form of politics has actually been. Critics have argued that central governments have remained in the driving seat of the bargains about EU spending, implying that regional bodies have remained on the periphery, albeit in receipt of finances. Allen (2005) suggests that the Commission's advocacy of a form of regional politics stirred something of a 'backlash' by the time of Delors 2, as member-states bargained over the resources that would be made available to them. Furthermore, it is not evident whether the capacity to engage in this form of politics exists in many of the member-states that joined the EU in 2004 and 2007.

The significance of this form of policy-making may have declined for several reasons. Other policy areas, such as R&D and justice and home affairs, are in competition for funds. And ironically enlargement may have precipitated a relative decline in this distributional mode of politics since the amount of structural funds per capita has been far less for the accession countries than it had been for lagging member-states and regions at the time of the introduction of the internal market and the Maastricht Treaty.

1.5.3   The EU regulatory mode

In its 1997 report, NESC drew attention to some of the distinctive features of EU governance and one of these was the regulatory policy mode. The comparative lack of finances available to the EU means that it is difficult to compare it to a typical state. Pelkmans summarised this feature by noting that a crucial feature of the EU's economic regime is that it is based primarily upon rules, not money; it is best understood as a 'regulatory machinery rather than a spending spree' (Pelkmans 2006: 25). If the redistribution of resources via tax revenues is a function largely unavailable to the EU, it has still been possible for it to have a significant effect through regulation, namely the setting and enforcement of rules. This sort of activity has accompanied the drive to create a single market within Europe, since this goal depends upon sweeping away obstacles to the free movement of goods, services, capital and labour.

Wallace (2005: 82) argues that 'during the 1990s regulation displaced CAP (the quintessential form of the community method) as the predominant policy paradigm among many EU policy practitioners'. Such has been the extent of this kind of activity since the 1980s that some have designated the European Union as a 'regulatory' or rule-making state (Majone 1996). For example, the EU passed more than twice as many regulations and directives in 1991 as it did in 1970 (Eberlein and Grande 2005: 153). Within the EU, this form of policy-making is characterised by the following:

◆ The Commission as the architect of regulatory objectives and rules;

◆ The Council as the forum for agreeing minimum standards and the direction of harmonization, complemented by mutual recognition of diverse national standards in different countries;

◆ The European Court of Justice acts to ensure that rules are applied which enables individuals to have some chance of redress if the relevant rules have not been applied;

◆ The European Parliament as a forum for considering the regulation of non-economic goals;

◆ The engagement of a broad host of actors to be consulted about and shape the structure and content of rules (Wallace 2005: 81).

Since the mid-1980s, much of the development of the single market has been based upon adhering to the principle of mutual recognition based upon the *Cassis de Dijon* case (1979). The EU's traditional approach to harmonization involved drawing

up detailed technical standards which entailed a slow process that held up the development of the internal market. It was the failure of this approach in the 1960s and 1970s that led to the launch of the internal market programme in the early and mid 1980s. That programme involved not only a move to mutual recognition where possible, but also a new approach to harmonization where necessary (Laffan *et al*. 2000: 120).

Mutual recognition is based on the assumption that EU states look out for many of the same risks in the manufacture of products within their borders. Therefore the Commission proposed that member-states should mutually recognise each other's regulations as offering an equivalent level of protection thereby avoiding 'lengthy horse-trading' in seeking to harmonize different sets of rules (Monti 1996). However, mutual recognition has not proven acceptable in all cases especially when it is considered that there is an underlying risk presented by the product in question. In these cases, member-states would try to 'harmonize' standards in order to ensure some commonality of approach.

With this new approach, when the EU decides that some form of harmonization is needed, EU directives specify the essential requirements that organizations would have to meet before allowing their products to be traded. Companies would then follow procedures set by a European standards-agency, such as the European Agency for the Evaluation of Medicinal Products. Firms that comply with these standards can self-certify subject to the operation of a quality assurance scheme such as ISO 9000. Alternatively companies would be free to develop their own procedures that would be then certified by a third-party. At this point the CE (Comunauté Européenne) mark can be affixed to the product, indicating that it complies with the requirements of all relevant directives and mutual recognition should apply.

Bailey and Bailey (1997) consider that involvement in this process boosts trading companies' performance in a number of ways. Not only does it open up the markets of the EU but also those of associate countries. For example, if a drug has been tested in a manner that meets the compliance standards of the EU, it is often accepted for use in countries beyond the EU without any need for retesting. Harmonization can cut down on certification costs but can also impact on direct operational costs. Bailey and Bailey (1997) report that the quality schemes used thanks to the new approach to harmonisation often show up redundant processes in the manufacture of products that can be discarded without compromising on quality. They give the example of Du Pont which eliminated 40 per cent of its test methods and retesting was cut by 90 per cent. Freeing up the work process allowed employees to concentrate on other issues that reduced negative feedback from customers by 75 per cent.

Craig and De Burca (2007) consider that this manner of operating breaks with models of hierarchical governance in several different ways. Policy-making is devolved to bodies that are not formal EU law-making institutions. Rather they are standard-setting organizations composed of representatives from national standards bodies. The EU institutions only issue the essential requirements and leave it to devolved actors to figure out how they might best comply with these. And even these bare requirements are not compulsory but companies have an obvious inducement to comply, namely access to the Single European Market.

EU legislation has been designed to liberalise many markets in order to serve the goals of a single European market. For example, the area of telecoms has witnessed an end to the restrictive practices of national companies in terms of access to public networks and the encouragement of the purchasing of equipment and parts from the most competitive source. In the area of air transport, the number of carriers has increased by 30 per cent which has had a positive effect on competition and fares, which in turn saw the number of passengers tripling between 1980-2000.

Majone points out that regulation cannot be achieved simply by rule-making but also requires detailed knowledge and intimate involvement with the regulated activity. This would require the creation of specialized agencies capable not only of rule making but also fact-finding and enforcement. At the European level the first set of agencies was established in the 1970s, but these were largely promotional, rather than regulatory, bodies. The 1990s saw a second set of agencies created, now dealing with regulatory issues, including the environment (EEA) and the medicines (EMEA) agencies. A third wave of agency creation started at the beginning of the present decade with the creation of the Food Safety Authority (EFSA), the Maritime Safety and the Aviation Safety Agencies and others. Most of the second and third generations of these agencies advise the Commission on technical aspects of regulation but do not possess the authority to take a final and binding decision themselves.

National regulators or legislators enjoy a degree of latitude in choosing the most appropriate regulatory regime in those areas that are subject to EU regulations. Majone claims that the maintenance of national discretion is part of the trade-off that the Commission makes in order to get its regulations approved by the Council. To claim that even in those policy areas where the EU has a competency, it also enjoys primacy is 'an exaggeration: national regulatory agencies will continue to be crucially important even in an integrated Europe' (Majone and Surdej 2006: 21) largely because of the reluctance of national executives to fund powerful pan-European agencies. Given the lack of formal powers available to these EU agencies and the fact that national agencies possess vital information, networks that join up agencies located within member-states have been formed, so-called 'European regulatory networks'.

At first, these were involved a relative informal gathering of public and private actors involved in particular policy areas which met occasionally and had no formal powers or organization. Examples include the European Electricity Regulation Forum (the Florence Forum, originated 1998), and one year later the European Gas Regulation Forum (the Madrid Forum, originated 1999). Since the early 2000s, these networks became more formalized through EU legislation in areas such as telecommunications, financial services and energy. Their tasks include providing technical advice to the Commission, gauging sectoral compliance with EU regulation and establishing norms and benchmarks to encourage further compliance (Coen and Thatcher 2008: 56). For example, the Committee of European Securities Regulators was established in 2001 with a brief to enhance consistent supervision and enforcement of the single market for financial services; ensure timely and coherent implementation of community legislation; and act as an advisory group to the Commission (see http://www.cesr-eu.org/). These networks act then as

overseers of consistent implementation through the creation of norms or soft law and relay their emergent knowledge back to the Commission.

Wallace (2005: 82) considers that European regulation has been least successful in the regulation of services, financial markets and utilities where there has been a move towards decentralized models of regulation. She admits to the emergence of new forms of networks including pan-European agencies such as the European Food Safety Authority which are steered partnerships of national competition agencies and self-regulating networks as outlined above. It is for this reason that Wallace suggests that it is becoming harder to identify the outline of a single coherent EU regulatory mode. But what is clear is that the new emergent forms, with their reliance on the establishment of norms, benchmarking and use of 'soft law' (see Box 1.3) seem to be a kind of policy co-ordination with neither Commission nor national agencies enjoying primacy. Instead, they interact and co-operate at the transnational level. This 'soft form' of power, relying on coordination between national and supranational institutions, has become prominent enough to be recognized as a distinctive form of policy-making within the European Union.

1.5.4   Policy Co-ordination

Policy co-ordination has developed in the absence of a strong mandate of the EU to accomplish matters in a particular area although the Commission would have believed that some form of collective action is necessary. For instance, in the 1970s the Commission would have encouraged systematic consultation between member-states on environmental issues and then made a case for the Single European Act to give the EU formal legislative powers (Wallace 2005: 85). Policy coordination was then intended as a transitional arrangement between nationally rooted policy-making and a collective regime of the European Union. For advocates of a strong European regime, policy-coordination was seen as a useful starting point but was still considered less than optimal. This form of policy-making is distinguished by the following:

Box 1.3   Hard Law and Soft Law

Soft law is the term applied to EU measures, such as guidelines, declarations and opinions, which, in contrast to directives, regulations and decisions are not binding on those to whom they are addressed (the term hard law is reserved for the latter category of legal instruments).

It is claimed that soft law may impact on policy development and practice precisely by reason of its lack of legal effect as it exercises an informal 'soft' influence through, for example, the demonstration effects of pilot projects, which illustrate possibilities and exert a persuasive influence. Soft law tends to be used in the EU context where Member States are unable to agree on the use of a 'hard law' measure, which is legally binding, or where the EU lacks competence to enact hard law measures. The Member States and EU institutions are thus able to adopt EU policy proposals, while leaving their implementation optional for those Member States who do not wish to be bound.

◆ The Commission as developer of networks of experts;

◆ Involvement of the Council through convening of high level groups to deliberate;

◆ Latterly, broad involvement of actors from civil society (Wallace 2005: 85).

In the 1990s, policy coordination received a boost thanks to developments in monetary and employment policy. Preparations for monetary union first centered on a set of convergence criteria agreed at Maastricht to prepare for the monetary union. These included a budget deficit of 3 per cent of GDP or less, public debt levels of 60 per cent or less, and a stable exchange rate. National governments were free to meet those goals in a manner that they deemed appropriate and there were annual assessments as member-states reported on their levels of convergence towards the designated targets. The process did not exhibit explicit sanctions since eventual membership of a common currency was deemed to be a sufficient incentive. As monetary union came closer and macro-economic convergence more intensive, this element of EU activity was largely managed by policy coordination rather than the traditional community method.

The second development that promoted policy coordination was an increased EU focus on employment. At a summit meeting in Essen in 1994 governments agreed a number of objectives to combat unemployment including investing in human capital, reducing non-wage labour costs and moving to active labour policies. The European Commission was to monitor national developments and report to the Council. Emulating these developments, the Treaty of Amsterdam committed the EU to the achievement of a high level of employment through the promotion of a 'skilled, trained and adaptable workforce' and the encouragement of labour markets responsive to economic change. Under Article 126, the Community would work towards this goal by 'encouraging co-operation between member-states and by supporting, and if necessary, complementing their action'. Every year, members states would agree on Employment Guidelines specifying common objectives and governments would draw up a National Action Employment Plan; the Commission, in conjunction with the Council, would then publish an employment report that would assess and evaluate these plans. If necessary, the Council would adjust the guidelines. Whilst the Amsterdam Treaty authorized a new goal for the EU – the co-ordination of national employment policies – it did not provide for any new resources. So, just as the regulatory mode re-invented itself by encouraging national agencies to benchmark themselves, a similar act of policy coordination was carried out in the area of employment. These procedures of the European Employment Strategy eventually became known as the Open Method of Co-ordination at the Lisbon summit of 2000 as a means of spreading best practice and achieving convergence towards established EU goals. The OMC involves the following four steps-

◆ fixing guidelines for the Union combined with specific timetables for achieving the goals which are set in the short, medium and long terms;

◆ establishing, where appropriate, quantitative and qualitative indicators and benchmarks against the best in the world and tailored to the needs of different Member States and sectors as a means of comparing best practice;

◆ translating these European guidelines into national and regional policies by setting specific targets and adopting measures, taking into account national and regional differences;

◆ periodic monitoring, evaluation and peer review organised as mutual learning processes (Presidency Conclusions, Lisbon European Council 23-24th March 2000)

The Lisbon European Council authorized the application of the OMC to a wide range of policy areas, including R&D/innovation, information society/eEurope, enterprise promotion, structural economic reform, social inclusion, and education and training. In the years after the Lisbon Summit the OMC began to be extended to other policy sectors such as social exclusion, race discrimination and environmental protection (De Burca and Scott 2006). Zeitlin claims that the OMC proved to be the 'the governance instrument of choice for EU policy making in complex, domestically sensitive areas, where the Treaty base for Community action is weak, where inaction is politically unacceptable, and where diversity among Member States precludes harmonization' (2007: 4).

A consistent criticism of the OMC has been its limited effectiveness and lack of impact upon national practices. Zeitlin (2009) disputes this charge and considers that the OMC has had the following effects:

(a) Substantive policy change through either by introducing a new topic, such as lifelong learning/gender mainstreaming, onto the domestic policy agenda or by introducing new ideas on a subject, such as helping to re-conceive poverty as a multi-dimensional phenomenon. This has sometimes led to changes in specific national policies such as anti-racism programmes.

(b) There have been noticeable procedural shifts in governance and policy-making arrangements. For example, the activity of drafting National Action Plans for employment and social inclusion has helped bring some coherence and co-ordination to the many organisations working in this field within various member-states. It has also helped to increase the involvement of non-state actors in this field.

(c) There has been policy learning in terms of the borrowing of positive examples in areas such as childcare, housing and pension reforms and also in terms of discovering how countries ranked; it was through the OMC that Belgium was shown that it was not the leader in terms of the involvement of civil society in working for social inclusion as it had previously thought.

Zeitlin (2007) admits that progress thanks to the OMC has been mixed. In some areas the OMC has been insufficiently open and transparent with bureaucratic actors playing a dominant role at the both EU and national levels. The OMC has often been conceived of as an EU reporting mechanism rather than a device that could reconfigure operational policies in many complex areas, despite some of the successes adverted to above. In a related vein, there have been too few examples of cross-national learning and diffusion of good practices. But Zeitlin argues that these shortcomings 'arguably stemmed not from any intrinsic weaknesses of the

OMC per se, but rather from procedural limitations of specific OMC processes' (2007: 6). These limitations pertain to the adoption of targets and indicators but without agreed national action plans, systematic monitoring and peer review and little follow-up in terms of country-specific recommendations. Zeitlin suggests conducting an OMC on those policy areas deemed to be falling short through benchmarking them against more successful policy areas such as social inclusion; organizing a peer review to evaluate why these policy areas are falling short and conducting a redesign in light of the lessons learnt.

A mid-term review of the Lisbon strategy – the Kok report (2004) - was perhaps even more critical of the OMC, claiming that it had fallen far short of expectations because member-states had not entered into the spirit of mutual benchmarking. Yet it is important to note that the same report was equally critical of the 'Community method' as it had not delivered what was expected: 'member states are lagging behind what has been agreed and the transposition of directives is in almost all member-states far behind the target' (Kok 2004: 42). A reformulated Lisbon strategy was launched in 2005 with a sharper focus on growth and jobs through a single national action plan. The Commission promised to clear away the 'jungle of existing reporting obligations' and shift the focus from multi-lateral discussion between 25 member-states and the Commission on individual policy themes to a bilateral dialogue between Commission and member-states on progress toward objectives as set down within national action plans (European Commission 2005: 33). The Commission shared the Kok's ambition to simplify the process of OMC by reducing the number of indicators but was less clear whether it supported his goals of 'praising good performance and castigating bad performance – naming, shaming and faming', as the report put it (Kok 2004: 43).

Two problems have become apparent. The indicators used in the current Lisbon Assessment Framework are based on a GDP framework which (1) may present data at too aggregate a level; (2) may not be valid for key objectives within national social and employment policies; and (3) does not involve self-assessment and peer review by national policy makers (Zeitlin n.d.). As an alternative Zeitlin suggests that indicators should be sufficiently comparable and disaggregable to serve as diagnostic tools for improvement and self- correction by national and local actors, rather than as soft sanctions or shaming devices to secure Member State compliance with EU targets Craig and De Burca (2008) offer a balanced appraisal of the OMC and by extension, policy co-ordination.

> 'For now, the significance of the OMC is in the fact that it was a policy instrument specifically designed and introduced as an alternative to hierarchical, prescriptively detailed and binding law-making. It was intended as a more flexible instrument which would simultaneously facilitate a degree of policy co-ordination and yet also accommodate diversity between the States. And despite its shortcomings and failures in delivering on the strategic goals of the Lisbon summit, OMC-like processes...continue to be adopted in a whole range of very different policy fields [and they instance anti-terrorist policy and GMO regulation]' (2008: 154).

Not only do different forms of policy co-ordination continue to spring up, but some have become quite durable, leading to a growing intensification of activity often outside the formal and established apparatus of EU governance.

1.5.5   Intensive Transgovernmentalism

Many innovations within EU foreign, monetary and justice policy originated mainly through interaction of members states with relatively little involvement by EU institutions. One of the most noted examples is the Schengen agreement of 1985 whereby Belgium, France, Germany, Luxembourg and the Netherlands abolished border controls between them without reference to the other member of the Union. Since then, this kind of extra-EU activity has been extended in a development that Wallace characterises as 'intensive trans-governmentalism'. This policy-mode usually touches upon sensitive areas of state sovereignty such as monetary or security policy which lie beyond the core competencies of the European Union. Wallace distinguishes this from the more usual form of policy making known as inter-governmentalism as occurs in the work of the European council. This normal kind of co-operation is rather limited and sporadic in contrast to those instances in which 'EU member governments have been prepared cumulatively to commit themselves to rather extensive engagement and disciplines, but have judged the full institutional framework [of the EU] to be inappropriate or unacceptable, or not yet ripe for adoption' (2005: 87). This process of intensive trans-governmentalism comprises the following features:

◆ The active involvement of the European Council in setting the overall direction of policy;

◆ Predominance of the Council of Ministers in consolidating co-operation;

◆ Marginal role for the Commission;

◆ Exclusion of the European Parliament and the European Court of Justice from involvement;

◆ The involvement of a distinct network of national policy-makers;

◆ The opaqueness of the process coupled with a capacity to deliver substantive policies (Wallace 2005: 87-88).

Viewing the processes of policy-making in monetary, foreign and security policy in the medium to long-term shows that transgovernmentalism does not necessarily remain aloof from the institutions of the EU or its typical policy processes. For example, monetary union grew from sustained interaction of European Union officials, finance ministers and national leaders and central bankers. Once the idea of a single currency became acceptable and the EU endorsed it, the development of the EU bifurcated between a type of Community method – member-state delegation to a strong principal in the form of the European Central Bank that promotes a collective regime – and a form of policy-coordination via adherence to principles of the Stability and Growth Pact.

Foreign and defence policy is a definite example of 'intensive trans-governmentalism'. The High Representative for the CFSP has been aided by a secretariat located within the European Council. The EU has recently established an Operations Centre in Brussels which is capable of autonomously implementing small scale military missions. Whilst it operates on a standby basis with a small

core staff, once activated it has about 200 seconded staff and can direct a group of between 1500-2000 in a military situation. In 2007, a similar structure was established for civilian crisis management. This has led scholars to speak of the establishment within this field of a permanent bureaucracy that is neither national nor supranational.

Justice and Home Affairs has seen even more institutional change and is noted for the proliferation of semi-autonomous special agencies and bodies such as Frontex, the European Border Management Agency and Eurojust, a body charged with enhancing judicial cooperation (Lavenex and Wallace 2005). A European Arrest Warrant has been launched which is based upon the principle of mutual recognition which entails that one jurisdiction accepts as valid the decision of another even if the offence in question is not criminalised in the first member-state. This represents quite an incursion upon traditional notions of state sovereignty.

Surveying the three policy fields of monetary, foreign and security policy, Wallace (2005: 89) suggests that

> New areas of sensitive public policy are being assigned by EU member governments to forms of collective or pooled regimes, but using institutional formats over which they retain considerable control. These regimes have soft institutions, though the arrangements of EMU have gone the furthest in hardening the institutional arrangements. Yet, these soft institutions sometimes seem capable of developing 'hard' policy, or at least to be aimed at creating the capacity to deliver 'hard' policy.

Intensive transgovernmentalism has been one of the most important and dynamic forms of policy-making within the EU for the last decade. This is not just because it touches upon sensitive areas of state sovereignty but rather because it introduces them into a collective regime that has dynamically transformed the institutional characteristics of the EU. This policy-mode is not easily understood as either an inter-governmental approach or as a supra-national one. It is not the former because member-states are clearly unsure of what their interests and preferences are in terms of trans-national co-operation over security or foreign policy; but they are aware that they are affected by common policies and need to wield some influence. It is not the latter because member-states are wary of ceding power to some supra-national body yet are still willing to submit to some form of collective regime.

1.5.6 Integrating Diverse Policy-Modes

There are important conclusions to be drawn from this review of EU policy-making. The first is that the more hierarchical methods of governance like the Community method have encountered some intrinsic difficulties that have impeded its success. Perhaps the two most important are the inter-connected issues of implementation and diversity. Problems of implementation relate to the problems the Commission has encountered in trying to ensure that EU directives are properly transposed and enforced. And problems of diversity relate to the issue of ensuring that directives are sufficiently sensitive to the conditions that they regulate.

This section has argued that the classic notion of the 'Community Method' has fallen into disuse as the Commission has embraced comitology as a means of adapting directives and regulations and recognised the role of intermediary organizations.

But other methods of policy making have developed, such as the regulatory mode or policy coordination, in an attempt to deal with the issues of implementation and diversity. This suggests that there may be a number of commonalities between these different policy modes and the next section explores this possibility.

1.6   The Underlying Architecture of EU Governance

Theorists of EU integration have been likened to blind men touching an elephant, each touching a different part and describing a different animal. Some choose to emphasize the deliberative nature of policy-making as initial preferences are transformed through discussion as better reasons emerge. Examples of deliberation include the process of comitology and the regulatory networks. Others highlight the relative informality of this process as it is not bound by prescriptive legal instruments but can be highly structured as the discussion on the regulatory mode demonstrated. Still more analysis draws attention to the multi-level nature of policy-making within the EU as organizations and individuals from local, regional, national and supra-national level might be connected without a formal line of authority. The distributional mode of policy making exemplified the clearest examples of this although all five modes share in it. Some scholars have suggested that this means that the EU is witnessing the emergence of 'new forms of governance' which stand in stark contrast to the top-down governing approach by central institutional actors leading to binding, uniform rules (Craig and De Burca 2008: 146). Box 1.4 below summarises some of the reasons why this new governance approach has become so prominent at EU level in recent years.

Sabel and Zeitlin (2008) do not disagree with those analyses that stress some of the distinctive features of EU policy making. However, they argue that these analyses may be in danger of overlooking the 'underlying architecture of public rule making in the EU: the fundamental design for law making, and the way this design transforms the distinct elements of EU governance by connecting them into a novel whole' (ibid: 273). As documented in the last section, the boundaries between the different forms of policy-making have tended to blur with the classic Community method becoming more accessible to other institutional influences and the softer forms of co-operation have often produced tangible gains in sensitive policy areas. It might even be suggested that they are beginning to display a shared logic or architecture despite the differences in relevant actors and instruments. Wallace herself recognised this when she granted that 'it is becoming harder to identify the contours of a single coherent EU regulatory mode' (2005: 82) and her co-author admitted that the various categories of policy-making 'overlap and spill over into each other' (Wallace 2005: 487).

Sabel and Zeitlin claim that these new forms of governance share an underlying architecture that can 'neither be mapped from the topmost directives and Treaty provisions nor read out from any textbook account of the formal competences of EU institutions, it regularly and decisively shapes EU governance' (2008: 273). This underlying architecture of what Sabel and Zeitlin term 'experimentalist governance' has the following features:

Box 1.4   Why do we see increasing use of
New Governance in the EU?

(a) Increasing complexity and uncertainty of the issues on the agenda
New governance can be seen as a way of coping with complex problems under
conditions of uncertainty. For example, the unexpected complexities involved
in 'reregulation' under the Single Market led to the emergence of the comitology
system, and as the Union moves into the new areas such as employment and social
exclusion it starts to tackle problems that have stymied many Member States for
years and for which no easy or uniform solution exists.

(b) Irreducible diversity
Not only are many of the problems the Union is now dealing with highly complex;
they also may simply not allow for uniform solutions. The underlying systems of
industrial relations and social protection of the 27 Member States vary
tremendously, and there is rarely one solution that will work effectively in all these
diverse settings.

(c) New approaches to public administration and law
In domestic administrative law and public administrative practice in Europe and
theUnited States there has been a growing recognition of the limits of traditional
top-down regulatory approaches, and repeated calls for things like power sharing,
participation, management by objectives, and experimentation.

(d) Competence 'creep'
Some of the new approaches may have been adopted to deal with areas where legal
authority for EU level action is limited or non-existent. There is no explicit treaty
base for such areas as social exclusion and pensions. In such cases, new governance
may or may not be the best available approach to policy making, but it may be the
only way the Union can play a role in a particular domain.

(e) Legitimacy
New Governance often reflects an effort to secure legitimacy for EU policy making.
Social dialogue seems to solve some of the democratic deficit problems in the
area it covers by essentially delegating law making authority to representatives of
the parties to be affected by these laws.

(f) Subsidiarity
The strength of the subsidiarity doctrine have certainly added impetus to the trend.

Source   Scott and Trubeck 2002

◆ Framework goals (such as full employment, social inclusion, or 'good water status') and measures for gauging their achievement are established by joint action of the Member States and EU institutions;

◆ National organisations (such as ministries or regulatory authorities and the actors with whom they collaborate) are given the freedom to advance these ends as they see fit;

◆ In return for this autonomy, they must report regularly on their performance, especially as measured by the agreed indicators, and participate in a peer review in which their results are compared with those pursuing other means to the same general ends;

◆ The framework goals, metrics, and procedures themselves are periodically revised by the actors who initially established them, augmented by such new participants whose views come to be seen as indispensable to full and fair deliberation (Sabel and Zeitlin 2008: 273-74)

These features are not specific to one particular policy-mode or set of institutions. Rather they can be performed through a variety of different forms of policy-making or set of institutional arrangements as was hinted at in the review of the five policy modes. Sabel and Zeitlin suggest that this form of working took root in four areas of policy between the mid-1980s and 2000, namely the re-regulation of privatised network infrastructure; public health and safety; social solidarity; and justice and home affairs (although the last example is left unexamined in their account). Examples from the first two sectors are presented below to explain this hypothesis and illustrate how this kind of experimentalist governance operates in practice.

1.6.1   Examples of Experimentalist Policy-Making

With regard to the regulation of privatized infrastructure, the EU, in 2002 introduced a new regulatory framework that requires member states to guarantee independence of regulatory authorities from service providers. Authorities were required to promote the interests of citizens as well as advancing the single market. The increased autonomy is balanced by new requirements of consultation and co-operation. National regulatory authorities must circulate information relating to measures that could adversely affect the single market to the Commission and other authorities and take into account their comments.

In relation to the second policy area, occupational health and safety (OH&S) has been prominent on the agenda of the European Union for some time. A Framework Directive in 1989 contained some general principles for occupational health and safety and some guidelines on how to implement them. It itself generated 17 directives on individuals aspects of health and safety. By 1994, only one member-state had implemented all these directives and five had not taken steps to transpose the original framework directive. Facing this lack of compliance, the Commission referred many recalcitrant member-states to the European Court of Justice and by 1999 had achieved a 95 per cent compliance rate with existing directives. Yet Sabel and Zeitlin remark that 'these very successes pointed up the intrinsic limitations of a European Commission-led judicial enforcement strategy for overseeing the ongoing operation of Community OH&S regulation' (2008: 287). The Commission only had one official responsible for implementation of OH&S issues and could not enforce its wishes through the ECJ without swamping the ECJ with this particular issue.

 An attempt has been made to transcend the limitations of this kind of command-and-control approach by creating the European Agency for Safety and Health Protection at Work, known as the Bilbao agency. Its role is to counter the weak implementation of OH&S directives by collecting and disseminating information, supporting cooperation and exchanges of experience among Member States, advising Community institutions (especially the European Commission), and coordinating a network of National Focal Points (NFPs) whose role is to transmit information to and from the Bilbao agency. However these Focal Points are often too overburdened to respond adequately to requests and are reluctant to pass on information concerning non-compliance in case it is used in court proceedings. A proposal to introduce a more structured and disciplined form of comparison through the use of the Open Method of Co-ordination has not yet come to pass.

This analysis suggests that a form of 'experimentalist learning' is occurring in several other policy spheres such as food safety, maritime safety, financial services regulation and the determination of fundamental rights. The European Food Safety Authority (EFSA) was established in 2002 in the wake of the BSE scandals. Its role is to provide scientific advice to the Commission and orchestrate co-operation amongst national regulatory authorities. The European Maritime Safety Agency (EMSA) was established in 2002 following a series of high-profile disasters. Its role is to ensure a high level of maritime safety and reduce pollution by ships. It plays a role in developing new legislation, monitoring its implementation and evaluating its effectiveness. The experimentalist governance approach has crossed over from the area of regulation and been introduced in relation to the determination of fundamental rights. For example, the Race Discrimination Directive focuses on ethnic and racial discrimination in a range of social and economic settings and leaves it to the member-states as to how they will achieve the principle of equal treatment. This legislation is supported by an action programme that requests member-states to promote the exchange of good practice between equality bodies. Independent experts were funded to examine the transposition of directives into national law and various events were sponsored to raise awareness of racial discrimination. De Burca (2006) argues that this is evidence of a hybrid approach, combining enforceable rights and judicial remedies – hard law – alongside an array of measures to encourage implementation and learning – soft law.

1.6.2   Reforming Policies and Institutions

Sabel and Zeitlin use the example of the Water Framework Directive (WFD) to demonstrate how both policies and institutions can be reformed. The WFD was adopted in 2002 and requires member-states to achieve good status of water quality by 2015 and ensure sustainability of water resources. An informal forum for open cooperation and information sharing between member-states known as CIS (Common Implementation Strategy) has been instrumental in the implementation of the Directive. CIS produces technical guidance relating to indicators for the definition of 'good' water status and the measurement of water quality. Member-states have to submit reports to the Commission on their achievement in implementing the WFD. The Commission produces its own survey of member-states progress based on benchmarks developed by CIS. New 'daughter directives' are explored in fora modeled on CIS and some have been transformed into CIS working groups 'in order to achieve a better integration between reviews of ongoing implementation and proposals for new policy development' (ibid: 310).

Laws themselves can be reformed in light of experience as the example of the Environmental Impact Assessment Directive demonstrates. This directive has been repeatedly revised 'within the framework of processes constituted by the directive itself' which provide for 'iterative evaluation and adaptation' (Scott and Holder 2006: 215). Central to this process is the notion of information exchange between member-states and the Commission on the experience gained in applying the Directive. On the basis of the information received, the Commission is charged with issuing five-yearly reports on the application and effectiveness of the Directive and making any recommendations for its amendment. Amending directives have been passed obliging developers to provide an outline of the main alternatives, taking into account environmental effects. Amendments passed in 2003 strengthen the framework for public participation so that people are notified of opportunities to engage in decision-making procedures and the assessment process must demonstrate that it has examined the concerns and opinions expressed by the public.

Why has this model of dynamic learning proved so fertile? Several institutional facets of the European Union make it so. As the European Union has extended itself into sensitive policy areas, use of the Community method is often considered inappropriate by member-states. This serves as a reminder that the European Union cannot be considered as akin to a typical state with a single source of authority at its apex. Rather there are multiple sources of authority, spread out amongst the different institutions of the EU and throughout member-states. This makes a model of hierarchical control untenable, perhaps even in the instances, such as OH&S, in which EU law has priority. Hence, the move away from harmonization and the affirmation of the principle of mutual recognition in many policy spheres. Apart from the institutional impossibility of constituting a single source of authoritative rule, the nature of the problems confronting the EU make a form of recombinant rule more attractive, that is to say different sources of authority are deliberately conjoined to achieve a beneficial outcome that could not be achieved without

these arrangements.[2] Sabel and Zeitlin argue that this process should be construed neither as a form of 'soft law', based initially on persuasive injunctions and failing this public embarrassment, nor as a form of 'bargaining in the shadow of hierarchy'. They argue that many interpretations of OMC type processes construe it as a form of 'state-delegated' authority that may be rescinded if outcomes are not favourable and taken over by the state-like entity itself, a second-best option as it were. But, in very many situations, this would nearly be the worst option given that 'the patent unworkability of official solutions or the failures of rules made by anything like traditional means'. It is this unworkability which 'makes the mere threat of imposing them so effective a device for inducing the parties to deliberate in good faith' (2008: 308).

Looking at the regulation of chemical substances in the European Union demonstrates this principle in action. The legislation, known as REACH (Registration, Evaluation and Authorisation of Chemicals) has been described as one of the most complex and ambitious to emerge from the European Union. At its heart is the concept of industry responsibility. According to this principle, it will be those companies manufacturing or importing chemicals which will have a duty to provide the data necessary to demonstrate their safety. There will be no need for any prior finding of risk for the principle of industry responsibility to bite. As the legislation bluntly puts it: 'No data, no market' (Scott 2009). Manufacturers are encouraged to phase out high-risk products when safer alternatives exist and be committed to transparency by disseminating information about the toxicity of chemicals used.

NGOs have spurred on the work of REACH by publicizing their own list of substances of very high concern that need to be phased out. Moreover, REACH may encourage a form of competition-based regulation whereby interested parties are enabled to 'submit comments on a proposal to restrict the manufacture, marketing or use of a particular chemical' (ibid: 62). The market would then generate information about the relative toxicity of various substances or products leaving it to the relevant environmental body to adjudicate on the findings rather than carrying out the primary task of discovery.

REACH attempts to overcome the customary information gap in regulation by placing the burden of disclosure upon commercial entities. The default rule — no data: no market — emphasizes that this is a prerequisite for commercial participation. Apart from requiring disclosure, it encourages comparison of the relative risk of various substances and products. This regulatory regime not only induces information through a non-negotiable demand for transparency but also enforces action toward improvement by disclosing, through peer comparison, precisely where positive adjustments can be made. These characteristics of transparency and involvement of interested parties typify many of the new governance regimes in the European Union.

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2 The term recombinant governance is used by Crouch (2005: 3) to elaborate the way in which 'individuals 'seek ways to do things which until now have proved impossible. They cast around for elements of institutions that they could recombine in unusual ways at opportune moments in order to produce change'. It is based on an analogy with recombinant DNA that does not exist naturally but is created by combining DNA sequences that would not normally occur together to achieve a beneficial purpose such as boosting immunity.

In effect, this amounts to a destabilization regime, where there is a cumulation of features that can be marshalled to make the current situation for incumbents untenable. These regimes do as much to wean actors from previously unquestioned commitments by suggesting plausible and superior alternatives as by in effect terrorising them into undertaking a search for novel solutions (ibid: 306).

With the classic community method, powers are divided between member-states and EU institutions in a zero-sum way with discrete authority residing at distinct levels of governance based upon a settled division of competences. In reality, the picture is far more fluid so that member-states or national organizations are 'not passive recipients of federal ordinances' but 'active equal co-participants in the iterative process of reform' (Scott and Holder 2006: 234). Yet this regime of experimental governance has gone relatively unnoted precisely because it does not adhere to a strict demarcation of powers. A forum like the Common Implementation Strategy (CIS) in the case of water quality is not given existence through law and thus appears to operate in a 'legal black hole'. This lack of legal certainty around CIS does not mean that its operation is either arbitrary or ineffective; on the contrary, it functions on the basis of routinised procedures and established provisionally settled practices ensuring that it is 'law-like' in practice.

1.6.3 Experimentalist Governance as More and Less Interventionist

This sort of regime illustrates one of the principal paradoxes of the European Union, namely that 'at the same time that the European governance style is becoming more extensive and more interventionist, it is also becoming less interventionist in some ways' (Peters and Pierre 2009: 100). More interventionist in terms of its expansion into numerous policy areas but often less interventionist in terms of the lack of direct action it undertakes. Often, it seeks to regulate the action of others to encourage them to accomplish certain tasks. As the example of OH&S demonstrates, national regulators can be wary of disclosing information to EU regulatory bodies either because of the perceived pernicious consequences and/or a lack of belief in their legitimacy.

Wariness about the EU is not confined to regulators; many members of the public are unsure about the progress of the EU and how best to evaluate it. Even though this chapter has shown that the successful policy-making within the EU relies upon the cooperation of member-states, there is still a widespread sentiment that the EU is somehow 'too distant' from the citizens of Europe. This worry is sometimes crystallized in the notion that there is a 'democratic deficit' underlying how the EU operates. The next section analyses this issue of democracy and the European Union.

1.7   The Democracy of the European Union

In the decades before the 1990s, there was little public disquiet about the European Union. Governments operated on the basis of a 'permissive consensus' that presumed the general public was favourably disposed towards European integration. The rejection by Danish voters of the Maastricht Treaty in 1992 and its approval by a bare majority of French voters (51%) signaled the end of this 'permissive consensus' and the emergence of a more skeptical attitude towards further European integration. Voters in Ireland rejected the Nice Treaty in 2001 although they approved it in another referendum the following year; in 2005 French and Danish voters rejected the Treaty establishing a Constitution for Europe; and in 2008, Irish voters dismissed its replacement, the Lisbon Treaty though they eventually approved it in a second referendum in 2009. It would be impossible to attribute these rejections to a single cause, such as anxiety over the state of democracy in the EU, but it has undoubtedly played a part.

This section analyses what is at the heart of this charge of a democratic deficit, namely that the European Union fails to abide by some of the fundamental principles and procedures of democracy as it operates within liberal democratic states. First, it lays out the main features of the 'democratic deficit' thesis, namely that the EU is allegedly unresponsive to national parliaments and European elections fail to produce a determinative shift in EU policy. Second, we then ask why these characteristics of the democratic process cannot be replicated at the level of the European Union. An increasingly common response is that the EU is such a distinctive form of governance that the standards that apply at the level of nation-states cannot be so easily transposed; the EU is stretching what is commonly understood as democracy, beyond a political order based upon a common identity. Its member-states display a profound level of tolerance in their willingness to be bound by precepts derived from those who are distinctively different. And last, we consider the view that this tolerance may be eroded by the injunctions of the ECJ, based on a 'market logic', that threaten to overturn various national social policies. On this view, it is the non-political policy-making of entities like the ECJ, which national politicians find difficult to justify that may presage a democratic deficit, rather than a lack of representativeness in the Commission, Council or European Parliament.

1.7.1   A democratic deficit in the EU?

The idea that there is a problem with the democratic legitimacy of the European Union is composed of several distinctive arguments. These might be summarised as follows:

1. **Community decision-making is unresponsive to democratic pressures.** It is an essential feature of democratic regimes that voting can bring about a change of governments. This is not so with the EU. Legislative power is divided between the Council, Commission and Parliament but only the last institution is directly elected. A change in the composition of the European Parliament will not necessarily lead to fundamental shifts in policy since it is only one part of the legislature. Elections for the European Parliament are really mid-term national contests into which EU issues rarely intrude. The contrast with American politics

has been made where State elections are frequently a mid-term signal to the central federal government. This sense of connectedness between national and EU politics is thought to be missing at present: 'no one who votes in the European elections has a strong sense at all of affecting critical policy choices at the European level and certainly not of confirming or rejecting European governance' (Weiler 1999: 266)

2. **The European Union encourages executive dominance** – The acquisition of various competences by the European Community enhances the power of national executives over legislatures. The power to assent to policy proposals is vested in the Council of Ministers. Decisions in this forum are often taken on the basis of qualified majorities and pass beyond the control of national parliaments.

   The European Parliament is ill-equipped to scrutinize these developments. Although its powers of oversight have increased thanks to the extension of the co-decision procedure, it is still, according to some democratic critics, structurally ill-suited to providing sufficient legitimacy to erase the democratic deficit.

3. **The European Union by-passes electoral democracy and is insufficiently transparent and overly complex** - many important decisions are taken by relatively enclosed committees and networks. This occurs in the committee structure known as comitology and the regulatory networks typical of 'new governance'. The complexity of policy-making and associated legal procedures makes understanding difficult for anyone other than an expert. Even the institutions of the European Union, such as the Council and Parliament, play a relatively limited role in these complex procedures.

4. **There is a substantive imbalance at the heart of the European Union.** Emphasis on the four freedoms of goods, capital, services and persons gives the impression that the EU is concerned with furthering the interests of capital rather than citizens.

5. **The European Union has contributed to a weakening of judicial control within member-states.** National courts are now themselves constrained by the principles of supremacy and direct effect rather than being the final arbiters of the constitutionality of legislation.

These are a challenging set of criticisms, but it is important to enquire about the appropriate yardstick. By what standard is the European Union judged? There are three important ones. The first relates to the benchmark of national democratic standards that are thought to apply within member-states. The second concerns the counter-factual question of what democratic standards would pertain in the international arena in the absence of the EU. And the third considers whether a people, conscious of its common identity, as is found within nation-states, is a necessary pre-condition for democracy.

We turn first to the question of standards in national democracies. Although the European Union is accused of contributing to a decline in national parliaments, it would seem executives tend to be dominant within member-states anyway. Furthermore, it is also not self-evident that the European Parliament is markedly less influential than its national counterparts. Therefore, it is difficult to claim that

it has caused 'executive dominance'. It is undoubtedly true that the decision-making process is complex, as exemplified in the system of comitology, but it is also the case that national policy-making has become more intricate as a variety of bodies external to central government have become involved in setting and implementing policy. Just like the European Commission, national governments make extensive use of secondary legislation that is rarely scrutinized by parliaments.

Second, there is an implicit counter-factual argument within the democratic deficit charge, the validity of which is questionable. The counterfactual is contained in the assumption that if the EU did not exist, matters currently within its competence could be kept at national level. Decisions would then be made closer to the people, alleviating the distance problem and parliaments would have greater control, reducing the problem of executive dominance (Craig and de Burca 2008). However, it is more likely that even if the EU did not exist, the pressure for some form of international co-ordination would still exist and might well take the form of *ad hoc* international agreements. If this was the case, the democratic credentials of such agreements would probably be worse than that supposedly perpetrated by the EU. Any such international agreements would score poorly on such issues as transparency, would make decision making more remote and make the executive less rather than more accountable to parliaments. Furthermore, such agreements would tend to be dominated by large and powerful states which would mean that the concerns of small states like Ireland would be largely ignored. The dispersed nature of power within the EU helps ensure that states can help to keep each other in check which in turn facilitates co-operation in the production of necessary collective goods. Far from being a threat to the democracy of small states like Ireland, the atypical dispersal of power within the EU may promote it by acting as a restraint on large states.

Third, it is often thought the existence of a people with a common identity is necessary for democracy to thrive. Literally translated, democracy translated means 'rule of the people'; those who are elected or chosen have some clear link with a defined group and their authority rests on this linkage with 'the people' or *demos*. Whatever political association arises derives its authority and legitimacy from the people or nation. It has been difficult to consider how any political authority can persist apart from a collective will based upon a common sense of identity, the so-called 'no demos, no democracy' hypothesis. One of the great problems for democracy in the European Union is that there is no 'people' as such with a sense of common identity akin to nationhood. Since people do not consider themselves to be Europeans, first and foremost, it is difficult to see how democracy within the EU can ever be legitimate on these terms. Yet might the EU not be stretching the popular conception of the democracy beyond the confines of the nation-state? Might it be possible to consider that there might be an alternative basis to democracy other than a relatively homogenous group?

Joseph Weiler (2003) has drawn attention to one of the most remarkable features of the European Union, what he calls its 'constitutional tolerance'. The European Union is distinctive for having a quasi-constitutional structure, in the sense that certain principles and practices are accepted as authoritative: the supremacy of EU law and the principle of direct effect. This exercise of authority has not been validated by a European people but has been accepted, often reluctantly, by member-states.

> In the Community, we subject the European peoples to constitutional discipline even though the European polity is composed of distinct peoples. It is a remarkable instance of civic tolerance to accept to be bound by precepts articulated, not by 'my people', but by a community composed of distinct political communities: a people, if you wish, of "others"' (Weiler 2003: 22).

Rather than being obliged to obey on the basis of some common identity or *demos,* member-states are invited to obey and accept a discipline in the policy areas over which the EU has jurisdiction, be it shared or exclusive. Tolerance has proven necessary because of the profusion of complex problems that cannot be solved unilaterally either by member-states or by the institutions of the EU. Constitutional tolerance might mean not only that member-states consent to being bound by the decisions of other member-states but, more positively, that they assent to collaborate together to search for the best possible means of resolving significant problems. What might bind the 'wider political community [of the EU] is no more and no less than the shared pragmatic desire to identify and secure whatever may be in the collective interest' (Walker 2006: 36) through the most effective means possible. This may seem to open the door to power without significant limits which raised concerns about a democratic deficit in the first place. However, it might well suggest the opposite, namely that apparently sovereign organisations find it necessary to co-operate with others who might then show up any limitations in the approach taken.

That this might seem like an affront to democracy underlines the hold that a certain view of national democracy has on the imagination, what one might call the 'chain of command'. On this view, political entities derive their authority and broad goals from the general will of the electorate and then delegate the achievement of these goals to an administrative branch. The legislature then reviews these goals periodically and the electorate pass judgment on political achievements which sets the stage for another set of goals to be enunciated. It is the sense of a clear 'chain of command' that many believe to be lacking within the governance of the European Union. But two fundamental constituents of this 'chain of command' might be weakening within liberal democratic states. First, for democracy to be a true system of self-rule for all citizens would require an implausible degree of agreement among them as to the suitability of all common policies to meet their joint and several needs (Bellamy and Attucci 2009: 215). National populations have always been less unitary than is often supposed and there is reason to believe that they are becoming less homogenous and more complex making it more difficult to think of them as a common set of people. People's identity may be as much defined through their sexuality, class or ethnicity as their nationality. As a population becomes more differentiated, then the sorts of issues thrown up by its members become less easy to resolve.

Second, the increasingly complex and uncertain nature of social problems have meant that governments have had to rely on solutions developed and delivered through networks rather than hierarchies since there are no uniform answers. Just as the EU has had to involve a number of different organizations in dealing with such issues as environmental protection, nation-states like Ireland have had to operate a similarly delegated approach to be successful. Relying on a hierarchical

approach in both cases is impracticable since the number of cases to be monitored is beyond the capacity of a central actor, irrespective of whether it is part of a national government or the European Commission. If the problem turns out to be similar – the difficulties of monitoring and enforcement with limited resources – so too does the solution, namely the co-ordination of ground level actors in search of satisfactory progress.

Just as the EU organized an informal forum like CIS to promote environmental goals (see section 1.6), Ireland has done the same. An environmental enforcement network has been formed involving the Environmental Protection Agency, local authorities, Health Service Executive, the Gardaí, the Fisheries Board and two bodies from Northern Ireland, the Environment and Heritage Service and the Police Service of Northern Ireland (see www.epa.ie). It promotes a coordinated approach to the implementation and enforcement of legislation and is itself part of an informal European network, IMPEL, that exchanges information on the implementation and enforcement of EU environmental legislation.

This kind of networked approach is replicated across many different sectors of Ireland in areas like health-care, food safety and disability support. Successful networks involve people in individual organizations, communities and firms, but do so in a quizzical manner, seeking greater understanding of the problem at hand and the capacity of people and organizations to correct it (NESDO 2009). Greater democracy is not about just giving people a greater opportunity to participate, but is also about asking what is needed for them to successfully tackle problems. Democracy becomes as much about creating conditions for self-discovery as instantiating occasions for self-rule. Self-rule rests upon the notion that people have a precise enough idea of the goals they desire to be able to give clear instructions to others like political representatives. In very many areas, like environmental protection or care of the disabled, what would constitute progress and how to recognize it are often not evident enough initially to be able to transmit clear instructions. In these circumstances, progress is achieved through a form of disciplined enquiry and monitoring that reveals the strengths and weaknesses of the approaches used. Revealing pros and cons in this way can lead to a revision of what people want and how best to obtain this goal.

1.7.2   Nesting the National within the EU

What does this have to do with the European Union? It is no coincidence that the way many networks within Ireland are dealing with social problems resembles the experimental governance approach described by Sabel and Zeitlin (2008). This is not just because of the diffuse nature of some problems that transcend borders. It is mainly because two systems, national and European, are 'nested' within each other. Nested refers to the way in which one system fits in with another larger system and how both systems draw sustenance from each other (Ferrera 2009). A national system of environmental protection is not just part of Irish society; it also is involved or nested in a larger European structure of concern with the environment. National systems are essential for ensuring the implementation of EU environmental law; and the informal fora organized under the umbrella of the EU are vital in establishing what constitutes good practice by encouraging forms of

Figure 1.1 Nesting the Welfare State within the European Union
(Ferrara 2009)
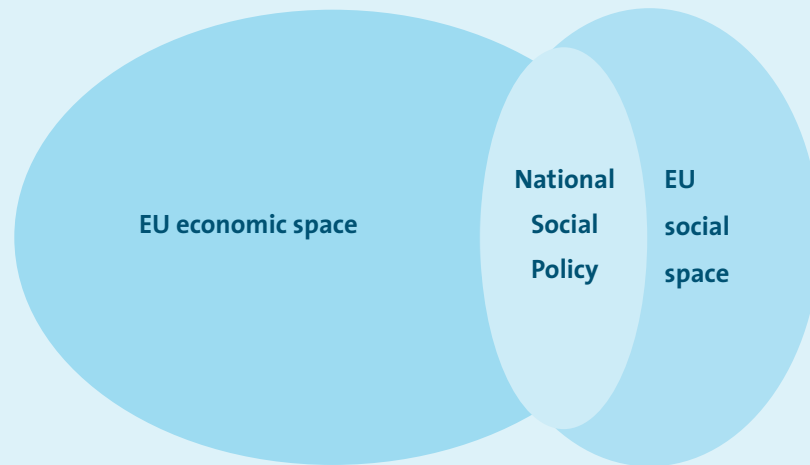
peer review. In many policy areas, the accomplishments of the EU and work within member-states are not opposed but complementary. The EU provides a sheltering space for work within the national arena, but also encourages innovation and experimentation by opening up national practice to peer review and comparison. If self-discovery is considered to be an increasingly important part of democratic life, then the multi-level nature of the EU can aid this process of discovery. In describing how organizations and systems are nested into each other, it is important to appreciate how

> No single level is decisive in shaping the world in which we live. Moreover, the levels are nested and linked with each other. One of the great challenges of our time is to comprehend the nature of this nestedness, to understand how governance, democracy and knowledge are linked together not only at each of these levels but how these processes are linked together across different levels. As societal institutions are increasingly nested in a multi-level world, we are all faced with the perplexing problem of how to govern ourselves (Hollingsworth and Muller 2008: 416).

According to some, this level of nestedness may not necessarily produce a virtuous balance between national considerations and the requirements of the EU. It may be the case the influence of the EU may be unbalanced, with its economic considerations having more influence upon national social policy than the social features of the EU (see Figure 1).

According to Scharpf (2009), the intrusion of the economic space of the European Union into the space of national social policy without compensating measures may have destabilizing effects upon customary social practices and popular legitimacy. The EU and the ECJ can seem to disregard national preferences upon which various

social policy decisions are made in favour of a 'market logic' based upon the four freedoms. This is perhaps only now becoming clear. During the earlier stages of the construction of the single market, Scharpf considers that it was 'hard to get politically excited about the Cassis decision which told Germany that it could not exclude a French liqueur on the ground that its alcohol content was too low' (2009: 191). Since this decision the ECJ has addressed issues of more obvious political importance such as the priority of economic liberties over social rights guaranteed by national institutions, demonstrated by the *Viking, Laval, Ruffert and Luxembourg* cases (see Background Paper 4 for a fuller discussion). For some, what these and other cases highlight is how the ECJ apparently disregards apparently legitimate national concerns, such as how opening up Austrian medical training to German citizens will impact on Austrian public finances, in favour of unilateral individual rights. Another concern arises from how these rights are enunciated without reference to how they are defined within a national context. For instance, in the *Laval* case, the ECJ would have favoured minimum wages to be set by legislation despite the fact that in Sweden this is a matter for local bargaining between firms and trade unions. Scharpf (2009: 196) complains that the ECJ's regime of Treaty-based rights 'makes no allowance for the fact that uniform European law has an impact on national institutions and policy legacies that differ widely from one member state to another'. He argues that this regime lacks an appropriate balance between EU communality and respect for national diversity which is fundamental for the EU's tradition of constitutional tolerance. It is this alleged lack of balance that is contributing to the EU's democratic deficit because

> the politically unsupported extension of judge-made European law in areas of high
> political salience within member-state polities is undermining the legitimacy bases
> of the multi-level European polity (Scharpf 2009: 199).

Scharpf does not believe that conceding this point entails the relocation of competencies to member-states since this might result in beggar-my-neighbour policies that would prove disruptive to the Union and damaging to national economies and societies. There is a need for some sort of review mechanism to ensure that national practices do not unnecessarily impede some of the fundamental freedoms of the EU. But any review, for Scharpf, has to pay attention to the 'the normative tension between solidarity achieved, with great effort, at the national level and a moral commitment to the 'inclusion of the other' in a European context' (ibid), a tension to which, in Scharpf's opinion, the ECJ has not sufficiently attended.

How does this bear upon the five criticisms of the EU's democratic deficit discussed earlier? It was said that although the EU does not conform to the democratic standards of nation-states, this does not prevent it from being democratic since it is a novel regime involving an atypical dispersal of power. While power is dispersed between Commission, Council, Parliament and the Court, in some respects there is enough of a democratic input to maintain its legitimacy particularly in those political modes of policy-making in which member-governments have a final say (see Scharpf 2009). By extension so too do the people of Europe have a say through their elected representatives in both the European Parliament and Council of Ministers. This may be enough to rebut the first three criticisms of the EU as unresponsive, non-transparent and encouraging executive dominance. However, the EU also engages in non-political policy-making in which the member-states do not have the final voice as when the ECB determines monetary policy, the Commission decides to prosecute member-states

and the ECJ gives substance to EU law. This is why criticisms 4 and 5 may have more force because national traditions may be overridden by these non-political forms of policy making.

Admittedly, non-political policy making already occurs within member-states in the form of practices like judicial review. But Scharpf considers that this is done with some degree of shared understanding between court and national culture and agreement on what is considered reasonable or not. He does not believe that such an understanding is shared between the ECJ and 27 member-states. In fact, the opposite situation may prevail whereby national cultures and practices are seen as sources of inertia against further European integration and EU law is conceived of as a method of discipline. In situations like these where the ECJ enjoys formal legitimacy, it could exhaust its stock of substantive or actual legitimacy if national leaders are unable to justify why customary practices should be amended thanks to EU legislation. It is in situations like these the EU runs the danger of amplifying perceptions of a democratic deficit.

According to this line of argument, the ECJ does not pay sufficient heed to national traditions and is intent on imposing its own form of 'market logic'. This is reminiscent of the popular perception of the Commission as an overbearing bureaucracy which is determined to impose EU regulations on reluctant, and often recalcitrant, member-states. In the review of the Community method, it became clear that this portrayal of the Commission is no longer accurate and it involves far greater consultation and co-operation with member-states and national authorities than is popularly believed. If it is the case that the Commission can maintain legitimacy with the organizations it oversees whilst retaining its non-political method of policy-making, can the ECJ do the same? If the ECJ is caught up in an antinomy between national autonomy and systemic conformity, is there a way out?

Examining the transformation of the Community method, it is suggested that it has been transformed from a relatively hierarchical tool into one of 'new' or 'experimentalist' governance, involving the recursive redefinition of ends and means. Doing so seems to permit the Commission to evade charges of a democratic deficit. If an executive entity like the Commission could accomplish this, could a judicial power like the ECJ do the same? There are some instances in which the judiciary has done precisely this, moving from a rule-setting approach in which discretion is something to be curbed toward a regime in which rules serve to encourage a reason-giving account which can justify departures from some putative norm (Noonan et al. 2009). In their discussion of child welfare, Noonan et al. show how courts were able to drive systemic improvement whilst remaining sensitive to the idiosyncrasies of each individual case. They did so not by 'deriving and enforcing determinate norms for the conduct of an entire system' but by inducing agencies that failed to meet their responsibilities to 'to reform in collaboration with injured stakeholders in a way that is both accountable and transparent' (Noonan et al. 2009: 559). If national courts have already evolved to deal with complexity and contingency, it may be that the supra-national court of the ECJ still has to make a similar leap, renouncing hierarchical rules in favour of standards that induce improvement.

1.7.3 Implications for democracy

This section began by elaborating a number of criticisms that amounted to the idea that there is a democratic deficit in the way that the EU operates. It was suggested that these criticisms partly rested upon a belief that in the absence of the EU, matters would either be dealt more benignly though *ad hoc* international agreements or more democratically within member-states. In contrast, this section has suggested that these sorts of agreements tend to favour large states and would be more remote than the operation of the EU. The latter notion of devolving matters back to member-states contains several questionable assumptions. First, it overstates the reach of the EU even in areas in which it has primacy. The Community method has evolved to give explicit recognition to the role of national and local interests in furthering EU policy. Second, it idealizes the standards of democracy that pertain within democratic states without examining how practice might fall short of these standards. In doing so, the democratic deficit argument neglects how contemporary conditions might be eroding what were believed to be essential features of democracy. This section has suggested two of these – a common identity and a clear hierarchy within government – are being diluted within member-states. Yet it is precisely the lack of these two features that is thought to be responsible for the EU's democratic deficit. If it is the case that the EU is less of a laggard and more of a trailblazer in terms of democratic ideals, then this may carry some important implications for what is considered appropriate democratic practice. Rather than viewing the EU has exemplifying some sort of deficit which must be corrected, it could be considered to be outlining an alternative path for democratic practice which member-states themselves are already exploring.

Some believe that not all institutions of the EU strike an appropriate balance between national distinctiveness and systemic concerns. In recent years, the ECJ is believed to have favoured a logic of integration based upon a market logic whilst paying insufficient attention to national concerns. Not attending to the balance between the two has made it difficult for elected representatives to support such rulings and may have detracted from the legitimacy of the Union. To maintain its legitimacy, some argue that EU law needs to become more supportive of various national social policies which is not to say that it becomes purely concessionary. New governance within the EU has demonstrated how policy oscillates across levels and between regions as means and ends are identified and re-designated; perhaps the next step in the EU's quest for legitimacy is to involve the ECJ in such a recursive and reflexive search.

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