THE IMPACT OF IMPLEMENTING EASTERN ENLARGEMENT: CHANGING THE EUROPEAN COMMISSION’S ACTION CAPACITY

Eva Gabriele Heidbreder

Thesis submitted for assessment with a view to obtaining the degree of Doctor of Political and Social Sciences of the European University Institute

Florence, October, 2008
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ABSTRACT
How does policy implementation impact on the institutionalised capacities of political agents? This question about the link between policy-making and institutional development lies at the heart of the study. It is inspired by an empirical puzzle about the dynamics of European integration. Since 1993 the European Union has developed a strategic approach to enlargement the most relevant trademark of which has been the criteria which acceding states have to meet before entering the Union. The conditionality-based pre-accession policy provided the European Commission with a set of new competences vis-à-vis the candidate states that were not directly derived from the internally applicable legal framework, the acquis communautaire. This kind of conditionality established double standards applicable to the candidate, but not the member states. Scrutinising all cases in which such double standards were created brings to the fore the fact that only in two cases did policies remain indeed limited to the candidate states before accession. In a further three cases the steering instruments the Commission developed in the enlargement context were extended beyond the institutional sub-system of the pre-accession policy to the institutional core of the acquis: why and how?

The theoretical framework draws from functionalist theory. The necessary condition for policies to be integrated from a distinct institutional sub-system – such as the pre-accession policy that applied to candidate states only – is functional pressure. Double standards create functional pressure for integration per se because they undermine the credibility of the political system in that candidates for membership need to comply with higher standards than members themselves. Functional pressure rises if policies are implemented successfully and if political problems persist so that at the moment of accession they become a common matter of concern for all member states. However, this alone does not explain why a single policy ‘spills-in’ from a sub-system to the institutional core. The sufficient condition and theoretical explanation builds on Theodore Lowi’s arenas of power approach. The variance between the single policies is explained by the policy type at stake that determines which steering instruments emerge in the respective arenas of power. The empirical results show that the Commission indeed extends its steering capacity if policies are formulated as non-binding rules and standards in the regulatory arena or in a restrictive way that limits redistributive effects in the distributive arena.

In conclusion, the thesis contributes to three strands of European integration research. First, it offers a theoretically-guided analysis of European Union widening. Enlargement policy is conceptualised as an institutionally linked but distinct arena of institutional rules. The effect that policy-making in such an institutional sub-system has may hence be extended and applied to other institutional sub-systems that are linked to but distinct from the Union’s core legal framework. Second, the study provides insights into the functioning the European Commission and how the organisation continues effectively to extend its steering capacities in the post-Maastricht era. Moreover, the case studies cover policy fields not much discussed in the existing scholarly literature. They therefore provide original research on how the Commission actually develops new responsibilities and implements policies. Third, the findings inform the study of European integration at large. Spelling out how implementing enlargement has been a source for extending the European Commission’s action capacity, the thesis highlights the process of widening as a specific cause for supranational institutionalisation which has so far attained little if any attention.
ACKNOWLEDGEMENTS

Writing the doctoral thesis have been important ‘Lehr- und Wanderjahre’ with a number of critical stations, all of which bore essentially new and hence at times bewildering challenges but also always supportive encouragement. It will be impossible to mention all, but on behalf I would like to express my gratitude to a few people in the most relevant places of the journey. First at all, however, a warm thank you to my supervisor Adrienne Héritier who was always available and offered patient and persistent guidance throughout the passed four years.

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<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>ACCESS</td>
<td>Community Programme to strengthen the Civil Society</td>
</tr>
<tr>
<td>AEBR</td>
<td>Association of European Border Regions</td>
</tr>
<tr>
<td>AEGR</td>
<td>Arbeitsgemeinschaft Europäischer Grenzregionen</td>
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<tr>
<td>AP</td>
<td>Accession Partnership</td>
</tr>
<tr>
<td>AQG</td>
<td>Council’s Atomic Questions Group</td>
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<td>CAF</td>
<td>Common Assessment Framework</td>
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<tr>
<td>CAP</td>
<td>Common Agricultural Policy</td>
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<tr>
<td>CBC</td>
<td>Cross-border Cooperation</td>
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<tr>
<td>CEEC</td>
<td>Central and eastern European country</td>
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<tr>
<td>COMECOM</td>
<td>Council for Mutual Economic Assistance</td>
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<tr>
<td>DG</td>
<td>Directorate General</td>
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<tr>
<td>EAEC</td>
<td>European Atomic Energy Community</td>
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<tr>
<td>EC</td>
<td>European Community</td>
</tr>
<tr>
<td>EACN</td>
<td>European Anti-Corruption Network</td>
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<tr>
<td>ECJ</td>
<td>European Court of Justice</td>
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<tr>
<td>EFTA</td>
<td>European Free Trade Association</td>
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<tr>
<td>EIDHR</td>
<td>European Initiative for Democracy and Human Rights</td>
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<tr>
<td>ENP</td>
<td>European Neighbourhood Policy</td>
</tr>
<tr>
<td>ENPI</td>
<td>European Neighbourhood and Partnership Instrument</td>
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<tr>
<td>EP</td>
<td>European Parliament</td>
</tr>
<tr>
<td>EUMC</td>
<td>European Monitoring Centre on Racism and Xenophobia</td>
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<tr>
<td>EURATOM</td>
<td>European Atomic Energy Community</td>
</tr>
<tr>
<td>ABBREVIATIONS</td>
<td>Description</td>
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<tr>
<td>ERDF</td>
<td>European Regional Development Fund</td>
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<tr>
<td>ESA</td>
<td>Euratom Supply Agency</td>
</tr>
<tr>
<td>ESF</td>
<td>European Social Fund</td>
</tr>
<tr>
<td>FCNM</td>
<td>Framework Convention on National Minorities</td>
</tr>
<tr>
<td>GNI</td>
<td>Gross National Income</td>
</tr>
<tr>
<td>GNP</td>
<td>Gross National Product</td>
</tr>
<tr>
<td>GRECO</td>
<td>Group of States against Corruption</td>
</tr>
<tr>
<td>IAEA</td>
<td>International Atomic and Energy Agency</td>
</tr>
<tr>
<td>ISPA</td>
<td>Instrument for Structural Policies for Pre-accession</td>
</tr>
<tr>
<td>LIBE</td>
<td>EP Committee on Civil Liberties, Justice and Home Affairs</td>
</tr>
<tr>
<td>LIEN</td>
<td>Linking Inter European NGOs</td>
</tr>
<tr>
<td>LS</td>
<td>EU Commission Legal Service</td>
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<tr>
<td>MEDA</td>
<td>Euro-Mediterranean Partnership Programme (Mesures d’Accompagnement)</td>
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<tr>
<td>NEA</td>
<td>Nuclear Energy Agency</td>
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<tr>
<td>NIS</td>
<td>Newly independent state</td>
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<td>NRWG</td>
<td>Nuclear Regulators Working Group</td>
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<td>NSRF</td>
<td>National Strategic Reference Frameworks</td>
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<tr>
<td>OLAF</td>
<td>European Anti-Fraud Office</td>
</tr>
<tr>
<td>OMC</td>
<td>Open Method of Coordination</td>
</tr>
<tr>
<td>OSCE</td>
<td>Organisation for Security and Cooperation in Europe</td>
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<tr>
<td>PHARE</td>
<td>Pologne, Hongrie Aide à la Réstructuration Économomique</td>
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<tr>
<td>PROGRESS</td>
<td>Community programme for employment and solidarity,</td>
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<tr>
<td>RAXEN</td>
<td>Information Network on Racism and Xenophobia</td>
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<td>RSWG</td>
<td>Reactor Safety Working Group</td>
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<tr>
<td>Acronym</td>
<td>Description</td>
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<tr>
<td>PROGRESS</td>
<td>Community Programme for Employment and Social Solidarity</td>
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<tr>
<td>PUMA</td>
<td>Public Management Service (OECD)</td>
</tr>
<tr>
<td>SAPARD</td>
<td>Special Accession Programme for Agriculture and Rural Development</td>
</tr>
<tr>
<td>SIGMA</td>
<td>Support for Improvement in Governance and Management</td>
</tr>
<tr>
<td>TACIS</td>
<td>Technical Assistance to the Commonwealth of Independent States</td>
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<tr>
<td>TAIEX</td>
<td>Technical Assistance and Information Exchange</td>
</tr>
<tr>
<td>TEC</td>
<td>Treaty establishing the European Community</td>
</tr>
<tr>
<td>TEU</td>
<td>Treaty on European Union</td>
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<tr>
<td>TFAN</td>
<td>Task Force for Accession Negotiations</td>
</tr>
<tr>
<td>TREN</td>
<td>Transport and Energy</td>
</tr>
<tr>
<td>UCLAF</td>
<td>Unité de coordination de la lutte anti-fraude</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UNCAC</td>
<td>United Nations Convention against Corruption</td>
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<tr>
<td>UNTOC</td>
<td>United Nations Convention Against Transnational Organised Crime</td>
</tr>
<tr>
<td>WENRA</td>
<td>Western European Nuclear Regulators' Association</td>
</tr>
<tr>
<td>WPNS</td>
<td>Working Party on Nuclear Safety</td>
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<tr>
<td>WTO</td>
<td>World Trade Organisation</td>
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PART I
INTRODUCTION

POLICIES AS FOCAL POINT OF POLITY FORMATION:
THE PUZZLE OF IMPLEMENTING ENLARGEMENT

The assumption made throughout this is that the nature of political organization depends on the conflicts exploited in the political system, which ultimately is what politics is about. The thesis is that we shall never understand politics unless we know what the struggle is about.
E.E. Schattschneider – The Semisovereign People

The puzzle underpinning this thesis derives from a salient empirical observation: policy-making in the European Union causes further integration even if competences are a strictly limited and placed in separate institutional sub-systems distinct from the core legal framework. In other words, policy-making restricted in time and scope forges the institutionalisation of new supranational capacities despite strong safeguards in the institutional design intended precisely to prevent the conferral of authority to the EU level.

Specifically, this puzzle revolves around the effects of implementing eastern enlargement on the institutionalisation of the European Commission’s action capacity. When mandating the European Commission the task to implement enlargement, the delegating member states endowed the supranational agent with extended competences. These competences were strictly limited in their applicability to the candidate states before accession and should therefore have disappeared at the moment of accession. Since rules were not integrated into the EU acquis communautaire – applicable to all member states – but remained explicit accession criteria, the institutional design provided strong safeguards to contain these additional competences. Yet, some policies developed under the constrained institutional conditions of the Copenhagen pre-accession framework do, in fact,
Part I: Introduction

Persist. Contrary to their formulation in the realm of enlargement policy, policies have been extended beyond the foreseen time-span and territorial scope in that they have gained general applicability to all member states. The question that therefore presents itself is ‘Why and how did the implementation of enlargement policy result in an extension of the European Commission’s action capacity?’

Enlargement policy is a significant field for the enquiry of how supranational policy-making determines European integration for three reasons. First, the establishment of enlargement policy is crucial in its own terms. The policy emerged only after 1993; before the large eastern enlargement round, widening of the European Community had followed a rather eclectic ad hoc approach. It was only with the prospect of extensive enlargement ever towards the east that the Commission developed, however incrementally, a systematic strategy towards the issue of widening. From this, enlargement policy emerged as one of the most important and popular policies of the Union for more than a decade. Second, enlargement policy is crucial due to its internal composition. As a horizontal policy it comprises basically all Union competences and, as will be argued, responsibilities beyond the realm of the EU’s legal framework, the acquis communautaire. It is thus a kind of mini-universe of EU policies under different institutional prepositions since it applied to the external candidate states only. Third, and most relevant here, enlargement policy brought forth new policies which the Commission implemented without having been conferred new formal competences under the acquis communautaire. Thus, new competences were exercised vis-à-vis external states without institutionalising these capacities in the core legal framework of the EU.

The analysis of the institutional effects of this particular policy-making can inform us more generally about the impact that policies have on institutionalisation. The empirical analysis will therefore take up all cases in which competences in the institutionally distinct enlargement framework exceeded the previously institutionalised capacities of the Commission. The cases fall into two groups that vary on the dependent variable, namely new executive capacities, or the action capacity of the European Commission. As will be shown, enlargement policy has led to institutionalisation of new policies in some and not in other instances. This variance enables an investigation into the conditions for the integration of new policies and the wider consequences of such policy-generated institutionalisation for the institutional and organisational structures and thus the polity evolution of the European Union.
1 ESTABLISHMENT AND TRAITS OF PRE-ACCESSION POLICY:
THE CHALLENGE OF IMPLEMENTING ENLARGEMENT

Enlargement policy since 1993 is marked by a number of distinctive features that distinguish it from earlier approaches to the widening of the European Union. The most relevant difference is that – backed by pre-accession conditionality – new EU responsibilities were created which applied only to candidate but not member states. Due to the asymmetric nature of conditionality, the applicant states had no say in the formulation of the policy. At the same time, they could not opt out from the conditions if they wanted to accede. The study will focus on the single policies that entered the EU agenda for the first time in the Copenhagen accession framework.

The incorporation of new members has been and will most likely remain a vital feature of the European Union. Just as much as the EU has intensified internal cooperation and harmonisation between states, it has expanded territorially from initially six to nine (1973), to twelve (1981, 1986), to fifteen (1995) to currently twenty-seven member states. The last, so-called ‘eastern enlargement’, was completed in two steps with the first big wave of candidate states joining in 2004, followed by two further countries in 2007.1

In contrast to earlier enlargements of the EC/EU2 this particular accession round was marked not only by its grand quantitative but also by a set of qualitative differences. Apart from the sheer number of candidate states, the fact that the majority of the applicant countries were in a process of economic, political and social transformation and had a Gross National Product decisively below the average of the member states, posed novel challenges for further widening. Unlike the ‘classical enlargement method’ (Preston 1995) the decision to offer a membership option to the central and eastern European states was linked to conditions which, for the first time, went explicitly beyond the full application of the common legal framework of the Union, the acquis communautaire. These Copenhagen criteria were given to the Commission together with instructions to go ahead with implementing enlargement when the European Council meeting in Copenhagen decided in 1993 to open for accession from the east. Due to high levels of uncer-
tainty about how to integrate up to 12 new member states, the Commission had great discretion to interpret and implement the pre-accession criteria. With respect to the extended competences the Copenhagen mandate implied: what was the effect of the newly established genuine approach to enlargement? What effect did its exercise have on the Commission’s role and capacities? And how do the findings on the impact of implementing enlargement inform our broader understanding of the European integration process?

The official starting point of the eastern enlargement process was the Council of Copenhagen in 1993. It affirmed that the membership aspirations of the Central and Eastern European states were to be taken seriously, and that “[a]ccession will take place as soon as and associated country is able to assume the obligations of membership by satisfying the economic and political conditions required” (European Council 1993). The Commission was at first called on to begin the screening process of the candidates to provide reports on the preparedness for membership of each state. The task the member states delegated to the Commission lacked both a precise tactic and a concrete schedule. Therefore, the Commission had considerable freedom in the operationalisation of the broad mandate. After a period of dispute on whether the EU should enlarge at all, the decision to do so was linked to conditions for the candidates to be met before admission to the club. These Copenhagen accession criteria marked a decisively new approach compared to earlier enlargements. For the first time, the requirement of the three pre-accession criteria went beyond the adoption of the acquis communautaire. The criteria covered three issues: the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union; and the ability to take on the obligations of membership including adherence to the Union’s aims. The European Council of Madrid (1995) supplemented these criteria by mandating that attainment of the membership criteria also included the adjustment of administrative structures.3

In essence, these conditions meant that the applicant states had to adopt more rules than those applicable to the member states. The approach to bind accession to conditions, which span further than the full acceptance of the common acquis and were to be met before joining, was the

3 The explicit mention of the issue of administrative structures was essential to tackle the evident gap between mere legal adaptation of EU laws without actual sufficient implementation, a consideration which gained increasing relevance in the later phases of the pre-accession period as repeatedly emphasised by the Commission: “While it is important that European Community legislation is transposed into national legislation, it is even more important that the legislation is implemented effectively through appropriate administrative and judicial structures. This is a prerequisite of the mutual trust required by EU membership” (Commission of the European Communities 2003d).
most relevant departure from the way previous enlargements had been handled. Moreover, demands on transposition included the *de facto* implementation of national institutions. The Copenhagen mandate marks the introduction of a new principle that shaped the preceding incremental policy change from the *classical* to the Copenhagen enlargement method. The accompanying policy instrument at the heart of the new approach was conditionality: who does not comply, cannot enter.

<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Acceptance full acquis</td>
<td>&gt; Reinforcement of principle</td>
</tr>
<tr>
<td>Entering states have to comply with the rules applying to all member states without being granted permanent opt-outs.</td>
<td>Entering states have to comply to the rules applying to member states, reduced options for opt-outs (e.g. no possibility to opt out from Schengen, even if not all member states members), plus addition of pre-accession criteria</td>
</tr>
<tr>
<td>Negations focus on acquis</td>
<td>&lt; Complexity</td>
</tr>
<tr>
<td>Formal accession negotiations focus solely on the practicalities of the applicants taking on the acquis.</td>
<td>Extension to pre-accession criteria and increased emphasis on implementation beyond formal legal adaptation.</td>
</tr>
<tr>
<td>New policy instruments (instead of reform)</td>
<td>&lt; Asymmetry</td>
</tr>
<tr>
<td>Problems created by an increased economic diversity of the enlarged Community are addressed by the creation of new policy instruments overlaid on existing ones rather than by a fundamental reform of the inadequacies of the latter.</td>
<td>Explicit goal to reform policies before accession, differentiated application of critical policies for new member states (CAP, Structural Policy) instead of introduction of new policies.</td>
</tr>
<tr>
<td>Incremental institutional adaptation</td>
<td>&lt; Conditionality</td>
</tr>
<tr>
<td>New members are integrated into the Community’s institutional structure on the basis on limited incremental adaptation which is facilitated by the promise of a more fundamental review after enlargement.</td>
<td>Candidate states have to undergo major adaptations before accession, reforms of the EU structures likewise before accession.</td>
</tr>
<tr>
<td>Negotiation with groups</td>
<td>&lt; Differentiation</td>
</tr>
<tr>
<td>The Community prefers to negotiate with groups of states that have already have close relations with each other.</td>
<td>Each candidate is evaluated and negotiated with separately, stressing the bilateral character of EU/candidate relations.</td>
</tr>
</tbody>
</table>

Table I.1: Changes in the Community/Union approach to enlargement

Table I.1 juxtaposes the five principles underlying the *classical enlargement method* until 1995 with the specific features that characterise the EU’s approach developed since 1993 as the strategic pre-accession policy based on the Copenhagen mandate. Preston’s claim that the principles of the classical method could not be upheld for the 1995 EFTA enlargement is even more apposite for the following eastern enlargement. While the firm application of the acquis remained a strict principle, the Copenhagen Criteria extended it. Thus, apart from the reinforced first principle,
principles two to five were basically overthrown in favour of a conditionality and control-driven strategic pre-accession policy.

The pre-accession strategy evolved, on the basis of the Copenhagen mandate, from the ensuing delegations from the European Council to the Commission as executive body of enlargement. This filled the very broad criteria with more concrete substance, as Table I.2 summarises in relation to major Treaty Reforms that occurred in parallel. While the Maastricht, Amsterdam Treaty and the subsequent Constitutional Treaty mark the grand integration steps of the period, key decisions for the EU approach to enlargement were taken at the European Council of Essen (1994) that inaugurated the pre-accession strategy under this very label, followed by the Luxembourg Council (1997) which launched the enhanced strategy and in which the Heads of State and Government agreed to open negotiations with a first group of applicants, as well as the Council of Helsinki (1999) that extended the number of states to negotiate accession to include further six applicants. The establishment of the Copenhagen criteria marked an important qualitative change to the previous approach to EU widening. Yet, only these subsequent decisions established structured approach to enlargement and a framework in which the underlying new principles could be operationalised.

\[
\begin{align*}
\text{Table I.2: Institutionalisation EU Polity / EU Enlargement Policy} \\
\end{align*}
\]

Further relevant European Councils were: CANNES (1995) which set the Phare budget at €6.9 billion for 1995-1999; VIENNA (19998) endorsing the Commission’s Regular Reports; BERLIN (1999) adopting the financial perspectives for 2000-2006, including pre-accession funds and accession-related expenditure; FEIRA (2000) which confirmed the principals of differentiation and catching up and emphasised the importance of candidate states’ administrative capacities to implement the acquis; NICE (2000) providing the institutional and policy reforms of the EU as basis for an enlargement and endorsing the enlargement strategy proposed by the Commission (central element: roadmap for negotiations); GOTHEMBOURG (2001) that confirmed irreversibility of enlargement process and reaffirming strategy; GENT (2001) making a mid-term review of the implementation of enlargement; SEVILLE (2002) reaffirming wish to conclude negotiations with 10 front-runners and inviting Commission to prepare roadmaps and revised and enhances pre-accession strategies to be adopted in Copenhagen; COPENHAGEN (2002) successful conclusion of negotiations with ten accession states.
The definition of an official strategy for enlargement departed from the method of earlier rounds of widening which were basically limited to negotiations between the candidates and the Community. The main new feature was the principle of norm compliance beyond the acquis before accession and the strong conditionality leverage the criteria created, at least in the first pre-accession stages. The shift from a logic of acquis-based negotiations to a logic of control enforced by means of conditionality were elements carved out throughout the pre-accession phase. “In the course of the negotiations the field of application of the principle of conditionality was further widened by applying certain conditions for the opening and closing of the negotiations’ chapters. In a majority of cases the European Commission shaped those conditions on an ad hoc basis” (Maniokas 2004: 22). Backed by conditionality, the Commission had unprecedented powers over states. This leverage diminished the closer the candidate states approached accession since the threat of rejecting a state lost credibility. Whereas the thrust of conditionality weakened in the eyes of the acceding states with respect to conditions that were not integral parts of the acquis, it was in the member states’ interest that the Commission pushed its competences to its limits within the Copenhagen Framework to exert influence on the candidates to be in compliance. The member states therefore granted the Commission considerable freedom on how to operationalise the criteria. It was through the entrepreneurship of key actors in the Commission that the abstract Copenhagen criteria were incrementally filled with concrete meaning and the Commission established completely new enforcement tools and structures to monitor and evaluate compliance prior to accession.

In sum, eastern enlargement brought about the creation of a genuine enlargement policy, including the establishment of a separate Directorate General for Enlargement. Both in terms of resources and actual authority, enlargement policy under the Copenhagen framework granted the Commission an unprecedented degree of coercive authority over the candidate states. Although economic and political criteria may be traced back to demands placed on the candidates during the Southern enlargement, making them explicit and insisting on adaptation before accession gave “a quasi-constitutional nature to the Copenhagen criteria” (Hillion 2002: 409). Despite this, the formalisation of a genuine enlargement policy increased uncertainty for the candidate states because “[a]ll in all, the candidates’ obligations as set out in Copenhagen have been further adapted, making accession increasingly look like a moving target” (ibid. 411). In a nutshell, “in response to the different nature of this enlargement the Union has developed a new method for this process. The new method is based on four new principles: complexity, differentiation, conditionality and asymmetry. […] All four principles form a single logic of control” (Maniokas 2004: 33).
The empirical analysis of this investigation will illustrate how the “logic of control” was established in single policies within the Copenhagen Framework. A central finding on the course and development of pre-accession policy is that those control instruments the Commission coined under the Copenhagen umbrella were partially adapted to enhance their intended effect, but only in one case in which the member states were confronted with a fully unintended extension of supranational capacities were withdrawn already prior to accession. Although the actual effectiveness of conditionality has been called into question (Hughes, Sasse et al. 2004a, b), the instrument as such was never challenged but incrementally refined. Thus, the enlargement strategy that evolved from the accession criteria was by and large considered successful, as reflected in the fact that the same approach is being applied to all current candidate states. Furthermore, the findings show that the very policy tools and techniques to control were extended to apply to all member states. However, without the creation of formalised new competences, these tools play out very differently because they lack the conditionality-based coercive leverage. Even though we see the continuation of some pre-accession techniques of control, their actual value and effect differs between the Copenhagen and acquis frameworks.
2 FROM NO COMPETENCES TO ACTION CAPACITY: 
THE TIMEFRAME AND CASE SELECTION

To analyse how the implementation of enlargement impacted on the institutionalisation of capacities on the EU level, I will conduct a temporal comparison of the status quo before and after the implementation of pre-accession policy. To understand why institutionalised capacities are extended, cases that vary on the dependent variable will be compared. While in three cases policy-making in the pre-accession framework led to an extension of capacities compared to the status quo ex ante, two policies featured in the enlargement context but did not result in new capacities beyond the implementation of enlargement. The empirical analysis is theory-guided. The explanatory model suggests that variance in outcomes is explained by the characteristics of different policy types. The findings specify how distinct policy types generate dissimilar forms of institutionalisation, either extending the Commission’s action capacity, or pre-empting further EU integration.

The time frame is set around the emergence and finalisation of the large eastern enlargement round, 1993 until 2003/2004, i.e. the signature of the accession Treaties and accession of the majority of candidate states. I refer to three conceptually defined points in time to measure change. T1 stands for the capacities of the Commission ex ante based on the acquis. It is, however, not strictly limited to the time before the Copenhagen mandate since these wider capacities need to also consider developments that occurred in the acquis independent from enlargement. T2 demarks the pre-accession phase, i.e. it focuses on the actual competences and policies of the Copenhagen framework. T2 is thus delimited more clearly, starting with 1993 mandate and with accession being the rough end point. Since enlargement policy continued, I will also refer to further developments after 2004, as far as they concern changes in the institutional sub-system of the Copenhagen enlargement framework. T3 is concerned with the capacities ex post, after accession of the new member states. 2003/04 marks the point by which most of the inclusion or extension of capacities should have been realised. However, this date can also only be an approximate indication for the conceptual break of the ex post state of arts. The perspective needs to be more open-ended since some policy measures will show only later, depending on programming and budget cycles etc..

Distinguishing for the three time-related points of measurement is that T1 comprises the institutional and policy context a new policy would be integrated into. T2 concentrates on the poli-
cies that were based on the 1993 Copenhagen mandate and developed in the subsequent years until 2004. T3 is eventually the situation after enlargement focusing on the effects of the policy creation under T2 on the general acquis context as illustrated at T1. These definitions distinguish all three phases clearly from each other, even if in ‘real time’ they overlap. The empirical analyses will follow this pattern.

The systematic case selection is linked to the specific features of the new enlargement policy based on complexity, differentiation, conditionality and asymmetry. The selection of cases is conceptually guided and based on the following assumptions. The population of cases is established by those policy fields in which the Commission had extended competences in the Copenhagen framework as compared to its overall responsibilities under the acquis, which implies that these areas were not institutionalised in the overall acquis at the moment of delegation in the 1993 Copenhagen mandate. By definition, potential cases will either be part of the Copenhagen Criteria – which were established beyond the acquis – or form part of the accession assistance which put increased emphasis on chosen aspects of the acquis.

We can envisage three possible scenarios: (a) the member states change their strategy and integrate the competences the Commission had on critical policies vis-à-vis the candidate states into the acquis (formal extension of action capacity), (b) the strategy of the Copenhagen framework is upheld, i.e. the competences vis-à-vis the candidate states expire once these enter the EU, but alternative policy instruments to respond the persisting problems are promoted (informal extension of action capacity), (c) authority over new policies remains limited to the context of enlargement policy (return to action capacity at T1). While the first two possibilities fall into one category yielding an extension of action capacity in various degrees, the third option leads to a different outcome – which by design of the Copenhagen mandate should be the expected outcome.

The actual theory-guided case selection was based on data which can be grouped into three categories, two of which are ex-post documentation of Commission action during the pre-accession phase; one covers ex-ante programming (in italics the actual documents that were used):

1. **output reflecting data I** (Commission documents produced within and for the functioning of the CF): these are primarily the Regular Reports (which also fed into the Accession Partnerships and National Action Plans for each candidate state),
(2) output-reflecting data II (documents reflecting on the COM actions): such as evaluation reports by the Court of Auditors, reports and inputs by the European Parliament, self-evaluations of the COM (annual PHARE, and accession assistance Reports).

(3) input-reflecting data (policy planning and framing documents): foremost, of course, the Copenhagen Criteria, which are complemented, on the one hand, by IGC conclusions (the appendix lists central documents), planning documents for pre-accession assistance.

According to these criteria and based on the document analysis, five cases have been identified and analysed: the respect for and protection of minorities, institutional capacity building, cross-border cooperation, nuclear safety and anti-corruption policy. Markedly, all these issues lay outside the classical policy areas of the EU, which form part of the acquis and were dealt with as chapters of the pre-accession negotiations. The accession negotiations remain outside the research interest that focuses on previously not existent supranational capacities. The cases scrutinised vary on the dependent variable. While in the first three an extension of the Commission’s capacities can be observed, this does not hold for the latter two cases. The empirical analysis will hence allow confronting the theoretical expectations on why and how supranational capacities are extended or not.

The research findings reveal that indeed the policy type and the thereupon-dependent choice of policy tools are significant for a policy to be integrated beyond an institutional sub-system. Policies that are intentionally constrained to an institutional sub-system spill into the institutional core structure. However, the institutionalisation of new supranational means to coerce exempts the conferral of formal competences. Accordingly, the results show that of the policies that were created in the enlargement context, non-binding regulatory and conditionality-bound distributive polices are generally integrated. In contrast, cases in which the creation of hard regulation was the only option to frame a policy outside the Copenhagen Framework, capacities were not institutionalised. Even more so, member states actively thwarted integration even in a case in which the Commission had formal Treaty competences. The member states’ strategies with respect to the extension of Commission action capacity resulted hence not from the conditions of the instit-

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5 The empirical data draws from official documents published by the EU institutions as quoted throughout the text. Moreover, I conducted 14 interviews with Commission officials in March 2007. The officials were chosen from the various relevant Directorate Generals and different levels of the organisational hierarchy, i.e. including desk officers dealing with the day-to-day policy implementation up to the level of a Director General. With one official involved in enlargement policy, I had a written exchange in September 2007 and I interviewed a former Commissioner in February 2007.
tionalised legal framework. Instead, the expected effects the execution of a particular policy type would trigger showed decisively the extension of supranational capacities.
3 INTEGRATION AS THE FORMATION OF A HYBRID POLITY: THE RESEARCH QUESTION OF SUPRA-STATE INSTITUTIONALISATION

The empirical puzzle focuses on an aspect of the broader research question: how does policy-making impact on institutions and institutionalisation? In more abstract terms, this enquiry is concerned with the effect of enlargement policy on the institutionalisation of capacities on the supranational level, i.e. the process of European integration. To understand the extent to which policy-making causes institutionalisation, the basic institutional features of the EU need to be taken into consideration because it forms the background against which our narrower question of extended Commission action capacity takes shape.

The governance system of the EU is marked by particularities that set it apart from other systems of governance, most notably unitary states. Being “less than a federation, more than a regime” (Wallace 1983) the Union has a hybrid nature. Various authors have come up with different terms for the ‘hermaphrodite’ – partially male and partially female – system (Amato 2004) whose main characteristics are depicted in Table I.3. The two logics that operate on the EU level coexist and overlap partially.

Thus, objectives range from pure inter-state cooperation to full harmonisation of national policies, the former being achieved through intergovernmental decision-making while the community method and co-decision between the Council and European Parliament move more towards a state-like ideal type but remain hybrid. They remain “bicephal” (Tömmel 2003: 285-88) since the EU has no centralised government, but authority is both vertically (across levels of governance) and horizontally (across institutions) dispersed. Powers at the EU level are not separated but split among the different governing organisations, which has been described as a system of “mixed government” (Majone 2006, 1998: 18) marked by a “dynamic confusion of powers” (Schmidt 2001: 339).6

Generally, the exercise of power can be understood as the monopoly to create behavioural conformity by others. In the EU the exercise of power follows diverging logics of two ideal typical modes. While decision-making in the Council resembles a natural political arena, i.e. “guaranteed power attributed to each actor depends exclusively on its resources (economic, symbolic, violence) and their strategic use through a continuous process of conflict and negotiation” (Bartolini

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6 Not only does – under the regular community decision-making method – the Commission initiate legislative acts and execute the resulting policies, also the member states reoccur in the implementation phase in the Comitology procedure. The latter still widely excludes the EP, which has however become an important player as co-legislator.
2005: 28), the strongly institutionalised community method applied to areas in which the Community has exclusive competences institute governmental political arenas. Unlike natural arenas, in which behavioural conformity is achieved temporarily, a “governmental arena (any governmental arena, from the state to the professional order) is endowed with an actor and an institution specialized in the production of behavioural conformity” (ibid. 28). The degree to which a political arena is governmentnalised on the EU level is accordingly also reflected by which organisations of the EU are entitled to participate in particular sectors and the various kinds of competences actors at the EU level have. In the most natural arena, the Council of Ministers takes intergovernmental decisions, such as in the second and third pillar, while the Commission and the EP are reduced to attendant responsibilities or are merely informed.

Moreover, the upcoming Lisbon Reform Treaty will establish the European Council as an official EU institution, headed by a president with a two-year term in office. The European Council has the competence to define the strategic guidelines of the Union and it will have to show in practice how this will play out in terms of power relationships between the European Council, the Council of Ministers and the Commission, the latter two will be asked to develop legislation and implement policies along the guidelines (Bermann 2005). In other words, the policy instruments of the communitarian arena are used without fully involvement of the EP and Commission and without establishing juridical control by the ECJ. The operationalisation of decisions taken in the second or third pillar relies often on instruments of the first pillar. Hence, in practice, even where a formal division of competences and responsibilities exists, these are mixed. The ideal-typical division between intergovernmental natural and communitarian governmentalised arenas is hardly ever upheld. The according expression of the hybrid nature of the polity is the formal classification of competences as exclusive or shared Community competences.

Finally, the political relationship between individual citizens and EU organs is based on both the regime-like logic of representation through state governments, through whom also legal remedy is offered, whereas the federal elements include direct representation of citizens in the EP and individuals’ right to call on the ECJ directly. In short, the policy takers are either the member states, and thus citizens in an indirect manner, or individual citizens, the latter applying in particular to a number of horizontal competences such as anti-discrimination.

The ‘male’ elements guarantee that the member state governments remain the ultimate masters of the Treaties and control fundamental constituent decisions. The ultimate legitimisation of the system rests therefore on the national constitutional orders, even if “solang” (as long as) the EU
does not contradict the national orders primacy of EU law is accepted in practice. The EU is formally limited to the competences conferred upon it. In actual fact the Union’s multiple modes of policy-making differ between policy fields and levels of governance and create various forms in which the EU has authority to coerce on member states and citizens directly. Yet, the fundamentally limited monopoly on authority entails that also in terms of policy tools to coerce the EU is not fully equipped to draw on all means a traditional state has at its authoritative disposition. The EU remains “a partial polity, without many of the features which one might expect to find within a fully-developed democratic political system” (Wallace, W. 2005: 494).

<table>
<thead>
<tr>
<th>IDEAL TYPE POLITY FEATURES</th>
<th>‘MALE’ REGIME</th>
<th>‘HERMAPHRODITE’ HYBRID</th>
<th>‘FEMALE’ FEDERAL STATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>OBJECTIVE</td>
<td>cooperation</td>
<td>Approximation</td>
<td>Harmonisation</td>
</tr>
<tr>
<td>INTERACTION</td>
<td>Intergovernmental</td>
<td>bicephal: community method &amp; co-decision</td>
<td></td>
</tr>
<tr>
<td>ORGANISATION OF POWER</td>
<td>member states alone</td>
<td>mixed government across EU bodies</td>
<td>separation of powers between EU bodies</td>
</tr>
<tr>
<td>EXERCISE OF POWER</td>
<td>natural political arena</td>
<td>governmental political arena</td>
<td></td>
</tr>
<tr>
<td>COMMUNITY COMPETENCES</td>
<td>strategic guidelines</td>
<td>shared</td>
<td>exclusive</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>adjective competences</td>
</tr>
<tr>
<td>REPRESENTATION</td>
<td>member state executives</td>
<td>member state executives &amp; EP</td>
<td>EP &amp; EU government</td>
</tr>
<tr>
<td>LEGAL REMEDY</td>
<td>through member states</td>
<td></td>
<td>individuals directly</td>
</tr>
</tbody>
</table>

Table I.3   The EU Partial Polity (in italics currently not applicable but logical category)

For our puzzle, which is concerned with the steering capacities of the Commission, the partial polity character of the EU connotes that every extension of capacities raises the question of where and how a new power is established. The findings of the study underscore the double-headedness of the EU and provide evidence for an extension of hybrid policy tools rather than the shift to either a clear-cut regime or federal structure. The observation that “[i]nexorably, the
nature of the Commission has been affected and the best we can say it is that it has become typi-
cally hermaphroditic” (Amato 2004: 3) is supported by the results that highlight how new capaci-
ties emerge in informal, and arguably legally shaky niches of the partial polity.
4 POLICY-MAKING AS CAUSE FOR INTEGRATION: 
THE MAIN PROPOSITIONS AND STRUCTURE OF THE STUDY

The main hypothesis put forward is that policies are the source for the institutionalisation of new capacities on the EU level. Policy-making generates institutional change. This ties up with streams in policy theory, which already in the late 1960s made the point that most of public policy is concerned with ‘constituent policies’ (say, an institutionalist view), despite the fact that it cannot be assumed “that in order to understand the level of wealth and economic development or the pattern of group activity in a society one needs to understand very much about the formal decisional system [...] we must concern ourselves with a larger problem, namely, whether the decisional system can be regarded as a significant independent variable at all” (Salisbury 1968: 163). More concretely still, the “major point here is that policy has, by and large, been treated as dependent variable that is affected in one way or another by political processes” (Froman 1968: 43, emphasis in original; see also Froman 1967) whereas the following will consider them as independent variables.

The causal direction proposed here challenges the dominant institutionalist reasoning according to which policies result from the institutional pre-conditions. Starting from institutions and referring to them as independent variables, three prominent alternative hypotheses can be formulated. From a sociological institutionalist perspective, socialisation shapes EU policy-makers’ shared believes and ideas; these determine which policies are integrated. From the viewpoint of rational choice institutionalism, institutions provide the framework in which actors are constrained and at the same time enabled to realise their preferences; correspondingly, new policies will be integrated along the constraints that institutions set to actors’ preferences. From a historical institutionalist perspective, processes of path dependency are the most relevant causal mechanism; accordingly the initially established institutions continue to have a causal impact on all following steps and explanatory value for the integration of new policies. The causal mechanism proposed in contrast to neo-institutionalism is: policy-making causes institutionalisation on the EU level, ergo the institutional architecture of the EU, and with it the institutional constraints as well as the context in which shared norms and ideas emerge, derive from the specific policies that are being implemented by the EU.

I will hence reverse the causal direction proposed by the currently dominant institutionalist perspective on the European Union, and base the study instead on Theodore Lowi’s affirmation that it is actually policies that determine politics (Lowi 1972: 299). The logic differs from path-
dependency since the results of policy-making go beyond positive feedbacks; policy-making results in a qualitative re-creation of institutionalised powers and not their (modified) reproduction. The logic differs also from rational choice since the policy-generated extension of capacities contradicts the constraining institutional design political actors created in the first place in accordance with their stable preferences. More closely related but not congruent is the notion of sociological institutionalism which suggests that norms and values shape the interests that motivate political actors’ choices. The difference to the theoretical argument developed here is that policies are not the result of norm-guided choices but that policies themselves generate pressure for integration which political actors respond to in view of their particular interests. The argument proposes a functional explanation in which the particularities of each single policy determine the dynamics that its implementation sets off. Policy-making differs depending on the specific political problem dealt with, accordingly the policy type at stake also shapes how and which steering capacities are being institutionalised.

Along these lines, the subsequent Part II develops the theoretical model. The argument is introduced from a neofunctional perspective that spells out the overall expectation that policy-making in an institutional sub-system generates functional pressure for further integration. Such processes of *spill-in* from the sub-system to the institutional core framework contradict the actual institutional design that intentionally delimits supranational capacities. The main thrust of the theoretical model goes beyond neofunctionalism. Why a policy spills from a sub-system into the institutional core is explained by the policy type at stake which in turn determines how policy tools are framed on the EU level. The institutionalisation of capacities beyond the delimited scope and time for which they are created is not automatic once functional pressure arises; to the contrary, where functional pressure arises, the policy type to be created in response to such pressure is decisive for the strategies political actors chose to either integrate or counteract unintended and unwanted consequences.

On the basis of this theoretical model, the operationalisation introduces the key empirical concepts and measures that guide over to the empirical studies of Part III. These studies cover, first, three cases in which Commission action capacity has been extended as a result of implementing enlargement are illustrated, then two cases in which no extension has resulted are presented. The case studies trace the process of policy-generated institutionalisation in three steps. First I illustrate the status quo ex ante before enlargement policy, second, the policy development in the Copenhagen Framework is analysed, and finally the institutionalised capacities at the status quo
post enlargement are scrutinised. Part IV discusses the empirical results in terms of effects that implementing enlargement has had on the three dimensions of policy-making in the Commission, on organisational structures within the Commission and in relation to other EU bodies, and finally on integration at large.

The closing Part V draws conclusions and provides an outlook on possible further developments. Building on the empirical findings, the specific characteristics for the extension of Commission action capacity and the particularities of the EU’s policy arenas will be discussed. Theoretically, especially the extension of the arenas of power approach to accommodate the realm of informal institutions will be presented as a promising way to analyse policy-making on the EU level. In sum, the thesis will contribute to the field of EU research with respect to the study of EU enlargement, the European Commission and the European integration process at large.

The bottom-line of the argument is that the European Commission, and thus supranational governance, is still extending its *de facto* capacities. Yet, this happens not through the formal extension of competences, especially where the formalisation of a redistributive arena is pre-empted by the member states. Instead, policies are framed in increasingly informal terms, as new niches are created by means of informal instruments, at times in legally grey areas. This move to alternative steering and informal institutionalisation serves also redistributive ends, which are promoted in disguise in regulatory or distributive terms of political conflict resolution. This move to a further hybridisation of the EU polity allows more supranational governance with a minimum of formal conferral of authority and, more importantly, without establishing direct political relationships between citizens and the EU level over redistributive conflicts. It comes, however, at the expense of more bicephal governance and raises novel questions about the democratic legitimacy of the governance system of the European Union.
PART II
THEORETICAL FRAMEWORK

POLICY-MAKING AS CAUSE FOR INTEGRATION: A TWO-LEVEL FUNCTIONAL APPROACH

I was attempting to turn political science on its head (or back on its feet) by arguing that “policy causes politics”.

Theodore J. Lowi – New Dimensions in Policy and Politics

The analysis starts from the empirical observation that from a set of restricted competences delegated to the supranational level, some competences recede as foreseen while others are extended beyond their initially intended reach. The very design of the Copenhagen framework was to establish new policies in a distinct institutional setting to realise enlargement without creating new formal powers for the European Union. Accordingly, the empirical null-hypothesis from which the following theoretical conceptualisation departs is: after the completion of enlargement, the capacities held by the Commission to implement enlargement will disappear. This hypothesis does not hold. As a matter of fact competences are extended beyond the constrained realm they were first placed in. Why and how? To explain the variance between two sets of cases in which capacities expire or persist, I will sequentially apply complementary theoretical approaches.

Over the following pages a two-level functional explanation will be developed. Overall, a neofunctional approach will explicate why enlargement creates functional pressure and thus the necessary condition for the extension of Commission action capacity. The approach does, however, not capture the sufficient conditions for a single policy to be institutionalised. Hence neofunctionalism provides the starting point of the analysis, which is complemented with the arenas of power.
approach focusing on single policies. Based on the latter the sufficient conditions for the integration of a particular policy are identified.

The institutionalisation of new capacities on the EU level viewed from a neofunctional perspective leads to the following expectation: if new capacities are established in a distinct institutional setting outside the core institutions, the overall likelihood for further integration increases. The underlying mechanism is policy-generated functional pressure to integrate capacities to the institutional core. This does however not mean that each and every policy under pressure will be institutionalised. The expectation for a single policy goes beyond the neofunctional explanation: if a policy comes under functional pressure to be integrated, whether a competence will be institutionalised or not depends on the specific features characteristic for each policy-type and the respective institutional consequences that decision-makers expect.

The theoretical explanation proceeds accordingly in two steps. First, the peculiar context of enlargement and the dynamics that derive from it are conceptualised along neofunctional reasoning. Neofunctionalism is built upon to explain how the conditions of the Copenhagen framework create functional pressures and thus increase the probability for actors to adapt their strategies to increase supranational capacities. In the second step, we will turn to the part of the empirical puzzle which is concerned with single policies. The cases are single policy issues whose likelihood of being institutionalised have risen due to their creation in the Copenhagen framework. The neofunctional expectation of higher likelihood for integration is qualified by complementing it with functional micro-foundations to capture under which conditions functional pressure leads to institutionalisation of a single policy, or not as the case may be. The second part of the analysis therefore spells out the sufficient conditions for integration of single policies.

Complementing the neofunctional approach by the equally functional arenas of power approach increases the explanatory scope of the model. Neofunctionalism alone suffers from a “lack of generalizable microfoundational basis necessary to support predictions about variation in support for integration across issue countries, and time” (Moravcsik 1998: 16). A microfoundational basis must however be compatible with the functional explanation. Unlike the realist school in international relations for which power and the distribution of preferences remain the basic ex-

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Note that in distinguishing liberal intergovernmentalism from neofunctionalism my concern is not with the difference between the roles attributed to member states-supranational actors and the persistence of national loyalties, usually depicted as the major dividing-line. The decisive theoretical difference that distinguishes intergovernmentalism from neofunctionalism is the definition of the key driving forces for integration, i.e. the underlying causal mechanisms. While for the latter this is a ‘functional rationality’, for the former it is power, following the theoretical rational school. Accordingly, for the former ‘rationality’ is an attribute actors give to their strategies, for the latter it is an analytical category.
implementing intergovernmentalism with a microfoundation, bargaining theory is an ideal choice to create a consistent more holistic theory (Nye 1988; Keohane and Nye 1974; Keohane and Milner 1996; Keohane 1984, 1989). But by the same token, it is not the case that “neofunctionalism lacked explicit theories of interest-group policies, interstate bargaining, and international institutions” (Moravcsik 1998: 16). Proposing a straightforward functional argument, the choice whether to cooperate for a particular purpose depends on whether the shared perception suggests that a choice ‘is rational’, i.e. offers the best available means to pursue a specific end. If sticking to a functional logic, the ultimate choice for cooperation or non-cooperation must therefore be intrinsic to the perceived ‘nature of the matter’ on which a shared rational understanding is constructed. Put in a nutshell: whether cooperation occurs or not depends on the kind of the policy at stake rather than the power of each of the participating actors to promote individual preferences.

Staying within the functional logic, it follows that the microfoundations must be linked to the shared perceptions on built-in qualities of each policy. Whether a policy established in the Copenhagen framework will be extended to the wider acquis must depend on its expected impact on the member states. This again derives from the manner in which a policy is framed at the supranational level, the possible choices for which are constrained by the policy type.

Following this line of thought, it is necessary to turn to heuristics that classify policies as well as a descriptive institutional analysis, in order to categorise policy features that should lead policymakers to devise their strategies. The second step of the analysis is therefore not a dynamic one; the point is not that policies change their ‘value’ but, on the contrary, that they are marked by certain stable characteristics that explain why, if under pressure to be integrated, member states will positively respond and favour the extension of supranational capacities for some policy types while they actively prevent the extension of other means to coerce.

Before elaborating on the theoretical approaches, this chapter will briefly sketch out the main ideas of a two-step analysis.

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8 If the explanation was a dynamic one, namely that the ‘value’ of a policy has changed due to adaptations of the context, the explanation would be exogenous to the model, an example would be that member states adapt their strategies to establish a forceful integrated common defence policy because the value of such a policy has changed due to new external threats.
Catalyst for Functional Integration: The Method of Eastern Enlargement

Based on the main causal explanations neofunctionalism offers, I will adapt the model to include the dimension of policy extension from distinct institutional sub-systems to the EU’s legal framework proper. It will be shown that if supranational capacities are established in a restricted institutional framework (outside or as sub-set of the core institutional structure), pressure to integrate the policies concerned into the core institutional framework will significantly increase the likelihood for further integration. Accordingly, enlargement is expected to be a trigger for the institutionalisation of new policies on the EU level.

Neofunctionalism, as reviewed by Ernst Haas (2004) and Philippe Schmitter (2003), will provide the thrust of the functional argument on the necessary conditions for an extension of supranational capacities. Although “neither functionalism, nor neofunctionalism nor neo-neofunctionalism has or had anything to say about enlargement” (Schmitter 2003: 70), neofunctionalism can be adapted to analyse the effects of post-1993 enlargement policy on EU integration. The approach allows defining ex ante under which conditions the likelihood for an extension of the sum of supranational capacities rises. Short of microfoundations we can however not formulate precise expectations on single policies that get under functional pressure in an institutional set that is linked but distinct from the institutional core.

The key argument derived from neofunctionalism is that integrating policy A into a separate institutional system that involves the same set of actors who operate in the core institutions will lead to the extension of A to the core of the institutional framework. This kind of policy expansion from one institutional to another setting goes beyond neofunctionalism as it currently exists. What is at issue is not whether integration in policy A will lead to integration in the related policy B, as described by the concept of spill-over. Moreover, the heart of the analysis is not questioning why certain policies were included into enlargement policy and others not. Neither is the question why we observe so many genuinely political rather than economic or technical problems entering the agenda in the context of enlargement policy – although both these questions are obviously vital to a neofunctional analysis of the relationship between widening and deepening of the EU. Instead, the issue is the theoretical question of how policies that are established in a related but distinct institutional setting create pressure to gain applicability in the broader legal and operational framework of the EU – in short: which effects has creation of institutional sub-entities outside the EU’s core framework on the course of integration?
The underlying causal mechanism suggests that where restricted competences are exercised and their implementation delivers intended results, functional pressure arises that pushes actors to adapt their strategies to extend supranational capacities regarding the respective policy. Where unintended consequences occur, i.e. outcomes contrary to those initially intended, actors should in contrast thwart further institutionalisation. Relevant actors are the member state governments, the supranational organisations – in our case foremost the Commission – and societal actors with a particular interest in the policy, be it in favour or against integration.

Besides this and dependent on the previous choices, existing institutional structures influence decisions. Beyond their enabling or constraining impact as context variables, expectations about the effects of future institutional rules influence actors’ choices. Regarding the latter, creating a new policy in a separate setting allows actors to respond more easily in case of unintended consequences, therefore reducing possible unwanted effects of strategic choices under high uncertainty. It also allows selecting at a later stage beneficial parts and the refutation of other policy tools. These features mark all policies under perspective. They are independent of questions about ‘high’ or ‘low’ politics and should apply to every policy that has been established in a separate institutional setting.

ARENAS OF POWER:
THRESHOLDS FOR INSTITUTIONALISATION

Neofunctionalism provides only the broad canvass for the theoretical explanation. It renders plausible why enlargement, or more generally the establishment of successfully exercised new policies in an institutional sub-system, leads to pressures for more integration and thus increases the likelihood for supranational institutionalisation of wider capacities for policy-making. Where functional pressure occurs that threatens to lead to unintended consequences, actors are expected to adapt their strategy and consciously resist functional pressure.

As the empirical analysis will illustrate, functional pressure arose in all cases, but although necessary it is not decisive for a policy to be integrated. In fact, in policy fields in which pressure was amongst the highest, institutionalisation was successfully blocked by the member states. Functional pressure does not automatically lead to integration, actors may either adapt their strategies to integrate new policies or counteract unintended consequences. What appears as a rational choice to an actor depends on the type of policy at stake. We hence have to go beyond the neofunctional approach along the hypothesis: if a policy gets under functional pressure to be
integrated, the arena of power it falls into will determines the actors’ strategy to integrate or resist institutionalisation on the supranational level. The arena of power a policy falls into entails two decisive consequences. First, it defines the type of policy, not all of which can be deduced from the EU’s formally established competences. Secondly, where a policy can be linked to the EU’s formal scope of powers, the pre-existing rules constrain the choices for policy tools that can be used on the EU level. Thus, the type of policy and the thereupon-dependent mode in which coercion is exercised explain whether a policy under functional pressure will be integrated.

In order to distinguish the influence of policy specific attributes on strategic choices of policymakers, I will turn to a set of typologies, foremost Theodore J. Lowi’s classic typology of public policies. The classification of EU policies to the four types of regulatory, distributive, redistributive and constituent policy fleshes out that actually only the regulatory and distributive arenas are fully developed in the EU partial polity. Redistributive and constituent policies may occasionally enter the agenda but in neither have clear competences been established, nor have the respective institutional structures emerged on the supranational level. To assume with Lowi that policies determine politics (Lowi 1972: 299) implies that governance structures depend on the policy type being pursued. Each type establishes its own arena of power, i.e. a genuine mode of interaction between the governing and the governed and a specific way in which political conflicts are channelled. Taking seriously that within the EU only two out of four arenas of power are wholly established must hence have substantial consequences for the Union’s institutional structure and steering mechanisms.

Lowi’s approach has been applied to the study of the EU and more narrowly to the question how the Commission extends its competences by Mark Pollack (1994; 2000). In a similar way as Pollack’s work on the creeping extension of EC competences until the 1990s, my analysis starts off by combining neofunctional and arena of powers approaches but bears some essential conceptual differences and departs substantially from Pollack’s interpretation of the arenas of power applied to the EU. Whereas, drawing from the intergovernmental school, Pollack attributes different negotiation styles to the various policy types, I will not refer to intergovernmentalism but will instead stretch Lowi’s categories to conceptualise also informal institutions and new governance tools within Lowi’s original model. In consequence, although Pollack’s conclusion that the extension of formal EC competences experienced a blow in the early 1990s is shared, it will be shown that opening ever further to the informal realm the Commission’s creeping power extension continues nonetheless. Moreover, focusing strictly on policy formulation and policy tools, my classi-
fication of EU policies clashes with Pollack’s reading which suggests that redistributive policies are at the heart of EU policy making. These issues will be discussed in detail in the concluding Part V (Chap. 17) and take up Pollack’s positions against the background of my following study.

As for the neofunctional model, in order to apply Lowi’s typology to the EU I will introduce some specifications both in terminological and conceptual terms. The former are to accommodate the nature of the EU as multi-level polity, the latter from the limitation of Lowi’s model to formal institutions and the rule of law as sole mode of governance.

First, Lowi’s notion of the state has to be widened, without however going beyond the theoretically essential attributes. As an abstract notion, “one can look in vain for the state” but “the state, although an abstraction, can be experienced through the policies pursued by institutions that possess political authority” (Lowi 1985: 67). Furthermore, following Max Weber, Lowi defines coercion as “basic to all state action” (1985: 69). Subsuming these features in a term that applies likewise to the EU or other regimes, it is defined as a governing structure with an (incomplete) monopoly on the exercise of coercion, or in the words of W. Wallace a partial polity (2005). Crucially, in the EU the monopoly on exercising coercion is not centralised, a characteristic usually attributed to weak or nascent democracies where non-state actors often fill power vacuums. The EU polity, in contrast, is functionally ‘incomplete’ in that the supranational level has the monopoly on only certain policies whereas the others continue to be exercised by the member states. Therefore, informal institutions will not necessarily be illegitimate replacements of state-functions to fill institutional vacuums. In the execution of policies, they will emerge to substitute or complement gaps that emerge on the supranational level.9

The second point drives from the fact that in the EU public authority is dispersed across different levels of the governance system. As a consequence, neither the supranational level can (arguably yet) nor the national level can (arguably anymore) claim fully centralised authority over the exercise of coercion. Still, functional pressure to exercise more comprehensive authority occurs which, if it does not lead to new formal competences, creates strong incentives for informal solutions and alternative modes of governance to pre-empt the extension of restrictive rule-of

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9 Further, the units targeted by supranational coercion differ from those of a state. While in a state the individual is the ultimate unit to impact upon, the EU (that is the supranational level) impacts on various lower levels of the polity. The targeted are foremost states or regional units since most EU actions have to be channelled through the national polities. Still, Lowi’s distinction that a policy affects the individual directly or through the environment can be upheld, irrespective the condition that coercion is ‘detoured’ through national legislation or regional implementation structures. That individuals are affected directly is most evident where horizontal rights (anti-discrimination being one of the few examples) are concerned and allow individuals to appeal as individuals to the ECJ, despite the fact that also litigation in the EU has to be channelled through the national structures.
law and hard coercion through the EU. Therefore, both theoretically and empirically informal institutions and alternative modes of governance prove essential in particular for the day-to-day exercise of authority by the Union. Since Lowi’s original typology is limited to a formal legalistic conception of policies, the approach is not sufficiently geared to encompass these phenomena. The framework allows, nonetheless, to be extended as to accommodate also for informal institutions and so-called new governance, which will be incorporated into the definition of a policy as “a rule formulated by some governmental authority expressing an intention to influence the behavior of citizens, individually or collectively, by use of positive and negative sanctions” (Lowi 1985: 70). Theoretically, this extension will be derived from the bias for informal rules that are generated from the functioning of the partial policy with split and limited authority to exert coercion.

The design of the study does not foresee to test different theoretical approaches and alternative explanations against each other. Still, another recently often referred approach appears from the outset very much geared to answer the question raised and deserves brief mentioning. Principal-agent frameworks in political sciences and in particular the question of “how rational actors can control the behaviour of agents to whom they delegate authority” have been first developed in US-American research on administrative law, congressional research, and economic theory (see Epstein and O’Halloran 1999a: 698) and have been applied to the EU in a number of influential studies, most prominently by Mark Pollack and Fabio Franchino.

Applying a principal-agent model offers a conceptual framework geared to capture unintended effects of delegation. Framing our puzzle in these terms, an extension of Commission action capacity should be caused by agency loss: the Commission (the agent) is delegated limited capacities by the member states (the principals) which are extended beyond the initial mandate. Agency loss arises since an agent has advantageous access to information. Hence occurring information asymmetries bare the danger that the agent behaves opportunistic in favour of his own preferences (shrinking, also bureaucratic drift), or systematically different to the principal’s pref-

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10 Employing principal-agent theory to the puzzle, we have to keep in mind two essential features of the approach. First, independent and different preferences of principals and agents have to be defined ex ante (Barnett and Finnemore 1999: 705); second, in politics delegation to an agent may place him in the de facto position of a principal vis-à-vis the actual principals (Moe 1990: 233; Majone 2001a).

11 I refer in particular to the following authors (Moe 1990; Moe 1984; Epstein and O’Halloran 1994, 1999a, b; Banks and Weingast 1992; McCubbins, Roger et al. 1987).

Scanning through the empirical evidence, principal-agent theory can indeed be well applied and the explanation offered does not contradict the findings that will be presented here. Yet, the explanatory scope is much more limited. In fact, it shows that in the two cases in which the Commission would have acted in conflict the principles’ preferences, the principles could successfully prevent shirking, let alone slippage (nuclear safety, anti-corruption). In the cases in which capacities were extended, these could be extended because they did precisely not threaten on key preferences of the member states which could thus tolerate more discretion (minority protection, administrative capacities, cross-border cooperation). Thus, an explanation based on principal-agent theory confirms the basic assumptions of the approach, yet the extension of action capacity from an institutional sub-system is not a matter of shirking by the Commission but a matter of member state preferences and the principles show effective in controlling their agent. The alternative explanation offered in the following does not compete with this contention but provides a different angle which asks instead: what determines the principals’ preferences regarding Commission capacities?

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13 Levine and Forrence (1990), use the term “slack” to indicate the degree to which agencies can escape political control, a term also referred to by Epstein O’Halloran (1994).
5 Neofunctionalism: Necessary Conditions and Macro-Perspective

The neofunctionalist point of departure is that policies which are created in institutionally distinct sub-sets or spin-offs outside the institutional core raise the likelihood for further integration due to policy-generated functional pressure to institutionalise capacities within the main legal framework. The competing expectation is accordingly that policies, which have intentionally been placed in an institutionally distinct sub-system, will remain strictly contained to this realm and will not impact on the institutional core.

Neofunctionalism will not be referred to in all its facets and manifold occurrences. I will narrow down the angle to the theory to revised version as last presented by Ernest Haas (2004a) and Philippe Schmitter (2003) in which they revive the theory whose “obsolence” Haas himself had announced in the 1970s (Haas 1975). Asserting that “[r]egional integration theory has a new lease; it is no longer obsolete” (Haas 2004a: liii), Haas and Schmitter integrate theoretical developments of the decades since the theory was first introduced (in particular: Haas 1968; Schmitter 1970, 1971b) and provide a sketch for a research agenda based on the strengths and weaknesses of the revised (neo-)neo-functional approach. I will start off from these revised versions by summarising the main innovations that are of relevance for our analysis. In the last section of this chapter, the reformulated approach will be extended by the notion of ‘spill-in’ of policies from institutional sub-sets or spin-offs that provides the explanatory mechanism to analyse the effects of the Copenhagen framework on the overreaching acquis.

5.1 The Basic Argument: Neofunctionalism and EU Integration

Put simply, neofunctionalism is a theory of regional integration in which non-state actors play the key role in advancing integration. In the case of the EU this role was expected to be played by the Commission as supranational secretariat, together with other non-state organisations (interest associations, social movements etc). In initiating integration, member states are the key actors. However, in all subsequent stages neither the direction nor the dynamics of integration are determined by member state governments alone. Quite to the contrary, non-state actors can successfully unite their potential influence to promote their own interest for more supranational competences. They do so by exploiting the fact that the initial assignment of limited tasks creates

14 Especially the work by Lindberg needs to be mentioned here (Lindberg 1963, 1965, 1966, 1967; and in particular the edited volume: Lindberg and Scheingold 1971).
functional pressures to extend supranational activities into other areas as far as this appears necessary to fully achieve the intended goals. In other words, unintended consequences and functional spill-over occur. This process is “intrinsically sporadic and conflictual”, but “under conditions of democracy and pluralistic representation, national governments will find themselves increasingly entangled in regional pressures and end up resolving their conflicts by conceding a wider scope and developing more authority to the regional organizations they have created” (Schmitter 2003: 46). The functional spill-over from the economic-social sphere will hence eventually lead to political spill-over, in which national actors and citizens shift expectations to the supranational level.

Adhering to this basic theoretical framework, Haas confronts the approach with related work dealing with multi-level governance, new institutionalism, path-dependency and constructivism to suggest amendments. Likewise, Schmitter offers a self-critical review and spells out an extended ‘neo-neofunctionalist’ research agenda. The following section summarises the authors’ central points of clarification that are of relevance for our model.

5.2 THE RESUSCITATED MODEL: NEO-NEOFUNCTIONALISM REVISED

The preceding summary of the revisions Haas and Schmitter suggested in 2003 and 2004 take stock of the many critiques that have been uttered and the numerous suggestions that have been proposed in contention or in emulation with the original works. The revised version of the approach will be summarised along five concepts: (1) the distinction of different mechanisms of integration, to be extended later by the notion of spill-in; (2) the definition of the dependent variable; (3) the key actors; (4) the double-role of institutions as context and dependent variable to control for the structure-agency problem in a restricted research design; and (5) the distinction from the logic of path-dependence.

1) Early neo-functionalism came soon under attack for assuming that, once initiated, integration would proceed quasi-automatically. Arguing that a theory of integration must also be a theory of disintegration, Schmitter refuted this notion already in 1970 when he introduced a model based on concepts for different modes of integration, stalemate and disintegration

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15 Haas extends this critique to the refinements of neo-functionalism by Sweet Stone, Sandholtz and Fligstein (SSF). “In my judgement, both the original NF and the SSF version make the same mistake with respect to the ‘automaticity’ of the integration process once the initial rules of the game are set”: once significant segment of collective life subjected to supranational authority: “spill-over will take care of the future. The process is seen as irreversible, though not necessarily linear progressive” (Haas 2004: xxi).
(Schmitter 1970, 1971a) which occur at different rates and rates of intensity in consecutive up
ward-moving cycles of integration. For integration to progress the most likely mechanism is spill-
over, i.e. the simultaneous and balanced increase of the level of authority (decisional authority) 
and scope of authority (number of issue areas)(Schmitter 1970: 845). The most likely outcome is 
encapsulation, “i.e. to respond to crisis by marginal modifications within the zone of indiffer-
ence” (ibid. 846), which marks the status quo reached in integration.

To account for the integration of a policy from an institutionally distinct but linked sub-set 
or spin-off, I will introduce the notion of spill-in below. Like spill-over, spill-in increases level and 
scope of authority, yet the mechanism is not that functional pressure links related policies but 
that functional pressure links different institutional frameworks. The emphasis on the non-
automatic nature of integration is key to the explanation developed in the following, in which 
functional pressure is a necessary but not sufficient condition for integration.

The different dynamics of (dis-)integration have further been extended to include different 
fora altogether. Consequently, not only the EU Commission may embody supranationalisaiton. 
This contention will be reflected in the cases studies, in which other international organisations 
than the EU prove important players that offer alternative functional responses and thus viable 
less-coercive substitutes for cooperation outside the EU framework. Theoretically, this implies 
that instead of a final state-like entity “it becomes possible (even probable) to envisage other end-
states”, and hence a “‘Multi-level and Poly-centric System of Governance’ is one such candidate” 
(Schmitter 2003: 69). This guides to the next two points of amendment: the dependent variable 
of neofunctional models and the role of actors, in particular member state governments.

2) The dependent variable was initially a political community, more precisely neo-
fuctionalism set out to “judge if and how ‘political community’ results from measures of ‘politi-
cal integration’” (Haas 2004b: 4). Regarding the EU, this was equated with the eventual forma-
tion of a federal state-like entity. Sandholtz, Stone Sweet, and Fligstein (2001) depart from this 
and redefine the dependent variable more open-ended as “institutionalized governance for an 
emerging ‘European space’” (Haas 2004a: xx). As a consequence, no explicit finalité or end state is 
implied or defined.16 Instead of integrating the compatible elements, I propose to use neo-

16 The definition of the Commission action capacity as dependent variable is in line with this institutionalist for-
mulation, yet with a significant difference to Sandholtz et al who explicitly state to be starting from a sociological 
institutionalist angle. Sociological institutionalism is most compatible with neofunctional thought (Schmitter 2003: 
48), other new institutionalist approaches – based on more hard rationality, epistemic, or legal logics (Hall and Taylor 
1996; Peters 1999) – remain outside of the neo-functional explanatory model. Haas limits his discussion of institu-
tionalism to the sociological variant whereas Schmitter acknowledges six different institutionalist versions, sharing 
however the notion that sociological institutionalism overlapping most with neo-institutionalist theory. In my model
institutionalist language as an heuristic to describe the dependent variable and to measure change as a function of altered scope and level of institutionalisation of single policies because competences on policies are the formal source of supranational power and therefore the key indicator for integration.

The definition by Sandholtz/Sweet Stone/Fligstein (SSF) faces Haas’s critique that the conceptualisation suggests falsely: “institutions are empty of content. What seems to matter to SSF is the creation and multiplication of organizations that make, interpret, and enforce rules, not the interests and actors who ‘inhabit’ them” (2004a: xxii). For Haas this is problematic since the logic of spill-over is driven by interests and ideas that determine the rules actors opt for. Sticking to SSF while paying respect to the role of interests and ideas is however no contradiction if we accept the dual role of institutions in the model. Accordingly the degree of ‘institutionalisation’ is a measure to estimate scope and level of integration, i.e. the dependent variable. At the same time, interests and ideas are on the side of the independent variables that are at the core of the explanatory mechanism. Here institutions appear as background variables and are by no means “empty of content”. The dual role of institutions will be further illustrated with respect to the agency/structure problem.

Schmitter proposed a different conceptualisation again, defining actor strategies as the dependent variable (1970). The tangible difficulty of identifying actor strategies other than inferring them from institutional choices is a further argument for conceptualising the latter as dependent variable – baring in mind, however, the two essential insides that modelling actor strategies as dependent variable fleshes out: first, the mechanism by which change occurs remains always dependent on the strategies actors chose; but, second, the structures previously created influence the strategies chosen and become thus a central source for change where they cause internal contradictions or are incompatible with external events or structures. If we look at a particular stage of integration, the institutional set-up existing at that point in time has to be integrated as a context variable; where these structures create contradictions they will potentially turn into an independent variable causing endogenous change. In contrast, measuring extent and structure of ‘empty’ institutions over time, constitutes the degree of institutionalisation as dependent variable. Accordingly, for the present analysis the Commission’s action capacity in terms of institutionalised policy tools marks a context variable as far as the capacities of the Copenhagen framework

I content with Schmitter. “Institutionalism, as such, has only minimal content (‘institutions matter’ seems to capture and exhaust it), but some of its sub-types at least deserve the label approach” (Schmitter 2003: 49).
and the pre-existing acquis are concerned, while the capacities the Commission has after enlargement are the dependent variable.

3) No fundamental adaptations regarding the role of different actors are suggested, but the emphasis on the impact and importance of different actors is being rebalanced with reference to related approaches to the analysis of EU integration. “An appreciation of multilevel governance implies continued respect for one crucial level: the national governments, embattled though they may be” (Haas 2004a: xvi). This perspective adds clarity in defining actors and their roles; it does not add explanatory elements. Rather, multi-level governance’s popularity “among theorists can be attributable to its descriptive neutrality and, hence, its putative compatibility with virtually any of the institutionalist theories and even several of its extreme predecessors” (Schmitter 2003: 49). Arguing that multi-level and poly-centric governance will always remain a feature of the EU and similar systems, the emphasis on member states as central actors is more pronounced than in earlier versions (ibid. 2003: 49-52).17

The relevance of the vertical and horizontal split of powers in the EU governance system is key for understanding the extension of action capacity. Authority is not only split between different levels but also across EU institutions (see above Chap. 3). It follows that any increased involvement of one organisation affects the relative power of the other organisations, both across the levels of governance and among the supranational organisations. Moreover, being a partial polity formal decisions on constituent rules remain a matter of interstate bargaining among the member states and thus outside the EU’s own capabilities. The functional analysis provides focuses on the reasons why these very decision-makers adapt their strategies to allow for more supranational authority, or to counteract the extension of steering capacities on the EU level.

4) Linking neofunctionalism to constructivist meta-theoretical notions raises another central question, namely the agency/structure dilemma. Underlining that his version of neofunctionalism “has no concern with structures at all, while that of Lindberg and Scheingold for example, does” (2001: 29), Haas puts clear distance in particular between his and Lindberg and Scheingold’s definition of structure and the conceptualisation of institutions as structures. Instead he stresses that “agency is constrained by the actors’ enmeshment in networks, formed by institutions and habit, not by structural forces. These constraints, however, do not predict the results of

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17 Haas defends the central roles member state governments were attributed also in early neofunctionalism. “It is not true that NF downplayed these actors [national governments] in the interest of puffing up supranational organizations. But it is true that NF exaggerated the rate at which national governments were expected to lose out on them” (2004a: xvi).
agency or action itself because PC [pragmatic constructivism] also assumes that actors adjust their later behavior in the light of the perceived failure or earlier behavior to realize the actors’ perceived interests. Put differently, later choices are the result of unwanted and unforeseen consequences.” (Haas 2004a: xxvi).

The strong emphasis on the primacy of actors over institutions is essential. Relaxing it would render the approach inevitably teleological. Nonetheless, institutions are not the only outcomes. Once in place they constitute constraints and opportunities for future choices. On the side of the explanans, they do not cause change but they set the context that affects actors. They are not ‘empty’, but are containers of ideas, preferences, etc., and thus influence the choices made.

It follows that for each analysis we need to control for stability of the ‘background’ of institutions for the period under perspective because an adaptation of an institutional context implies that it becomes a different context variable that impacts differently on the dependent variable ‘institutionalisation’. It follows, moreover, that structure cannot be an overreaching general force, or even be the independent variable. What is a relevant structure, or, even more so, what are the relevant features of a structure, is time- and case-dependent.

Agency remains always the ultimate source for action and the creation of structure. No social structure is removed from agents, yet also no action is independent from structure. The notion of intended and unintended consequences reflects precisely this: if actors set up formal rules to bind each other, they do so consciously in order to constrain their future options; if an institution causes unforeseen side-effects, actors might be forced to intervene etc., etc..

5) The causal mechanism according to which successfully functioning policies established in an institutional sub-entity generate functional pressure for the ‘spill-in’ of policies resembles strongly the concept of path dependency. Notwithstanding similarities to Pierson’s work on path-dependency (1996; 2000), Haas underlines the conceptual differences between neofunctionalism and historical institutionalism. Firstly, neofunctionalism similarly refers to irreversibility and lock-in effects, though not envisaging positive feed-back as historical institutionalism does. “Instead of developing a notion of positive gains, the spill-over was driven by a postulated fear by the actors of suffering losses unless further sectors were integrated” (Haas 2004: xxxiii, emphasis in original). Although in both approaches preceding choices have a decisive impact on future actor strategies, they differ slightly in that path-dependency is concerned with costs that derive from changing previous choices while spill-over – and for our propose spill-in – considers future costs of not integrating further.
Second, Haas sets apart the concept of unintended consequences from other theoretical explanations because “these perspectives are not congruent. Principal-agent theory, PD [path-dependency], and rational choice theory are not concerned with specific actor values and interests; NF, using the logic of unintended consequences, is” (2004: xxiii). Both the neofunctional and path-dependency logic conceptualise unintended consequences as a strong integration force since they force actors to improvise and device new strategies when confronted with unpredicted difficulties. What distinguishes the approaches is that neofunctionalism is primarily concerned with what spills over or not and which consequences are unintended and unwanted. The “idea that different actors entertain different hierarchies of values and interests”, which is “factored out” by the other approaches, “is the mainstay of research” (ibid. 2004: xxxiii). Thus, “the logic of unintended consequences is clearly different from spill-over and path-dependency thinking. Making it the centerpiece in an explanation of major changes dispenses with the mechanical aspects of both. It moves the empirical scope of study well beyond the expansion of economic ties and networks, by making any concrete policy domain and any constitutional issue subject to its logic” (Haas 2004a: xxiv, emphasis in original).

The subsequent empirical analysis will illustrate these two distinctions from historical institutionalism. First, the logic of spill-in regards the member state governments’ expected future costs in case of (non) integration from the institutional sub-set to the acquis. Second, unintended consequences, where they occur, will explain especially non-integrative strategies of actors who are faced with unwanted outcomes.

5.3  **Extending the Model to Enlargement:**
**Institutional Sub-set and Spin-offs As Triggers for Spill-In**

The development of neofunctionalism has been an eclectic exercise involving a wide range of scholars, resulting in a vast pluralism of streams and ideas. The five points summarised above suggest in essence three clarifications: the adaptation proper of some elements (the dependent variable), the reformulation of earlier tackled questions against developments in other theoretical streams (multi-level, constructivism), and the distinction from other related approaches (path-dependency). The explanatory mechanism remains the functional linkage between policies that generate pressure for actors to adapt their strategies to further integration.
In order to include enlargement into the model, Figure II.1 introduces the concept of functional *spill-in*. The theoretical addition is not concerned with the question of why enlargement occurs, it does not offer a functional explanation to the phenomenon of widening but proposes a way to conceptualise the effect of institutional sub-sets and spin-offs on the course of integration. Under the Copenhagen pre-accession framework, enlargement was implemented in an institutionally distinct but acquis-dependent structure, i.e. an institutional sub-set. Without creating genuinely new supranational competences, the Commission had extended powers that were limited to the pre-accession context. These are illustrated in the lower two boxes (policies A’, B’...), in contrast to the formal competences in the acquis depicted in the upper part of the figure (policies A, B, ...). On the left hand side, the concept of spill-over is depicted both for the institutional core, say the EU acquis (upper cell) and an institutional sub-set, say the Copenhagen enlargement framework (lower cell). The logic is that integration of policy A will lead to integration of policies B and C, which again lead to integration of further policies.

The same dynamics may occur in the institutional sub-set. To illustrate this, the addition of ‘administrative capacity building’ as accession precondition in the Madrid EU Council in 1995 was triggered by the perception that this was indispensable to achieve the pre-accession objectives set out earlier. Hence, a spill-over into a related field occurred within the Copenhagen framework.

![Figure II.1 The Concepts of Spill-over and Spill-in](image-url)
The right hand side of Figure II.1 depicts the interaction between the two institutional systems. The innovation introduced is the jump of policies from the sub-set to the core. The underlying mechanism is that once established and exercised in a linked sub-set, pressure for integration proper rises, i.e. the likelihood for integration mounts. Should strong unintended consequences emerge, actors may however prevent a spill-in to be realised.

The way in which I refer to neofunctionalism limits the explanation to the increased likelihood for integration. If C’ will indeed be integrated as policy C depends on the micro-foundational characteristics of the policy, which we will turn to now.

In conclusion, policies newly established and successfully implemented in an institutional sub-system generate functional pressure and thus raise the likelihood for further integration. The underlying mechanism is spill-in: the respective policies are extended beyond the distinct institutional setting which they are restricted to by the original institutional design because political actors expect to suffer losses unless they move the policy from the institutional sub-system to the institutional core. The decisive political actors for the extension of action capacity from a sufficiently established institutional sub-system are the member state governments because – given a successful exercise of policies in the sub-system – supranational actors are generally assumed to have an interest in extending their capacities in the respective areas. The competing expectation is that policies will remain limited to the institutional sub-system and will therefore vanish automatically if the mandate they are based on expires, just as foreseen by the original institutional rules.
6 ARENAS OF POWER: SUFFICIENT CONDITIONS AND MICRO-FOUNDATIONS

The general hypothesis drawn from the arenas of power approach is that whether a policy will be integrated or not depends on the policy type in question. If a policy is extended beyond the institutional sub-system depends accordingly on the specific traits of the policy tools that will be established dependent on the particular arena of power a policy is placed into. From this general hypothesis, concrete expectations on the extension of supranational action capacity will be derived for each of the cases under scrutiny.

As will be illustrated in the following application of the arenas of power approach to the EU, only two arenas are sufficiently institutionalised at the EU level. The EU’s institutional structure is limited since not all arenas of power are fully set up. Therefore, only policies that are framed within one of the established arenas may be institutionalised. This does not, however, imply that all regulatory and all distributive policies will be integrated automatically. It is important to keep in mind the scope conditions spelled-out above in the discussion on neofunctionalism. The whole purpose of an institutional sup-set or spin-off is to respond to functional pressure while keeping formal coercive competences of the EU as contained as possible – else integration into the institutional core should be preferred because it offers by and large more efficient enforcement tools and more efficacy in the implementation on the state level circumventing double standards whose credibility is disputable. At the same time as an institutional sub-set or spin-off offers relief in that it responds to external functional demands, the policies created in the sub-system generate new functional pressure to integrate the respective capacities into the more comprehensive institutional core framework. The same logic as opting for a formally less coercive sub-entity applies to the question why a policy moves up into the institutional core framework, namely the scope to contain supranational power. If there are informal options for integrating regulatory or distributive policies, i.e. options that do not create substantial new formal competences of the supranational agent, policies will be integrated. If, in turn, new exclusive formal competences will result, member states will reject the spill-in of capacities for the respective policy.

The hypothesis derived from the neofunctional and arenas of power approaches establish a functionalist two-level explanation. While Lowi’s arenas of power “model as it stands is a tool of microanalysis, but offers no theory of institutional change that can help us to integrate it into the analysis of systemic change” (Nicholson 2002: 170), approaching the issue from the more ab-
Abstract angle, neofunctionalism as it stands is a theory is a tool for macroanalysis, but offers no theory for institutional change that can help us to integrate it into the analysis of policy change. As pointed out with reference to Moravcsik, it lacks microfoundations (see above p. 22).

In combination the two complementary approaches offer a broader functional explanation. Whereas neofunctionalism regards the relative likelihood for integration, the hypothesis on the arenas of power concerns the conditions for a single issue to be institutionalised. In reverse: the arenas of power approach cannot explain why issues appear on the institutionalisation agenda, but it can explain why issues will be further institutionalised or not once they are defined in an institutional sub-set and under functional pressure; while neofunctionalism cannot explain why a particular policy that comes under functional pressure will be integrated or not, yet it renders plausible when and why such functional pressure emerges in institutional sub-systems and raises therefore the likelihood for integration.

Relating these reflections back to the puzzle, the following conceptualisation is the basis for the second step of the analysis. Given that the neofunctional proposition holds, i.e. the implementation of enlargement raises the functional pressure to integrate the competences the Commission had *vis-à-vis* the candidate states, the remaining question is why this functional pressure leads to institutionalisation in one case but not in another. Sticking to a functional logic, the answer must be linked to the perceived kind of problem, i.e. the type of policy a choice has to be taken on.

After the presentation of Lowi’s arenas of power model applied to the EU (Chap. 5.1), as for the neofunctional model some specifications of the original approach are proposed (Chap. 5.2) in order to render it apt to the empirical puzzle. To respond to demands on policies that remain out of its arenas of power, the EU’s partial polity features will be taken up once more in order to explicate why this system of governance shows a specifically strong inclination in favour of informal institutions. Concerning the Commission’s action capacity this implies that also the implementation tools to exert coercion may occur in an informal disguise if no clear formal competences exist. Succinctly, the EU as partial polity has not fully developed all arenas of power which implies that the EU has only limited authority and means to coerce; therefore the partial polity character entails also an inclination towards informal institutions to complement and accommodate lacking capacities or even substitute missing authority. In practice, this is reflected in the promotion of alternative new modes of steering. The notions of informal institutions and new governance will be integrated into Lowi’s model by stretching the concept of coercion.

Heidbreder Eva G. (2008), The Impact of Implementing Eastern Enlargement: Changing the European Commission’s Action Capacity European University Institute 10.2870/20746
6.1 The Basic Argument: The European Union’s Arenas of Power

Theodore J. Lowi first developed his typology of policies and arenas of power in the early 1960s and refined the approach throughout the 1970s and 1980s. Although a fourth policy type was added to the originally three, the assumptions the typology is built on and the logic of the theoretical argument remained the same. Turning the prevailing understanding of political systems on its head, or “back on its feet” as he termed it (Lowi 1988b: xi), Lowi claimed that it is actually policies that define politics rather than the other way around, which implies that the way in which state-society interaction are organised, the “political relationships”, depend on the type of policy.

The “general interpretative scheme” is based on the argument that “(1) The types of relationships to be found are determined by their expectations – by what they hope to achieve or get from relating to others. (2) In politics, expectations are determined by governmental outputs or policies. (3) Therefore, a political relationship is determined by the type of policy at stake, so that for every policy there is likely to be a distinctive relationship” (Lowi 1964: 688). While “these types are historically as well as functionally distinct” the “categories are not mere contrivances for purposes of simplification. They are meant to correspond to real phenomena – so much so that the major hypotheses of the scheme follow directly from the categories and their definitions. Thus, these areas of policy or government activity constitute real arenas of power. Each arena tends to develop its own characteristic, political structure, political processes, elites, and group relations” (Lowi 1964: 689-90 emphasis in original).

Coercion is the defining characteristic of public policy and encompasses positive or negative sanctions that are imposed intentionally on citizens (Lowi 1985: 70). The two dimensions of the typology refer to the ways in which a state exercises its power (coercion). The first is the likelihood of state power, which can be immediate or remote. The initial notion of immediate and remote coercion (1964) is clarified by replacing the terms with the concepts of primary and secondary rule (1985). While the former impose concrete obligations or positions, the latter refer to powers and privileges. The second dimension regards the applicability, or the unit that coercion applies to. Coercion affects individuals directly, or indirectly by modifying their environment.

The four policy types will be presented one by one illustrating the respective arena of power applied to the EU, based on the assumption that the distinctive configuration of political relation-
ships is dependent on the policy type at sake. This assumption implies that the particularities of the EU polity impact significantly on the actor constellations in each arena. The limitation of the EU responsibilities to policies explicitly conferred to it by the member states entails fundamental differences of the EU system of governance. Compared to traditional unitary or federal states in which the state has a monopoly on the exercise of public authority that comprises the self-attribution of new policies, introducing new EU responsibilities depends on the competences the member state governments confer from outside to the EU. Asking how the different policy types play out in the EU brings to the fore that the EU has institutionalised only two out of four types, i.e. it also lacks in substantial parts two arenas of power and political relationships are consequently less comprehensive in terms of authority and the matching policy tools.

<table>
<thead>
<tr>
<th>Likelihood of Coercion</th>
<th>Applicability of Coercion</th>
<th>Works through Individual Conduct</th>
<th>Works through Environment of Conduct</th>
</tr>
</thead>
<tbody>
<tr>
<td>Immediate</td>
<td>Regulatory Policies</td>
<td>Example: elimination of substandard goods, unfair competition, fraudulent advertising</td>
<td>Redistributive Policies Example: Federal Reserve controls of credit, progressive income tax, social security</td>
</tr>
<tr>
<td>Remote</td>
<td>Distributive Policies</td>
<td>Example: 19th century land policies, tariffs, subsidies</td>
<td>Constituent Policies Example: reappointment, setting up a new agency, propaganda</td>
</tr>
</tbody>
</table>

Table II.1: Arenas of Power/Policy Typology (Lowi 1972: 300)

Regulatory policies, although rules stated in general terms, impact directly on individuals by raising costs and/or reducing or expanding alternative options. They are laws that focus on desired outcomes, imposing obligations and sanctions. In contrast to constituent rules that prescribe general procedures without prior definition of the substantive subject matters, regulatory policies have a concrete target. Accordingly, “[s]ince the most stable lines of perceived common impact are the basic sectors of the economy, regulatory decisions are cumulative largely along sectoral lines; regulatory policies are usually disaggregable only down to the sector level” (Lowi 1964: 691). As regards the mode of interaction, regulatory policies involve the interplay of group conflict since they imply the betterment of some at the expense of others.
A good deal of the academic attention paid to the EU revolves around regulatory policies, which is likewise the type that dominant theoretical lenses are best geared to analyse.\textsuperscript{18} Regulation in the EU covers mostly the economic realm and is generally derived from competences delegated in the Treaties granting the right to legislate on the supranational level. In areas of exclusive Community competence, genuine regulatory policies can be exercised, yet the implementation remains always a matter of the lower levels of the policy. Accordingly, the behavioural hypotheses on compliance and non-compliance that can be deduced from Lowi’s approach (Lowi 1985: 72) play out differently in the EU than within a state with a single centre of power. Since regulation has to be transposed into national law, the control of compliance already in the policy formulation phase is at least a two level game. In principle the analytical distinctions do not differ from implementation in a state system (Giuliani 2003), albeit EU policies involve different actor constellations owing to the split monopoly of authority across the levels of the polity. The same holds true for juridical control since in first instance national courts have to implement EU legislation.

Besides the limited authority in formulating policies, supranational actors are therefore also limited in operational terms when it comes to the implementation of policies. The key limitation originates from the Community budgetary rules, as will be further elaborated in the below discussion of distributive and redistributive arenas. Like the real competences, the effective financial means are also exogenously imposed on the EU by the member state governments. At the same time, however, the specific features of the EU budget also account for the fact that most EU policies are framed in the regulatory arena since it allows externalising costs. Accordingly, “Majone has argued, the lack of funds privileges regulation over other forms of intervention which require funds. The costs of regulation are paid by those whom regulation affects rather than by public authorities” (Sbragia 2000: 323). I will now turn to discuss the four arenas in turn.

**Distributive or patronage** (Lowi 1988b) policies are based on secondary rules (remote coercion) working through individual conduct without imposing obligations. Without regard of limited resources, they confer privileges or facilities in a disaggregated manner, i.e. dispensed by small units of individual applicability, each unit more or less in isolation from other units and from any

\textsuperscript{18} “The regulatory arena could hardly be better identified than in the thousands of pages written for the whole polity by the pluralists. […] Within this more narrower context of regulatory decisions, one can even go so far as to accept the most extreme pluralist statement that policy tends to be a residue of the interplay of group conflict” (Lowi 1964: 695). Much of the EU literature is actually focused on this type of policy, it is also the one for which Moravcsik’s liberal intergovernmental explanation fits best, namely power-based bargaining over outcomes on scarce goods. Majone famously takes the argument about the EU being a regulatory state altogether (Majone 1996).
general rule. Therefore distributive policies “are virtually no policies at all but are highly individualized decisions that only by accumulation can be called a policy” (Lowi 1964: 690). Coercion is remote because of the permissive and dispersed effect on citizens. Therefore, political interaction is marked by mutual non-interference, instead of compromises on opposed interests. Decision-making is characterised by logrolling and putting together in a ‘pork barrel’ unrelated interests. These traits of patronage relationships distributive policies entail also that they are difficult to change or terminate.

To illustrate the policy type with an example from the EU, its major characteristics are well reflected in about forty percent of the EU budget spent under the title of the Common Agricultural Policy. Being part of the EU’s so-called compulsory expenditures, i.e. the European Parliament has formally still merely consulting budgetary rights on this fixed budget line which is decided on by the member states, adds a considerable additional hurdle to change these long-established patronage policies in the Union. A limitation to distributive policies is, however, the Community’s obligation to keep a balanced budget. Member state contributions are capped as a fixed percentage of their GNP according to which each member’s payments are calculated. As should become evident in the proceeding, the obligation for a balanced, capped budget is vital since it does not only limit the execution of policies but also the potential to formulate policies. “Perhaps most importantly, the lack of money simply keeps many potential demands off the agenda. [...] It forces a zero-sum calculation which, until very recently, had been foreign to national debates and conflicts about public monies” (Sbragia 2000: 323).

Still, the mode in which Community money is dispersed creates patronage relationships with specific beneficiaries which are traded off by log-rolling, rather than resembling conflict resolution typical for the redistributive arena. Since the EU lacks a developed arena in which redistributive conflicts can be resolved, no matter how large the redistributive intentions or outcomes of the policy, it is prone to shift rather sooner than later to take on the traits of the patronage type. Member states are not classified into broader categories on the basis of which redistribution is

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19 The Lisbon/Constitutional Treaty will abandon the distinction between compulsory and non-compulsory expenditure and thus extend the Parliament’s budgetary powers (Martínez Iglesias 2007), which may be interpreted as a formalisation of incrementally increased EP budgetary powers. On the role of informal institutions in this see also (Eiselt, Pollak et al. 2007).

20 A very recent case might mark a precedent for even more upfront distributive spending. Under qualified majority voting the majority of member states overruled opposition to redirect reserves out of CAP (that should have been paid back to the contributing states) into its satellite programme, deeply in crisis. “EU ministers have agreed to full public financing of the Galileo satellite system and a brand new technology institute, as part of a deal on the bloc’s 2008 budget – the first ever to earmark more cash for growth and jobs than for farm aid. [...] Germany, as the biggest contributor to the EU budget, had strongly opposed this scenario fearing it would set a precedent for not giving unspent farm money back to national capitals, despite a declaration that it is to be an ‘exceptional measure’” (http://euobserver.com/9/25213/?print=1, 26 November 2007).
legitimised. On the contrary, while it is the national level in the member states that contributes to the budget, funds are dispersed in a disaggregated manner by offering facilities to sub-state entities. This holds for all financial and technical facilities the EU offers, except for the Cohesion Fund (paid off to central state authorities) whose nonetheless distributive rather than declared redistributive nature I will turn to in a moment.

The stickiness of distributive policies in general, coupled with the limited potential for control of the budget for member states that depend on sufficient coalitions to introduce changes in Community expenditure, make these political relationships strongly patronage like. To regain some grip on the dispersion of funds, a number of safeguards exist in that the Commission controls and monitors the actual distribution of funds. Most importantly, Community assistance is based on co-financing by the recipient national body.\(^{21}\) As the case study on administrative capacity building will illustrate, the Commission’s management of the dispersion of Community funds bears other, more substantial conditionality elements in the execution of distributive EU policies. Such conditionality contradicts Lowi’s definition of relationships in the distributive arena as rules that “confer facilities or privileges unconditionally” (see below, Table II.2). I will further elaborate this notion linked to the discussion of informal institutions, not specified in the original approach but essential to capture in conceptual terms the functioning of partial polities. It will be shown that albeit sticking with the ‘distributive mode’ the attribution of conditions on the conduct of beneficiaries marks a specific set of distributive policy tools which allow to produce certain redistributive effects. Let alone their potential redistributive effects, policies are formulated without institutionalising political relationships between EU decision-making and citizens directly in the redistributive arena, i.e. sidestepping the redistributive mode of ideology-driven conflict resolution.

As a first cut application of Lowi’s categories, we can record that distributive policies, even if limited in financial quantity, make a substantial qualitative part of the EU’s activities. They are to different degrees conditional in nature, which demands an extension of Lowi’s original model.

Redistributive policies are likewise primary rules, yet exerting coercion on the private sphere by manipulating the environment of conduct rather than conduct directly. Redistributive policies are

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\(^{21}\) Arguing for the creation of federal structures in the EU, the complete abolition of all co-financing has also been argued for as a crucial necessary reform. The ending of co-financing would take the EU closer to a system of fiscal federalism. Schäuble/Lamers made the claim for all future policies: “Diese Überlegungen gelten auch für mögliche zukünftige Felder gemeinsamer Politik. Dabei sollte allerdings Ko-Finanzierung als Mischfinanzierung durch eine klare Zuständigkeitszuweisung ausgeschlossen werden” (Schäuble and Lamers 1999: 23), and the authors continue with a call for a genuine EU tax (Europasteuer). Together these measures would not only revolutionaries the EU budget but change the nature of the polity in general.
categorising activities in that they impose classifications or statutes under which individuals are subsumed involuntarily (Lowi 1985: 73). They affect social classes (property itself, equal possession, and the ‘being’) and the effects are not disaggreable as under distributive policies – winners and losers are openly conveyed. State-society relationships will therefore involve the major interest representations in order to channel strongly ideological positions.

The EU, to date, does not have any watershed redistributive policies. Instead, the “distributional mode” of policy-making prevails (Wallace, H. 2005: 82-85). Although regional (structural) and cohesion policies are, of course, in balance redistributing money, in practice there is no single member state that would not benefit from EU funds. “In the long run, all governmental policies may be considered redistributive, because in the long run some people pay in taxes more than they receive in services” (Lowi 1964: 690) – yet, as much as in the long run we are all dead, the perceptions of politics concern in their vast majority not the ‘long run’. In the EU they are reflected in the relationship between ‘net-paying’ and ‘net-receiving’ states, without these really being terms for different classes of member states if we consider that on the regional, recipient level all net-paying states are also beneficiaries. The balance between contribution to the EU budget and the reception of funds is not strictly linked to the relative ‘wealth’ of a member state but is obscured in many ways, most prominent example of it being the ‘British rebate’.

By the same token, the organisation of the member states’ contributions is dispersed. In the words of the Commission’s explanations on the Union’s ‘redistributive’ policies: “[u]nlke in the case of national budgets, where progressive taxation plays an important redistributive role, in the EU budget, contributions are proportional to the capacity to pay measured by nominal GNP at current exchange rates. Redistributive objectives, as noted above, are, therefore, pursued through expenditure alone” (Commission of the European Communities 2006g). Through ‘expenditure alone’ no truly redistributive policy can be established, it will perforce turn out distributive because the political relationships that emerge in the implementation phase will be patronage-like.

A further consequence is that the most important means by which eventually redistributive effects of dominant distributive policies can be influenced is the setting of the ‘cap’, i.e. the percentage of GDP and VAT revenue every member state contributes – therefore unsurprisingly the main concern of the ‘net-contributing’ states in budgetary negotiations.22 However, “the ultimate benefits or costs are never distributed according to the accounting logic of net balances” (Le

22 The drifting of declared redistributive policies in the distributive arena also implies consequences in terms of political relationships and the nature of political debate, which marks a fundamental of EU functioning. “The intensity of the political conflicts over the structural and cohesion funds, the main examples of redistributive politics in the Union, ironically illustrates how much energy and political capital does not have to be spent simply because funds are unique. If a plethora of policy proposals involving the redistribution of cash – or even the distribution of cash – were to be allowed onto the Union’s agenda, it is likely that its ‘steering’ function as conceptualized thus far would be undermined. The Union’s relative single-mindedness would be diluted” (Sbragia 2000: 232-33).
Cacheux 2005: 2). Still, such calculations are fuelled by claims of “fair return”, i.e. precisely to prevent real distribution but to ensure that no state will be burdened with paying into the EU budget at the favour of others, 

“because the ‘net contributions’ logic is based on the erroneous assumption that European integration generally, as well as, more specifically, common policies financed by the European budget, are ‘zero sum games’ in which gains on one side necessarily mean losses on the other” (ibid. 2005: 28). This also contradicts any “redistribution by expenditure” will operate according to a distributive nature, i.e. serving established privileges that were created often as side-payments, especially linked to enlargements, rather than redistributing along categories of member states.

Distinguishing redistributive policies, Lowi underlines the limits of defining a policy as redistributive such as “various ‘welfare state’ programmes, which are redistributive only for those who entered retirement or unemployment rolls without having contributed at all” (1964: 691). In analogy also EU Cohesion Policy, as it stands today, is better described as distributive and not redistributive. Besides the effects of the above-explicated organisation of the EU budget, the decisive argument to be made is that both the creation and the subsequent implementation of cohesion payments made it drift rather into the distributive than redistributive arena.

Instead of creating actual classes of member states, the Cohesion Fund established patronage policies. Founded as side-payment with the objective of compensating the poorest member states for the effects of the single market, it grew out of a trade-off between states that were expected to gain and lose from economic integration. With enlargement all four current cohesion countries would have lost their eligibility, being no longer below the eligibility benchmark of a GNP below 90% the EU average, which was successfully prevented during the 1999 budgetary negotiations. “The maintenance of the CF [Cohesion Fund] for the same countries was instead contradictory and inconsistent with the premises on which it was founded and the changes in the meantime intervened. [...] The fundamental mission of the CF could be considered almost fully achieved; its role could therefore be revised” (Mele 2003: 290-91). Notably, although functionally the most

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23 “After two decades of the ‘British cheque’, it now transpires that the UK, whose per capita income has more than made up its lost ground, is nearly always among the top net contributors. However, the ‘rebate’ which it obtains reduces its budget contribution to an amount well below that of the other countries of a comparable economic development level. At the same time, demands for a ‘fair return’ spread to all net contributor members. During the financial negotiations over the future 2000-2006 budget (‘Agenda 2000’) at the Berlin summit (spring 1999), this group called for a redistribution of the financial burden of the ‘British cheque’, with France assuming a bigger share and Germany, Austria, the Netherlands and Sweden a little less than before. These countries now want a spending cap of less than 1% of GDP. In an effort to get the governments of net contributor countries to agree to a minimal (1.15% of the EU’s GDP) increase in the size of the budget in the financial negotiations covering the new 2007-2013 budget, the Commission offered to freeze, then gradually reduce the ‘British cheque’ and to replace it by a general correction mechanism. Any country whose net contribution exceeds 0.3% of its GNI would have 2/3rds of its net balance refunded” (Le Cacheux 2005: 10).
appropriate solution, the introduction of ‘cohesion fund east’ for the new member states, never entered the political debate. Instead the states have been integrated into the existing policies – but under slightly different rules.\textsuperscript{24} In sum, enlargement put unprecedented strain on EU Cohesion Policy and “[a]gainst these developments it is surprising that the institutional setting and the distributive character of the budget provided so robust” (Laffan and Lindner 2005: 201). This robustness appears less surprising if we consider Cohesion Policy to be operating \textit{de facto} in the distributive arena, i.e. as hard to change patronage policy the conflict around which is handled by log-rolling rather than the confrontation of broad ideological positions and through imposing classifications on member states, the latter being the trademark of a strictly redistributive arena.

Latest reforms do not indicate any qualitative change, neither regarding French claims on agricultural spending, nor British claims on their rebate. Attempts to shift Cohesion policy into a redistributive arena remain likely to be disappointed (see in particular: Emmerling 2002) despite the extra pressure enlargement has put on it. In sum, the “\textit{Agenda 2000} has consolidated the formulation of the CRP [cohesion and regional policy] and its intervention tools, instead of favouring its revision. In short, if the enlargement had to be the EU political priority starting from 2000 and the CRP its main support element, the reform of the latter one, at least in its fundamental aspects, should have been done in Berlin [1999 budgetary framework, EGH] instead of being postponed to 2004-2005” (Mele 2003: 282; see also: Rollo 2003).\textsuperscript{25} These subsequent deals eventually introduced the phasing-out of member states that would have been eligible for the Cohesion Fund if the threshold had stayed at 90\% of the GNI average of the EU at 15, i.e. before enlargement, which concerns only Spain while Greece and Portugal remain eligible and Ireland (GNP average of 101\%) lost eligibility in 2004. Also the new Lisbon Treaty, to be enforced by 2009 along the lines of the Constitutional Treaty, will not introduce significant changes to the budgetary rules but mainly formalises currently in place informal procedural agreements between the Council, Parliament and the Commission (Laffan and Lindner 2005: 208).

\textsuperscript{24} “The funding granted to a Member State is liable to be suspended if the country fails to comply with its convergence programme for economic and monetary union (stability and growth pact) running i.e. an excessive public deficit (more than 3\% of GDP for Spain, Portugal and Greece, this threshold is being negotiated separately for each of the ten new Member States according to their own public deficit at the moment of the accession). Until the deficit has been brought back under control, no new projects might be approved” (http://ec.europa.eu/regional_policy/funds/procf/cf_en.htm), I will get back to the notion of ‘conditional’ distributive policies in the following.

\textsuperscript{25} Similarly, on the expenditure side, the basis on which the amounts are decided is very diverse, [...] the danger is one of adopting criteria for deciding common expenditure that have little to do with the stated policy objectives. The most striking example of this anomaly occurred when changes to the criteria for allocating EU structural funds were skilfully negotiated at the 1999 Berlin Summit solely for the purpose of arriving at a net balance configuration acceptable to all. Because of the unanimity rule, negotiations that concentrate on net balances alone nearly always end up with another round of expenditure allocation the only of which purpose is to correct the net balance of an individual member state that considers it has been unjustly treated by a compromise that was shaped by decisions on expenditure. At the 1999 Berlin Summit, all the member states except Denmark and France had to be awarded last minute made-to measure ‘compensation’ in this way” (Le Cacheux 2005: 25).
A brief sketch of failed reform proposals and inexistent policies underpins the claim that the EU lacks a redistributive arena proper. The first and most striking example for the persistent lack of redistributive policies is, despite all odds and actually little de facto costs for the member states, the failure to harmonise national tax policies (Genschel 2004), let alone the creation of a genuine EU tax. Second, the lack of a capacity to create formal rules with direct redistributive effects contributes in great part to the little effect in achieving the goals of the Lisbon Agenda. As will be outlined below, policies remain at best in the limbo of the informal. Third, social policy – where it exists – is either in the realm of regulatory or distributive policies, and if at all occurring as redistributive policy it is limited to enforcement mechanisms that lack hard coercive backing. Moreover, the above-mentioned constraints on the Community budget imply that the “frugality of the European Union is being projected onto the member-states. The latter cannot hope that Brussels will make up their shortfalls – for Brussels simply does not have the money. It is therefore impossible for social actors at the national level to ‘socialize’ the conflict over national expenditure by going to Brussels, for expanding the arena of conflict over finance to Brussels will serve no purpose in the sense that Brussels cannot give money” (Sbragia 2000: 233). Taking a neofunctional perspective alone, it is not understandable why these policies continue to fail. Although there have been proposals arguing in instrumental terms for the need to introduce EU taxes and direct transfers payments between regions none of these measures has been realised on the supranational level (an example is the ‘Schäuble-Lamers paper’ by a German Minister’s proposals, which would have implied strong redistributive effects, gained considerable attention: Schäuble and Lamers 1999: 21-23).

To avoid confusion, although monetary policy is a redistributive policy, the transfer of sovereignty to the European Central Bank does not establish a redistributive policy of the Union. As a matter of fact, the case falls out of the policy typology scheme altogether since the states do not transfer monetary policy to the supranational political authority but they delegate to a fiduciary who is precisely meant to ignore certain political redistributive temptations (Majone 2001, 24-26).

The absence of redistributive policies is argued likewise for the process of UK devolution. Accordingly, Mitchell illustrates that redistribution remains a centralised policy despite large reallocation of powers to the sub-state levels (Mitchell 2006). An explanation might be the fact, that national governments hold on to redistributive policies through which they define their identity as welfare states, be it against the supra- or sub-state level.

The ‘Schäuble-Lamers Paper’: “Neuartig ist in diesem europäischen föderalen System nicht nur die Aufteilung der System Kompetenzen zwischen den föderalen und den gliedstaatlichen Elementen, sondern auch das Fehlen von Transferleistungen, die im Umfang vergleichbar wären mit denjenigen, die etwa im föderalen System der Bundesrepublik Deutschland stattfinden. Gleichheit und Gerechtigkeit werden Europa nicht in erster Linie durch Transfer, sondern durch die Wettbewerbsfähigkeit hergestellt. Der auf die föderale Föderalismus ein Wettbewerbsföderalismus” (Schäuble and Lamers 1999: 10).
2002a). In other words, the states give up their capacity to exert power in the field. Brussels cannot do monetary policy, Frankfurt is in charge.\(^\text{28}\)

**Constituent** policies did not feature in Lowi’s original model and were subsequently added as fourth type completing the typology. It remains empirically and conceptually the least developed arena of power. Constituent rules are secondary rules conferring powers of privileges, and work through the environment. They are “referred to as rules about powers or rules about rules” (Lowi 1985: 74), or to take up the terminology established before: the monopoly to decide where and how to locate authority to coerce in the multi-level system.

Constituent policies are also present only in a restricted sense in the EU, namely limited to procedural rules organising the rules about rules of behaviour. This derives from the official regime character of the EU according to which the contracting member states remain the ultimate masters of the Treaties. This implies that ‘in the long run all EU policies are constituent’ because they are at the end of the day based on agreement between states that confer powers. According to the principle of conferral, the EU formally only exists where competences have been shifted to the supranational level. In terms of control this is evident also in the fact the ECJ can only judge on EU policies and has no powers beyond, while where it has stretched the interpretation of what it felt entitled to judge on, it has implicitly created powers. In the same vein, the intergovernmental second and third pillar that guarantee member states’ ultimate authority over issues are excluded from ECJ jurisdiction.

The ultimately constituent nature of EU law also features in the revised founding Treaties that lack an explicit hierarchy of law, i.e. detailed rules on sectoral policies have the same status and are subject to the same revision procedures as rules of constitutional character and are thus also found in the Treaties themselves. In short, lacking a ‘Kompetenzkompotentz’, i.e. the competence to establish its own competences to create rules, the EU lacks constituent policies in the narrow sense of establishing rules about power proper. Room for manoeuvre exists only where the Treaties grant exclusive competences and where legislation based on this pushes the boundaries of formal competences.

\(^{28}\) Accordingly also, although monopoly on the exercise of coercion has been delegated to a fiduciary outside the political realm, the ultimate power remains with the member states that are however strongly restricted in the exercise of this power – arguably creating a vacuum for political action. Should political intervention occur at one point, not the Commission or the EP could exercise this but only the member states that have to overrule their self-set rules (which might create problems if an external shock should make quick political intervention necessary).
Table II.2: Policy Typology (extended: examples from EU) (Lowi 1985)

Table II.2 summarises once more the four arenas of power, as revised in 1985, adding examples for EU policies. The bulk of these fall into the regulatory arena, in the majority dealing with instrumental economic rather than social regulation. Social regulation is generally framed by establishing a bridge to the economic core competences of the EC, given that the latter establish the legitimate legal basis for Community competences (for the distinction between social and economic regulation see: Spitzer 1987: 682). Distributive policies remain more limited in number and restricted by the overall budget available. Yet, the crucial point for the argument pursued is that in qualitative terms distributive policies are vital tools for the Commission to influence national policies. Accordingly, the distributive arena and the respective patronage relationships have been well established over the more than five decades of EU integration.
In contrast to this, even if prone for a spill-over to underpin existing EU policies, attempts to integrate substantive redistributive policies have failed. Initiatives such as the open method of coordination were also included into the Constitutional/Lisbon Treaty, yet rather out of despair to have some (albeit arguably rather ineffective) tools than none. In order to prevent the shift of authority on core redistributive policies has lead to some cooperative alternatives between member states granting a facilitating role to the Commission. These alternatives willingly prevent the supranational level from creating direct political relationships, in other words they pre-empt and do not promote the emergence of a supranational redistributive arena. The same holds true for the increased opportunities for enhanced cooperation for sub-groups and opt-outs for single member states which further extend the options to disperse powers across levels and institutions to prevent a univocal shift of authority to the EU level.

Let alone all rhetoric and intensions, the Constitutional Convention may be argued to illustrate the same phenomenon, namely that instead of marking the rise of an EU constituent arena, it established a new method that will substitute genuine constituent policies. On the one hand, the great scepticism that surfaced in connection with popular votes on the Constitutional Treaty showed that the Convention was not perceived only in part representative body of ‘the European people’. On the other hand, even if accepted as a more efficient way of deciding on institutional and policy reforms, the Convention did in the end officially only deliver a template on which the member states took the official inter-state decisions. The convention method introduces therefore no real shift of the power over powers. Even if the Convention method has been shown to be more fruitful in producing comprehensive reform proposals than European Councils, it does not qualify as a genuine constituent arena as long as it lacks the actual power over powers. The experience with the Constitutional Treaty has moreover shown that the EU lacks direct relationships to citizens on these matters, which are strongly controlled on the national level not only with respect of actual power over decisions but also in the shaping of public perceptions.

29 For a critical expression of participants see e.g. the “alternative report” published by EU sceptic members of the Convention (European Convention 2003).
6.2 **Beyond Hard Coercion and Formal Arenas of Power: Informal Institutions and New Modes of Governance**

Having fleshed out how the distinctive arenas of power play out on the EU level, a further step is necessary to apply the approach to our puzzle. To recall: the matter of concern is the extension of the capacities the Commission has at its disposal to steer policies in the member states. What is to be explained is accordingly the variance in the availability of instruments to coerce. From the application of the arenas of power approach above we can conclude that no unambiguously redistributive or constituent policies should emerge, ergo the Commission is expected not to gain any new capacities to coerce in either of these arenas. What are the actual instruments by means of which coercion is exercised, say the action capacity of a policy-implementing authority?

Although the focus of the arenas of power approach is on policy formulation and not implementation, the formulation of a policy is informed by the expected effects, which in turn depend on the conflict lines inhibited in each policy type. “A great part of the ultimate success of a public policy may be attributable to the mere statement of the preferred future state of affairs. The purpose of good citizenship is to make public policies virtually self-executing. But most policies are accompanied by explicit means of imposing their intentions on their environments, and in all policies some techniques of control are inherent” (Lowi 1985: 69-70). It is precisely these “techniques of control” which we are interested in when analysing the Commission’s action capacity.

This facet of the arenas of power is not elaborated on in the initial approach, neither have the many critics explicitly dwelled on this point, even though related alternative proposals have been made that connect to the question of which steering instruments may be attributed to each of the arenas (Hayes 1978). The avenue taken here is not to propose an alternative typology or dimension. Instead, I will build on the original four types in order to develop which respective policy instruments each arena is to bring forth.

Unlike a state in which the exercise of authority has no direct impact on the government’s power residuals, the partial character of the EU polity implies that any Europeanisation limits independent authority of its member states’ governments.\(^{30}\) Other than policy execution within a state, most EU legal acts do not affect citizens directly but are transposed by member states and there-
fore influence the capacity of the state’s authority proper. With the exception of constituent policies, policy-making within a state does not have this effect on the distribution of power.

This point gains further relevance bearing in mind that the member states have so far never withdrawn substantial competences from the EU level. The absence of a fully developed constituent arena implies that the ‘rules for changing rules’ hamper decision-making. As a consequence, once established formal rules are hard to amend. Due to the difficulty of changing rules, flexibility is in turn often achieved through widening the room for interpretation in the Treaties, which increases the scope for informal institutional arrangements. In this vein, Henry Farrell and Adrienne Héritier underline the incomplete contractual nature of the Treaties (see also: Hix 2002). “Two forms of Treaty ambiguity are especially important. First, the Treaty may allow for the application of any of several procedures of choice (legislative procedures such as codecisions, or comitology procedures) in a given instance. Second, the Treaty texts themselves will very frequently be obligationally incomplete – that is, they will not spell out precisely the respective competences and obligations for the different actors involved – so that the process of specifying them will involve the creation of new interstitial rules [i.e. emerging between official Treaty renegotiations amongst member states, EGHJ]” (Farrell and Héritier 2007b: 228). Not the independent master of its own constituent arena, the EU is built on underspecified constituent rules in order to evade the problems of readjusting rules about powers and rules about rules. Thus, there is a bias for informal rules because “the ‘remediability’ of mistakes made by the member states depends on the decision rule that they adopt; and many mistakes will be difficult, or impossible, for them to remedy under the unanimity requirement for Treaty change” (ibid. 230). In essence, the restricted monopoly on authority of EU policy-making boosts the relevance of the mode in which coercion will be exercised in any arena because, once conferred, capacities are hard to change and even harder to be again withdrawn from the EU.

31 While the methods of conferring further powers have increasingly been widened and will be extended in the Lisbon Treaty by means of the ‘flexibility clause’ that allows integration also for sub-groups of states, the option to make this flexibility clause effective also in the direction of withdrawing competences from the EU was discussed but rejected outright in the EU Convention when drafting the Constitutional Treaty.

32 Changing this by revising article 48 TEU on Treaty revisions to allow an easier procedure, as proposed in the little lucky so-called ‘Penelope’ proposal by R. Prodi (Commission of the European Communities 2002a). The idea was outwardly rejected in the Constitutional Convention by particularly one member state – yet on the basis of a more widespread agreement between member states that this would imply and undesirable weakening of the direct control by member states (De Witte 2007: 935).

33 This ambiguity stands in potential conflict to Lowi’s normative claims that a political system should obey to the rule of law. Constituent rules establish the rules that political processes ought obey by all means, else separate government will eventually be undermined (Lowi 1969: 54).

Heidbreder Eva G. (2008), The Impact of Implementing Eastern Enlargement: Changing the European Commission’s Action Capacity European University Institute 10.2870/20746
The direct impact of the restrictive decision-making rules regarding the choice of steering instruments is best reflected in the shift towards so-called ‘new governance’ which can be observed since the completion of the integration project in the core economic area. In the context of the EU, new governance is defined as the departure from the classic community method, which grants the Commission the right to initiate legislation and is directed to create binding legislative and executive acts (Scott and Trubek 2002: 2). Still subsumable under the community method but departing from it in part are non-binding norms (soft-law) granting member states more flexibility implementing policies, and the increasing use of comitology. Going even further, ‘new’ modes of governance provide full-grown alternatives to the community method. Just as ambiguity in the Treaties and informal institutions reduce the constraining traits of constituent rules, new modes of governance leave room for more flexibility and diversity of the member states in the execution of policies. The EU has shown particularly prone for new governance. Scott and Trubek distil six factors accounting for the increased use of new governance: increasing complexity and uncertainty of the issues on the agenda, irreducible diversity among the member states, general trends new approaches in public administration and law, the need to fill gaps of legal authority on the EU level (competence creep), the need to respond to claims for more legitimacy (through participation), and the need to respect the subsidiarity principle and therewith “to accept diversity, allow flexibility, and encourage decentralised experimentation” (2002: 8). Applying new governance instruments, the principles guiding political relationships are accordingly characterised by voluntarism (non-binding targets, soft law), subsidiarity (measures decided by member states or private actors), and inclusion (the targeted groups participate in the decision-making process) (Héritier 2002: 106). In this vein, new modes of governance have been applied as a way towards cooperation in the Community framework without empowering it with hard coercive means and pre-empting the transfer of formal authority.

In sum, we can assert that the specific technique of coercion in a policy arena will be decisive for whether member states delegate powers to the Commission in the light of high decision-making hurdles and coercive effects on the member states. These features of the EU as partial polity entail a bias for underspecified or informal rules and new modes of governance.

Before extending Lowi’s arenas of power by these respective instruments of coercion, the following pages will parenthesise a conceptualisation of the accentuated meaning of informal institutions in the EU framework. The informal realm is absent from Lowi’s typology that focuses exclusively on the formal rule of law while it should have become clear that it is of constituent relevance for policy-making in a polity with split authority. The questions to be confronted in the
remaining sections of the chapter are thus: what informal institutions are characteristic of in the EU? Which specific instruments of coercion can be attributed to each arena of power? And eventually, how do these different ‘techniques of control’ fit into the arenas of power scheme?

**Modes of Discretionary Coercion:**
**Informal Institutions and Soft Steering Instruments**

What are informal institutions in the EU? Informal institutions will be defined as procedural and organisational rules without full legal formalisation. Correspondingly, informal institutions feature in the grid of steering instruments as one type of soft steering tool serving to evade hard and binding constituent policies.

As outlined, the EU system is expected to be more inclined to certain informal institutions than states with authority in all arenas of power. This claim is to be substantiated taking the broader literature on informal institutions as a point of departure. The concern here is not with informal ‘dysfunctional’ institutions that are decoupled from the official system of governance. The focus is limited to functional informal institutions that are endogenous to the governance system. The influence of informal rules on formal rules can be direct, shaping the performance of formal institutions such as executive-legislative relations, or indirect by creating incentives to comply or disrespect formal rules. Informal institutions can be studied in various walks of life, such as social and economic interaction. Following Helmke and Levitsky “we are concerned only with *political rules of the game*” (2004: 726) – and our current perspective is even more narrowly concerned with functional informal institutions endogenous to governance structures.

Generally, informal institutions are defined as socially shared rules, usually unwritten, that are created, communicated, and enforced outside of officially sanctioned channels (ibid. 2004: 727). A typology developed on the basis of this definition distinguishes, first, the relationship between formal and informal categories. Dysfunctional or problem creating, informal institutions outside our spectrum include e.g. corruption, clientelism, or patrimonialism. Leaving these aside, the perspective is limited to treating “informal institutions as functional, or problem solving, in that they provide solutions to problems of social interaction and coordination” (ibid. 2004: 278), and consequently informal institutions that converge in their goals with those of formal institutions or challenge them ‘from within’. In this vein, informal institutions may complement effective formal
institutions or substitute formal rules where these are not sufficiently effective to enable or constrain political actors’ choices.

<table>
<thead>
<tr>
<th>Formal Institutions</th>
<th>Effective (EU: exclusive competences/Federation character)</th>
<th>Ineffective (EU: Intergovernmental rules/Regime character)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Convergent</td>
<td>Convergent: Respect the Treaties in letter and spirit without involving sovereignty shifts</td>
<td>Substitutive: Respect the Treaties in letter and spirit involving sovereignty shifts</td>
</tr>
<tr>
<td></td>
<td>Examples EU: Cooperation procedure, External representation in international organisations</td>
<td>Examples EU: New rules created by the ECJ, rules created by 'Committee of Governors (rules in limbo before being formalised)</td>
</tr>
<tr>
<td>Divergent</td>
<td>Complementary: Respect the Treaty letter but violate the spirit, involving by definition sovereignty shifts</td>
<td>Competing: Disrespect the Treaties in letter and spirit involving by definition sovereignty shifts</td>
</tr>
<tr>
<td></td>
<td>Examples EU: Trialogues in budgetary procedure</td>
<td>Examples EU: Informal budgetary accord giving EP power to compel consolidation committee meeting at certain stage in procedure</td>
</tr>
</tbody>
</table>

Table II.3: A typology of informal institutions
(Adapted from Helmke and Levitsky 2004/Stacy and Rittberger 2003)

Table II.3 reproduces Helmke and Levitsky’s typology, adding characterisations developed by Rittberger and Stacy for the EU. Applied to the EU, complementary informal institutions should emerge where the governance structure is ‘effective’, i.e. where the ‘state nature’ prevails and the supranational level has a monopoly on the exercise of coercion – in short, where it has been conferred exclusive competences under the first pillar. In this realm, informal institutions will “fill in gaps” either by addressing contingencies not dealt with in the formal rules or by facilitating the pursuit of individual goals within the formal institutional framework” (ibid. 728). They may, moreover, serve as forerunners for the foundation of formal norms.34 Regarding the EU, I place informal rules around decision-making processes studied in particular by Farrell and Héritier (2003; 2005; 2007a) into this box: their existence owes not to divergences over outcomes

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34 The particular role of informal institutions as endogenous causes for formal Treaty changes have been subject to a number of studies on the EU and is one of the main themes of a special issue of West European Politics 2007, 30: 2 (see in particular: Rasmussen 2007; Farrell and Héritier 2007b, 2003, 2005).
but from underspecified constituent rules. A sovereignty shift does not occur since there is no substantial rebalancing in the capacity of one actor to keep another accountable (Stacey and Rittberger 2003).

In contrast to this, Stacy and Rittberger classify informal rules that do not transfer powers but rebalance the inter-organisational balance of mutual accountability as being “rules that respect the Treaty letter but violate its spirit, and by definition involve sovereignty shifts” (2003: 862), i.e. accommodating informal institutions that “create incentives to behave in ways that alter the substantive effects of formal rules, without directly violating them” which may help to reconcile actors with competing interests. Thus, “although accommodating informal institutions may not be efficiency enhancing, they may enhance the stability of formal institutions by dampening demands for change” (Helmke and Levitsky 2004: 729). Examples for accommodating informal institutions are “institutional contents of informal accords that do not on the one hand transfer power, yet on the other do allow an organizational actor to better hold one of its counterparts more accountable” (Stacey and Rittberger 2003: 862). Examples are trialogues in the budgetary procedure or co-decision “which do not mandate concessions; however, the more that are held the more concessions tend to be made” (ibid. 862).

Substitutive informal institutional rules share with compatible ones that actors support the goals of formal rules, yet in environments where these are not effectively enforced. I add to this policies for which formal rules are incomplete, i.e. where there is a gap to effectively exercise coercion on lower levels. Accordingly, “[s]ubstitutive institutions tend to emerge where state structures are weak or lack authority” (Helmke and Levitsky 2004: 729) and they “respect the letter and spirit of the Treaty, yet involve sovereignty shifts” (Stacey and Rittberger 2003: 861). In the EU such substitutive informal institutions are wilfully created in policies that are under functional pressure for supranational harmonisation, but lack a sufficient member state majority to create formal rules. The rule creation through ECJ jurisdiction is a prime example of this type of informal rules, which may be formalised at a later stage.

Stacy and Rittberger also provide an empirical example for system-endogenous informal competing informal institutions. This category is theoretically least relevant for the functional model because according to the theory we should expect that such institutions lack stability over time. If contradicting formal rules, competing informal institutions will either be legally challenged and will adapt to comply with formal rules, or they have to be formalised. Assuming rule
of law, competing informal institutions can therefore only be an intermediate phenomenon doomed to disappear in the mid- or long-term.

In sum: informal institutions are expected to be the preferred strategic choice in a situation of uncertainty and under institutional conditions that are inflexible and thus limit the options to react to potential unintended consequences by adapting formal rules. In a polity with divided monopolies on the exercise of coercion, informal arrangements are more likely to occur, either to substitute for institutional vacuums regarding rules, or to functionally complement existing policies. Actors will opt for functional informal institutions within the system to make up for omitted formal institutions, if informal institutions are less costly under conditions in which formal rules are hard to change (Mershon 1994); or if goals that are pursued are not publicly acceptable (Helmke and Levitsky 2004: 730), which for the EU means if goals contradict the preferences of the member state governments.

Remaining within the functional logic and the realm of coercion by a governing authority, we can expect informal institutions to be intentionally established either to complement existing rules or to substitute absent formal rules on the supranational level. Moreover, they may take an accommodating function to satisfy competing demands without immediately adapting the formal rules. Reviewing the examples of informal institutions in the EU from the theoretical angle of the public policy typology, they noticeably establish procedural and organisational rules besides the formal Treaty provisions. Accordingly, placing them within the typology, informal institutions are best depicted as a conceptual extension of the formal constituent arena depicting alternative policy instruments for “rules about rules and rules about power” besides the formal Treaty-based institutional rules (Table II.4).

Linked to informal institutions are the notions of informal governance and soft law. While informal governance in the EU has been defined as “the operation of informal networks which link policy-makers to client groups as well as actors across the EU, national and sub-national institutions, and influence (or at least seek to influence) decision-making in the EU” (Christiansen and Piattoni 2003: 1); the definitions of soft law maintain in essence that “soft law is classified procedurally as rules that are not legally binding and that soft law comes in many variants” (Mörth 2004b: 5). In this sense, soft law understood as “rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects” (Snyder 1993, quoted in Mörth 2004: 5) are the actual tools applied – the mechanisms of control – while informal governance is the broader framework of informal institutions – the political relationships – in
which soft law formulated as a tool to implement policy objectives. As mechanism of control, soft law may be a transitional phenomenon leading to hard regulation; yet equally “soft law can be a more independent, and not a transitional form of regulation. In these cases, soft law is clearly linked to network governance” (Möth 2004: 193). In other words, political relationships linked to soft law are not determined by hierarchical structures guided by a centralised authority, but by more lose and less formally organised coordination.

As argued with regard to informal institutions, the EU is particularly prone to rely soft law and standardisation instead of hard regulation given its particular features as partial polity, or as “meta-organisation” as Ahrne and Brunsson depict the EU. In a meta-organisation that is itself made up of organisations (instead of individuals) regulation “tends to be relatively soft, and soft regulation comes in many forms. Soft regulation is a way of not exploiting some organizational elements of the meta-organization and thereby giving more room for organizational elements in the member organizations” (Ahrne and Brunsson 2004: 187). Due to its limitations in terms of formal organisation – or development of political arenas of power – the EU is limited in the exercise of coercion on its members, “meta-organizations tend to avoid attempts at issuing directives; instead they issue standards” (ibid. 2004: 185). More so, soft law may be disguised strategically: “the very word ‘law’ seems to be avoided because it has the unwanted connotation of coercion, hierarchy and supranational decision-making. There is a tension in and a gap between the way the rules are legitimized and presented on the one hand and the meaning of the rules on the other hand” (Mörth 2004a: 194). Consequently, analysing the application of soft law in various policies “one might expect a less powerful position for the European Commission. [...] According to conventional wisdom in the EU literature soft law is presumed to be useful because it preserves national sovereignty. In practice, however, the autonomy of the Member States seems to be relatively weak. One explanation for this discrepancy between the formal and informal processes is cosmetic. It is important for the politicians to retain national sovereignty, however symbolic it may be, if they are to co-operate on politically sensitive domestic issues” (ibid. 2004a: 219). The de facto capacities of supranational agents to coerce do thus not match but, on the contrary, stand in tension with the formal distribution of powers. Informal governance in which constituent rules are based on informal institutions and implementation relies on soft law will be

35 The authors argue that whether a meta-organisation is capable of issuing and enforcing hard regulation (directives) or rather soft regulation (standards) depends on degree to which the organisation is formally institutionalised. “There are, in fact, six more elements of formal organizations which support rule setting, rule enforcement and rule following: 1) organizational membership; 2) management’s right to information, 3) its right to issue sanctions; and 4) its monopoly at issuing rules; 5) the organization’s ability to accumulate resources; and 6) its structure; facilitating stability” (Ahrne and Brunsson 2004: 173)
further dwelled on in the following section which will further differentiate which alternative mechanisms of control are characteristic for policy-making in the European Union.

WIDENING THE NOTION OF COERCIVE POLICY INSTRUMENTS: ‘NEW’ GOVERNANCE

Turning thus to the question of which further instruments for policy implementation can be attributed to the specific arenas of power, I will turn to the literature on new governance to extend the notion of the steering instruments to control/coerce other actors. Underlining the limited analytical value of the distinction between ‘new’ and ‘old’, Treib et al. argue that “[s]ome modes of governance may have been historically relatively new in some empirical contexts, which explains why researchers chose to label them ‘new’. But the same governing modes may turn out to be long-established in other areas” (Treib, Bähr et al. 2005: 4). A more substantial reason for the ‘emergence’ of ‘new’ modes of governance is the lack of analytical categories to capture steering beyond the realm of hard coercion. The more traditional governance perspective concentrates on ‘steering’ and the capacity of to exert control (Rose 1978). If, in turn, “the ‘modern governance’ or ‘new governance’ perspective is adopted (Kooiman 1993; Rhodes 1997) then the question becomes one of how that centre of government interacts with society to reach mutually acceptable decision or whether society actually does more self-steering rather than depend upon guidance from government” (Peters 2000: 36).

Applied to the EU, the interaction between ‘government’ and ‘society’ needs to take into consideration the vertical multi-level structure of the system, in addition to the horizontal division of decision-making and implementing powers across the different EU organisations. Accordingly, mutually acceptable decisions will be those respecting the varying preferences of member state governments and self-steering will imply the evasion of any formal conferral of competences, the
most prominent application in the EU being the open method of coordination. One reason for opting in favour of new governance is hence the attempt to achieve more efficient policies on the EU level without losing national authority, i.e. without altering the vertical distribution of authority. At the same time, new modes of governance grant the member states more scope than the Community method to dominate any kind of coordination on the EU level, i.e. the horizontal division of powers is altered in favour of the member states.

This links to a second reason for the choice of particular steering instruments – be they ‘old’ or ‘new’. Analysing the efficiency of new modes of governance, Héritier argues that one of the explanatory factors is “the particular policy problem dealt with”. Accordingly, new modes of governance only increase efficiency if applied to certain policies and in this vein “[i]f redistributive problems are tackled with new modes of governance, political efficiency is unlikely to increase” (2003: 111). Although we are not concerned with the tangible efficiency of governance, the expected efficiency is also central to the process of policy formulation because it drives the choice of policy tools and therefore the policy problem at stake is relevant for the choice of steering instruments. Obviously, the policy type and nature of political conflict of a particular arena of power determine the ways in which informal governance can be effectively applied, or where hard regulation promises more effective to resolve conflicts. As stated above, soft law takes many different forms; identifying which political problem is tackled allows however to conceptually define more clearly which political context will bring forth which forms of informal governance.

In contrast to the thus established wide reading of ‘techniques of control’ to comprise both hard coercive and soft responsive tools, in Lowi’s model state coercion is transmitted purely by the formal rule of law (‘command/control’). This becomes evident in particular in the modifications of the approach in its later versions. Replacing the terms of immediate and remote coercion by primary and secondary rules clarified the concept in that it depicted better the role of political and social expectations that are endogenous to the formulation of a policy (Capano 1992: 562). The reduction to the formal realm is expressed even more clearly in that: “[p]ublic policy can be defined simply as an official expressed intention backed by sanction. Although synonymous with law, rule, statute, edict, and regulation, public policy is the term of preference today probably because it conveys more of an impression of flexibility and compassion than the other terms” (Lowi 1988b: x). Read in a restrictive way, this definition is too narrow to capture the capacities supranational EU organisations have over the member states. Whether to still subsume alternative instruments under the term coercion, in Weber’s footsteps understood as basic to all state action,
or as a separate category is an important question because it has implications for the theoretical embedding of informal institutions and new governance.

Proposing an inclusive definition of any mode of governance as a form of political coercion, I will comprise also those instruments that have been subsumed under the term ‘new’ as elements under the dimension ‘framing of coercion’ because for any public policy to be successful, the recipient has to somehow react – either following a logic of consequences or appropriateness, but feeling coerced by it in one way or another. For the ‘new’ modes, “success actually depends on a complex combination of material and non-material conditions which are unlikely to be present in all policy areas, in all member states or at all times. The contingencies influencing policy outcomes are therefore many, indicating that despite their recent proliferation, the employment of ‘new’ modes of governance may quickly revert to older, tried and tested, approaches to policy making when policy effectiveness proves lacking and the political salience of the issue area is high” (Citi and Rhodes 2007: 22). So, if the tool to promote self-steering cannot create some coercive effect, it will fail. More explicitly, this argument is reflected in the notion of the necessity of a “shadow of hierarchy” for new modes of governance to be effective (Scharpf 2002; Héritier 2003; Héritier and Lehmkuhl 2008; Héritier and Eckert 2008; Smismans 2008). Moreover, as concerns the actual political relationships, it has been argued convincingly that “more heterarchical, horizontal and flexible modes of governance do not necessarily imply more participation and inclusion in terms of involving all stakeholders as too quickly taken for granted by some normative claims about the participatory and deliberative democratic character of new governance” (Smismans 2006: 5). 38 Political relationships surely differ under various modes of governance. Yet, whenever they are effective because they trigger some voluntary receptiveness, they remain ‘techniques of control’ even if they do not work through sanctions.

38 Studying the turn to new modes in the area of occupational health and safety policy (OH&S) Smismans finds that “the shift to these new policy instruments and persuasive policy-making often appears to primarily address the national administrators [...] and to lead to a certain level of ‘technocratisation’ of OH&S policy-making”, attesting that “whereas the main civil society actors in OH&S – namely the social partners – have been satisfied with their involvement under the Community Method, their participation in the new modes of governance shows (still) important shortcomings” (2006: 19).
6.3 Steering Instruments in the Arenas of Power: Incorporating the Informal Realm

In more generic terms, many have brought into question Lowi’s conception of coercion before. Spitzer (1987: 684) expresses a similar critique as the one spelled out above, proposing the addition of the dimension of “new regulation”. While the addition of a dimension has itself been criticised for distorting the elegance of the typology, the limitations of basing the taxonomy on the notion of ‘coercion’ has lead other scholars to propose alternatives, especially linking Lowi’s approach back to Schattschneider’s conceptualisation of the scope of conflict as determining political relationships (Schattschneider 1975), as well as the differentiation between structural policies (rules for future allocation) and allocative policies (conferring direct benefits) (Salisbury and Heinz 1970) and the concept of costs and benefits (Olson 1965, 1982; Wilson 1973). In this vein, Kjellberg dwelled on the transactional perspective of the model and thus the inadequately reflected threefold distinction between the provision of goods and services, indirect allocation of benefits, and the most indirect form of impacting on welfare through governmental organisation (Kjellberg 1977: 558). Elaborating this further, Kellow phrases this very issue most bluntly: a “typology based upon the nature of costs and benefits is preferable because it incorporates the relationships between government and beneficiaries in a way in which a coercion-based schema cannot. It makes no sense to talk of the recipient of a subsidy being coerced in any way; the taxpayer is coerced into paying for the subsidy, but it is the manner in which the benefit is sought and provided which determines the absence of active opposition from the taxpayer which gives rise to the patterns which characterize this arena” (Kellow 1989: 541). The common line of critique focuses on the problem the concept of coercion poses, most evidently in the distributive arena. This raises a point other than the extension towards alternative modes of steering discussed above: the different arenas of power themselves are by the logic of their functioning more

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39 For a critique of adding new dimensions see (Kellow 1988; Lowi 1988a), but (Spitzer 1989). Likewise Lowi rejected Tatalovich and Daynes’ (Tatalovich and Daynes 1988) proposal to add a fifth category ‘social regulatory policy’ (Lowi 1988b: xi-xii) in favour of subsuming it into the original model.

40 The other points of critique concern less the reliability and theoretical consistency of the typology than the validity when trying to operationalise the types for empirical analysis. The most repeated criticisms in this respect are: (1) the ambiguity of the typology in that the different types are not mutually exclusive (Greenberg, Miller et al. 1977: 71x; Wilson 1973: 328); and (2) the static nature of the categories while the political relationships are dynamic and adaptive (Heclo 1972: 105). Still, especially for the EU, in which the multidimensionality of policies is indeed often reduced to those elements that overlap with the Unions competences (most evidently in the division of foreign policy in ‘external relations’ and ‘Common Foreign and Security Policy’, but also social policy where only those elements linkable to economic concerns in the regulatory or distributive arena are communitarised), we can assert with Heckathorn and Master that the “original appeal of the typology lay in its robust descriptiveness – most policies fit rather comfortably within the original typology’s four cells” (Heckathorn and Master 1990: 1119).
or less ‘coercive’, raising the question whether the voluntary adaptation of behaviour in exchange for benefits is a different category to ‘coercion’ altogether.

Albeit expressing his appreciation for Kellow’s effort, Lowi casts doubts whether it indeed offers valid solutions. Most importantly for our study, Lowi refutes Kellow’s reading that coercion serves to bind those who oppose a policy. On the contrary, Lowi emphasises that “it is government coercion that makes participation inevitable (if permitted, so that we are speaking here only of liberal systems). Beyond that, I am concerned with the forms of participation (in which networks are only one such form)” (Lowi 1988a: 727). Therefore, even if paying tribute to the fact that there are conceptual differences between policies that create either costs or benefits, the last cited definition may comprise both, if we admit that to achieve whatever policy goals policy takers have to somehow participate and respond to the intended goal. The difference is the degree to which policy takers are permitted discretion: while regulatory and redistributive policies are restrictively imposing compliance, distributive policies leave considerable discretion (a recipient of subsidies may disrespect greatly a government’s actual goals, without any option for the government to punish ex-post). Constituent policies, on this reading, create discretion in themselves since they set the rules about authority and thus define whom is granted which powers. As pointed out in the discussion of new governance, if policy takers do not respond to the discretionary policies, i.e. if there is no ‘as if coercion’, there will effectively be no steering at all. Accordingly, if no responsiveness can be expected, policy makers should not opt for these ‘techniques of control’. If they fail to create a quasi-coercive effect, there is no steering in the wider sense of changing individuals’ behaviour.41

41 Stretching the concept of coercion in this way, i.e. to include both formal and informal policy tools which trigger different mechanisms for rule compliance by policy takers, can be further refined drawing from neo-institutional literature (March and Olsen 1998; March and Olsen 2004; Goldmann 2005). Accordingly, both the logic of consequentiality (individual rational calculations) and the logic of appropriateness (internalised rules) would be a form of coercion because actors feel constrained to comply. Generally, informal governance that lacks hard enforcement tools appeals more to setting standards and “[i]f they are lucky, rule setters see their rules become norms, that are internalised rules that we either as being elements of our own will rather than a rule, or that we see as external but take for granted and accept as condition of life” (Ahrne and Brunsson 2004: 187). In other words, “[w]hereas hard law can have virtually immediate effects, soft law is more closely related to socialisation, identity-building and other social practices” (Mørth 2004a: 196). As pointed out, both logics of compliance are here understood as a response to coercion – hard or soft – and as elements of an inclusive concept governance. This is in line with the neo-institutional understanding that “[p]erhaps the most important element of an institution is that these are in some way a structural feature of society and/or polity. That structure might be formal (a legislature, an agency in the public bureaucracy, or a legal framework), or may be informal (a network of interacting organizations or a set of shared norms). As such, an institution transcends individuals to involve groups of individuals in some sort of patterned interactions that are predictable based on specified relationships among the actors” (Peters 1999: 18).
Linked to this, an authority’s policy goals may be stated directly in the policy or they may be transmitted as an indirect effect of the policy. What is to be controlled can be explicit, such as in regulation and distribution where the policy measure spells out directly the desired effect. In contrast, redistributive policies reallocate material resources, e.g. the imposition of taxes is a means to create the necessary resources for a wide range of state activities. Likewise, the constituent rules in a democracy are no ends in themselves but aim at creating the conditions in which ‘good governance’ can be exercised. The concrete policy goals are not spelled out explicitly but are transmitted.

Hence, the two dimensions of instruments for exerting coercion proposed are the leeway granted to the recipient (framing of coercion) and the explicitness of the goals (framing of objectives). The former can be restrictive, i.e. leaving no opt outs for the recipient, or it can be discretionary, i.e. relying on the voluntary receptiveness of the recipient. The latter may be explicit, i.e. the policy instrument tries to directly promote a particular goal, or it is transmitted, i.e. the policy instrument tries promote certain goal(s) implicitly, as captured by the terminology substantive and adjective rules.

42 The definition of restrictive/discretionary policy instruments is similar to one of Hayes’ dimensions (Hayes 1978: 145), which he calls “supply patterns” that have, however, three dimensions. While the two dimensions “policy-without-law / rule-of-law” are congruent to “discretionary / restrictive” modes of governance, the following does not pay attention to the third category “no government intervention”, since obviously here no steering instruments are played out. The second dimension “demand patterns” distinguish Hayes typology in basic terms from the below proposed classification of steering instruments.

43 While in the English language the distinction between ‘substantive/adjetive of law’ underlines the function and thus matches the functional approach (likewise in Spanish derecho adjectivo/derecho material oder derecho sustancial/sustantivo), other languages underline the equally inherent formal (regarding the form)/material (regarding the content) dimension (German: formelles/materielles Recht, French: droit formel/droit matériel; Italian: diritto formale/diritto materiale). The fact that adjective law is explicitly formal is the distinguishing feature of a ‘Rechtstaat’, i.e. the rule of law. Rules about rules and powers are constituted formally the state must not be run by ad hoc or materially driven informal rules. Changing these rules therefore usually underlies special rules and super-majorities.

Note that notion of ‘substantive and adjective law’ is not directly applicable to the political realm in that the terms refer to the classification of the legal system. Adjective law is about the endogenous structure of the legal system and not the formal structure of state coercion. Accordingly, in a legal classification scheme all parts of public law fall under substantive law. Applying the term to politics, public regulation falls however under the category of ‘adjective rules of the state’. The meanings are congruent but empirically the terms relate to different systems. The terminology of substantive and adjective rules captures precisely the significant difference. Just as primary and secondary rules are unlike primary and secondary law, substantive and adjective rules must not be confused with substantive and adjective law.
### Table II.4: Steering Instruments by Arena of Power

Table II.4 summarises both ‘old’ and ‘new’ steering instruments according to policy type. In the **regulatory arena**, restrictive steering is the common mode of exercising coercion as defined also by Lowi, namely binding legislative acts. Examples in the EU are the formally binding legal acts (regulations, directives and decisions) which leave at best limited leeway for interpretation to the member states. Still in the very same area, soft law is understood as regulatory policy, granting discretion to policy takers and thus reducing hard coercion while still formulating rules which concretely spell out substantive policy goals. The EU has a variety of institutionalised tools be-
sides non-binding agreements among member states (especially recommendations, framework decisions and the instruments of the second and third pillar).

Policy tools in the **distributive arena** guarantee by default more discretion to policy takers who receive unconditional benefits. While patronage policies established at the EU level have shown very difficult to reform, let alone terminate, they have increasingly been bound to conditions. Conditional privileges increase the constraining control over recipients of funds. The patronage nature of political relationships is sustained but discretion of the policy takers is reduced granting the implementing body considerable leverage in evaluating compliance with the conditions. Examples for unconditional distributive policy instruments are direct payments, e.g. in the Common Agricultural Policy (CAP). The main tool to impose conditions has for long been the co-financing principle in EU regional policy. Another example of linking the dispersion of funds to certain policy objectives is subject of the case study on administrative capacity building below.

Although conditional patronage policies have redistributive effects, they remain distinct from policy instruments in the **redistributive arena**. In particular, the organisation of political conflict along broad ideological divisions is not typical for the Union’s ‘redistribution by distribution’. Examples for redistributive policies in this sense are meagre, the European Council’s budgetary negotiations on member state contributions being the most straightforward case. Increasing the discretionary scope of policy tools, especially in connection with the Lisbon Agenda new modes of governance have been introduced to substitute for restrictive redistributive policies. Working through means such as targeting, peer reviews and the development of non-binding standards adaptations of the national systems are to be promoted. Without the backing of restrictive policy instruments, the effectiveness of these measures and their actual redistributive impact have been brought into question.

Formal Treaty articles, finally, are the instruments by which ordinary **constituent policies** are implemented. They are discretionary because they create powers for certain actors. At the same time, defining rules about authority and rules about rules also has restrictive effects because formal institutions impose constraints. Still, it makes sense to distinguish constituent rules from the redistributive arena. Accordingly, the institutional rules which make constituent policies are defined as enabling actors, i.e. creating discretion to coerce. Following this reasoning, informal rules that adjust the power relations of actors increase the level of restrictiveness for those who origi-
nally hold the monopoly on authority. Informal institutions are thus understood as limiting further those actors which are formally endowed with certain powers.

To sum up, the hypothesis that derives from the arenas of power approach is: if a policy generates functional pressure due to its successful implementation in an institutional sub-system, whether it will be institutionalised in the institutional core framework the EU level depends on the policy type. Generally, it is expected that member states will not integrate redistributive or constituent policies. The extended model allows for the further refinement that regulatory and distributive policies will be integrated if framed in informal terms, i.e. without the creation of new coercive implementation tools and no-amenable patronage relationships. This expectation follows from the fact that policies had been created outside the institutional core from the outset. We should thus expect non-binding regulation and conditional patronage policies or distributive policies to emerge. Where policies are framed in other arenas, member states should oppose integration.
7 Observing the Extension of Action Capacity: Operationalisation

This chapter will serve to operationalise the functional model spelling out the measures for change. The question to be answered concerns the impact of implementing enlargement on the action capacity of the Commission, in other words: how did policy-making in the Copenhagen Framework affect the Commission’s institutionalised action capacity?

Accordingly, the dependent variable defined above as institutionalised governance for an emerging ‘European space’ (see p. 33) translates into institutionalised capacities of the Commission. The first of the following sections will specify this definition of action capacity as the ability to formulate policies and develop empirical measures for it. For the Commission to take on new capacities, the member states need to give in to functional pressure. The action capacity variable is measured on a gradual scale between formally and informally institutionalised capacities.

Recalling the double but analytically discrete role of institutions, these serve on the one hand as indicators for change on the side of the explanandum, and on the other hand as context variables on the side of the explanans that do not cause but confine actor choices (see esp. p. 36). Therefore, the rules of the Copenhagen framework and its specific institutional features need to be identified because they will determine the institutional context in which policies are first created, being the same for all cases under scrutiny. Moreover, the specific features of the eastern enlargement process determined the available policy choices for national and supranational actors. The second contextual element for this is case-specific. Depending on the already existing institutional rules within the acquis, integrating a new policy from the Copenhagen sub-system to the acquis proper will have to abide to those rules. Only if a policy is completely new and detached from the existing acquis can member states choose the rules that will apply within the boundaries of the common legal framework. If functionally linked to existing supra-national competences, new policies will have to play by the rules that exist.

The independent variables can be subdivided into two groups in line with the two-step approach. First, the neofunctional concept of unintended consequences and functional pressure need to be attributed empirical definitions. If political actors act rationally according to the wider framework of the instrumental rational of the EU polity, second, we need to identify the policy type as which new action capacity will be framed and which determines whether a policy will be integrated or not.
7.1 **The Dependent Variable: Operationalising Action Capacity**

How do we recognise an extension of action capacity when it occurs? While the strongest form of action capacity is defined by exclusive competences held by the actor, a tangible definition of the lower end is less straightforward. Theoretically *action capacity* is the sum of formally or informally institutionalised capacities of an agent. The cut-off point is defined between institutionalisation, in contrast to *ad hoc*, timely restricted, or haphazard capacities. A capacity is institutionalised, if it persists over time and endures contestation by the actors concerned. In other words, if actors comply with the institutions, defined as formal or informal rules constraining human behaviour (North 1990: 3-5).

Action capacity thus comprises both formal and informal mechanisms of control the Commission has on the member states, representing the component organisations of the Union, or in some cases individuals directly (cf. Table II.4, p. 69).

Action capacity can take different degrees of intensity, ranging from Treaty-based formal competences to informally institutionalised capacities to adapt other actors’ behaviour (be it the member states or lower levels within them such as regions, other EU institutions or external entities). While the strongest form of action capacity is clearly defined since it corresponds to the Commission’s official Treaty powers, the notion of institutionalisation is crucial to delimit informal capacities from actions that are not defined as action capacity. Action capacity is not being extended if the capacities are not tangibly institutionalised to a minimum degree. Institutionalisation requires: (a) that a rule, or set of rules, is identifiably defined, and (b) that this rule is stable over time, i.e. that it resists contestation by deviant behaviour. An ad-hoc action, say the reaction to a contingent event in which the Commission intervenes into member states or external units, does not establish action capacity according to this definition.

Indicators for the different degrees of action capacity are therefore the following. A formal extension of action capacity shows in adaptations of the founding Treaties of the European Community and Union that attribute official competences to the Commission. Intermediate, or semi-formal, action capacity is extended if the wider *acquis* is extended. If new policies are integrated, this implies that the Commission’s powers apply respecting the applicable decision-making and implementation rules. Accordingly, a new policy that confers exclusive Community competences

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44 Action capacity defined as the sum of formal and informal institutionalised capacities does not refer to one particular stream of the various neo-institutional approaches. Neo-institutionalist concepts are applied in a heuristic manner since they allow to establish a coherent terminology embracing the key elements of the analysis, namely integration, enlargement, action capacity.
represents a larger extension of action capacity than one incumbent on intergovernmental co-operation. In any case, when delegated a task, the Commission has the right to and obligation to develop the respective means to implement this task. This intermediate kind of action capacity is thus derived from the official powers of the Commission and the areas that these apply to. The same holds for ‘supporting actions’ for decisions taken in the second or third pillar for which the member states rely on Community instruments (cf. Table I.3, p 15). An extension of the acquis to include new issue areas is therefore an indicator. Both of these formalised capacities are linked to third-party control by the ECJ.

<table>
<thead>
<tr>
<th>DEGREE OF ACTION CAPACITY</th>
<th>FORMAL ACTION CAPACITY</th>
<th>INFORMAL ACTION CAPACITY</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>DEFINITION</strong></td>
<td>Treaty-based competences</td>
<td>Task-bound competences of Commission (Principle: when task, COM can create means to realise it)</td>
</tr>
<tr>
<td><strong>CONTROL / EXECUTIVE MEANS COMMISSION</strong></td>
<td>Referral of breaches to the ECJ</td>
<td>- Referral of breaches to ECJ</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Control ECJ of rightfulness of Commission intervention.</td>
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<td></td>
<td></td>
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</tr>
<tr>
<td><strong>OPERATIONALISATION / INDICATORS</strong></td>
<td>Treaty competences⁴⁶:</td>
<td>- Secondary law (full acquity: competences apply</td>
</tr>
<tr>
<td></td>
<td>- legislative initiative</td>
<td>- single tasks to which competences apply</td>
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<td>- ‘guardian of treaties’</td>
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<td></td>
<td>- ext. representation</td>
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Table II.5: Commission Action Capacity: Conceptual and operational definitions

In contrast, informal action capacity is marked by the absence of negative enforcement sanctions and the lack of third party control. Although the Commission can derive certain interventions from the Treaties and its semi-formal competences, these are not all enforceable by referral to the ECJ. The most important indicators for an extension of informal action capacity are regular spending on predefined issues, thus as budget lines under particular headings, and the setting of standards that are subject to regular monitoring. Even if the results of such monitoring cannot be

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⁴⁶ The Common Foreign and Security Policy (CFSP) almost chronically depends on Community instruments. Even before CFSP’s official inception in the Treaty of Maastricht, member states implemented intergovernmentally reached common foreign policy decisions by means of Community instruments, such as the sanctions against the South African Apartheid regime. Likewise the very first joined action under the CFSP umbrella, the administration of the city of Mostar, was only realised once Community funding was guaranteed (Schmalz 1997: 8), without guaranteeing new funding so that “the Commission, who had been asked to start implementing the joint action within the limits of the amount charged to the EC budget was having a difficult task, and one exacerbated because the funds had to be taken away from other budgetary headings” (Monar 1997: 39).

⁴⁶ Beyond these formal functions, Cini adds two implicit functions, namely “the Commission as mediator between member states, the European institutions and other sectional interests; [and] the Commission as the conscience and voice of the Union as a whole” (Cini 1996: 14, italics in original).
legally challenged, it is assumed that the application of the policy tool widens the Commission’s action capacity (see Table II.5).

This conceptualisation of action capacity does not take into account to which degree member states or other actors react to actions by the Commission. It does not comprise the outcomes nor outputs of Commission actions but is limited to the potential the Commission has to steer. It is hence the capacity the Commission has to impact on the member states \textit{ex ante} – but leaves un-analysed which impact will actually result. An extension of action capacity is thus the extension of the Commission’s toolbox to produce policies, be it in the number of areas or number of measures in one area. This definition defines moreover that action capacity is issue-specific and not measured across the full range of activities the Commission pursues. The sum of the single capacities aggregates the overall action capacity of the agent. In order to capture the extent to which the implementation of enlargement affected the Commission’s capacity, the analysis is limited to those areas in which the Commission had extended competences in the Copenhagen framework. Thus, also the question of extended capacities focuses on the capacities to act in these particular policy areas, and in these only.

The three possible outcomes at the moment of accession of new member states are: that the Commission will have the same action capacity as it had before enlargement (stability), the Commission will have more action capacity (increase), or the Commission will have even less action capacity in a policy at the end of the pre-accession phase (decrease). Potential change is measured regarding each of the areas in which the Commission had extended competences within the Copenhagen framework. An extension of formal action capacity is the conferral of competences to exercise hard regulation; an extension of informal action capacity is marked by new instruments of informal governance, i.e. soft law or modes new modes of governance more generally. Informal action capacities based on resources that are granted the Commission on an ad hoc basis an thus lack stability over time, as well as tools that fail from the outset to establish networks with the targeted policy takers, will be classified as not institutionalised.

7.2 \textbf{THE CONTEXT VARIABLES: THE COPENHAGEN FRAMEWORK AND THE ACQUIS COMMUNAUTAIRE}

When the heads of states and governments decided in 1993 to open the EU for the predominately central and eastern European states, they mandated the European Commission to implement a policy for which there was neither a strategy nor a schedule. Following a period of dispute
on whether the EU should enlarge at all, the decision to do so was bound to conditions that had to be met before admitting new member states. These so-called Copenhagen accession criteria demarcated a decisively new approach compared to earlier enlargements since they expanded the requirements for adaptation by potential members beyond the acquis communautaire. In other words: the applicant states were demanded to adapt to more conditions than those applicable to the actual member states.

The Copenhagen framework was thus marked by two decisive characteristics. Concerning the content, it spelled out pre-conditions for accession additional to the rules valid for states within the Union. Concerning the operational side, it mandated the Commission not only with the task but, hand in glove, with the competence to implement these rules, i.e. competences that went beyond those contained in the acquis. The Commission operationalised the very broadly formulated criteria applying two policy instruments. Adherence to the criteria was to be controlled through regular monitoring, and it was to be supported by providing assistance. How to realise this Copenhagen mandate was left to the widely independent agency of the Commission.

Distinctive for the Copenhagen criteria is that they aimed at preparatory adaptations, i.e. changes in the candidate states before accession. Of the preconditions to be met prior to widening only one concerned the Union itself: the EU had to ensure that the policies and institutions were capable of accommodating the new members. This criterion regarding the “Union’s capacity to absorb new members, while maintaining the momentum of European integration” (European Council 1993: 13) was further defined as the need for institutional and policy reform, in detail spelled out in the Agenda 2000 (Commission of the European Communities 1997a). Changes were introduced in a set of formal reforms and are the result of bargaining amongst the member states, most notably in the Treaty adaptations in the Intergovernmental Conferences of Amsterdam (1996) and Nice (2000), as well as central budgetary decisions in Berlin (1999). While these changes did indeed touch on constituent and redistributive policies and were hence subject to complex and highly conflictual treaty negotiations, the conditions for including new distributive or regulatory policies never occupied a dominant place on the reform agenda in connection to enlargement. The reforms eventually agreed on at Nice (2000) focused almost exclusively on institutional issues: no substantial policy reforms were introduced. For our question – when and how a policy under functional pressure is being integrated or not – these changes are thus not decisive, but they underline the difficulty of changing established rules also of policies and accordingly the constraints that the introduction of a new policy creates. Before briefly outlining
these policy-specific institutional context conditions, I will discuss the specific features of the Copenhagen framework.

**THE DISTINCT INSTITUTIONAL SUB-SET:**
**ENLARGEMENT POLICY BASED ON THE COPENHAGEN FRAMEWORK**

In the Copenhagen framework the tangible capacities, or available policy tools, of the Commission were both organisational, i.e. creating structures within the organisation, and operational, i.e. policy instruments which it applied *vis-à-vis* the candidate states. Compared to the Commission’s powers under the acquis, the competence to initiate legislation was absent from enlargement policy. The Commission was limited to its executive and oversight functions.

Apart from the negotiation of the different chapters in which the acquis had been subdivided, policy instruments can be subdivided according to two core purposes, namely monitoring of compliance with the accession conditions, and EU assistance for achieving those. Both these key instruments emerged from tools established before 1993. In order to support transition in the post-socialist states, the Commission fell initially back on “part of the standard repertoire of economic instruments used by the EC in relation to third parties” (Gower 1999: 4), i.e. “trade and aid” (ibid.: 20). Accordingly, the first steps were Trade and Co-operation Agreements. Additionally the aid programme PHARE (*Poland, Hungary Assistance for the Reconstruction of the Economy*) was set up. Launched in 1989 for Poland and Hungary only, PHARE was extended to Czechoslovakia, Bulgaria, and Yugoslavia in 1990, and also to the three Baltic States after their independence in 1991. While it was originally an instrument of external policy towards the eastern states, PHARE was redefined within the enlargement strategy to become the most important tool to channel pre-accession assistance as to ease integration. Other programmes subsequently complemented PHARE, in particular SAPARD and ISPA that were to prepare the candidates to join the Common Agricultural and Structural Policies (both since 2000).

As regards the exercise of its monitoring function, the Commission first published its *opinions* on the applicants in 1997, as it had always been the case in previous enlargements. Novel here though was the introduction of annual progress supervisions in the so-called *Regular Reports*. These represent a strong means of control on the candidate states. Regular monitoring has hence emerged as standard procedure, unquestionably applied to every candidate state. Annual reporting increased knowledge on the soon-to-be members substantially. This oversight was considered necessary due to the extraordinary number of states and the fact that they were in a transitional
phase towards democracy and market economies. The dominant role of conditionality as the guiding pre-accession principle justified the continuous observation of compliance; as a matter of fact the establishment of conditions for accession made the need to create a comprehensive stock of knowledge on compliance indispensable. The shift to a conditionality-based process therefore demanded a more coordinated organisation of enlargement than the previous rounds in which monitoring was limited the drafting of one single Opinion (avis) by the Commission. Relations between the Community and the central and eastern European states were first regulated by Associations Agreements that excluded explicitly an option for accession (see e.g.: Friis 1998a: 334; Schimmelfennig 2001: 55). In the course of the process these so-called Europe Agreements were redefined to become the main instrument for realising enlargement. Moreover, the reinforced strategy (1997) introduced the bilateral Accession Partnerships between the EU and each candidate state. Stressing the enhanced exercise of conditionality, Maniokas points out that “[t]here was a tendency to create new and more detailed conditions as for example happened in the case of the accession partnerships (APs) which set out priorities for the candidates at a fairly advanced stages of the enlargement process” (Maniokas 2004: 19-20). As the Regular Reports, Accession Partnerships have become a standard instrument of EU enlargement policy.

In sum, the enlargement framework created a new institutional setting whose most defining feature was the shift to a conditionality-based approach that went beyond the previously applied ‘classical method’. What marked the Copenhagen method, namely the establishment of new spheres of influence for the EU in third countries, was established incrementally, mainly due to very limited experience to draw from and a high level of uncertainty dealing with the transforming states at the eastern periphery of the Union. This led to a set of major changes in the handling of widening. As a result, an enlargement strategy in the real meaning of the term emerged incrementally and was institutionalised eclectically. With respect to its incremental evolution one can however claim that it grew ‘strategic’ rather ex post. Remarkable too is that the Commission developed new tools from scratch and under a fairly undefined mandate, i.e. with great room to experiment with tools on how to implement the new policies outside the EU’s traditional policy areas. The most important feature in this respect is the lack of what is generally considered the most powerful function of the Commission, the right for initiative of legislation. Despite this clear restriction to executive and ‘guardian of the Treaties’ role, because it was restricted to the Copenhagen framework the Commission had considerable scope to develop new policies applying monitoring and assistance.
Unlike applying these tools within the EU, during the conditionality-based accession process steering with the soft tools of monitoring and assistance could unfold a quasi hard impact – a further facet of the inconsistencies between the constitutional frame of the EU and the Copenhagen criteria. Wiener describes this contradiction in terms of the contrary meanings contained in a strong rational of rule-following for the accession states and only unclear (if at all) defined rules on the EU level (Wiener 2002: 4). If these tools get extended to the EU, they lose the implicit hard enforcement leverage it was granted by the threat of non-accession. Therefore, the very manner in which policies were developed in the Copenhagen framework also leads to the expectation that an extension of monitoring and assistance will be likely to create new soft steering.

The Institutional Core: Policies in the Acquis Communautaire

The degree of formalisation depends on previously established rules that new capacities relate to in that these limit the available strategic choices for new institutional rules. Therefore, on the one hand each case has to be considered against the background of the pre-existing institutional framework to understand which institutional rules apply for establishing it. On the other hand, and more relevant, a policy maker’s expectations of future institutional burdens or opportunities will depend on the rule category the new policy will fall under, i.e. which decision-making procedure (inclusion or exclusion of the European Parliament) and which decision-making rules (majority or unanimity in the Council), plus whether the introduction of a new policy marks new substantial competences and thus legislative functions for the Commission (to propose related legislation) or not. By the same token, the available implementing tools for a policy depend on where a new capacity is placed in the acquis. For instance, matters of foreign policy may either be framed as part of the intergovernmental or communitarian acquis, which underlie substantially different procedures and means.

In essence, the context variables set the conditions in which spill-in from an institutional sub-system emerges – thus, they are concerned with the specific features of both the particular sub-set (Copenhagen framework) and the broader system (the acquis communautaire). Tracing the development of enlargement policy will flesh out the former, scrutinising the pre-existing EU capacities in a specific policy area will focus on the relevant elements of the acquis.
7.3 **The Independent Variables: Causes for Adapting Agent Strategies**

The independent variables affect all policies equally as unintended consequences of previous choices that actors react to, and pressure for spill-in that derives likewise from the necessities born out of the policies already integrated. While unintended consequences explain a shift in actor strategies, what is perceived as ‘unintended’ is linked to the emerging policy type. The way in which unintended consequences and spill-in play out hence depends on the particular policy problem faced.

**Common Independent Variables:**

**Pressure for Spill-in and Unintended Consequences**

The conceptual mechanisms of ‘spill-in’ was introduced as congruent to the original neofunctional expectation of ‘spill-over’, i.e. integration of policy $A$ that will lead to integration of policy $B$. Spill-in is then: integration of policy $A'$ in an institutional sub-entity will lead to integration of $A$ in the greater institutional framework (see p. 36). Accordingly, integration of a policy in an institutional sub-entity must also create the potential for unintended consequences and pressure for functional spill-in to assume more general applicability of the institutionally contained policy.

How do unintended consequences and functional pressure materialise, and how can they be observed empirically?

To define empirically what makes an **unintended consequence** deriving from enlargement policy-making is rather clear-cut, given the intentional design of the Copenhagen framework. Instead of extending the Commission’s responsibilities to new areas considered relevant, the member states mandated the Commission certain tasks in enlargement policy, and only there. Therefore, no matter how far-reaching the Commission exploited its competences under the Copenhagen umbrella, this was to a considerable extent unforeseen but not necessarily unintended. On the contrary, the Commission had a broad mandate that defined policy instruments and outcomes only roughly; the more it stretched this mandate to effectively coerce on the candidate states, the more was this in the intention of the member states. The broad mandate made enlargement policy therefore an experimental field for new policy tools without creating tensions with the member
states for as long as these were not affected.\(^{47}\) Those competences that were not carried over to the acquis would vanish with accession.

However, the mere fact that policies reoccur within the broader acquis does not qualify for unintended effects. Although not intended in the first place and therefore placed in a better controllable institutional sub-system, member states may subsequently tolerate the limited extension to the supranational level if supranational capacities remain sufficiently contained. Therefore, such an extension should not amount to new hard competences. Still, it is the very thrust of the neofunctional argument that the existence of certain competences by a supranational authority causes actors to adapt their strategies. Even if assuming that preferences remain stable between T1 when the mandate is being delegated to the Commission and T3 after enlargement, some extension of action capacities in the institutional core may be accommodated as long as it remains containable. A full-fledged unintended consequence occurs therefore only if more supranational powers are established against the member states’ contention. This may be by the formal attribution of competences against the will of the member states (a judgement by the ECJ) or by the establishment of informal institution that circumvents the member states, be it between supranational actors excluding the Council (Commission/EP) or supranational actors and non-state actors excluding the governments. Indicators for the qualitative analysis are thus Court rulings or opinions, informal agreements and cooperation between the EP and the Commission including the provision of special budget lines by the EP, and joint projects between the Commission and non-state organisations.

To operationalise the **spill-in** mechanism, first, the underlying logic will be elaborated upon. Second, indicators for ‘functional pressure’ must be defined. This can only be derived indirectly from the actual ‘well-functioning’, or establishment of successful policies, which entails that functional pressure for spill-in is generated by the policy because new workable means for desired ends have been established.

The reason for which the formal authority member states delegated to the Commission translates into real power *vis-à-vis* the external states is the backing of the accession criteria by conditionality. Although depicted as the first effective foreign policy of the EU (Smith 1999), enlargement policy needs to be distinguished from ‘pure’ foreign policy even if the effect is that the EU exercises influence on external actors. The underlying logic of the pre-accession process foots on

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\(^{47}\) Interviews with Commission officials occupied with the European Neighbourhood Policy suggest strongly that this experimental policy making is being continued – with much less resources but an equally wide mandate – in the new neighbourhood approach. This area is therefore also prone to incorporate policy instruments developed in the enlargement context.
the integration of states. Accordingly, the EU has established that achieving the status of a candidate state itself indicates that a country has advanced well down the road towards membership. Analytically a candidate state is therefore no longer a wholly exogenous unit. This institutional construct creates two kinds of internal contradictions, which create policy-generated functional pressure for spill-in.

First, the Copenhagen criteria established double standards: candidate states had to comply with more or higher norms to become members of the club than the states that were already in. This contradiction has only limited relevance in pure foreign policy and is often successfully ignored with reference to more abstract values or principles. For politics of integration, however, the problem increases the closer a candidate state approaches full membership. The thrust of conditionality diminishes as the likelihood of accession increased and the candidate has increasing leeway to argue for the illegitimacy of those rules that are not codified in the acquis. The first kind of functional pressure is thus the illegitimacy of double standards which can only be resolved if rules are being formally established for all current and future member states. Although it is generally accepted that the Copenhagen criteria established double standards, the Commission somehow had to justify its acts and therefore stretched the meaning of the Treaties. Functional pressure emerges where no clear competences exist in the acquis and these have to be constructed at least to a minimal degree to justify the Commission’s doing.

The second reason for functional pressure owes to the horizontal nature of enlargement policy that involved all the areas of Commission activity and basically all its services. This becomes more than evident if we take a look at the organisation of enlargement policy within the Commission. While DG Enlargement has mainly a coordinating function, most of the substantive issues are dealt with by the respectively competent DG. Therefore, implementing enlargement was not restricted to officials in one DG but informed policy-making throughout. Given the open mandate and the freedom to interpret it in terms of new (experimental) policy tools, functional pressure to apply those tools in sectoral policies should be expected and promote the diffusion of new instruments across Commission services due to the high interconnectedness of enlargement policy. The second internal contradiction is hence the existence of successful policy tools that a sectoral DG applies to external states only, which will create pressure to extend their applicability. For both dynamics, it is essential that the capacity exercised in the institutional sub-entity is successful in achieving the intended political goals, i.e. that it does not create unintended

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48 It is therefore misleading to try to export EU conditionality to promote certain standards in international organisations which cannot offer inclusion into a desired club, or an equally potent carrot (as the EU is attempting to do by means of preferential agreements in the European Neighbourhood Policy, the title of which already suggests the special value of the relationships between the target states and the EU).
effects within the institutional sub-entity itself. If a policy is not sufficiently successful in the institutional sub-set, actors should change their strategy and adapt it.

These reasons for functional pressure are therefore policy-generated. They follow logically from the successful implementation of a policy in the institutional sub-entity. They can be made explicit by political actors. Societal actors or member states may raise the demand to continue or extend successful policies exercised during enlargement. Likewise, they may call for the abolition of illegitimate double standards. Both claims can only be responded to by extending the applicability of the delimited policy competences to all member states. Abolishing the Commission’s capacities can only respond to the latter claim against double standards.

It follows from this, that expressions by state- or non-state actors in either of these veins indicate functional pressure, yet the actual pressure is generated by each policy that is successfully implemented. Functional pressure is not an observable phenomenon but a theoretical assumption. It is, however, conditioned by two observable circumstances: the establishment of a policy in the Copenhagen Framework (i.e. that the mandate on paper is put into practice), and a certain perception of ‘effectiveness’, or ‘usefulness’ of the new policy tools that it is implemented by. In other words: a policy has to function and not produce dysfunctional effects.

Empirically, I will tackle these two indicators tracing the incremental evolution of enlargement policy regarding the single policies of the case studies. The number and quality of adaptations of policy tools to implement the different issues is taken as a dummy to indicate the stability and ‘effectiveness’ of the policy. For this the major steps in developing and reforming the enlargement approach are considered. Where available, positions of actors that express their perception of the functionality of the policy are referred to. As much as such statements are a reflection of and not functional pressure themselves, the pressure they may create has to be interpreted dependent upon its context.49

While it is an open question for the empirical analysis whether unintended consequences that extend capacities against the member states’ preferences will be observable, we should expect pressure for spill-in for all cases in which functioning structures were built around a policy in the Copenhagen Framework.

49 For example, if a non-governmental organisation propagates the opinion that the Commission should continue to monitor the respect of minority rights, the effect will be pressure on governments to legitimise rejecting such claims (if they cannot prove the dysfunctional effect of Commission activity). If the Commission (not backed by societal groups) raises such claims, the argument will have to be instrumental, either that it derives from the Treaties or that it enhances the effectiveness of EU policy but can nonetheless be ignored by the member states as long as they do not breach Treaty obligations.
SPECIFIC INDEPENDENT VARIABLES: VARYING EXPECTED EFFECTS ON DIFFERENT POLICY TYPES

The hypothesis developed in the theoretical chapter is: *if functional pressure emerges, whether and how integration emerges depends on the policy type at stake.* Two EU-specific scope conditions have to be added: first, depending on the policy, different institutional rules for transferring powers will apply; second, the political choice is a collective enterprise amongst a group of member states. Thus, the shared expectation on the effect of a policy is decisive for how that policy will be institutionalised. This explains variation in how a specific political problem will be established in a particular arena of power.

The Commission’s interests are in essence unimportant since the organisation cannot give itself new powers other than interpreting and stretching the conferred powers. Moreover, in those fields in which the Commission has developed functioning capacities, we should expect that it will promote the extension of capacities in order to respond to functional pressure for spill-in. The Commission should be most successful in extending action capacity where it can frame policies in discretionary regulatory or restrictive distributive terms because these threaten least to reduce member state authority.

Although organisations are generally expected to aim towards increasing their power, one cannot assume that the Commission will under all circumstances strive for more competences. In cases in which new competences cannot be effectively exercised, be it due to a lack of resources or cross-level conflict over EU competences, certain competences will not increase but eventually weaken the supranational bodies in terms of real capacities. Competences without sufficient means to realise these fail to diminish functional pressure and do not increase the *de facto* power of the agent. The Commission should hence even reject certain responsibilities if asked to get involved in grey areas for which it lacks effective resources to enforce a policy. For all policies

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50 This has happened with regard to conflicts over social property when the Commission refused to respond to Austrian demands to consider matters of denationalisation in the accession negotiations with Slovenia. In spite of jumping onto the Austrian argument that denationalisation was linked to Single Market issues and thereby creating a new competence for itself, the Commission relegated the issue under the generic Copenhagen political criterion and promoted a bilateral extra-EU solution between the states. The path of non-intervention was continued and the issue handled with even less claims on competences despite its high potential for conflict when the same matter emerged between Italy and Croatia. “In opposition to conventional expansive behaviour, the Commission did not deem wise to embark on the evaluation of denationalisation as a matter of negotiation. With all probability, it foresaw the myriad of unsettled bilateral issues, from the Sudetendeutsche in the Czech Republic to the exil in Croatia, that would have arisen after the establishment of such a precedent” the reason for it being that it would lack the legal means to respond to wider claims and would therefore substantially be weakened (see: Guardiancich, unpublished paper).
in which the Commission has established functioning tools in the Copenhagen framework, we can nonetheless assume that the Commission is interested in extending these since it has already created capacities while implementing enlargement. This should find expression in policy proposals directed to the governments, and in communications to the wider public to promote support for the instrumental value of more supranational activity in the respective areas.

Overall, the Commission has little scope to promote its powers against active opposition by the member states. One option is that the EP grants the Commission limited budgetary means for a limited period of time to pursue certain goals, or the Commission may rely on its own, especially human resources. For such strategies, the Commission’s leeway increases if it can build direct support from civil society. Still, as long as member states generally oppose a new policy, action capacities will not be institutionalised to be consistent over time and to adapt to the behaviour of other actors.

Member states’ expectations on outcomes are hence decisive for the spill-in of capacities from an institutional sub-system. These expectations concern the actual policy output and the binding constrains that a conferral to the EU imply. If the sufficient condition is met, i.e. supranational institutionalisation into the institutional core is expected to offer functionally more efficient steering, the necessary condition to be met is that institutionalisation of new capacities will fall into the established arenas of power but evade new hard coercive authority, both in terms of formal institutional rules and hard coercive modes of governance. Generally, only regulatory and distributive policies should be accommodated. If spill-in results in hard regulation, policies should not be integrated into the institutional core. In turn, patronage policies will be integrated if all member states expect to profit from it, or when conditionality guarantees some continuous control over distributions for a minority of member states. If distributive policies are framed as unconditional but profit only a minority of member states, they should not be integrated.

In short, integration proceeds because functional pressure builds up behind policies that have consciously been placed in an institutional sub-system to prevent formalisation. A policy will be integrated into the core if it is framed in the regulatory arena in a way so as to evade binding legislation, or if it is bound to conditions in the distributive arena.  

Going beyond the present theoretical model, the institutionalisation of new formal regulation or patronage policies without restrictive conditions will occur only if changes in the environment occur that lead to a redefinition of means-ends calculations because member states change their initial goals. Likewise, the integration of redistributive or constituent policies depend on external causes that reshape the perceived rational of the polity. A recent example are Community actions to implement a UN Security Council resolution to freeze financial assets of individuals allegedly linked to the Taliban or Osama Bin Laden. To render their intention effective, the member states passed a EC regulation, i.e. went beyond the intergovernmental CFPS. “Financial sanctions, such as freezing the assets and funds of both groups and named individuals, clearly fall under the jurisdiction of the Member States, and not of the Community, which is empowered by the Treaties to adopt economic sanctions only against States. [...] Nevertheless,
thanks to their firm support for the fight against terrorism after 11 September in the context of our Common and Security Policy, our Member States decided to implement the UN resolutions not individually, but by a Community Regulation adopted upon the legal basis of the EC Treaty. [...] The Regulation was challenged before the Court of first Instance and, by reading the judgement of the court, it is easy to understand how difficult it was for our judges not to strike down the measures" (Amato and Ziller 2007: 259). The case referred to: Court of First Instance, Judgement of 21 September 2005 Ahmed Ali Yusuf and Al Barakaat International Foundation, Case T-306/01.
What we have learnt in enlargement are these very hands-on things, 
... okay, they speak of the Brussels bureaucrats, but I think the least bureaucratic I have come across were the people that have worked on enlargement. 
And I think we have tried to bring this spirit also to the European Neighbourhood Policy because if you really have a bright idea, you can achieve something.

Official – European Commission

The empirical analysis covers all cases in which the Commission was delegated extended competences in order to implement enlargement. None of these policies had been harmonised before 1993 in the way they were defined in the Copenhagen framework. By definition, those policies newly assembled under the Copenhagen accession criteria did not concern the traditional EU policies that were sufficiently covered by the accession negotiation chapters derived from the acquis communautaire. In accordance with the neofunctional logic, in all five cases under perspective functional pressure emerged to extend the Copenhagen capacities to the wider acquis. This did not lead to a one-to-one copy of policies from the Copenhagen framework to the acquis, but in all cases functional pressure lead to new cooperative arrangements to accommodate the most pressing demands. While some of these extended the Commission’s action capacity, in other cases the member states actively prevented an extension of Community powers. Whereas in the former cases Commission action capacity increased, in the latter the creation of functional responses within the EU system of governance was sidestepped by fostering alternative albeit less
efficient arrangements in other international fora which exclude the Commission and hence pre-empt an extension of its institutionalised action capacity.

The case studies exhibit therefore a decisive variance in outcomes. Among the five, in two cases no institutionalisation within the EU framework can be observed because pressure for an extension of the Commission’s action capacity was successfully prevented by the member states. This was achieved by conferring the legitimate role to respond to organisations outside the EU. Thereby, the member states avoided an institutionalisation of policy instruments to exert hard coercion, but opted at the same time for functionally inferior policy tools than those of the EU policy arenas. Varying on the dependent variable in the remaining three cases new regulatory and distributive policies have been incorporated. In balance, in the majority of cases the action capacity of the Commission has indeed extended beyond the Copenhagen pre-accession realm.

The role of international organisations other than the EU is contingent on the particular policy contents in which responsibilities overlap. The strong role of international organisations that offer functional alternatives can be well accommodated by the theory established above. Yet, their prominent role as alternative settings to formal integration within the EU framework is foremost an empirical finding. It is linked to the nature of the policies that were included in the Copenhagen criteria, namely politically sensitive questions of human rights, security and inner-state structures, which above all the Council of Europe and the Organisation for Economic Cooperation and Development (OSCD) were involved in. Although one may argue that overall functional pressure for EU involvement existed even before enlargement, these sensitive policies had not been harmonised on the EU level. In contrast, they could be accommodated in the Copenhagen framework that had no direct effects on the member states but allowed a stricter scrutiny of the candidate states than the Council of Europe or the OSCD provided for.

The narratives on the single cases are theory guided. The main propositions can be summarised along a set of questions that will guide the empirical chapters. 1. What was the new competence in the Copenhagen framework and to which degree was it extended beyond the existing competences (dependent variable)? 2. How was the mandate put into practice and actually implemented during the pre-accession phase (‘functional value added’)? 3. How was an extension of the Copenhagen policies framed (policy type/types)? 4. How did this new competence relate to existing capacities (institutional rules and expected constraints)? 5. Which consequences did the member states expect in terms of future institutional constraints (expected institutionalised effect)?

The first two questions take up the neofunctional contentions of the theoretical model. While the first question is about how much ‘spill in’ occurred, i.e. the measurement of the de-
dependent variable, the second question regards the measurement of functional pressure in terms of ‘success’ of the policy in the pre-accession framework, reflected the way policies were created and implemented in the Copenhagen framework. It is expected that functional pressure will be observable in all cases, while not in all cases spill-in materialised. The third question leads over to the arenas of power. To identify which policy type the member states were faced with, we need to spell out into which arena of power a political problem would fall outside the Copenhagen framework. Additionally, question four on the institutional rules takes up the constraints pre-existing rules imposed for choosing one or another policy tool. Finally, the expected impact that the framing options and the respective institutional constraints surmount to will allow to hypothesise whether a single policy should spill-in or not. Accordingly, the individual expectations for each case will be spelled out at the beginning of each chapter.

**Policy Creation in Institutional Sub-System**

<table>
<thead>
<tr>
<th>Policy Formulation (independent variables)</th>
<th>Regulatory arena: soft law</th>
<th>Distributive arena: conditional/ ‘equal return’</th>
<th>Constituent or redistributive arena</th>
<th>Formal Treaty competences</th>
</tr>
</thead>
<tbody>
<tr>
<td>Containment of formal supranational authority</td>
<td>EXTENSION COMMISSION ACTION CAPACITY</td>
<td>No containment of formal supranational authority</td>
<td>ALTERNATIVE RESPONSE OUTSIDE EU</td>
<td></td>
</tr>
</tbody>
</table>

**Table III.1 Theoretical Model and Expectations**

Table III. 1 recaps the theoretical expectations. Additionally, Annex I provides an overview of the empirical indicators. The five questions will structure the illustration of each case study, organised chronologically tracing the Commission’s capacities at T1 regarding the general competences under the acquis in 1993 and further related developments independent from enlargement; the dynamic phase T2 during which the pre-accession policy is implemented and policy tools are
developed; and T3 after the pre-accession phase to measure the actual change on the dependent variable that was triggered by functional pressure form enlargement policy-making. I will first focus on the three cases in which supranational capacities were clearly extended and subsequently turn to the two cases in which the response to functional pressure did not lead to further institutionalisation within the EU polity.

As pointed out before (see p. 28), the study is not designed to test competing explanations against each other but applies one theoretical model to the systematically selected cases. The main hypothesis is that policy-making in the Copenhagen framework generates functional pressure and thus policy-making is a vehicle for further EU integration depending on the policy type at stake. Yet, implementing enlargement is an additional and not the only cause for the institutionalisation. Therefore, reviewing the empirical cases and outcomes at T3, we need to be aware of potential other equifinal explanations. Instead of involving into a hard to realise attempt to comprehensively identify and analyse these, I will control the problem of equifinality conceptually and methodologically. Conceptually, all policies under perspective are contained to an institutional sub-set full integration was not intended in the first place. Therefore, if there was functional pressure for spill-over (in the traditional sense) it was not effectuated but rejected for the particular policy issues under perspective. However, related policies may be subject to other dynamics of integration. Therefore, if spill-in occurs a linkage to these related fields is to be expected. Methodologically, I thus include a discussion of related policies. This discussion does not elaborate causes for the integration of these related policies but simply depicts the state of arts at T1 since they mark the relevant context variables (acquis communautaire) that mark the conditions for spill-in. To control for equifinality regarding the outcomes at T3, the methodological approach is to carefully trace the actual development and application of policy tools during the implementation of enlargement (T2) to compare these with the tools applied outside the pre-accession framework (T3). The results are most conclusive where no spill-in materialises. In these cases in which capacities are not institutionalised due to the policy tools that would have been established, the explanation is rather unambiguous. Yet, also in the cases in which specific policy instruments exclusively developed in the institutional sub-system can be traced to have ‘travelled’ beyond, the problem of equifinal explanations seems well-controlled for.

The interviews referred to were conducted foremost with officials who currently implement policies outside the enlargement framework in order to scrutinise to which degree ‘mechanisms of control’ are indeed equal to those first established in the institutional sub-set (and consciously only there). According to the functional logic developed here, other than by spill-in policies those policies intentionally put into an institutional sub-system should only integrated due to external shock which fundamentally affects the member states’ perceptions and strategies (see footnote 51 above); or alternatively a fundamental change in member states’ preferences regarding the integration of initially contained policies.

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52 The interviews referred to were conducted foremost with officials who currently implement policies outside the enlargement framework in order to scrutinise to which degree ‘mechanisms of control’ are indeed equal to those first established in the institutional sub-set (and consciously only there). According to the functional logic developed here, other than by spill-in policies those policies intentionally put into an institutional sub-system should only integrated due to external shock which fundamentally affects the member states’ perceptions and strategies (see footnote 51 above); or alternatively a fundamental change in member states’ preferences regarding the integration of initially contained policies.
8 **INSTITUTIONAL CAPACITY BUILDING: EXTENDING CONDITIONAL DISTRIBUTIVE INSTRUMENTS**

_Institutional or administrative capacity building_, so the terms are used to by the Commission, aims at the improvement of national administrative systems. The capacity of national administrations was subject to monitoring during enlargement, backed by distributive measures both in terms of financial and technical assistance. The Commission directed money into the candidate administrations in the conditionality based pre-accession context and with reference to country specific goal definitions negotiated in the *Accession Partnerships*. At the same time, the perception for administrative reforms of national bureaucracies was in ascent more widely, for which also some member states requested financial assistance from the Commission, which lead to first pilot programmes targeted at the cohesion countries. It was accordingly possible to frame the policy outside the Copenhagen framework either in the regulatory arena to harmonise national legislation along the lines of common standards, or as soft regulation and more open coordination along these lines. Moreover, continuing the pre-accession assistance in the distributive policy providing financial and technical assistance was feasible. This leads to the following expectations (Table III.2 summarises the empirical indicators):

> If framed in terms of binding common administrative standards, no spill-in should be expected; spill-in should emerge if the standards developed during the pre-accession phase are framed along the lines of soft regulation or as a distributive policy offering financial or technical assistance.

<table>
<thead>
<tr>
<th><strong>INDEPENDENT VARIABLE:</strong> POLICY TYPE</th>
<th><strong>DEPENDENT VARIABLE:</strong> ACTION CAPACITY (EX POST)</th>
<th><strong>CONFIRMED</strong></th>
<th><strong>DISCONFIRMED</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Distributive Policy</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Policy formulated as win-win distribution of funds</td>
<td>New institutionalised budgetary powers of the Commission distributed to all member states or contained by conditions for recipients</td>
<td>New budget lines distributed along member-state class lines (→ redistribution)</td>
<td></td>
</tr>
<tr>
<td>Regulatory Policy</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Policy formulated as constraining actors' behaviour</td>
<td>Non-binding rules and standards (lacking tools to sanction member states)</td>
<td>New hard regulatory competences (giving Commission tools to sanction member states)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>New non-binding cooperation among member states (e.g. peer-review, benchmarking)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

.Expectation: Policy objective (impact on national administrative capacities) can be framed in distributive terms and also in non-binding cooperation within the EU, so spill-in should emerge.

**Table III.2: Empirical Indicators, Administrative Capacity Building**
Though there is little doubt about the integration process affecting national administrative structures in various ways, “public administration [...] until now has remained strictly an area of national sovereignty, there cannot be any European policy since there is no community competence in this area” (Mangenot 2005: 4, italics in original). Taking a wider angle, the Community is limited to substantial competences with respect to services of general interest. Besides this, administrative cooperation between national civil services deserves mentioning. In balance, competences under the acquis remained nonetheless either limited to or derived from the Community’s economic responsibilities, apart from some cautious inter-state cooperation. In principle interference with the member states’ administrative systems remains outside the Commission’s sphere of influence, let alone any direct or indirect say on the quality of institutions or even calls for ‘institution building’ to comply with the acquis.

It is quite to the contrary in enlargement policy. For the states aspiring to join the Union, sufficient administrative capacities have been constituted as a precondition to accede. Although in the central and eastern European countries the process of state and economic restructuring was a general objective in the 1990s, a considerable role has been ascribed to EU conditionality in advancing the reform of public administrations. Given the absence of equivalent competences in the framework of the acquis, it does not come as a surprise that the Commission had to newly establish standards to define what makes an ‘efficient’ and ‘effective’ administration. This happened step-by-step in the course of the pre-accession process in which the notion of administrative capacity was first more narrowly limited to sectoral matters of the acquis and the administrative and juridical ability to apply it, to be later extended to general horizontal administrative capacities. The respective policy tools the Commission developed alongside were, on the control side, monitoring starting with the initial Opinions and refined in the Regular Reports. This was extended to the ‘prescription’ of specific national targets contained in the Accession Partnerships. On the side of assistance, the financial resources were subsequently increased within Phare, moreover specific programmes were set up to prepare the states for participation in the agricultural and structural policies of the EU. Most markedly, a significant innovation regarding the main instrument for technical assistance was introduced with the establishment of the twinning instrument in the framework of the Technical Assistance and Information Exchange (TAIEX).

Outside enlargement policy, improving administrative efficiency and efficacy remains formally under the member states’ sovereign auspices. Yet, since the accession of the ten states in 2004, this principle no longer applies perfectly in the area most prone to incorporate the policy tools developed vis-à-vis the candidate states, i.e. cohesion and structural policy. As from the programming period 2007-2013 the distribution of financial assistance to the so-called convergence
regions and cohesion countries within the European Social Fund (ESF) is made conditional on the integration of national administrative efficiency improvement into national programming plans. The conditionality element is thus extended to member states requesting EU funding in that recipient states have to prioritise administrative capacity building as one of their programming targets, the conditions of which are subject to bilateral negotiation between each state and the Commission. Moreover, the new principle of transnationality obliges states to include inter-state exchange on technical matters, mirroring the twinning mechanism providing technical assistance. Inspired to a good degree by single initiatives for cohesion countries as from 2002 onwards, the tools integrated in the 2006 Council Regulations on the Social and Cohesion Fund take up those instruments exercised in the Copenhagen framework. They do not establish a genuine policy or competence of the Union since they apply only to states when requesting EU funds. The capacity to impact national administrative systems is nested into the distributive policy; the Commission promotes individualised standards indirectly through conditions recipient states have to comply with in order to receive funding. The inclusion of the so-called convergence criterion marks a decisive qualitative shift since it allows the Commission to judge on the national administrations’ capacities to implement community goals and to negotiate the conditions states have to meet with respect to their administrative structures and inter-state exchange. This marks the introduction of an additional conditional instrument in the distributive arena, tackling a core sphere of the state apparatuses, which has previously not been subject to EU interference. Against the expectation of pure distributive policies to emerge, the definition of a limited group of recipients and the conditionality element render the policy effectively redistributive in its outcomes. This notwithstanding, the policy is framed in the distributive arena in terms of adapting some parts of the Social Fund without involving into a debate along redistributive conflict lines. Moreover, as expected we see no extension of EU regulation towards more formal harmonisation but member states promote voluntary cooperative networks. The extended Commission action capacity is thus based on conditionality-bound distributive policy tools, with only limited additional steps towards soft regulation.

**Status Quo Ante:**

**National Administrations as National Business**

The question of the actual ‘administrative capacity’ of member states remains outside the Commission’s sphere of influence. Supranational actors have no say on the quality of member state
institutions to comply with the acquis. A formal regulatory policy to harmonise national administrations remains unperceivable given the regime character of the EU, thus supranational influence is limited at best to soft law or distributive measures that support certain national reform efforts. Nonetheless, there are many indirect ways and related fields in which the supranational level affects national administrations. I will therefore start with a definition of the terminology and demarcate the concept from other related ones.

The term institutional capacity is used interchangeably with the term administrative capacity, institutional capacity building is concerned with improving the efficiency and effectiveness of national administrations. It needs to be distinguished from processes of supranational impact on national structures by processes of Europeanisation. The way it was defined in the Copenhagen framework, it was also distinct from a more global approach to ‘soft harmonisation’ through cooperative networks between member state administrations (Mangenot 2005; D’Orta 2003), which is, however, strongly linked.

An adjacent but distinct field is a long-established Community competence regarding Services of General Interest. Hence, if taking a broader angle, the Commission has been dealing with national administrative structures since the early days of European integration. Yet, there remains “a difference in terms of definitions: whereas the field of public administration remains nationally defined (only some posts are defined by the Community), the very concept of services of general interest was developed by the European Community” (Mangenot 2005: 4). Roughly speaking, the services of general interest that developed from Treaty of Rome’s initial mentioning of services of general economic interest, are derived and related to the Community’s economic realm in the broadest sense.

Besides this, administrative cooperation between national civil services deserves mentioning since it has gained some more structured shape, most visibly in the framework of the European Public Administration Network (EPAN). EPAN was founded in 1983 and has held biannual meetings at the ministerial level since 1991. Despite these incremental advances regarding national administrative systems of the EU member states, the EU’s steering instruments on the member states’ civil services remained either limited or derived from the Community’s economic responsibilities or restricted to the facilitation of inter-state cooperation. Other than this, the matter of the general horizontal ‘administrative capacity’ of member states was for a long time a non-issue.

The topic was touched upon in the framework of the Constitutional Convention. The innovations of the Lisbon Treaty will widen the legal basis for administrative cooperation in areas in which the “Union shall have competence to carry out supporting, coordinating or complemen-
tary action” (Council of the European Union 2004: Art. I-17, applicable according to first paragraph Art. I-37). This legal basis will allow the adoption of EU legislation to assist the member states’ efforts in improving their administrative systems. At the same time, harmonisation in the field remains explicitly forbidden, which enables the member states alone to opt for or against Union support independent of the Commission’s prerogatives (Verwilghen 2007: 740). Furthermore, the Charter of Fundamental Rights confers the “right to good administration” (Art. 41). To estimate the impact of this article can at date only be matter of speculation. It might become a door opener for future jurisprudence of the ECJ and could therefore lead to the positive formulation of administrative standards, formally however limited to areas that concern the national execution of EU law.

Institutional capacity building concentrates on reforms of national administrative structures to achieve particular policy goals or to improve civil services at large. This is either as a follow-up to legislative transposition, i.e. to ensure that transposed EU legislation is indeed implemented, or it concerns the establishment and improvement of public service structures to achieve more general Community objectives. The latter has been linked to technical and financial assistance provided to national or regional units. Support to the improvement of national civil services – unlike general administrative cooperation – has been applied in a rather ad hoc manner so far. Only with the programming period starting in 2007, a global strategy has been put in place that mainstreams ‘administrative efficiency’ across the European Social Fund measures.

A qualitative novelty in this respect first occurred in the Union’s structural policy with projects for Greece and Portugal. Projects for the overall modernisation of public administration and a “completely new programme – exclusively dedicated to the development of administrative capacity” (Commission of the European Communities 2006h: 11) were set up in response to demands of these states for Community funding to support national administrative reforms in more general terms. Whereas the European Social Fund has since the 1994-1999 programming period offered technical assistance to support the implementation of the Fund’s objectives (such as developing employment services, as well as education and training systems), the pilot projects for the two cohesion countries went beyond this scope in that “since the early 1990’s, ESF has supported comprehensive reforms of the administrations in several Member States” (ibid. 11). The Portuguese programme, which was introduced after the 2003 mid-term review of the Social Funds programming period 2000-2007, served as a template for the further elaboration of a more general ‘institutional capacity priority’ which I will turn to in the last section of this chapter.
In sum, the Union has no genuine competences on the structure and workings of member state administrations; efficiency and efficacy of national administrations remains an exclusive state domain. Yet, from the 1990s onwards some punctual projects have been financially supported by the EU, which marked the emergence of a distributive policy to promote wider goals in improving the efficiency of national administrations, especially in implementing the obligations of the acquis and the objectives of the Lisbon Agenda. Although there is no binding acquis laying down precise standards and benchmarks, a nascent distributive policy is emerging within the structural funds. Moreover, non-binding links between the member states have been strengthened in the framework of EPAN.

PRE-ACCESSION PHASE:
FOSTERING COMPLIANCE BY IMPROVEMENT OF NATIONAL IMPLEMENTATION STRUCTURES

Administrative capacity was the last explicit accession criterion to be formulated. It was put down after 1993 when the pre-accession strategy was developed. The emphasis on administrative capacities increased steadily in the late 1990s. It was formally linked, on the one hand, to the demand on rule of law under the democracy criterion and, on the other, the implementation of the acquis to comply with the obligations of membership. As an explicit criterion, administrative capacity was introduced by the European Council of Madrid in 1995, on the basis of which it was included in the Commission’s 1997 Opinions, which for the first time referred to “the criterion in its own right” (Verheijen 2000: 16). It gained additional weight in the preceding Regular Reports, especially the horizontal notion of administrative capacities in general which went beyond the narrower notion of sectoral capacities to cope with the adoption of sectoral obligations of the acquis. Thus, whereas “sectoral capacity was linked to particular parts of the acquis, horizontal capacity, emerged as synonymous with administrative reforms” (Dimitrova 2005: 80).

53 The Lisbon Agenda, also known as Lisbon Strategy or Lisbon Process, is an action and development plan for the European Union. Initiated by the European Council of Lisbon in 2000, the process aims at making the EU “the most dynamic and competitive knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion, and respect for the environment by 2010”.

54 The main requirements associated with the ‘bureaucracy criterion’ emerged as sectoral capacity to implement sectoral acquis; the development of European integration co-ordination structures; horizontal reform of the administrations including civil service laws and a strategy for comprehensive public administration reform; and, finally, ‘ability to implement’” (Dimitrova 2002: 179).
This re-emphasis towards general horizontal capacities is reflected also in pre-accession assistance. While the need for sectoral capacities featured already in the first Phare programming (December 1989, still only for Poland and Hungary) that was based on a project-focused and demand-driven approach, it was step-wise expanded. The European Council of Essen (1994) re-defined Phare and its role as pre-accession instrument, including all candidate states besides the originally two targeted countries. The instrument was now to focus on providing know-how and technical assistance and, where necessary, humanitarian aid. As progress was made, the demand for technical assistance declined in relative terms and the need for investment aid, particularly in areas such as infrastructure and environmental protection, increased considerably. Phare’s overall objective was in this vein reformulated by the Council in 1999:

“Whereas the PHARE programme set up by Regulation (EEC) No 3906/89(6), will in future focus on the essential priorities linked to adoption of the acquis communautaire, i.e. building up the administrative and institutional capacities of the applicant countries and financing investments designed to help them comply with Community law as soon as possible”; and further amendments were made to the end that

“[f]or applicant countries with accession partnerships with the European Union, funding under the PHARE programme shall focus on the main priorities for the adoption of the acquis communautaire, i.e. building up the administrative and institutional capacities of the applicant States and investment, except for the type of investments financed in accordance with Regulations (EC) No 1267/1999(8) and (EC) No 1268/1999(9). PHARE funding may also be used to finance the measures in the fields of environment, transport and agricultural and rural development which form an incidental but indispensable part of integrated industrial reconstruction or regional development programmes” (Council of the European Communities 1999).

Likewise, the Agenda 2000 identified institution building as one of the two key areas of Phare, besides the access to EU programmes. Further support was channelled through the preparatory instruments ISPA (Structural Funds) and SPARD (Common Agricultural Policy). Moreover, Phare provided a tentative definition of the term: “Institution building means adapting and strengthening democratic institutions, public administration and organisations so that, once adopted, EU legislation or the national equivalent is properly implemented and enforced. This requires development of the necessary structures, human resources and management skills” (Commission of the European Communities 1999).

Yet, in the absence of an acquis on horizontal administrative capacities, the Commission lacked standards to transpose the criterion into measurable benchmarks. In a first step towards the op-
eralisation of the criterion, the Commission requested assistance from the member states in 1996. Input remained limited and came foremost from the UK. “According to a Commission source, ‘we never found a way to judge administrative capacity among the existing member states. It was only in the case of the Central and Eastern European candidates knocking on our door that we erected the barrier of administrative capacity’” (Dimitrova 2002: 178). Nonetheless, no EU concept of administrative capacity was ever defined. Instead, the EU relied on external sources “as far as administrative capacity assessment is concerned, based on inputs provided by a new assessment tool: the SIGMA baseline assessment. This system is a response to the lack of specificity in horizontal administrative capacity assessment, combined with the perceived lack of accuracy by candidate states of previous assessments” (Verheijen 2000: 17). Cooperation with the Support for Improvement in Governance and Management (SIGMA) programme, operating under the OECD Public Management Service (PUMA) and funded mainly through Phare provided the main tool for the assessment and support of administrative capacity in the candidate states. The SIGMA baseline criteria outlined for the first time minimum standards for horizontal administrative capacities (Verheijen 2000: 19). Regarding administrative capacities, the internal cooperation within the Commission was remarkably weak – if not completely absent. Thus, in DG Enlargement “the Commission sought expertise not from within the organisation (we certainly did not consult our Directorate General for Administration!) or from other EU organisations, but from a non-EU source, OECD’s SIGMA” (official DG Enlargement, written exchange September 2007).

As the main implementing tool, the Commission launched the twinning programme in 1998. The wording of the twinning manual “reflected the Commission’s eagerness not to repeat some of the mistakes which have tarnished the reputation of other Phare-funded projects in the past: namely, the vagueness of objectives, difficulties in monitoring progress and evaluation, and the reliance on expensive short-term western consultancy with few concrete results (Mayhew 1998a: 138–50; Bailey and Propris 2004)” (Papadimitriou and Phinnemore 2004: 624). From 1999 onwards, twinning was to support the capacity building for the implementation of the acquis, such as agriculture and fisheries, environment, structural funds, social policy, public finance and internal market, justice and home affairs, transport, energy and telecom.

It has been argued that, the Commission relied so exclusively on twinning that it came under attack by the Court of Auditors. “Institution-building is not equivalent to twinning. However, some representatives of the candidate countries criticised the Commission’s tendency to over-emphasise twinning at the expense of other mechanisms directed towards institution-building
that are eligible for support (general horizontal support to public service [...], private sector service contracts, participation in Community programmes)“ (Court of Auditors 2003b: 31). This imbalance owed in great part to the legal discrepancy of missing EU standards and benchmarks for efficient administrative structures. This especially hampered the promotion of de facto implementation beyond legal adoption of reforms which gained increasing attention as the pre-accession process drew to an end (Grabbe 2001: 1018-19).

The Court of Auditors underlined the same point in particular for the environmental sector. Criticising that the Commission concentrated too much on the twinning instrument that was based on strong member state cooperation paired with a lack of measurable criteria to evaluate institution building, the Court stated: “The fact that there is no acquis in relation to institution-building means that the standards to be achieved by public administrations are not specified and the Commission has not established objective and measurable criteria to define the level of ‘adequate’ administrative capacity in the environmental sector although it has done this in other areas to the extent that the acquis enables it to do so” (2003a: 7). The Commission, in turn, defended the excessive use of twinning precisely with the lack of clear and measurable standards – and the fact that such benchmarks were impossible to create. Accordingly, the loose exchange of practices was defined more a virtue than a weakness in exploring ways to adapt the candidate states’ administrative structures to some kind of shared standard of the member states:

“In the absence of any specific acquis as the Court observes and in the context of subsidiarity the Commission has not established criteria to define overall levels of capacity, as this is not applied to the diverse administrative cultures of Member States. Consequently, it is not possible to invent separate standards for candidate countries. This is precisely why twinning was so essential in exposing the candidate countries to existing practices, particularly given the fact that the Commission does not implement or manage the main body of the acquis but Member States do. Thus, the Commission pioneered an unprecedented strategy in an area at the limit of its competence to transfer know-how on complex technical issues from diverse administrative traditions to equally diverse candidate countries. Within this strategy the Regular Reports (on which the strategy papers and Accession Partnerships are based) tactically targeted the priorities and mobilised political will and resources in the Candidate Countries. The positive feedback from EU administrations engaged in twinning was essential in building the confidence that secured closure of the negotiations in Copenhagen. This evident success was one of the results undeniably delivered by twinning.” (Court of Auditors 2003a: par. 14)

Despite the weaknesses of the eclectically developed approach57 and despite the underspecified definition of its standards, some observers have ascribed the Commission an important role in promoting administrative reforms. “The reform of the civil services in the candidate countries has taken place in recent years in no small measure due to the political pressure of the European Commission, which has deemed a well-functioning administration and an efficient judicial struc-

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57 The Commission conducted a number of evaluations and subsequent improvements of the twinning instrument, see: Ad Hoc Report on Twinning Instrument, OMAS Consortium (24 October 2001); Commission of the European Communities 2000: Report on the Assessment of the Twinning Instrument under PHARE (July); and the subsequent revisions of the Twinning Manual.
ture to be important criteria for accession. [...] However, the criteria applied in assessing the efficiency and effectiveness of the civil service were not always clear” (Bossaert and Demmke 2003: 4). Also, for the shift in emphasis form reforms in the economic sector to institution building, EU conditionality was attributed a relevant role (ibid. 2003: 6), and “[g]iven empirical evidence not only for rule adoption but also in some cases of a direct link between administrative reform legislation and the start of the respective candidate state’s negotiation for membership, we can conclude that conditionality matters” (Dimitrova 2005: 89).

Nevertheless, there remained substantial doubts about the real success of administrative reform attempts. In absolute terms, the objective to not only transpose but to implement the full acquis on the ground could hardly be achieved before accession. Thus, as pointed out in academic accounts and the Commission’s Regular Reports, although many announcements and drafts were produced, as far as effective implementation was concerned “there are strong indicators that progress in horizontal administrative capacity development has been limited at best” (Verheijen 2000: 24-25). The evaluation of the actual functional value-added is thus ambivalent.

However, to conclude that the policy was dysfunctional because the ultimate goals were not fully achieved would be overly harsh. The Commission’s increasing emphasis on administrative capacities found resonance and was therefore crucial, and – even if no silver bullet – twinning remained the best option since it was the only policy tool available considering the lack of uniform standards across the different states and the impossibility of harmonisation other than through cooperation and exchange in the absence of a single administrative space with a coercive monopoly of the EU.58 This leads to the overall conclusion that, although “the European Union has played a significant role in this process [...] institution-building in the case of horizontal administrative reform has had mixed success in the post-Communist candidate states” (Dimitrova 2002: 172).

Growing awareness of the problem in view of minimum standards – even if well contained as SIGMA baselines outside the EU framework – and the conviction that the challenges in the future member states would not be resolved before accession, resulted in increased functional pres-

58 “The idea of a ‘European Administrative Space’ was put forward by SIGMA in 1998. For this organisation, which was created within the OECD but is financed primarily by the European Union, ‘it is clear that a ‘European Administrative Space’ is now beginning to emerge’. SIGMA reached similar conclusions in 2000. According to a new study, the ECJ’s strict interpretation of article 39(4) of the EC Treaty and of the concept of ‘public administration’ will lead to the creation of a administrative space in the Member States” (Mangenot 2005: 13). Yet, such a development should occur, if at all, more through cooperation and exchange, it seems unlikely that the ECJ would indeed interpret the Treaty in the direction of creating hard Community competences for harmonising national civil services.
sure for continued EU engagement. “Administrative capacity assessments have generally produced a picture of lack of progress, regardless of statements of intent, reform strategies and even adopted legislation” while it was seen that the “entry of a large group of new member states with inadequate administrative capacities can pose threats to the EU as political and administrative system, in particular to the decision-making system and the policy implementation system” (Verheijen 2000: 61). The very evaluation that administrative reforms had not fully achieved the desired outcome gave rise for concern that insufficient administrative capacities in the new member states would affect the principle of mutual trust between member states, and could impact negatively on economic development in the respective states (ibid. 2000: 50). Even though the effect of EU conditionality was disputed, functional pressure remained in the absence of credible alternative policy instruments while faced with the potential problems that related “both to participation in the EU decision-making process and to the ability to cope with the administrative workload generated by EU membership” (ibid. 2000: 53).

In a nutshell, functional pressure derived from (a) demands by cohesion countries to continue Community support for administrative reforms, (b) the candidate states whose administrative capacities were arguably not yet fully capable of implementing and enforcing the full acquis. We can assert functional pressure because despite its fallbacks, the policy was extended instead of being abandoned. There were, moreover, concerns about the sustainability of the results of twinning in the new member states due to the high turn-over in public administration staff and remaining weaknesses of the general framework for public administration and systemic failings of the systems (Court of Auditors 2003b: 28). Thus, the question of how to go beyond policy formulation and ensure actual implementation of the acquis, both in the new and some of the old member states, remained unresolved. Instruments to respond to these two target groups were needed but there was only limited legal latitude for regulatory measures. What is more, an instrument offering financial and technical assistance was asked for by some member states themselves while, at the same time, voluntary cooperative structures between the member states further flourished. Although rising functional pressure triggered also new Commission tools inside the acquis, there is no evidence for unintended consequences during the pre-accession phase because the pilot projects put in place were a response to member states demands and therefore anything but outside the states’ intentions.
STATUS QUO POST:
CONDITIONAL DISTRIBUTIVE POLICIES AND VOLUNTARY COOPERATION

The main challenge beyond enlargement was to create means to impact on the \textit{de facto} implementation of the acquis in the member states, i.e. the administrative functioning beyond the mere transposition of legislation. Moreover, the improvement of civil services as such to ensure wider goals of stability and economic growth had moved up on the common agenda. A response has been accommodated in the revised regulations of the \textit{European Social Fund} for the programming period 2007-2013.\footnote{The respective legal bases are: (Council of the European Union 2006a; European Parliament and Council 2006a, b, c; Council of the European Union 2006b, c).} Novel about these revised eligibility rules for the Social Fund are, first, the definition of goals for a specific \textit{convergence objective}; second, the introduction of a \textit{strategic framework} that each recipient state has to negotiate with the Commission alongside the objectives set out by the Council; and third, the extended policy tools that oblige the recipient states to include into their programming \textit{inter-state exchange} of the twinning type.

These changes mean, on the one hand, a substantial qualitative widening of ESF objectives which, referring to the obligation to implement the Lisbon Agenda, now recognises explicitly that \textit{“[i]nstitutional and administrative capacity includes the ability of Member States and regions to contribute to the European Union’s objectives and to fulfil the conditions and obligations arising from membership”} and that to this end, \textit{“for the future programming period, the strengthening of institutional and administrative capacity will be generalised and will be one of the main ESF priorities”} (Commission of the European Communities 2006h: 3-4).

As pointed out in the previous section, functional pressure augmented because administrative reforms in the entering states were not considered sufficient. As later studies confirm, even where administrative reforms had been implemented these were often questionable effect in the mid-term (Meyer-Sahling 2001) or essential parts of reforms were even reversed at a later stage (World Bank 2006). These effective outcomes create a dilemma for the EU: reforms introduced before accession had only limited lasting effect increasing the pressure to act, yet the establishment of other more coercive instruments is and is to remain outside Community competences – let alone the question what would indeed establish such effective instruments. The measures within the ESF do not establish a comprehensive new approach. Much rather, the transfer of instruments developed in the Copenhagen framework were the only available tools to exert any coercion at all.
Council Regulation 1083/2006 newly defined a *convergence objective* for the regions that correspond to the NUTS 2 level, i.e. regions with a GDP below 75% of the Union average (Council of the
European Union 2006a: art. 5(1)). Only for the regions under the convergence objective (see Figure III.1), the national strategic reference framework needs to include “the action envisaged for reinforcing the Member State’s administrative efficiency” (Council of the European Union 2006a: art. 27(4, f, i)). The revised EP/Council Regulation on the Structural fund defines further that for areas under the convergence objective the Fund should work towards “strengthening institutional capacity and the efficiency of public administrations and public services at national, regional and local level and, where relevant, of the social partners and non-governmental organisations, with a view to reforms, better regulation and good governance especially in the economic, employment, education, social, environmental and judicial fields, in particular by promoting: (i) mechanisms to improve good policy and programme design, monitoring and evaluation, including through studies, statistics and expert advice, support for interdepartmental coordination and dialogue between relevant public and private bodies; (ii) capacity building in the delivery of policies and programmes in the relevant fields, including with regard to the enforcement of legislation, especially through continuous managerial and staff training and specific support to key services, inspectorates and socio-economic actors including social and environmental partners, relevant non-governmental organisations and representative professional organisations” (European Parliament and Council 2006b: art. 3(2)b).

Both monitoring and evaluation mechanisms are operationalised by introducing the National Strategic Frameworks that define objectives and goals ex ante, while in the previous programming period of the Social and Cohesion Funds projects were appraised ex-ante after a structured assessment of the social and economic situation, paying special attention to the environmental situation, equal opportunities and the expected impact of measures. In the different programming periods this exercise was carried out first by independent evaluators, then the by Commission and was eventually left to the member states (Bachtler and Wren 2006: 145-46). In contrast, for the 2007-2013 programming period, the Commission negotiates individual Programmes with the recipient states. It goes hence beyond the previous strong concentration of evaluations on the project level (Florio 2006) by formulating also more overreaching objectives to be achieved in a “strategic framework”.

Concretely, states benefiting from the European Social Fund are obliged to respond to the strategic guidelines spelled out by the Council, including the objective of improving administrative efficiency. This has to be either through particular projects or inclusion of the objective into wider programmes and is subject to negotiations with the Commission that result in “national reference document” as framework for the operational programmes (Council of the European Union 2006a: art 34). These National Strategic Reference Frameworks (NSRF) are hence a new tool that allows including ex-ante an additional conditional element to promote explicitly the objective of horizontal institution building, beyond the previously more narrowly defined assistance to im-
plement the ESF itself. The NSRF is a tool similar to the individual National Action Plans introduced in the later stages of the pre-accession policy based on the Accession Partnerships.\(^6^0\)

There is a visible continuity to the pre-accession implementation framework in that the definition of what constitutes efficient administrative capacities remains not clearly defined. Instead, it is established individually in interaction between each state and the Commission, which gives the latter considerable discretion on how to operationalise the Council’s guidelines. Within the organisation, there is coordination on different levels of the Commission.\(^6^1\) A very rough guideline of what should be considered essential for administrative reforms has been formulated in a meeting of the responsible national ministers stressing “the need to adapt legislative and administrative structures, the need to improve services to all clients and especially to citizens and enterprises, [and] the need to invest into people” (Commission of the European Communities 2006e). This vague formulation hints at the very early stage at which the policy remains. Unofficially, the Commission also refers indirectly to the World Bank and OSCD indicators, which have however not the status of official benchmarks but offer some more directly applicable operationalisation (Interview 2007 DG EMPL). This notwithstanding, on an individualised basis more concrete goals are negotiated with the eligible states to be then monitored by the Commission in order to respond to the particular needs of each state instead of aiming for some kind of generalised harmonisation.

The essential change of the new regulations is that assistance goes intentionally and conditionally beyond the previously available technical assistance that focused exclusively on the implementation of ESF, hence “the ESF will continue to finance actions aiming at supporting the structures for the management and implementation of the Fund. This is financed with Technical Assistance and should therefore be clearly distinguished from the activities under the institutional capacity priority. The objective of the institutional capacity priority is to support the reform

\(^6^0\) For a list of the NSRFs: http://www.central2013.eu/fileadmin/user_upload/Downloads/Document_Centre/OP_Resources/scoreboard17082007.pdf (accessed 14 August 2008). To provide but some examples, the Bulgarian NSRF includes a chapter “2.2.4.2 Reforming the Administrative Bodies of the Executive Power”(see: http://www.eufunds.bg/docs/NSRF%20Bulgaria%202007-2013%20-%20very%20last%20ENG.pdf); the Estonian Framework includes chapter “2.15 Administrative Capacity Building”, stating that “[a]t each level of policy-making, the quality of policy design and efficiency of policy implementation can be significantly improved” (p. 56), providing the current and intended measures in this direction (http://www.strukturfondid.ee/public/Estonian_NSRF_21June07_ENG.pdf) (both accessed on 17 June 2008).

\(^6^1\) At the lowest level are the desk-officers responsible for the different states coordinate. On the next level up are the ESF managing authorities (national missions), topped by the ministerial level.
of the administrations irrespectively of their role in Structural Funds’ management and implementation” (Commission of the European Communities 2006h: 9, emphasis in original).

In line with the argument that administrative capacities need to be supported on a basis corresponding to the specific national conditions, and therefore also in absence of generic standards, the tools for technical assistance draw from the enlargement experience by adapting instruments developed in the pre-accession context. Thus, the concept of transnationality has been introduced as a second element that recipient states are obliged to include in their national strategies. This refers to the provision of technical assistance by national administrations to promote the exchange of best practices, drawing not least on the TAIEX networks established in the Copenhagen framework, yet opening it up to exchange across member states (instead of the previous ‘teacher/student’ structure between old and future member states). Considering that in twinning programmes “the creation of an ‘administrative market’ (from where the applicant countries could ‘shop for’ the most suitable solutions to their particular problems) has been one of the top priorities of the exercise” (Papadimitriou and Phinnemore 2004: 625), transnationality is also an attempt to further profit from this ‘market’. “Twinning is another experience that we wanted to incorporate in the future programming period, not only for this administrative capacity, and something like twinning can be done in transnationality [...] the transnationality must be promoted this is the requirement of the regulation, but it is the member states’ choice if they do it across ALL policy areas that they get support for by ESF or if they chose some” (Interview 2007 DG EMPL).

In short, institutional/administrative capacity building has been incorporated into the European Social Fund for which the poorest regions of the EU are eligible, i.e. the cohesion states and convergence regions. These funds have been made conditional in two respects. First, states need to make concrete propositions on how to improve their administrative structures for implementing the acquis, as well as the wider goals of the Lisbon Agenda. Secondly, in terms of policy tools, the recipient states have to get involved into direct exchanges with other member state administrations – a means to promote some harmonisation in the absence of genuine standards and benchmarks. The Commission has remarkably wide discretion in the execution of the intuitional capacity priority since it negotiates, monitors and evaluates the states’ compliance with the individual strategic frameworks. Institutional capacity building is hence promoted through a distributive policy with re-enforced conditional elements under the umbrella of the European Social Fund. Though it is the Council that sets the general framework of objectives, the operationalisation is incumbent upon the Commission which has hence considerable discretion to interpret the
guidelines and control member states’ compliance. In the light of continuous absence of genuine EU standards and competences, the actual effect of these steering instruments may remain limited. Still, the new Social Funds regulations have offered a way to continue some Commission involvement in the consolidation of the new member states’ administrative structures through raising the conditions on patronage policies by nesting demands on national administrative structures in the formally distributive policy.

**SUMMARY:**

**INSTITUTIONAL CAPACITY BUILDING**

The functional pressure that derived from enlargement was, foremost, the need to respond to still insufficient implementation of the acquis in the new member states. Yet, shortcomings in this respect existed also in the EU-15. These two factors were reinforced by explicit demands for technical and financial support, based on positive experiences with EU-supported reforms in Portugal that aimed at improving administrative services for citizens, i.e. taking a horizontal perspective instead of focusing exclusively on the implementation of obligations linked to EU membership. The introduction of conditional assistance in member states parallel to the development of the policy tool in the Copenhagen framework was therefore no unintended consequence but an additional, intended strategic decision by national governments. General regulatory measures to transpose developed in the Copenhagen framework (in particular the SIGMA baseline criteria) remained out of question but new conditional distributive tools were established for the poorest states and regions in the EU.

The development of an EU policy focusing on horizontal administrative capacity building did not lead to a genuine new policy with hard competences for the Commission. The enlargement experience was however a forceful catalyst both for the recognition of the importance of national administrative capacities, and the awareness that further EU involvement in the future member states was needed. Although the SIGMA baseline criteria remained outside the EU framework, they established standards that have led to far-reaching suggestions for EU involvement. Thus, Verheijen even argues for the desirability and feasibility of an “administrative acquis” proper, “possibly based on the assessment criteria defined for the enlargement process” (2000: 56). Reckoning that to date member states would reject any such formalisation, which might moreover conflict with the principle of subsidiarity, the author propagates that “a charter of administra-
tive capacities, as an instrument of ‘soft law’, is a workable antidote to this likely erosion of mutual trust. Indeed, ‘soft law’ or ‘benchmarking’ is probably the only acceptable form of interference in what will continue to be viewed as an exclusively national area. An administrative capacity charter [...] would be implemented through a mechanism of peer review, with related reporting requirements. It would constitute a logical follow-up to the definition of minimum requirements carried out in the enlargement process” (ibid. 56).

The Commission itself has not even suggested a comprehensive instrument such as a charter, stressing rather the need to respond to individual national demands than proposing standardised harmonisation. Apart from the Commission’s prudence, as far as regulatory measures are concerned, the member states have driven forward some limited promotion of non-binding coordination of national civil services outside the enlargement context. In 2000, the European Council adopted a Common Assessment Framework (CAF), guidelines for which were approved in 2001. This “voluntary assessment framework aims to be ‘an aid to public administrations in the EU’ in the use of quality management techniques in public administration” (Dimitrova 2002: 182). This notwithstanding, these guidelines depend on the responsiveness of EU member states which leads to the conclusion that in a more binding way “none of the above SIGMA defined ‘principles’ can be identified as common EU norms or that they are in the process of negotiation in the EU itself and are not sufficiently specific yet” (ibid. 2002: 182).

Notably, the way action capacity was framed outside the Copenhagen framework took account of the hurdles for hard regulation. It focused on the extension of capacities in the distributive realm – introducing standards through the backdoor of binding funds to conditions but evading member state resistance against new formal competences on administrative capacities.

By the same token, the innovations of the future Lisbon Treaty will widen the legal basis for EU involvement, forbidding however hard legislation, which limits the Union’s role to supportive, coordinating and complementary actions. Therefore potential future measures are also likely to be contained to the distributive arena. The introduction of conditional spending that puts demands on administrative capacities of the recipient state is an important qualitative innovation because it marks a precedent for the organisation of conditional patronage relationships in this area. Any further regulatory moves, in turn, should remain soft regulatory instruments such as benchmarking and the exchange of information. These are most likely to develop out of the Common Assessment Frameworks whose aim is “to assist public-sector organisations across Europe in using quality management techniques to improve performance” and – with also supportive
functions – the *European Public Administration Network* that serves as “platform for exchange of information concerning Europeanisation and facilitates dialogue between Public Administration teaching institutions in Europe”.62 The fact that the member states involve increasingly actively in establishing non-binding cooperation by means of CAF and EPAN took even more wind out of the Commission’s sails to suggest harmonising regulation, i.e. to frame policy tools developed in the Copenhagen framework in regulatory terms.

While enlargement may have played a reinforcing role in the emerging stronger recognition of the need for strengthened EU capacities, implementing enlargement has surely been a crucial catalyst for the development of standards for soft regulatory means and the introduction of conditional distributive policies. It created strong functional pressure whereas unintended consequences did not emerge. Quite on the contrary, parallel to the policy development in the pre-accession context claims for Community funding were raised by member states. Hence, framing the issue in the distributive realm suggested itself much more obviously than new formal regulatory claims. The latter were further weakened as voluntary cooperation between member states increased and extended the toolbox of non-binding regulatory policy instruments.

Disconfirming expectations on straightforward distributive policies, funds are targeted clearly to the poorest member states and linked to conditions for the recipients. Although introduced as an additional distributive policy in the ESF, i.e. financial and technical assistance for regional units, the convergence and transnationality criteria create in the end redistributive effects. Instead of resulting from a broad debate on redistribution favouring the new member states, these changes were introduced as a reform of pre-existing patronage policies. To contain these new patronage claims and to preserve a control tool targeted foremost at the new member states, funding is linked to conditions that in point of fact increase the Commission’s capacities for impacting on national administrations. The effect of these instruments can be expected to be weaker than the mechanisms of control use in the enlargement framework (backed by conditionality), yet, let alone the de facto effects, the Commission enters a field that had previously been absolutely outside its sphere of influence.

9 THE RESPECT FOR AND PROTECTION OF MINORITIES: EXPLOITING LEGAL GREY AREAS AND PATRONAGE POLICIES

“The respect for and protection of minorities” (European Council 1993) had strong regulatory features in the pre-accession monitoring scheme and was backed by conditional distributive policies. Although in particular the responsibilities of the office of the OSCD High Commissioner on National Minorities’ (founded in 1992) overlap with those of the EU, both civil society and political actors alike attributed a distinct role and added value to the EU’s promotion of minority rights in the central and eastern European states. This is not least reflected in manifold public calls that the end of the pre-accession policy would lead to a considerable gap in the effective protection of minorities.

Although the explicit focus on minorities was absolutely new in the Copenhagen context, strong links to the increasingly strengthened anti-discrimination acquis exist. Hence, a spill-in of minority competences to the formal acquis would be strongly constrained by pre-existing rules. More decisively, unlike anti-discrimination, which establishes individual rights, collective minority rights have a social redistributive element (Table III.3 summarises the empirical indicators).

If framed in terms of binding laws on minority protection, no spill-in should be expected; spill in should emerge in if standards for the protection of minorities are framed non-bindingly in the regulatory arena and as distributive policy offering both financial and technical assistance.

<table>
<thead>
<tr>
<th>INDEPENDENT VARIABLE: POLICY TYPE</th>
<th>DEPENDENT VARIABLE: ACTION CAPACITY (EX POST)</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Distributive Policy</em></td>
<td></td>
</tr>
<tr>
<td>Policy formulated as win-win distribution of funds</td>
<td>New institutionalised budgetary powers of the Commission distributed to all member states or contained by conditions for recipients</td>
</tr>
<tr>
<td></td>
<td>New budget lines distributed along member-state class lines (→ redistribution)</td>
</tr>
<tr>
<td><em>Regulatory Policy</em></td>
<td></td>
</tr>
<tr>
<td>Policy formulated as constraining actors’ behaviour</td>
<td>Non-binding rules and standards (lacking tools to sanction member states)</td>
</tr>
<tr>
<td></td>
<td>New non-binding cooperation among member states (e.g. peer-review, benchmarking)</td>
</tr>
<tr>
<td></td>
<td>New hard regulatory competences (giving Commission tools to sanction member states)</td>
</tr>
</tbody>
</table>

Expectation: Policy objective (minority protection) can be framed in distributive terms and there is scope for control on national regulation without creating new hard competences at the EU level, so spill-in should emerge.

Table III.3: Empirical Indicators, Minority Protection

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63 This holds especially for so-called ‘old’ minorities, defined as national minorities in contrast immigrant ethnic groups, so-called ‘new’ minorities (Kymlicka 2000; Kymlicka and Opalski 2002).
PART III: EMPIRICAL ANALYSIS

The supranational level had no competences whatsoever in the field when minority protection was established as one of the core criteria for accession. Hence it has even been described as “a commonplace that the process of Eastern enlargement can be regarded as the primordial catalyst moving the protection of minorities onto the European Union’s (EU) agenda” (Toggenburg 2006: 1). While formal competences on minorities proper remain absent, especially in the area of anti-discrimination a substantial acquis has been developed since. The emergence of this acquis was not as such was not a matter of spill-in from enlargement policy but it offered a framework to which instruments developed in the pre-accession context could be linked to.

The formation of capacities in the Copenhagen framework was based on norms and standards defined by international instruments outside the EU. These applied implicitly to the EU by virtue of membership of the member states to key agreements. From these the Commission derived definitions and benchmarks to monitor and evaluate the criterion in the candidate states. The existence and successful application of these instruments lead to (a) a limited and implicit formal extension of the anti-discrimination acquis in Amsterdam (and mentioning in the draft constitutional treaty), (b) the informal extension of the Commissions capacities regarding the monitoring function – exercised by an agency with regard to all member states –, and (c) financial support for minority programmes focusing on Roma communities in all member states. In sum, the Commission could extend its action capacity in the field of minority protection informally continuing both its monitoring and assistance functions and by linking it to the formally extending anti-discrimination acquis.

STATUS QUO ANTE:
A STRONG CRITERION WITH WEAK LEGAL BASIS

In 1993, no competences regarding minority policy were established on the EU level. To assess which capacities were established after the pre-accession phase, some remarks on the EU’s more general handling of human rights are required. Human rights have gained considerable importance in the EU’s external action since the 1990s (Brandtner and Rosas 1998: 468). However, the Union is marked by a fundamental discrepancy between the internally and externally applied standards for evaluating respect for human rights (Williams 2000: 616). Overall, the EU suffers from “inconsistency, inherent in the CFSP, whereby the Union decries violations of human rights abroad yet has no voice with regard to human rights problems at home” (Clapham 1999: 639).
When the minority criterion was established for outsiders who wanted to join the Union, no equivalent regulations or standards existed on the EU level, causing a normative and a practical problem. Conditionality exercised through the Copenhagen criteria draws its legitimacy essentially from the fact that the conditions imply necessary adaptations to the EU-acquis, a justification hard to sustain for criteria that go beyond the acquis. Inherent to the demand for minority protection is this legitimacy problem of conditionality-based enlargement policy (see also: Wiener and Schwellnus 2004: 2-4). Consequently, also the rules monitored in the accession context could not be derived from established EU legislation. Alternatively, the Commission filled the criterion with meaning derived from a set of international standards, most importantly the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR, Council of Europe, 1950). The Commission did so despite the fact that the Union (the European Community respectively) itself has not joined the ECHR. The EC/EU’s abstention from the ECHR has been strongly criticised, so Alston and Weiler state: “It appears to be highly anomalous, indeed unacceptable, that whilst membership of the Convention system is, appropriately, a prerequisite of accession to the Union, the Union itself – or at least the Community – remains outside that system. The negative symbolism is self-evident” (1999: 30), and Brandner and Rosas add that the fact that “the Community remains formally outside the written conventions, including the ECHR [...] is regrettable, as it means that the EC is not directly responsible for the execution of these conventions” (1998: 490).

This critique loses some bite considering the ratification by all EU member and applicant states. Moreover, the European Court of Justice has systematically taken direct reference to the convention as guideline for its jurisdiction. This practice has been strengthened by the introduction of Article F(2) in the Treaty of Maastricht as well as Article 6 in the Treaty of Amsterdam. Nonetheless, well into the 1990s the ECJ insisted that a Community accession to the convention was impossible without prior changes to the Treaty. Exposing the ECJ’s and the member states’ motives behind the long resistance to an EC accession to Convention, Gaja concludes that “what is at stake is the conservation by the Court of Justice of its present functions” (1996: 988). Accession to the ECHR would give the *European Court of Human Rights* in Strasbourg certain supervisory power over the ECJ. Hence, preventing an accession, “the Court has discouraged any external review of the way in which human rights are protected within the Community system” (Gaja

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64 The Treaty of the European Union in its Maastricht version refers to human rights in the preamble, in Article J.1 and K.1 with regard to fundamental rights in the fields of Common Foreign and Security Policy and Justice and Home Affairs, as well as Article F(2) that relates to international instruments representing “the constitutional traditions of the Member States”.

Likewise the proclamation of the *Charter of Fundamental Rights of the European Union* (Nice, 2000) did not immediately change the legal situation within the EU. Although the general attorneys of the Court refer regularly to the Charter, it lacks formal legal status.

Against the background of this long-dominant opposition, the Lisbon Treaty will mark a decisive turning point because it will both give the Charter legal force and set off the process for EU accession to the ECHR. As concerns concrete minority rights however, the Constitutional/Lisbon Treaty “astonishes in its strong symbolic pro-minority message but disappoints in its rather weak policy relevance” (Toggenburg 2006: 10), since it will arguably have no substantive effect on the current legal practice and does not change the formal status of concrete minority rights in the EU.

Besides fundamental rights (Article 6 TEU), on which anti-discrimination and minority rights are based, the Union’s economic acquis is the second important legal basis for minority protection. Both a substantial acquis as well as a non-binding acquis exist on particular aspects. While this acquis has extended – in the instrumental disguise of measures supporting the Common Market rather than promoting certain values – collective minority rights remain excluded and the principle of protection of individuals against discrimination prevails. Regarding individual anti-discrimination, the most important innovation was the introduction of an anti-discrimination acquis in the 1996 Treaty of Amsterdam (Art. 13), on the basis of which anti-discrimination directives were passed in 2000.

The development of this new wider anti-discrimination acquis was itself not caused by spill-in from enlargement. A. Geddes and V. Guiraudon analyse how the policy-paradigm underlying the anti-discrimination policy emerged on the EU level and explain the emergence the of the 2000 anti-discrimination Directives as a ‘framing process’ in which contrasting member state positions were moulded. Accordingly, they “hypothesise that the success of a frame at the European level is contingent upon the specificity of the European ‘venue’, its institutional setting and its decision-making modus operandi” (Geddes and Guiraudon 2004: 335). As they point out “the intergovernmental impetus to action came from state-level reaction against racist and xenophobic

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66 The EU Charter was solemnly proclaimed by the Council, the European Parliament and the European Commission on 07.12.2000; cf. OJ C364, 18.12.2000, p.1-22. Since it is included as the second part of the Treaty for a Constitution for Europe, an enforcement of this Treaty would give the also the Charter a formal legal thrust.

outrages early in the 1990s” (ibid. 2004: 341-42). Very much in line with the theoretical model proposed in the current study, the expected effects for the member states were essential; i.e. for the two states under perspective the low adaptional pressure for the UK and in the case of France “[a]nti-discrimination had advantages since it cost little – much less than redistributive measures such as politique de la ville and shifted the blame to non-state actors, such as employers and nightclub owners” (ibid. 2004: 345). In the process “the two main factors that explain why an anti-discrimination Directive with a distinct Anglo-Dutch flavour was adopted are policy and ideational linkages to the fight against xenophobia and an equal opportunity frame inherited from the EU gender and equal treatment legislation. To the extent that our qualitative research design can ‘measure’ the respective importance of independent variables, policy linkage was key, because it accelerated the negotiations and silenced potential opposition from employers and national bureaucratic actors” (ibid. 2004: 350). The directive was, however, much quicker adopted than could be expected, and the “single factor most often mentioned to explain why the Race Directive was given priority and its negotiation accelerated is Jörg Haider” (ibid. 2004: 346). This must again be seen in the context of the particular frames held by some member states in the face of the Haider’s right-wing party entering government in Austria: “the success of Haider’s party could act as an accelerator for EU negotiations only because for some key member states – France and Germany – anti-discrimination is synonymous with anti-racism and resonates with post-war attempts to fight the ideas of the extreme right” (ibid. 2004: 347). The birth of the anti-discrimination directives happened independent from enlargement. This framework that emerged in parallel offered subsequently options to integrate specific instruments from the pre-accession context that specialised on minority issues. Just as policy-linkage and the avoidance of openly redistributive policies had been essential for the establishment of the anti-discrimination acquis, these mechanisms were essential for the spill-in of instruments of minority protection.

In sum, at the time of mandating minority policy as one of the key areas regarding the Commission’s approach towards the candidate states, human rights were only insufficiently institutionalised on the EU level – whereas minority issues were completely absent. Moreover, while the definition of minority rights in the realm of enlargement marked a fundamental qualitative shift embracing the principle of collective rights, the incremental advances on the supranational level remained committed to the paradigm of individual rights protection. Hence, from its outset minority policy in enlargement context created strong functional pressure due to the double standards it evoked.
The transfer of competences regarding minority policies in the Copenhagen framework was by virtue of the Copenhagen criteria. Part of the political conditions to be met by the candidate states was “the respect for and protection of minorities” (European Council 1993). Along these lines, minority protection was given a twofold meaning. In addition to the protection from discrimination of individuals, the criterion implies the provision of special, also collective minority rights (cf. Open Society Institute 2001: 16; Wiener and Schwellnus 2004: 8-9). The protection of individual rights already represented a generally accepted norm since the Helsinki Final Act (Conference for Security and Cooperation in Europe, 1975). Rights referring to minorities as groups were, on the contrary, formulated for the first time by the Organisation for Security and Cooperation in Europe (OSCE) at the beginning of the 1990s (Hughes and Sasse 2003: 8). The phrasing and definition in the Copenhagen criterion conform to this turn towards the inclusion of collective rights. For the candidate states this entailed decisively higher requirements for norm adaptation than minority protection limited to individual anti-discrimination. Outside the Copenhagen framework, this normative re-interpretation remained limited mostly to a rhetorical meaning, neither did the EU member states oblige themselves to the extension of minority protection to include collective rights. Even more so, the heavily diverging definitions of minority protection on the national levels in the various member states persisted and none of the EU Council Decisions extended beyond individual rights after the declaration of the Copenhagen criteria (Hughes and Sasse 2003: 4-10).

Faced with the discrepancy between a rather explicit external criterion and an internal legal blank, the Commission needed to set up standards and benchmarks on how to evaluate whether a candidate met the criterion – without having unambiguous reference points within the acquis to apply these ‘double standards’ (see e.g. Amato and Batt 1998) internally to the member states. It was not obvious which standards and benchmarks should be used to enact the minority criterion applying the two tools it had at its disposal, i.e. monitoring/evaluation and assistance. For both, operationalised benchmarks to measure compliance had to be found.

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68 For a detailed account of how the Commission applied the minority criterion vis-à-vis the CEEC, see (Heidbreder and Carrasco 2003).

69 I will mostly use the term ‘minority protection’ Both the two approaches to minority policy entailed in the criterion are implied, however, i.e. the protection from discrimination and the respect for specific (collective) minority rights.
Deficient of clear-cut EU regulations on minority protection, the Commission drew mainly on international instruments, i.e. standards defined by other international organisations provided the tangible basis for what was to be monitored. Besides the United Nations’ Universal Declaration of Human Rights (1949), the ECHR and the Framework Convention for the Protection of National Minorities of the Council of Europe (1995) deserve mentioning here – disregarding the fact that not all of the EU-12, and later EU-15, member states had signed and ratified the last mentioned international instruments. For the partial application of the so established standards the Commission drafted a catalogue of aspects to be monitored. This catalogue was already introduced in preparation of the Commission Opinions in 1997. In the form of a handbook, including concrete checklists, these practical guidelines were hardly adapted during the pre-accession phase and used at all levels involved in the annual reporting (Heidbreder and Carrasco 2003: 32). Even though this operationalisation of the minority criterion is founded on international conventions, its specific contents are influenced by the particular conditions the Commission considered of relevance in the candidate states, especially the situation of Roma as well as Russian-speaking communities (ibid. 2003: 33).

It is noteworthy that it was only due to pressure from key actors in the Commission that the EU approach embraced also Roma minorities. The member states and parts of the Commission Services focused initially rather on “Estonia and Latvia whose Russian-speaking minorities were one of the main targets (not Roma) that the authors of Copenhagen had in mind” (official DG Enlargement, written exchange September 2007). But also within the Commission, there was some resistance along these lines “When it was suggested that we should leave them out of the analysis (‘that’s not what they meant at Copenhagen’) I argued that one could not realistically exclude them in making an objective assessment of minorities” (ibid.). From this disputed start, the concern for Roma minorities soon advanced as the focal point of EU minority policy.

For the practical operationalisation of the monitoring task, the Commission developed a complex internal organisation and an external network to assemble information for the regular reporting (Heidbreder and Carrasco 2003). The cooperation with other international organisations that play a role in European minority protection – the Council of Europe and the OSCE High Commissioner on National Minorities – had a privileged role in the process. Regarding Russian-speaking

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70 The only member state that has not signed the Framework Convention is France, whereas Belgium, Luxemburg, Greece and the Netherlands have not ratified it yet. Among the new member states and remaining accession countries only Latvia runs short of ratification. All candidate states were moreover explicitly called on to sign and ratify the Framework Convention for the Protection of Minority Languages, which has so far only been ratified by eight of the old member states.
minorities, for example, more relevant than Commission’s own services was the cooperation especially with the OECD’s High Commissioner Max Van Der Stoel who “rapidly became the authority on whose judgment the Commission relied [on], particularly in the case of Estonia and Latvia” (official DG Enlargement, written exchange September 2007).

In spite of the intensive and extensive illustration of shortcomings in protecting minorities, the final evaluation on conformity with the criterion in the Regular Reports has, except for one case, always been positive.\(^71\) Whereas the system that the Commission set up within the Copenhagen framework may be judged an effective instrument to monitor minority protection at the national level, the eventual evaluations suggest therefore that the judgements are not solely based on a strict application of the criterion. In terms of functional pressure, the dilemma was that the reporting was effective in spelling out shortcomings at the national level while at the same time the scope for political responses was limited in the shadow of double standards – thus increasing policy-generated functional pressure as the monitoring process went on.

As regards the second means the Commission had for achieving specific policy targets, from as early as 1989 DG Enlargement offered support through the pre-enlargement programmes PHARE (main assistance programme for the accession states), Phare LIEN (co-financing of projects initiated by nongovernmental organisations) as well as the ACCESS programme (strengthening the Civil Society, in 1999 replacing LIEN Phare and partnership programmes). Assistance to the central and eastern European countries focused foremost on Roma minority groups. Within Phare, as from 1998 DG Enlargement allocated significant resources primarily to Bulgaria, the Czech Republic, Hungary, Romania and Slovakia. “Presumably, this funding was intended to support candidate states in addressing some of the problems identified in the Regular Reports. However, rather than dealing with minority protection or rights, ‘most Phare programmes were developed as socio-economic interventions designed to deal with some aspects of the social exclusion experienced by many Roma minority populations’ (European Commission Evaluation Unit, 2004, p. 1). A significant percentage of Phare funding supported equipment purchases or infrastructure development (particularly in isolated Romani communities) or ‘social integration’ (European Commission Evaluation Unit, 2004, pp. 63–4)” (Gugliemlo and Waters 2005: 771–72).

Supplementary to the Enlargement Directorate, the DG for External Relations was active with projects under the heading of the *European Initiative for Democracy and Human Rights* (EIDHR),

\(^71\) The only state ever evaluated negatively is Slovakia. In the 1997 Opinion the state was judged not to meet the political accession criteria.
which is preoccupied with the support for democracy and the rule of law in third countries. When all budget lines dealing with human rights were pooled in 1994 also PHARE: democracy was subsumed under this initiative. EIDHR supported micro projects that were managed by the Commission delegations in the respective states. To ensure consistency across the various programmes these projects were terminated for the accession states in 2001. For the budgetary period of 2002-2004 still a number of focus countries were financed with means from EIDHR as the fight against racism and xenophobia counts to the priorities of the initiative.

The reliance on double standards put a question mark on the actual agreement of the candidate countries to the validity of the criterion as such (Hughes and Sasse 2003: 24) and reduced the actual leverage of conditionality as an instrument of enlargement policy (see on this issue also Grabbe 2001; Checkel 2000). As for all the cases analysed, the closer accession moved the less was a strict application of conditionality feasible. In addition, external incongruence may be asserted, i.e. contradictions between the official compliance with the criterion measured against the actual situation of minorities. However, it remains questionable whether the assessed states have and had in actual fact sufficient (financial) resources to implement the criterion to its full extent. Against this background Guy argues that the criterion, which does in principle also comprise a functioning implementation side, could be met in “merely formal terms in the foreseeable future, and certainly not by the time of accession” (Braham/Braham cited from Guy 2001: 16). Even if the assessment of real implementation makes up for a central part of the reporting, it thus seems plausible that the final assessments broadly ignore shortcomings in implementation and concentrate instead simply on the adaptation of formal legal structures.

Nonetheless, even if the actual outcomes of EU conditionality may remain sub-optimal due to a lack of credibility, the Commission’s minority approach during the pre-accession phase was generally considered a valuable contribution, leading as it did to an open discussion fostered by civil society groups and politicians alike that called for continued EU involvement beyond the date of accession. One of the most explicit examples is offered by the Open Society Institute: “The EU should make it clear to aspiring members that assessment of basic human and minority rights will continue after accession; the best way to convey the seriousness of this message is to initiate a genuine and thorough assessment of all member States” (Open Society Institute 2002a: 64). Another example, more narrowly focused on Roma minorities, is the European Parliament

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72 If we take into account that the French constitution rejects the principle of minorities altogether, the discrepancy is more than obvious if the 2002 Regular Report on Latvia states with reference to the Framework Convention for National Minorities that “Latvia is urged to ratify it” (p. 32). The acceptance of the Commission’s reports is thereby undermined in principle.
which continues to stress the “need to strengthen the system for monitoring such discrimination and to resolve the legal status of the Roma” (European Parliament 2005a). 73

Although other international organisations increased their involvement in minority policy, foremost the foundation of the office of the OSCE High Commissioner on National Minorities, throughout the pre-accession phase the Commission’s role in the promotion of minority protection and rights was attributed a distinct and important function in the candidate states which would be lost with accession. For example, the legal advisor of the OSCE High Commissioner on National Minorities, John Packer, demurred in 1999: “we have serious concerns that if there is not an EU internal (human rights) assessment process and if there is not a continual annual reporting, new states which become EU members might feel less pressure to meet those human rights standards”. 74 The Commission’s monitoring system was generally accepted as a well functioning tool adding positive effects to the instruments of the Council of Europe and the OSCE (Vermeersch 2004). This was argued especially pointing to the weak instrument the Council of Europe Framework Convention offers in terms of enforcement.

Functional pressure surfaced above all because the reasons for tackling the respect for and protection of minority rights persisted in the candidate states and was increasingly perceived to exist also beyond accession. The perceived scope of the problem widened to include also the territory of the old member states. Besides a concern for the actual situation of the individuals concerned, the EU-15 moreover increasingly perceived the Roma question in particular as a potential security problem affecting themselves. “Concerns about migration, security and integration that surfaced at the beginning of the accession process persist, but minority protection has decisively entered European policy and Europe’s self-image. It will become increasingly necessary to address Romani issues in a different register; in the light of this, prudent policy will consider not if, but how, Roma will be integrated into Europe as minorities” (Gugliemlo and Waters 2005: 764). Accordingly, there was ample expression, either pointing to the future member states’ specific situation or by more generally reacting to calls to continue both regulatory and distributive policies around minority matters in the EU.

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73 More general claims, going beyond the direct responses to activities in the Copenhagen framework, were made by NGOs asking without success for a clause on positive minority rights in the drafting of the Charter of Fundamental Rights and Freedoms in 2000 and by the EP which called for a ‘Bill of Rights’ on minorities as early as 1981 (De Witte 2004: 110).

This extension of the problem definition which defined minority protection and in particular questions on the Roma minorities as matters concerning also the old member states indicates that the subsequent extension of distributive policy tools was not an unintended consequence. In stark contrast to this, the extension of collective minority rights, as created in the Copenhagen framework, to the acquis would have marked an unintended consequence – this did however not occur. Although individual anti-discrimination rights developed parallel to the Copenhagen framework under the acquis umbrella, this did not undermine member state intentions to contain the way in which minority rights were framed in the enlargement context.

**STATUS QUO POST:**

**INFORMAL INSTITUTIONALISATION OF MINORITY POLICY**

Tracing the evolution of EU minority policy in relation to enlargement some direct effects of implementing the minority criterion on the EU level can be asserted. Foremost in order to maintain the potential impact on minority protection in the new member states, some kind of continuation beyond the Copenhagen framework had to be tolerated by the member states. First, monitoring of minority rights, introduced as part of the regular reporting for the candidate states, is continued in a limited format in the framework of the European Monitoring Centre for Racism and Xenophobia (EUMC)\(^75\) founded in Vienna in 1998. While the foundation of EUMC was not a direct response to enlargement, it nonetheless took on some of the monitoring tasks. Thus tasks could be responded to in the parallel emerging institution. Moreover, the Commission considers itself to have an indirect oversight responsibility under Article 6 of the Treaty on the European Union that states fundamental human rights as basic principle of the Union. Second, assistance offered during the pre-accession phase – particularly regarding Roma minorities – has been extended to all EU member states. Third, the issue of explicit and collective minority rights has entered the supranational agenda not at least because of the expressed interests of one of the new member states, Hungary. In sum, although the member states refrained from shifting further hard competences to the EU level, a process of informal institutionalisation of the policy tools developed in the enlargement context can be observed.

\(^75\) Since 2007 the EUMC has been transformed in the Union’s Fundamental Rights Agency, in the run-up to which some tensions regarding competences and the potential duplication of these emerged between the EU and the Council of Europe, which found resonance in a number of NGOs (see EUobserver 1 March 2007). These should eventually be resolved by the accession of the Community to the ECHR, which would formally underpin the primacy of the Council of Europe framework in human rights questions.
First, the foundation of the EUMC, in connection with a Community Action Programme\textsuperscript{76}, established a monitoring organisation that deals with all old and new member states alike. While EUMC activities have been carried over to the Agency on Fundamental Rights (since 2007), the Action Programme has a follow up in the Community programme for employment and solidarity, PROGRESS (2007-2013).\textsuperscript{77}

One of the major tasks of the Centre/Agency is the collection of reliable and comparable information and data on racism, xenophobia, islamophobia and anti-Semitism in the EU. Drawing on this data it publishes analyses and strategies to fight these phenomena. The agency’s Information Network on Racism and Xenophobia (RAXEN) contains national focal points that work along harmonised benchmarks, and, as part of that, also consider minority issues on the individual national level. Regular publications serve not only to draw the public attention on states performing comparably bad but also to work indirectly towards an adaptation of standards.

Furthermore, actor networks in the field are being established. Reacting to a request by the European Parliament, the Commission has also established an expert network dealing, amongst other issues, with that of minorities.\textsuperscript{78} The European Union Network of Experts in Fundamental Rights has subsequently come up with a number of reports, including one outlining the “need for an EU Roma Integration Directive” (Commission of the European Communities 2004f: 44). Yet, calls for binding legislation on concrete minority groups’ rights have not been taken up by the member states.

Apart from the Agency’s monitoring, based on soft enforcement tools in form of reporting, the Commission has developed the position that minority protection counts as one of its competences more generally. This interpretation creates considerable tension “with the simple fact that the words ‘minority’ and ‘minority protection’ do not appear anywhere in the EU and the EC Treaties. They are neither mentioned as being part of the values recognized by the European Union nor are they listed among the policy competences of the EU” (De Witte 2004: 110). Still, even if this is the state of arts up-front, parts of the Commission promote a more subtle self-understanding by referring candidly to the implementation of enlargement. While the first Regular Reports did not make a direct link between the Copenhagen criterion on minorities and Article 49(6) TEU, the 2002 Reports referred explicitly to the Article 6 TEU and that “through the


\textsuperscript{78} Official Journal of the EU 20.05.2003: 96.
entry into force of the Treaty of Amsterdam, the political criteria defined at Copenhagen have been essentially enshrined as constitutional principle in the Treaty on the European Union” (quoted from Hoffmeister 2004: 88). This logic was also followed by the Accession Partnerships, as well as by the EP when issuing enlargement related resolutions. All this can be justified with reference to the Council of Europe Framework Convention on National Minorities (FCNM) that defines minority rights as integral part of the protection of human rights (Council of Europe 1995: article 1). “Hence, taking into account the latter text and unanimous practice by the EU institutions, Article 6(1) TEU could be interpreted widely, so as to encompass minority rights and the protection under the heading ‘human rights’” (Hoffmeister 2004). From this perspective, Article 6 thus also provides the basis for some monitoring of the member states and the principles of Article 6(1) are “widely regarded as confirmation of the Copenhagen political criteria within the text of the TEU” (Nowak 1999: 692). Even more so, since the Commission has the right to request the suspension of membership rights in cases of serious breaches of Article 6 principles under Article 7, one can read an implicit monitoring function also for minority issues into the TEU. This notwithstanding, since the only enforcement tool – the suspension of membership rights – is a means of last resort, the Commission has hardly any leeway to act. Given that the initiating the procedure of suspending membership rights is too hard an instrument to be applied except for exceptional cases, the Commission actually lacks less coercive tools such as mentioning shortcomings in a regular reporting mechanism. Thus, oversight on minority protection in the member states is being exercised rather cautiously and remains little visible – but it is exercised and understood part of the Commission’s responsibilities (Interview 2007 COM LS).

This interpretation of the EU’s legal basis for minority protection is admittedly a balancing act and can be questioned from a number of angles. First, not all member states have ratified the FCNM, neither has the European Community.79 Second, the Amsterdam Treaty transposed basically all of the other accession criteria into primary legislation – apart from the criterion for minority protection. “The fact that the minority clause was kept separated appears to indicate that its inclusion – whereby it would have assumed a clear binding force and an internal dimension – was not desired” (Toggenburg 2000: 17). Consequently the official separation between the EU’s acquis and the accession criterion has been sustained, “respect for democracy, the rule of law and

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79 Whereas all new member states were urged to accede and enact the Convention, Belgium, Greece and Luxembourg have so far not ratified the FCNM. France has also not signed the Convention, given that the French Constitution does not recognise the existence of minorities. For a list of signatories/ratifications see: http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=157&CM=8&DF=5/29/2007&CL=ENG (accessed 29 May 2007).
human rights have been recognised as fundamental values in the European Union’s internal development and for the purpose of its enlargement, whereas minority protection is only mentioned in the latter context” (De Witte 2000: 4, emphasis in original). Third, it seems also that within the Commission’s legal service different views exist. While some departments interpret their monitoring task to have officially ended with accession of the states, while others promote the view outlined above (Interviews COM LS).

Despite all this, in the ongoing enlargement policy there is strong evidence for this latter, extensive interpretation and, what is more, the member states silently tolerate this extension of Commission capacities. Even though on a slightly dubious legal basis, minority protection has been moved from a pre-condition to open accession negotiations into chapter 23 *Judiciary and Fundamental Rights*, newly introduced in the revised enlargement strategies for Turkey and Croatia. Given the delay in the enforcement of the Constitutional/Lisbon Treat that would have strengthened the legal basis of fundamental rights, the Commission continues to refer to the basic rights references in the Treaties and the related international instruments. An argument the Commission makes in favour of making minority protection content of a negotiation chapter is that standards and criteria of measurement need to be clearer from the beginning of the process than they were for the Copenhagen criterion in order to raise transparency and credibility *vis-à-vis* the candidate states (Interview 2007 COM LS). At the same time, this clarification for the candidate states however also blurs the legal basis for EU involvement in the formally still national competence on a more genuine minority policy.80

The reasoning behind this argument further endorses a broad interpretation of Article 6 in connection with the FCNM. It suggests an implicit EU responsibility regarding minorities much more vividly than a narrow reading of the actual formal regulations. More than just tolerating this wide interpretation on arguably soft legal grounds, “the Council and the European Council – and hence the representatives of the national governments – have substantially contributed to the development of second generation conditionality. This might indicate that minority protection is no longer exclusively seen as a condition for becoming a member state of the Union but increasingly as an expression of being an EU member state. It seems as if the Council and the Heads of

80 Hillion contests the Commission reasoning even more fiercely. “The legitimacy of the current enlargement process rests in part on the extent to which the conditions for accession are defined and applied in a predictable manner. It is argued that the aforementioned conditions have been elaborated, strengthened, and sometimes applied in a different way, while new conditions have been added, notably during the process. Such a revision may have produced more detailed and sophisticated accession criteria, a necessary given – to use the Commission’s terminology – the ‘nature and number of candidates’. Nevertheless, it has paradoxically made enlargement appear more uncertain, especially from the candidate states’ point of view; particularly because enlargement has also become subject to an obligation to be met by the Union itself” (Hillion 2002: 407-08).
State and Government are aligning themselves with the legal position of the European Commission, which regularly holds that minority protection is part of the founding principles of the Union as outlined in Article 6 TEU” (Toggenburg 2006: 4-5). As pointed out above: in the absence of any explicit legal basis this interpretation opens a vast legal grey area in which the Commission has de facto far-reaching additional capabilities.

The implementation of most initiatives directed at all member states relies on various soft implementation instruments, such as mainstreaming and impact assessments (Toggenburg 2006: 11-13); but also some related hard legislation has occurred. Based on Article 13 of the Amsterdam Treaty, the Race Equality Directive (Council of the European Union 2000b) establishes individual rights of members of societal minorities. Although limited to rights against individual discrimination, the directive includes the obligation to designate a body or bodies that promote “equal treatment of all persons without discrimination on the grounds of racial or ethnic origin” (Article 13). Alarmed by poor transposition by the majority of member states, the Commissioner in charge has issued formal requests to 14 member states in June 2007 for falling short of implementing rules banning discrimination on the grounds of race or ethnic origin81, which indicates the formal legal leverage the Directive grants to the Commission as well as the Commission’s decisiveness to make use of its powers.

Moving to the second set, the continuation of assistance or distributive policies targeting minorities, a number of new tools have been established. The basis for this is mainly the anti-discrimination acquis. Measures are rather comprehensive, especially regarding the continuous concern with Roma minorities from which some more general tools for the incorporation of minority groups become apparent. The Commission developed policy programmes during the enlargement phase, the bulk of which focused on Roma communities. Initially placed within Phare, during the late stages of the pre-accession phase a more global approach including candidate and existing member states was adopted. Thus, the Support for Roma Communities in Central and Eastern Europe (Commission of the European Communities 2003e) extended well beyond the enlargement context and involves different Directorate Generals of the Commission. Measures were accordingly not anymore limited to states outside the EU. In this vein the Commission informed that: “However, there are Roma communities in EU Member States as well, and the EU

has developed programmes to improve the situation – particularly in the educational field, and in combating racism and discrimination” (Commission of the European Communities 2003e: 6).

Nonetheless, at the moment of accession the perception that Roma were foremost an issue of the new member states persisted. The discourse on Roma as a minority of the Central and eastern European states evolved as from the first half of the 1990s and was essentially interconnected with the establishment of the Union’s enlargement policy (Simhandl 2006). Already for the programming period 2000-2006 support for Roma communities was given priority status by the EIDHR, DG Education and DG Social Affairs as part of the mainstreamed aim to “fight off racism and xenophobia”. Referring to the more general anti-discrimination law,82 Roma programmes have subsequently been fully integrated into the Commission’s framework and been placed DG Employment, also running the above-mentioned PROGRESS programme.83 Policy measures have been developed along the main conflict lines that were identified during pre-accession monitoring as indicators for discrimination on grounds of race and ethnic origin (Heidbreder and Carrasco 2003: 32-47). Accordingly, the main focal points of basically all initiatives that tackle minorities by approaching their particular problems from a wide interpretation of anti-discrimination are: education, employment, access to housing and medical care. In this, the Commission is going beyond assistance for Roma minorities. Following the same reasoning, minority issues have also found their way into the European Employment Strategy, more precisely the Process of Social Inclusion and Migration/Integration Policy (Toggenburg 2006: 14-19).84

The bulk of financial assistance outside enlargement policy is provided by the Social Funds. The Commission estimates that during the last seven years of the programming period, the contribution to various projects promoting the living conditions of Roma communities has amounted to

82 Based on Article 13 introduced in the Treaty of Amsterdam, this is in particular the Race Equality Directive (Council of the European Union 2000b) which has been transposed in late 2006 by the last member state, the Employment Framework Directive (Council of the European Union 2000a), as well as anti-discrimination based on sex as provided for by the European Community Treaty and the some relevant case law on by the ECJ.

83 The EU Commission has also launched a web-page on The EU and Roma, as part of its information campaign, see: http://ec.europa.eu/employment_social/fundamental_rights/roma/rabout_en.htm (accessed 29 May 2007).

84 In November 2007, due to dramatic events in Italy that revealed missing instruments to tackle problems both in the member states and in the EU, the call for a stronger EU Roma policy has been raised vehemently, “Italian Prime Minister Romano Prodi and Romanian leader Calin Popescu-Tariceanu also called for a European strategy of inclusion for the Roma. On Thursday (15 November), EU lawmakers adopted a resolution suggesting that a network of organisations deal with the social inclusion of Roma as well as promote the rights and duties of the Roma community. The issue is expected to be discussed by a fundamental rights group in the commission, consisting of ten commissioners - Jose Manuel Barroso, Franco Frattini, Vladimir Spidla, Jan Figel, Margot Wallstrom, Benita Ferrero-Waldner, Olli Rehn, Luis Michel, Vivianne Reding and Sim Kallas. ‘We hope the EU will play a facilitating role’, Andrew Wilkens from Open Society Institute told EUobserver, adding it should for example pay better attention to how the EU funds are targeted” (EUobserver.com 22 November 2007).
some 300 million Euro. An additional amount of three to four times higher was spent in other areas indirectly profiting in one way or another Roma minorities.

Especially in projects aiming to advance awareness creation and an information campaigns, the Commission is collaborating strongly with various nongovernmental and international organisations. One prominent example is the Roma Decade 2000-2015, initiated by Gorge Soros together with the former head of the World Bank James David Wolfensohn and Commissioner Anna Diamantopoulou.\textsuperscript{85} Moreover, the Commission itself runs its own internship programme hosting 10 Roma interns a year, financed by the Soros Foundation. Furthermore, the EU has launched European Year of Equal Opportunities for All in 2007, with the declared aims to “make people more aware of their rights to enjoy equal treatment and a life free of discrimination – irrespective of sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation, promote equal opportunities for all, launch a major debate on the benefits of diversity both for European societies and individuals”.\textsuperscript{86}

Finally, in order to develop more clearly a strategy for the future, the Commission has created a high level group of experts under the auspice of the former president of the German Bundestag, Rita Süßmuth (Commission of the European Communities 2006c). The group produced a report in which it issued eight tangible recommendations and identified 14 major barriers to market inclusion of ethnic minorities (Süßmuth 2007).\textsuperscript{87} The objective of the group was foremost to provide practical recommendations, including a practical definition of minorities deduced from the anti-discrimination notion. In the words of a Commission official: “It is clear, the members of the group are no professors, no ethnologists, we will not try to define that ‘an ethnic minority is ... in state A it is this group, in state B it is that’ ... what we do is to go towards a pragmatic definition of the type: in every country there is a minority, and in every country there are spheres in which a part of society feels simply disadvantaged [...] we are not interested in the fact that ... there is a Mr Öger in Hamburg, or a Mr Mitta in London. What we are interested in is the point of intersection, where the belonging to an ethnic group constitutes a social disadvantage” (Interview 2007: DG EMPL, my translation). This definition underlines clearly the Commission’s shift of interest and conceptualisation from old minorities to new minorities (see also: Toggenburg 2006: 1), hand in glove with a limitation to individual anti-discrimination rights.

\textsuperscript{85} For further information see www.romadecade.org/ (accessed 29 May 2007).
To wrap up: both in the monitoring/regulatory and the assistance/distributive arena the Commission continues to be active. In the narrower legal definition this is based on the anti-discrimination acquis that developed since 1997. Yet, in the regulatory as the distributive arena the Commission stretches the narrower formal legal framework and pushes informally into further areas. Enlargement policy was key in this new emphasis on minorities in its various disguises. “The systematic, regular work with this topic was surely absent before all the enlargement activities, that is before 1995” (Interview COM LS, own translation).

Last but not least, a general sensitisation and politicisation regarding minority issues can be observed. This was apparent especially in the strong push by Hungary to make an explicit mentioning of minorities in the Treaty on a Constitution for Europe, which it eventually succeeded in against the reluctance of many member states (cf. Article I-2 The Union’s Values, and Article II-81 Non-discrimination). Human and in particular minority rights have furthermore gained increasing attention against the background of the Yugoslav conflict, and the EU’s enlargement policy directed to the western Balkans based on a “second generation conditionality”, following “a so-called graduated approach” (Toggenburg 2006: 3-5), strengthening the role of minority protection. The expectation that formal accession of the new member states would internalise new demands on minority protection (regarding the issue persistence on the EU agenda also: Simhandl 2006: 97) has indeed lead to an extension of the Commission’s action capacity.88 The sum of the related informal regulatory and supportive distributive policies “clearly demonstrates that the Union internalized its minority engagement. The enlargement experience did not only lead to an even more outspoken engagement of the Union in its relations towards current and potential candidate states but provoked a new EU-engagement for minorities within the EU territory. […] This, however, corresponds to the fact that for questions of preservation the Member States will remain the primary responsible entities” (Toggenburg 2006: 27).

Functional pressure that existed from the start given the double standards increased due to a positive evaluation of the Commission’s performance in the Copenhagen framework and the extension of the problem definition in terms of territorial expansion to include also the EU-15. A push for spill-in occurred both in the regulatory and distributive arena. Unintended consequences did, however, not emerge because the official definition of minority protection was contained by

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88 The particular interests of the new member states, above all the Hungarian concern with national minorities outside the Hungarian territory, might play an additional role in future pushing to move from the informally emerging rules and actions to more explicit formalised regulation (Hughes, Sasse et al. 2001 state a similar hypothesis). Moreover, it remains an open question as to how the ECJ will interpret the already formalised elements of the acquis relating to anti-discrimination and might thus work to a continued formalisation of de facto rules.
(a) focusing on new minorities and (b) limiting rights to those of individuals against antidiscrimination. Despite these formal restrictions member states silently tolerate a de facto much wider interpretation and application of minority policy in the ongoing enlargement process – and thus implicitly also with effect on themselves. Distributive policies have been extended to all member states and mainstreamed across EU policies. The main focus remains however on Roma communities that are defined as a special case, which again allows the containment of patronage claims by minority groups in terms of collective rights.

SUMMARY:
RESPECT FOR AND PROTECTION OF MINORITY RIGHTS

It is telling that extended minority policy in the EU was framed implicitly in the contexts of the European Employment Strategy, as well in Social Inclusion and Migration/Integration Policy instead of moving towards a genuine minority policy derived from basic values. Capacities on minority policy were extended precisely because they were contained to single issues where these could be linked to the existing acquis on instrumental grounds. Thus, the inclusion into the Employment Strategy did explicitly not refer to minority rights “as a cultural phenomenon or a question of political participation but as an issue of inclusion in the employment market. Consequently, belonging to an ethnic minority is seen primarily as a ‘particular risk factor’ which enhances exclusion” (Toggenburg 2006: 15). This is as instrumental and exclusionary towards any shift to a fundamental rights value-based rationale as it can get. The same holds for the reasoning behind social inclusion and migrant policies, which are constructed as necessary responses to the challenges entailed by economic integration and not as genuine rights of the individuals who are affected.

The underlying instrumental nature of EU policies renders also plausible that the increased attention on minorities and “the process of ‘internalization’ of the minority topic after enlargement went hand in hand with shifting the policy focus from old towards new minorities” (ibid. 2006: 19), the latter of whom base their definition as minorities on genuine rights to defend their ‘being different’, which can hardly be defended on other than value-rational grounds.

Moreover, it falls directly in line with the proposed theoretical explanation that these concerns are tackled with soft steering tools for which “new forms of governance apply such as employment policies, social policy and migration policy are characterized by the desire to include potentially segregated, disadvantaged, poor and discriminated groups into society” (ibid. 2006: 15).
19). The way in which regulatory elements of minority protection were integrated was outspokenly reduced to an instrumental framing and attributed soft implementation instruments. New hard coercive means were created in the field of individual anti-discrimination, which however continues to exclude collective minority rights. As illustrated, the expansion of the anti-discrimination acquis as such was not caused by enlargement but minority protection as first introduced in the Copenhagen framework could be partially accommodated and reframed in the newly emerging anti-discrimination acquis.

In sum, the analysis gives support to Bruno de Witte’s conclusion that “we are witnessing the gradual emergence of an EU minority protection system whose contours are blurred and whose treaty bases are largely implicit rather than explicit. What we see for minority rights is a replication, at a later state and at a much lower level, of the gradual emergence of a human rights system within the European Union. [...] The logical recommendation would be that the European Union institutions themselves should, in turn, take a more holistic approach to the matter and look toward the EU minority protection policy in an open and comprehensive way” (De Witte 2004: 122).

The evidence provided suggests that it is precisely this direction that the Commission is taking under a generously tolerant Council that allows the stretching of the acquis, in particular in the revised enlargement policy. It would be false to claim that the boost that the anti-discrimination acquis has seen since 1997 was all due to the prospect of enlargement. The inclusion of minorities as a focal point was however surely linked to the implementation of enlargement. It allowed transferring certain elements and tools to the EU level from which an increasing web of Community activities and capacities is evolving without the need to establish new formal Treaty competences for the Commission. Thus, new unconditional distributive policies from which all member states may profit have been extended, and strong calls for further EU funding have been raised most recently, without creating new institutional constraints that would impose new rules in an extremely sensitive social area.

Relating back to the theoretical model, due to the double standards the minority criterion created, functional pressure was inherent in the policy from the start. This pressure rose as the implementation went on and because pre-accession monitoring was judged a substantial value-added – while the leverage of the instrument weakened in the persistent absence of a substantial acquis. Moreover, the notion that minority issues would be ‘internalised’ to the Union once the candidates joined reinforced functional pressure for EU policy tools and led to a widening of the problem definition beyond the scope of the central and eastern European states. Hence, the extension
of Commission action capacity that followed was no unintended consequence of implementing enlargement but intentionally tolerated or even unofficially promoted by the member states. In contrast, member state governments successfully prevented the wider definition of collective minority rights of the Copenhagen framework to spill-in. Although the Race Equality Directive grants the Commission also new hard policy instruments, these do not sufficiently disconfirm the theoretical expectation that spill-in from the Copenhagen framework will not lead to hard regulation. The Directive expressly includes both “direct” and “indirect” discrimination within the scope of prohibited action, but it is limited to individual rights. In addition, those policy tools targeted at genuine minority rights that include collective rights and claims of ‘old’ minorities remain limited to soft regulation of two kinds: benchmarking, both through the Vienna Agency and pragmatic standards to be developed in expert groups, and the acceptance of a wide self-interpretation of the Commission’s responsibilities in monitoring the member states. Although the Commission is acting in a legal grey area, the member states have to accept this blurring of EU competences in the field to grant it some minimum credibility in order to justify a stronger take in the accession process with Turkey, Croatia and other foremost Balkan candidate states. Finally, genuine distributive policies have been extended to all member states. Recalling the widened problem perception – which seems to be ever more shifting to calls in favour of treating the matter as a ‘common problem’ – the assistance offered by the EU has no implicit redistributive features and is not bound to additional conditions increasing Community control.
10 Cross-border Cooperation: Executing Intergovernmental Competences

Cross-border cooperation is a distributive policy instrument that provides funds to the Union’s border regions. It was founded as a distributive policy before and independently from enlargement policy and was subsequently integrated in the Copenhagen framework. In the enlargement context, the functional demands on cross-border cooperation differed however from the previous purpose for EU internal borders. This entailed a substantial redefinition of objectives and extended the Commission’s action capacity into the realm of foreign policy. Although cross-border cooperation remains under the administrative responsibility of the Directorate General Regional Policy, the following analysis will not so much concentrate on the extension of EU regional policies. To capture the essential features of new Commission capacities in the sphere of foreign policy, the angle is wider with the emphasis on the European Neighbourhood Policy (ENP). ENP is a crucial innovation in the EU’s foreign policy repertoire which draws heavily on the enlargement experience. Within ENP cross-border cooperation served from the start as a consolidated instrument that granted substantive foreign policy action capacity for the Commission.

By nature of the political problems dealt with, cross-border cooperation is distributive offering assistance to border regions. Since it touches on crucial matters of state sovereignty, regulatory aspects are unequivocally excluded from local cross-border initiatives. Regulative objectives may however be nested in the distributive arena depending on the goals financial and technical assistance focus on (Table III.4 summarises the empirical indicators).

Cross-border cooperation has evolved within the EU legal framework as a distributive policy for which all member states are eligible; spill-in from the Copenhagen context should hence also be framed in distributive terms and we should expect an extension of Commission responsibilities.
Table III.4: Empirical Indicators, Cross-border Cooperation

When first initiated at the European level in 1990, cross-border cooperation was aimed at overcoming internal borders among members of the Common Market by promoting cooperation in all spheres of life between regional and local authorities in border regions. Soon after, in 1994, the ends to which cross-border cooperation had been created were broadened. Beyond a tool to ease the effects of creating a common economic space among members of the European Community, cooperation across borders was promoted among candidate states. Cross-border cooperation was integrated into the pre-accession strategy for enlargement aligning future member states among each other and with the EU member states. Drawing on the experiences of these first two rounds of EU internal and pre-accession cross-border cooperation, and in particularly from experience with the candidate states, the policy instrument was further extended beyond future member states to third states without a EU membership perspective. While cross-border projects with future member states remained an instrument for integrating and (even if not immediately) lowering borders, applying the tool to states that would remain outside the EU signified a substantive shift in the ends cross-border cooperation served for, namely stabilising frontiers.

Drawing on cross-border cooperation to pursue straightforward foreign policy goals, as first done under Tacis CBC and MEDA and refined in the European Neighbourhood and Partnership Instrument (applicable since 2007), entrusts the Commission with broader foreign policy responsibilities under the cross-border heading. ENP is a new element in the Union’s foreign policy, which is made up of a variety of sectoral instruments that amount to a fragmented policy whose...
coherence and consistency have been recognised as particular challenge (Duke 1999). To counter the drawbacks of this fragmented foreign policy responsibilities in the EU, ENP was created explicitly to bridge the three pillars of the Union and to amalgamate the various foreign policy elements into one single instrument (Cremona and Hillion 2006). Both its objectives and methodology draw strongly from pre-accession policy (Kelley 2006). In particular the management by means of the accession partnerships within the Copenhagen Framework is replicated in the ENP Action Plans for each partner state. Accordingly, it also reproduces the Commission’s “pivotal role in implementing the Union enlargement policy” in which it promoted the application of the EU’s acquis “well beyond its traditional role as ‘guardian of the [EC] Treaty’ vis-à-vis the current Member States” (Cremona and Hillion 2006: 10).

The Neighbourhood Initiative stresses “the dual nature of the instrument (external policy and economic and social cohesion) when it comes to financing cross-border and transregional cooperation between partner countries and Member States” (Commission of the European Communities 2004b: Title I, Art. 4). Although, in a narrow sense, still formally focusing on the same objectives of cohesion in border regions, the underlying goals of cross-border cooperation with third states include core issues of foreign policy – such as security and migration. The goals and objectives cross-border cooperation is to serve in this new context have substantially upgraded the Commission’s scope to reproduce the soft capacities first exercised during the pre-accession phase. Without an official transfer of new competences, the outspoken objective of the Neighbourhood Instrument to bridge the pillar division widens the issues embraced, including not at least the promotion of EU security interests (Aliboni 2005; Cremona 2004). As the implementing and coordinating agent, the Commission has considerable discretion in particular regarding cross-border initiatives, extended the organisation’s action capacity to some vital aspects of foreign policy making.
Figure III.2: INTERREG 2000-2006

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Cross-border cooperation was first initiated outside the EU framework and diffused across various groups of states. Inter-state initiatives were set up in the mid 1960s without any direct involvement or funding by the European Community. As from the early 1990s onwards they continued parallel to and increasingly interlinked with the establishment of the Community programme Interreg. Supplementing Structural Fund operations, cross-border cooperation initially focused on areas entitled to special structural funding. Fourteen pilot projects were funded under Article 10 of the European Regional Development Fund (EDRF) in 1989 (Council of the European Union 1988). The pilot initiatives of 1989 were followed by a first programming period of only three years (1990-93) and subsequent six-year programming periods (1994-99, 2000-06, 2007-13). Covered by strand A of Interreg, cross-border cooperation is distinct from transnational and interregional cooperation (covered by the strands B and C). Under Interreg II A, cross-border cooperation was extended to all border regions along inner and external EU borders, independent of their relative degree of development (see Figure III.2).

Cross-border cooperation has been subject to repeated evaluation and revision processes. After each period the initiative was re-framed based on various ongoing and ex ante evaluations (see: Commission of the European Communities 2004e, in particular Title VI). Beyond this, the Commission issued comprehensive reports compiling different monitoring data (Commission of the European Communities 2002b). Other than the safeguards for policy evaluation and reformulation built into the institutional design of Interreg, Interact was set up in 2002, which “is designed to capitalise on the vast pool of experience accumulated through INTERREG in the areas of regional development, cross border cooperation, trans-national cooperation and interregional cooperation” (INTERACT Managing Transition 2005: 2; for a full description see: INTERACT Programme Secretariat 2002). Furthermore, external organisations, such as the Council of Europe and the Arbeitsgemeinschaft Europäischer Grenzregionen (AEGR) issue reports in the field. AEGR, a non-governmental association of border regions, also evaluates and brings forward policy proposals focusing explicitly on Interreg (see e.g.: Arbeitskreis Europäischer Grenzregionen (AGEG) 1997, 1999). Thus, cross-border cooperation has been developed in a framework with various inbuilt mechanisms for evaluation and revision that fed experiences back into each new programming period, which have supported the development and expansion of the policy without, however, causing major revisions in the policy design but including incrementally the new experiences collected in the cooperation along the borders with the candidate states.
Cross-border cooperation among European states first started along the Dutch-German frontier as early as 1965, best known under the acronym EUREGIO (or Euroregion). These “first cross-border initiatives were internal arrangements between contiguous regions of the founding members of the Union, most notably the Dutch and the Germans” (Kennard 2002: 188). Already in the 1960s further initiatives along Franco-German borders, the Franco-Swiss-German borders, as well as among the Benelux countries followed. These initiatives established former collaboration between municipalities giving cooperation a formalised framework with a council, presidency, secretariat, and specialised working groups on relevant contents (Perkmann 1999: 658).

Table III.5 summarises all early EUREGIO initiatives, as well as the Nordic and further frameworks outside the EU. The table features all initiatives that followed in these networks established by a multi-lateral approach at local level until 1999, i.e. before the elaboration and promotion of EU objectives through Interreg or another Community initiatives.

A number of steps institutionalising these early, little centralised, initiatives followed suit. Encouraged by the Council of Europe, in the end of the 1960s border regions started common initiatives. This cooperation was bundled in the Association of European Border Regions (AEBR) in 1971. Also the Council of Europe has been an important international actor promoting cross-border initiatives across Europe, yet with a slightly different focus than the one pursued by the EU. While the Council of Europe was relevant mainly for creating legal foundations to accommodate local cooperation across borders – which in general was part of a state’s central authority – the European Union’s involvement took mainly the form of financial assistance. Over the

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90 The Council of Europe defined Euroregions, referring to AEBR which “sets the following criteria for the identification of Euroregions: An association of local and regional authorities on either side of the national border, sometimes with a parliamentary assembly; A transfrontier association with a permanent secretariat and a technical and administrative team with own resources; Of non-profit-making associations or foundations on either side of the border in accordance with the respective national law in force; Of public law nature, based on inter-state agreements, dealing among other things, with the participation of territorial authorities.

It would appear that several ‘labels’ are used which are categorised under "Euroregions". These include: Euregio, Euregion, Euroregion, Europaregion, Grand Region, Regio, Council. In some cases the label ‘Euroregion’ is not used at all, such as the ‘Nova Raetia’ which is composed of territorial communities of Switzerland, Italy and Austria. The terms ‘Regio’ and ‘Euroregions’ are also used for national border associations created by the municipalities and counties. This is the case with the Czech Klub Euroreregion, the German Euregion Egrensis Arbeitsgemeinschaft Bayern and the German Inn-Salzach Euregio e.V. (association of Bavarian municipalities) and many others” (see: http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/areas_of_work/transfrontier_co-operation/euroregions/WhatIs_Euroregion.asp , accessed 19 April 2008).

91 AEBR’s first president, Alfred Mozer (1971-75), was moreover a former Head of Cabinet at the European Commission, for further reference consult: http://www.aebr.net/ (Accessed 13 June 2006).
years, cross-border cooperation makes a substantial share of Community spending, which was scattered over different Community projects.  

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<td>BEL/LUX/NL</td>
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<td>FR/IT/CH</td>
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<td>Euregio Erzgebierge</td>
<td>D/CZ</td>
<td>1992</td>
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<td>Euregio Pro Europa Viadrina</td>
<td>D/PL</td>
<td>1992</td>
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<td>Ore Mountains Euroregion</td>
<td>D/CZ</td>
<td>1992</td>
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<tr>
<td>Danube 21 euroregion</td>
<td>BUL/ROM</td>
<td>1992</td>
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<tr>
<td>Spree-Neisse-Bober Euroregion</td>
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<td>East Sussex/Seine-Maritime/Somme euregion</td>
<td>FR/UK</td>
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</table>

92 “Since 1988, co-finance has been made available for such co-operative initiatives under Article 10 of the European Regional Development Fund (ERDF) particularly through RECITE (Regions and Cities of Europe), INTERREG (International Regions) and the EEP (Experience Exchange Programme) (Brenner 1993). In the early 1990s, RECITE alone supported 37 interregional cooperative networks (Williams 1996). INTERREG, in particular, has supported cross-border programmes. Whilst it is limited in financial terms, representing just under 1% of the Structural Operations budget, it is politically significant. By 1994 it was the largest of 13 Community Initiatives which are programmes proposed by the EC on its own initiative to encourage Member States to tackle problems the EC has identified at the European scale (ibid.)” (Church and Reid 1999: 643-44).
<table>
<thead>
<tr>
<th>Euregio Egerensis</th>
<th>D/CZ</th>
<th>1993</th>
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<td>Euregio Euregio Bayrischer Wald/Böhmervald</td>
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<td><strong>Tatras Euroregion</strong></td>
<td>PL/SK</td>
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<td>TriRhena Euroregion</td>
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<td>BUG Euroregion</td>
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<td>Euregio “Via salina”</td>
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<td>Euregio Nestos-Mesta</td>
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<td>International Lake Constance conference</td>
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<td>Danube – Kris – Mures – Tisza Euroregion</td>
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<td>Sonderjylland-Slesvig</td>
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<td>Gieszyn Silesia Euroregion</td>
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<td>Siret - Prut - Nistru Euroregion</td>
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<td>Superior Prut and Lower Danube</td>
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<td>BLR/PL</td>
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<td>Silva Nortica Euroregion</td>
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<td>2007</td>
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<tr>
<td>Biharia Euroregion</td>
<td>RUM/HU</td>
<td>2007 (?)</td>
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</table>

**Table III.5:** Euregios and Euregios Similar Structures in Scandiavia and multi-lateral cooperations (AG)\(^{93}\)

The formalisation of EU assistance in a single-standing instrument was realised later in form of the Interreg Community initiative, introduced in 1990. Although part of Structural Funds, the Community Initiative enjoys more managerial autonomy then other regional policies (Perkmann 1999: 659). As regards the underlying objectives behind the increased spending “[t]he Interreg Community Initiative, which was adopted in 1990, was intended to prepare border areas for a Community without internal frontiers” (INTERREG II (1994-1999)).

Legally, cross-border actions potentially challenge existing divisions of competences between regions and central governments regarding the interaction outside national borders. Initially, there was no formal legal basis for cross-border cooperation in public law and “[t]he first CBC initiatives were based on agreements with varying degrees of formality and mostly relied on good will” (Perkmann 1999: 658). Correspondingly, the European Outline Convention on Transfrontier Cooperation between Territorial Authorities, the so-called Madrid Convention (21 May 1980), marked an important step for institutionalising and creating opportunities for increased cross-border cooperation. Initiated by the Council of Europe, the Convention provided first steps to place cross-border cooperation under public law (Perkmann 1999: 659).

Table III.6 lists the signatory states to the Madrid Convention. Before 1987 thirteen states signed (marked in *bold*). Although the approach of the convention, namely to advance local level initiatives dealing with local-level issues, was copied by the first Interreg initiatives, the Madrid convention was not organisationally linked to Community initiatives. This is reflected in the table in that a number of EU member states are not signatories of the convention, even if they are beneficiaries of prominent cross-border programmes such as the PEACE programme between the UK and Ireland (marked in **italics**).

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**PART III: EMPIRICAL ANALYSIS**

<table>
<thead>
<tr>
<th>STATES</th>
<th>SIGNATURE</th>
<th>RATIFICATION</th>
<th>ENTRY INTO FORCE</th>
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<td>Iceland</td>
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<td><strong>United Kingdom</strong></td>
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European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities (CETS No.: 106); Treaty open for signature by the member States and for accession by European States which are not member States (Status as of: 15/6/2006)

Opening for signature Place: Madrid  Date: 21/5/1980
Entry into force Date: 22/12/1981  Conditions: 4 Ratifications


**Table III.6: Madrid Convention**
Given the fact that cross-border cooperation is operational on the local level but touches on some of the core responsibilities of central governments, the operational level deserves some attention. To balance interests and competences across the various levels of EU governance, an interlinked system of cooperation has been created. “Operational Programmes (OPs) are formulated between participating Member States for their respective border areas and submitted to the European Commission for approval. This means that European funds are granted to Member States and not directly to Euroregions or similar cross-border bodies themselves” (Perkmann 1999: 659).

Nonetheless, for the implementation of cross-border programmes, the Commission relies on partners on the local or district level. “As a ‘hollow’ organization, it needs to find new partners for policy delivery, as it is prevented from direct policy implementation by organizational and legal limitations. On a trans-European level, it is supported by the transnational Association of European Border Regions (AEBR) which operates a ‘think tank’, gives advice to its members and acts as a European interest organization for CBRs” (Perkmann 1999: 664). The operational features of cross-border cooperation underline the disaggregated way in which benefits are dispersed and hence its distributive traits. Moreover, it reflects how formal authority remains with the member state governments despite the actual implementation privilege of local authorities and civil society.

Noteworthy about the early steps institutionalising cross-border cooperation within the Council of Europe and the EU is that formal rules were carefully designed to prevent cross-border cooperation to conflict with competences of the central state authorities. Consequently, initiatives concentrated merely on very specific objectives of local cross-border collaboration. The inherent problem is that inevitably “[f]or local and regional authorities, co-operating across borders means they enter a field long reserved for central state actors” (Perkmann 1999: 658). The objectives of the Euroregions, for example, remained limited to local cooperation in order to promote socio-cultural, social-economic development, advice in day-to-day border issues, support of inter-municipal cooperation, and participation in interregional cooperation.96

Regarding cross-border initiatives under Interreg, the “overall aim of the Interreg initiatives has been, and remains, that national borders should not be a barrier to the balanced development and integration of the European territory” (Commission of the European Communities 2004e:

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As will become evident in the following discussion, this purpose and the very concept of cross-border cooperation have been widened and redefined – if not upturned – as part of enlargement policy and beyond the pre-accession framework. In the same vein, pursuing actual security goals the European Neighbourhood Policy is basically reversing the approach: the aim is no longer to smooth the barriers in border regions in order to dissolve them, but to stabilise borders. Although cross-border cooperation was not all new, its use in the Copenhagen framework promoted a substantial advancement of the previous inner-Community policy tool.

Summarising the development of cross-border cooperation independent from enlargement we see that the European Community started to take up an instrument that had developed outside its system in order to compensate underprivileged regions at the dawn of the Common Market. The philosophy pursued with the start of Interreg enhanced the goal of upgrading peripheral regions, but working towards the abolition of internal borders. Hence, the early redistributive elements cross-border cooperation promoted disappeared as all EU border regions became permeable and cross-border cooperation took the clear traits of a distributive policy.

PRE-ACCESSION PHASE:
EXPERIMENTAL DEVELOPMENT OF A POLICY TOOL

The inclusion of the instrument into enlargement policy was crucial for the development of cross-border cooperation in general. Cross-border initiatives within the external assistance programmes Phare and Tacis overlapped organisationally with the Community programmes and measures were financed out of both sources. Interreg IIA (1994-99) and IIIA (2000-06) as well as Interreg IVA (2007-13) were step-wise adapted to foster cooperation with EU-external states. Phare CBC was added on to Interreg IIA in 1994 and Tacis CBC followed in 1999. Up to this

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97 For a more detailed summary see also Annex II (Commission of the European Communities 2004c). Strand A priority topics are: “promoting urban, rural and coastal development; encouraging entrepreneurship and the development of small firms (including those in the tourism sector) and local employment initiatives; promoting the integration of the labour market and social inclusion; sharing human resources and facilities for research, technological development, education, culture, communications and health to increase productivity and help create sustainable jobs; encouraging the protection of the environment (local, global), the increase of energy efficiency and the promotion of renewable sources of energy; improving transport (particularly measures implementing more environmentally-friendly forms of transport), information and communication networks and services and water and energy systems; developing cooperation in the legal and administrative spheres to promote economic development and social cohesion; increasing human and institutional potential for cross-border cooperation to promote economic development and social cohesion” (Article 11).
point, the institutional foundations of Interreg A had not undergone much change. Assembling pre-accession and other assistance programmes under one single umbrella allowed to go beyond the established policy objectives and to introduce also programmes which served very different underlying aims for pursuing cross-border cooperation. Although the formal rules stated in Phare CBC and Tacis CBC remained in line with those of Interreg A, the fact that they were aiming at EU external states implied a qualitative shift in the instruments basic principles because cross-border initiatives became part of broader strategies towards third countries. This change went beyond cross-border cooperation with the already strongly associated EFTA states. In particular relating to the candidate states that were to join the EU cross-border cooperation was applied as a pre-accession instrument, i.e. as means to prepare the integration of the respective external regions and between the future member states.

Somewhat different to this, cross-border cooperation with states without an accession option was introduced as part of the EU assistance to the former Soviet Republics within the Tacis programme. Although the narrower formal rules and goals continued to focus on social, cultural and economic cohesion in border regions, the implicit principles shifted. Instead of overcoming and lowering borders, cross-border cooperation along the (future) external borders between the candidate states and their neighbours emerged as tool to achieve precisely the opposite, namely to stabilise the Union’s frontiers along the future fringes. The decisive strategic move by the Commission was to apply and adapt an existing instrument to the end that it would also deal with these new challenges. While introducing the tool into Tacis CBC and to the southern adjacent states as part of the MEDA initiative, it was further developed on the basis of the experiences collected with the candidate states in Phare CBC since application to third states without accession perspective remained at the outset limited to two states only.

The way cross-border cooperation was extended to external states – with or without accession option – was inclusive to the development of the policy within Interreg. Thus, functional pressure did not arise in terms of institutional rules and whether the policy was located within or outside the acquis. Functional pressure regarded the re-definition of policy objectives. Once the goal definition was widened beyond ‘overcoming internal borders’ and was successfully implemented between and with the candidate states, functional pressure rose to use cross-border cooperation as a the tool for foreign policy purposes proper along external borders. Although giving the Commission capacities in an area that is formally under intergovernmental member state control, the expansion of Commission responsibilities into the foreign policy realm was no unintended
consequence. Quite to the contrary, making use of policy tools that had been developed inside the Community and refined in the pre-accession context in the European Neighbourhood Policy provided a way to touch upon sensitive high politics while keeping these on the operational level and thus circumventing direct state-level confrontation, as the following section will illustrate.

**STATUS-QUO POST:**
**CROSS-BORDER COOPERATION AS INSTRUMENT FOR EXTERNAL COERCION**

The extension of action capacity in cross-border cooperation concerns less the very existence of the policy than the actual capabilities it comprises. Founded as a purely internal policy it was to soften the effects of the internal market along the borders between member states. In the context of enlargement the tool was applied first along the external borders among future member states and subsequently further expanded to external borders with states without a membership prospect to then be included in the ENP which meant a substantive extension of the definitions and goals pursued. Thus, the Commission is executing programmes the focus of which regards foreign affairs. The development of the tool itself has hence created Commission activities far beyond the internal realm and its competences in economic external relations. The ENP builds on Community resources and tools, albeit the actual policy contents fall into intergovernmental foreign policy. It is therefore an example of the extensive use of adjective Community resources to pursue policy objectives the authority for which remains with the member states.

The first step towards the Neighbourhood Policy was the Commission’s so-called *Wider Europe Communication* (Commission of the European Communities 2003a). Cross-border cooperation was identified as a key tool recognised in the Commission’s strategic planning. The Commission took the Wider Europe initiative as reference point for the following motives. “One of the elements of the Wider Europe Communication was the specific possibility of creating a new Neighbourhood Instrument, which builds on the experience of promoting cross-border co-operation within the PHARE, Tacis and INTERREG programmes”, and which could focus “on ensuring the smooth functioning and secure management of the future Eastern and Mediterranean borders, promoting sustainable economic and social development of the border regions and pursuing regional and transnational co-operation” (Commission of the European Communities 2003c: 3). Moreover, the new Instrument was to “help to avoid drawing new dividing lines in Europe and to promote stability and prosperity within and beyond the new borders of the Union”, hence
the Communications emphasised “that cross-border cultural links gain additional importance in the context of proximity” (ibid. 2003: 3), drawing explicitly from the experience that cross-border cooperation had brought forth during the implementation of enlargement and trying to institutionalise the policy tool beyond this realm.

<table>
<thead>
<tr>
<th>MAIN TOOLS OF CONDITIONAL CRITERIA AS ELABORATED IN ENLARGEMENT POLICY</th>
<th>SECURITY CONCERNS REGARDING EXTERNAL STATES</th>
<th>ALIGNMENT OF EXTERNAL STATES TO EU</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) promoting political dialogue and reform,</td>
<td>(n) ensuring efficient and secure border management;</td>
<td>(q) promoting participation in Community research and innovation activities;</td>
</tr>
<tr>
<td>(c) strengthening of national institutions and bodies responsible for the elaboration and the effective implementation of policies in areas covered in association agreements, partnership and cooperation agreement and other future comparable agreements;</td>
<td>(o) promoting cooperation in the field of justice and home affairs, including on issues such as asylum and migration and the fight against and prevention of terrorism tax fraud;</td>
<td>(t) supporting participation of partner countries in Community programmes and agencies;</td>
</tr>
<tr>
<td>(j) fostering the development of civil society;</td>
<td>(p) supporting administrative cooperation to improve transparency and the exchange of information in the area of taxation in order to combat tax avoidance and evasion;</td>
<td>(x) encouraging communication and promoting exchange among the partners on the measures and activities financed under the programmes;</td>
</tr>
<tr>
<td>(k) promoting the development of a market economy, including measures to support the private sector, encourage investment and promote global trade.</td>
<td>(w) providing support in post-crisis situations, including support to refugees and displaced persons, and assisting in conflict prevention and disaster preparedness.</td>
<td>(y) addressing common thematic challenges in fields of mutual concern and any other objectives consistent with the scope of this Regulation.</td>
</tr>
</tbody>
</table>

Table III.7: Article 2 Scope of Assistance New Neighbourhood Programme Initiative

(Commission of the European Communities 2004b)

The Commission’s Communication was followed up by a Strategy Paper on the establishment of ENP, published in 2004 (Commission of the European Communities 2004d, SEC(2004) 564-570). The Initiative’s core aim is to create a more coherent approach across the various policies the EU had developed with respect to its neighbouring states. Cross-border cooperation was included into ENP as a tool to promote the reformulated objectives in the EU’s approach to its neighbouring states. With respect to the organisation of cross-border cooperation, ENP assembled all previously existing programmes within a more comprehensive framework. Besides profiting from earlier experiences, the new institution allowed also for more fundamental adaptations
in terms of policy goals. According to the objectives defined in *Wider Europe*, cross-border cooperation within the ENP is “to work with the partners to reduce poverty and create an area of shared prosperity and values based on deeper economic integration, intensified political and cultural relations, enhanced cross-border cooperation and shared responsibility for conflict prevention between the EU and its neighbours” (ibid. 2004: 9). The *European Neighbourhood and Partnership Instrument* (ENPI), proposed in 2004, operationalises these goals for the programming period 2007-13. Table III.7 summarises those issues listed in ENPI that enter into foreign policy and hence depart from the context cross-border cooperation was originally designed for. The crucial items comprise, first, issues that were part of the accession criteria but not the overall acquis. Second, particular security concerns regarding external states were newly introduced. Noticeably, the matter of migration and border control was integrated to the objectives, which was not official part – though arguably informal motivation – for Phare and Tacis CBC. Thirdly, ENPI embraces items accommodating broader alignment of external states to EU activities such as.

Turning to the operational programmes and project management, the Neighbourhood Programmes were considered a great step forward since they introduced the idea of launching joint calls for proposals, combining different sources of funding. Moreover, joint management structures are encouraged also for dealing with third countries. Thus, the role of central governments is effectively further reduced in favour of joined local management structures.

Moreover, during the pre-accession phase funding was based on matching Interreg money with the various funds external states were eligible, which created many difficulties and was considered “a less than ideal situation”, especially in procedural terms. To this end, Phare CBC had been created as a first step towards genuine cross-border cooperation between member states and the candidate states. A Phare CBC regulation issued in 1998 already introduced joint management structures and joint programming documents, involving regional and local authorities. With the accession of 10 new Member States on 1 May 2004, this became a priority all along EU external borders. Drawing from the Phare CBC experience, the 2003 Neighbourhood Communication addressed these problems comprehensively and reinforced the approach in the ENPI as from 2007, which also harmonised asymmetries in the funding periods that existed before 2004 between the mirroring funds external cross-border cooperation drew from.

With respect to the formal rules and the actual policy contents promoted by cross-border cooperation, the former were basically kept unchanged. Nesting assistance programmes into the cross-border initiative moved however the goals beyond overcoming internal EU borders towards the
objective of establishing more stable relations along the Union’s new external borders. Phare and Tacis CBC were especially geared to fulfil these aims, remaining formally restricted to the local level and programming objectives established before. The scope of the policy contents widened effectively with the introduction of ENPI.

Besides these shifts in the underpinning goals and purpose the cross-border instrument, Wider Europe underlined the objective of further diffusing the incrementally extended cross-border cooperation. “The Northern Dimension currently provides the only regional framework in which the EU participates with its Eastern partners to address trans-national and cross-border issues. But participation is restricted to Russia” (2003: 8). Thus, although Tacis CBC and MEDA offered the opportunity for cross-border cooperation with third states, in real fact initiatives existed only Russia and Morocco. The experiences in enlargement policy proved decisive for the subsequent active promotion of further diffusion of cross-border programmes with third states. Accordingly the 2003 strategy emphasises that “the Commission will consider the possibility of creating a new Neighbourhood Instrument which builds on the positive experiences of promoting cross-border cooperation within the Phare, Tacis and INTERREG programmes. This instrument will focus on trans-border issues, promoting regional and sub-regional cooperation and sustainable development on the Eastern border. For the Mediterranean, consideration should be given to whether such a unified proximity instrument could also apply to shorter sea crossings (between the enlarged EU and a number of Barcelona partner countries)” (Commission of the European Communities 2003a: 14). Indeed, to date cross-border cooperation does not only cover all EU internal borders, but cooperation includes Belarus, Moldavia, Morocco, Russia, Ukraine, Serbia and Montenegro, Switzerland, Turkey, the former Yugoslav Republic of Macedonia.

First experiences with the implementation of the Neighbourhood Policy at large highlighted, on the one hand, the strong influence that implementing enlargement. The transfer of experiences was in many respects very direct, not at least since a great number of staff moved from the downscaled DG Enlargement to ENP. On the other hand, the limits of applying the same tools.

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98 Morocco’s initiatives are with Spain, and between the UK/Gibraltar – Morocco. For (ES/MA) Spain – Morocco (2000 CB 16 0 PC 007) whose main purpose is to “contribute to an integrated and sustainable development of the area. The programme seeks to increase the competitiveness of the production system, to speed up convergence with the most developed economies and to promote the economic cooperation between border regions” see: http://www.interact-eu.net/604900/604902/603765/605405; for the Gibraltar/Morocco programme (approved in 2002) see the mid-term evaluation, http://www.interact-eu.net/download/application/pdf/943981 (both accessed 15 June 2006).

PART III: EMPIRICAL ANALYSIS

one-to-one in ENP became soon apparent. The direct transfer of elements from enlargement policy concentrates on actual policy tools because the ‘ultimate carrot of accession’ is not available which makes it impossible to apply a strong conditionality logic. A further difference regards the targeted states for which policies have to be much stronger differentiated than under the logic of enlargement which was based on the principle of equal treatment of all candidates. While still relying heavily on concrete tools developed in the Copenhagen framework, the Neighbourhood Instrument has incrementally developed a more differentiated approach. More differentiation between states was vehemently demanded by the target states – in contrast to the member states’ strong preference for a single global approach. In the actual policy implementation it was therefore recognised that “in the beginning one of the mistakes – if I dare to say – is that we have too much tried to apply the enlargement logic because it does not really work in the ENP – you can use certain elements but not the logic because the logic is completely different” (Interview 2007 COM DG External Relations).

Despite the need for a more differentiated approach to implementation than during enlargement, it is precisely the framing of the Neighbourhood Instrument in terms of a new universal approach that has opened a window for the Commission to extend its policy means to implement the wider goals. Thus it was that “by putting our relationships with the different countries in a sort of global framework, we have been able to mobilise certain things which we would not have been able to mobilise without such a framework” among these the direct continuation of twinning/TAIEX\(^{100}\) activities, in the words of a Commission official: “we have been able to send the same type of missions to Ukraine – I think for the moment only Ukraine but others will follow – that we sent to the accession countries, the same kind: with experts in all the fields, on how the judiciary works, on public prosecutor, how the border should be managed – this would have been inconceivable before but since we have developed this expertise and we had these people available and in the neighbourhood framework we could say ‘you have finished in the acceding countries, now you should go to Ukraine’ – and they did, and this was very beneficial” (Interview 2007 COM DG External Relations).

Noteworthy about the ENP as “policy in the making” (Delcour 2007: 130) is the rather eclectic way in which the more abstract objectives are put into action. The experience from activities in the Copenhagen framework – established in a comparably incremental manner – appear particu-

\(^{100}\) TAIEX was established in 1996 and its responsibilities and area of activity have substantially extended since. To date it supports candidate states, acceding states and the twelve new member states, as well as states participating in the New Neighbourhood Policy and Russia along individual national action plans.
larly relevant for the travelling of ideas. Generally, proposals and implementation of concrete actions and single projects are often based on previous experiences in other contexts. One example is a project at the border between Ukraine and Moldova, in the Commission’s view “an extremely successful border assistance mission where we have around 100 seconded customs officials and border guards from our member states, and we took the idea actually from something very small that we did in Albania and we completely adapted it to the local conditions, and I think it is one of the most successful things that we have ever done because it meets several concerns: it does capacity building, it brings new concepts to the customs border guards in Ukraine and Moldova, for instance the question of risk analysis. [...] so we have been able to apply something … we have done capacity building, we have learnt new concepts” (Interview 2007 COM DG External Relations).

Where this creeping extension of Commission activities meets resistance of the member states, the actual successful implementation of pilot projects appears a strategy of the Commission to widen its scope for action. This is clearly expressed by the view that “we will have to convince member states that what we propose can be beneficial” and with reference to overcoming member states’ reluctance, “and now it works and they love it, there have been articles in the Wall Street Journal, in the Times, and people come to look what we are doing there from very far, we had a good idea, we were convinced of it but it took a long time to convince them – but now we know and member states want to do the same thing, while in the beginning we had to plead with them like crazy to convince them; so our role, I think, is to be inventive and to understand which tools we can usefully use and which tools we should just forget about because they do not work in that context to try to be creative and not to spent too much time in going for a sort of ‘battle on competences’ but just to prove that it works. [...] It’s all about soft capacities, and using them in a convincing manner because that makes a difference” (Interview 2007 COM DG External Relations).

The distributive nature of cross-border cooperation allowed the reframing of the underlying objectives without the formal conferral of new competences. Interestingly, the Lisbon Reform Treaty states the ENP to “special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness” (Article 7a) as part of the “general provisions” instead of listing it in connection with foreign policy. This stresses the symbolic relevance attributed to the policy but at the same time it further blurs the division of formal authority over foreign policy matters between the supranational and intergovernmental modes of governance. The
case of cross-border cooperation illustrates how the supranational level is effectively steering in substantial foreign policy matters, extending the Commission’s action capacity in substance but containing it to the distributive arena. Accordingly, initial redistributive notions of the very first cross-border actions disappeared with making all EU border eligible, which allowed subsequently the extension of distributive measures to external states promoting new policy objectives.

**SUMMARY:**

**CROSS-BORDER COOPERATION AND THE NEW NEIGHBOURHOOD INSTRUMENT**

The development of cross-border cooperation from rather loosely coordinated bilateral initiatives to a structured EU policy is summarised below in Figure III.3. The upper boxes relate to the degree of diffusion of cross-border initiatives across states, linked to various stages of organisational institutionalisation indicated in the boxes at the bottom.

The division into phases conforms basically to programming periods of the Community Initiatives. First, the initial phase from the 1950s up to the end of Interreg I in 1993 marks the period in which the core objectives for cross-border cooperation as EC-internal policy tool were developed and limited institutionalisation occurred. A relevant change occurred when cross-border headings were integrated into pre-accession assistance under Phare and assistance programmes for the former Soviet Republics, Tacis, in addition to the elements of the Barcelona process which are the framework for the EU’s relations with its Mediterranean neighbour states, MEDA. Although already under Interreg I external borders with EFTA states were part of the Community policy these initiatives were still in accordance with the original format and content of cross-border cooperation to reduce border barriers. The redefinition of cross-border as a distributive tool in foreign policy developed out of with the inclusion into the Copenhagen framework and the experiences collected during the implementation of enlargement which crystallised the potential of the policy instrument with respect to third countries. In essence, from the original design of cross-border cooperation, we see a shift in that policy type (from announced redistributive trade-offs to a distributive framing), in scope of the policy (form a limited application to internal borders to external frontiers), and in the underlying policy objectives (from integration and abolition of borders to the stabilisation of external borders).
Figure III.3: Evolution CBC in Europe

The qualitative difference with the pre-accession assistance programmes was that a linkage to a different set of institutional structures was put in place. Most relevantly for the dynamics of change was that cross-border cooperation was linked to enlargement policy in which the Commission had extraordinary discretion regarding the development of policy instruments.

Integrating the variety of different programmes for external relations in the European Neighbourhood Policy, a further refinement of the policy instrument is reflected in additional programmes for external cross-border cooperation for Interreg IV period (2007-13). This falls into the wider extension of the Commission’s foreign policy capacities, which now extend to substantive matters such as migration and border security. The literature on the European Neighbourhood Policy unanimously underlines that, both in terms of policy design and implementation tools, ENP is the continuation of enlargement policy (see e.g.: Balfour and Rotta 2005; Cremona 2004, 2006; Delcour 2007; Del Sarto and Schumacher 2005; Hillion 2005; Kelley 2006; Magen 2006; Marchetti 2007). This holds particularly true for the cross-border instrument for which in fact “the ENP programmes are to be inspired by the experience of cross-border cooperation between border regions within the EU, as well as between border regions laying along the EU’s external border” (Sushko 2006: 44).

This reflects the fact that, although in the absence of pre-accession conditionality the logic of ENP is decisively different to that of the Copenhagen framework, implementing tools were
nonetheless directly transferred to another realm. Overall, the most important import from enlargement policy was the inclusion of policy instruments developed in the Copenhagen framework. “This is the good thing about using expertise from enlargement, because we have really developed very, very detailed expertise that we have been able to test in reality and that we have been able to refine” (Interview 2007 COM DG External Relations). It is also by applying these tools, that the Commission widens its capacities through actual policy-making: “I think in general, in quite a lot of occasions we have been able to use a good idea from enlargement and adapted it, and we have been able to convince member states by doing that” (ibid.).

The results hence confirm the expectations that, if framed as a distributive policy, new capacities will spill-in. In the case of cross-border cooperation this was less a matter of institutional incorporation because EU-internal and external actions were strongly linked from the outset and developed in parallel. The extension of capacities regarded the political agenda pursued with policy tools that travelled from enlargement policy to the EU’s New Neighbourhood Policy and granted the Commission new steering capacities without establishing additional formal competences in an area which remains officially under intergovernmental control. This happened through a wider definition of the policy objectives and diffusion of the policy instrument, which permitted the nesting of foreign policy objectives within the formally purely distributive policy.
11 NUCLEAR SAFETY: RESISTING UNINTENDED CONSEQUENCES

In the enlargement context, an extended definition of nuclear safety has emerged under high pressure for new formal regulation. In the Copenhagen framework some assistance was provided, in particular for the decommissioning of plants, but the main focus was on monitoring given the regulatory nature of nuclear safety which aims at controlling nuclear installations. Fostered by unintended consequences, namely a ruling by the ECJ supporting that the Commission had formal competences on the matter, the member states fiercely objected any extension of Commission capacities. Against the expressed support by all EU institutions, this was possible since falling under the Euratom Treaty the institutional rules applying are those of exclusive intergovernmentalism. Finally, a dominant non-state actor organisation expressed heavy opposition, and in so doing represented an alternative response to binding EU rules by being in alliance with the decisive national governments. Given that a vast informal acquis existed already before enlargement entered the agenda, functional pressure pushed the Commission to go beyond the existing cooperation and left little option but to frame the policy in terms of hard regulatory policies, backed by the ECJ ruling confirming Commission competences (Table III.8 summarises the empirical indicators).

Nuclear safety was framed as regulatory policy, given in the nature of the political problem to control nuclear installations; thus we should expect an extension of capacities as non-binding rules or informal cooperation but at the same time if framed as new binding regulation member states should take action against spill-in.

<table>
<thead>
<tr>
<th>INDEPENDENT VARIABLE: POLICY TYPE</th>
<th>DEPENDENT VARIABLE: ACTION CAPACITY (EX POST)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Distributive Policy</td>
<td>Confirmed</td>
</tr>
<tr>
<td>Policy formulated as win-win distribution of funds</td>
<td>New institutionalised budgetary powers of the Commission distributed to all member states or contained by conditions for recipients</td>
</tr>
<tr>
<td></td>
<td>Disconfirmed</td>
</tr>
<tr>
<td></td>
<td>New budget lines distributed along member-state class lines (redistribution)</td>
</tr>
<tr>
<td>Regulatory Policy</td>
<td>Confirmed</td>
</tr>
<tr>
<td>Policy formulated as constraining actors’ behaviour</td>
<td>Non-binding rules and standards (lacking tools to sanction member states)</td>
</tr>
<tr>
<td></td>
<td>Disconfirmed</td>
</tr>
<tr>
<td></td>
<td>New hard regulatory competences (giving Commission tools to sanction member states)</td>
</tr>
</tbody>
</table>

Expectation: Policy objective (control of national nuclear safety installations) can only be framed in hard regulatory terms, so spill-in should not emerge.

Table III.8: Empirical Indicators, Nuclear Safety
In the field of nuclear safety, the Commission has been an independent regulatory authority since the first hours of European integration. As early as 1957, nuclear safety featured in the Euratom Treaty, which assigned the Commission a role in securing the separation of military and civilian uses of nuclear technology and safeguarding the attribution and distribution of radioactive material. Since then, however, what is commonly subsumed under the term as ‘nuclear safety’ has undergone a substantial extension and re-definition, the Euratom Treaty has however not been adapted to these fundamental changes. Most relevantly, the safety of nuclear installations and waste disposal remain absent from supranational legislation.

Quite to the contrary, the Copenhagen framework applied a much wider definition of ‘western standards’ of nuclear safety. During the pre-accession process “[f]or the first time in its history, the European Union started the process of carrying out an evaluation of nuclear safety in an independent State. In fact, in all the candidate countries” (De Esteban 2002: 5). The question is accordingly: did this wider definition of nuclear safety, which for the first time explicitly included safety of installations and waste disposal in civilian use of nuclear power, extend beyond enlargement policy?

Arguing that a general revision of the Euratom Treaty was overdue with respect to the changed use and challenges of nuclear technology, the Commission raised the explicit claim that the extended capacities exercised in the Copenhagen framework had to be expanded to all member states. The respective legal proposals were bundled in the so-called nuclear package in 2002/2003. Disputed from the beginning, the package was strongly opposed by a number of member states. Despite pressure by all the supranational institutions, from the European Parliament to the Economic and Social Committee, supporting the Commission’s proposed path, and regardless of a judgement of the European Court of Justice, granting that Euratom’s safety objective covered also installations and waste management, the member states remained firm. A number of directives effectively passed are restricted to the applicability of safety standards in third states and the accession of the EC to an international agreement; in other words, Community capacities – and with it a more comprehensive definition of nuclear safety – were contained to application outside the EU, any new instruments that affected the member states were pushed to alternative platforms outside the EU framework.

The bottom-line is a strong support of the status quo before implementing enlargement. This means a continuation of safety controls on installations and waste management based on non-binding international instruments instead of binding EU legislation. More so, as regards an exten-
sion of Commission capacities following a modernised definition of nuclear safety has so far been effectively blocked by the majority of member states, against the unison call in favour by EU institutions. Notably also survey data on public opinion supports the call for more supranational regulation, this goal has however not entered the agenda of non-governmental organisations who are traditionally against nuclear energy as such and therefore the promotion of nuclear safety is understood a contradiction to the more fundamental goals. In contrast, the power plant operators have built up a strong network that informally implements most of the proposed legislation to evade and to lobby against further hard EU regulation.

**STATUS QUO ANTE:**

**SIMPLY EURATOM**

Nuclear safety has been a policy issue since the very beginning of the European integration process. The *Treaty establishing the European Atomic Energy Community* (EAEC or Euratom Treaty) laid down the basis for the Community responsibility in 1957. In contrast to the *Treaty on the European Community* (TEC), together with which it was signed, the TEC expired after 50 years while Euratom has indefinite validity. Another sharp and more relevant contrast is marked by the many adoptions to the TEC whereas the Euratom Treaty has hardly been changed since entering into force and also the future Lisbon Treaty will preserve the separate legal character of Euroatom. Regarding safety issues the Treaty has been interpreted from the start to give the Community responsibility to be active in areas such as radiation protection of the work force and the public (Chapter III), supply of nuclear fissile materials for the developing nuclear power sector (Chapter VI), safeguarding of this nuclear fissile materials to prevent it from being used for unauthorised military purposes (Chapter VII) and general aspects including research and dissemination of information. However, the emphasis on safety issues “in the 1950s centred on ensuring that the

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separation of the civilian and military uses of the technologies was maintained [and responded to the need that] civilian uses of nuclear technology for electricity generation required secure access to the basic raw material of uranium” (Barnes 2003: 122). In this vein the Euratom Supply Agency (ESA) and the Euratom Safeguards Office were established, while questions regarding the safety of nuclear installations remained of exclusive state concern.

Besides these formal Community competences in nuclear safety, a non-binding acquis has emerged on the basis of a 1975 Council Resolution “on the technological problems of nuclear safety” (Council of the European Communities 1975). Given a substantial increase in numbers of reactors, the member states agreed in the resolution to work towards the harmonisation of safety requirements and criteria by closer cooperation between the national governments. Moreover, two expert groups were created to support this process: the Reactor Safety Working Group (RSWG) and the Nuclear Regulators Working Group (NRWG). The Council adopted a second Resolution in 1992 in response to new concerns raised by the nuclear accidents in Three Mile Island in the US (1979) and Chernobyl in the Ukraine (1986) (Council of the European Communities 1992). This resolution aimed at intensifying the harmonisation of safety measures within the EU and to increase cooperation with the states of Central and Eastern Europe and the former Soviet Union.

The stability of the Euratom legal framework in contrast to the broad extensions of the Treaty on the European Communities has at times demanded clarification on the relationship between the two documents. “Accordingly, Euratom competences have repeatedly given rise to litigation before the European Court of Justice. One set of cases concerned post-Chernobyl-legislation on contaminated food, regarding which there is an overlap of EC legislative competences for common commercial policy and the internal market on the one hand and the Euratom competence for radiation protection on the other: there the ECJ decided as to the ‘correct’ legal basis to be used on the basis of the ‘centre of gravity’ of the individual acts. In doing so it accepted that, generally, EC legal bases could apply in the area of Euratom law as long as the relevant Euratom provisions were not conclusive” (Trüe 2006: 251). Moreover, EC law on state aids raises questions regarding the applicability to member states’ subsidies in the area of nuclear energy, which

102 Between 1964-1977 some 148 reactors were constructed and started operating in Western Europe (Belgium, UK, Finland, France, Netherlands, Spain, Sweden and Germany), (see: Barnes 2003: 120).

103 “Increased levels of interest in nuclear electricity production and a dramatic rise in numbers of reactors under construction by the national governments during the 1970s pointed to the need for some level of convergence of national safety practices in the nuclear installations” (Barnes 2003: 123).

104 Relevant case law is regarding the relationship between the Euratom and European Community Treaties are the European Court of Justice’s Ruling in Case 1/78, ECR 1978, p. 2151; Case C-161/97 Kernkraftwerke Lippe-Emms GmbH v Commission of the European Communities, ECR 1999, p. 1-02057.
is explicitly promoted by the Euratom Treaty. Although Community law applies in general to nuclear energy and allows the Commission to intervene to prevent distortions of competition in the energy sector, the legal basis of the Euratom Treaty provides that state support on research and insurance contracts is admissible. Therefore, in these areas Community state aid control is at least limited (Pechstein 2001: 311).

Finally, concerning the Commission’s potential to promote an extension of its capacities in terms of formal discretion it is noteworthy that Euratom is a sectoral and not a framework treaty as the EC Treaty. Consequently, unlike the legislative character of the latter, the former is mainly a sectoral limited administrative treaty. Thus, the legislative responsibilities under Euratom are in comparison very restricted. Furthermore the legislative proposals are of highly technical nature due to which the drafting is to a great extent done by external experts (Grunwald 2007: 6). The two aspects leave the Commission relatively little scope to extend its competences by means of initiating legislation.

Besides the European Community, other supranational actors have developed various international instruments to regulate nuclear safety. The Commission holds strong cooperative links with these. The most relevant ones are the United Nations International Atomic and Energy Agency (IAEA), the OSCD Nuclear Energy Agency (NEA), and the association of 17 European nuclear regulators WENRA, which will be part of the illustrations remaining two sections of this chapter.

The IAEA has been active in all states with nuclear capacities since 1956, setting international standards and guidelines on nuclear safety and other areas, such as waste management. With respect to nuclear safety and waste management, the IAEA provides two conventions. First, the IAEA’s Convention on Nuclear Safety was adopted in 1994 and entered into force in 1996. By setting international standards, it commits the participating states operating land-based nuclear power plants to maintain a high level of safety. As an incentive instrument, the Convention does

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105 The Council decides unanimously, i.e. legitimacy is based on the veto power of each state with still very delimited consultative powers of the European Parliament.

106 These are the: International Atomic Energy Agency (IAEA), Nuclear Energy Agency of the OECD, International Commission on Radiological Protection (ICRP), International Science & Technology Center, Association for Regional and International Underground Storage (Arius), and GMF – Group of Municipalities with nuclear facilities (for links to all these see: http://ec.europa.eu/energy/nuclear/links/index_en.htm).

not set legally binding obligations that could be enforced by control and sanctions but builds on a network of peer-review reporting and trust in a common interest for nuclear safety. A Commission Decision of 29 April 2004 laid the legal ground for Euratom to access the Convention on Nuclear Safety (see: Commission of the European Communities 2004c). Second, the Joint Convention for the Safety of Spent Fuel Management and the Safety of Radioactive Waste Management was opened for signature in 1997 to enter into force in 2001. The European Union played a decisive role in negotiating and defining the Convention, “we have been responsible for a lot of the work that had gone into safety standards in the IAEA, a lot of the IAEA safety standards and guidelines were based on work done by the EU” (Interview 2007 DG TREN). The obligations of the contracting parties include the establishment and maintenance of a legislative and regulatory framework to govern the safety of spent fuel and radioactive waste management as well as an adequate protection of individuals, society and the environment against radiological and other hazards. The Commission has, furthermore, enacted resolutions on the transfer of information to support the IAEOS’s international security instruments (Grunwald 1998: 293). Euratom accessed the Convention in October 2005 (entry into force 2 January 2006).

Within the OSCE, the NEA is an intergovernmental, semi-autonomous body with, currently, 18 members. It was created in 1985 as European Nuclear Energy agency “with ‘the same spirit’ as the Euratom Treaty (Q 664) although the NEA and Euratom operate completely separately” (House of Lords 2006b: 23). NEA operates as think-tank trying to develop of a common approach to nuclear energy issues, based on the exchange of best practices and feedback between its members. The Commission is a non-paying member of NEA, the IAEA acts as observer.

The Commission, in cooperation and addition to other international organisations, has thus been active in certain fields of nuclear safety for decades. To some observers this stability and in particular the continuous exclusion of safety of nuclear installations – i.e. plants producing nuclear energy and waste disposal – is striking. “It is even surprising that the Euratom Treaty would not have undergone any significant alteration to date. Compared with the continuous process of evo-

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110 All member states with nuclear facilities have ratified, for a list of signatories and the full text of the Convention see: http://www.iaea.org/Publications/Documents/Conventions/jointconv.html (accessed 30 May 2007).
lution experienced by the (E)ECT, the Euratom Treaty has remained unchanged over the years, becoming *embedded* in a manner that is inconvenient for those who have unsuccessfully postulated its reform” (Prieto Serrano 2006: 13). Different claims for changes are made that range from challenging the underlying objectives of the text, to the legitimacy of the decision-making processes it functions on. By the same token, critics of the current EU legal framework bring forward especially three shortcomings of Euratom: the inadequateness of the Treaty to respond to the changed definition of nuclear safety (lack of comprehensiveness need for legally binding rules), a lack of democracy due to the exclusion of the EP, legal conflicts between the separate Euratom and the TEC, the general pro-nuclear approach of the document, and the negligence of the back-end problem for nuclear waste.

Interestingly enough, “[t]he 1957 European Atomic Energy Community (EAEC) EURATOM Treaty came at the time when there was great optimism about the peaceful use of nuclear technology. At the time negotiations for the [Euratom] Treaty began, the EAEC was regarded as perhaps having a greater integrative potential than the evolving European Economic Community. This was because it was originally perceived as non-threatening to major national interests” (Barnes 2003: 122). Yet, already during the negotiations differences between France and Germany led to an unfalteringly more modest outcome, leaving the Treaty with relatively limited objectives while the Commission’s control functions remained restricted.

Since then, the red threat in the evolution – respectively stability – of the Euratom Treaty is that “[i]t is in relation to the powers of the Commission vis-à-vis the Member States’ nuclear activities that the Euratom Treaty has proved to be most contentious” (Scott 1996: 226). Pursuant to a reference for a preliminary ruling of an administrative tribunal in Strasbourg, in 1986 the ECJ gave a “purposive interpretation” backing the Commission under Article 37 Euratom according to which each state has to inform the Commission with data on any plan for disposal of nuclear waste. Similarly, Article 34 Euratom, establishing the member state obligation to first obtain a Commission opinion before conducting ‘particularly dangerous experiments’ that might affect the territory of another member state, have not been respected during French nuclear tests in 1995, however without the Commission instituting a case before the ECJ (ibid.: 1996: 226-28). These two examples underline the member states’ consistent reluctance to accept too much Commission intervention under the Euratom Treaty, even in cases in which the Commission responsibility has been confirmed by a Court ruling, a pattern that we will see re-emerging in an even more straightforward manner in response to the Commission’s advances that evolved out of enlargement policy.
In short, the legal framework of the Euratom Treaty provides the Commission with considerable discretion producing efficient policy outputs as far as the Treaties rather limited initial definition of nuclear safety is concerned. Moreover, a number of expert groups and agencies have been established, indicating that the resources to implement the security policies have been put in place that administer, as far as nuclear safety beyond radiation protection is concerned, a wide body of informal rules. Notwithstanding increased salience, in particular due to nuclear accidents and substantially more critical public opinion, the interpretation given to the definition of safety in the binding legal framework has not been extended to the safety of nuclear installations and waste disposal. Although indisputably part and parcel of an up-to-date nuclear safety agenda and although the Community framework is considered a success, the Commission remains without formal capacities. As a substitute for Community control member states cooperate through a wide web of non-binding acquis or through international agreements outside but with close links to the Community – not at least by the fact that these instruments, foremost of the IAEA, have been drawn up in part on the basis of existing non-binding Community standards. In policy terms, nuclear safety is handled purely as a regulatory policy. Regarding the existing institutional framework, the Euratom Treaty basically excluded the European Parliament from decision-making while the member states decide unanimously. Since its drafting, Euratom has undergone hardly any changes, which can be also attributed to its very lose formulations and extremely high flexibility to accommodate a wide range of different policies. This, in turn, lifts the hurdle for a consensus on changing parts of the Treaty even higher.  

Nuclear safety in a wider sense has thus a long regulatory history under the Euratom Treaty. Regarding the safety of nuclear installations and waste disposal, the Commission has however not exercised any responsibilities. By nature of the problem, it has to be framed in the regulatory arena. Given the pre-existing acquis, this would materialise in an extension of the definition of nuclear safety, which under Euratom rules demands unanimity of all member states.

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111 “The Euratom treaty is very loosely drafted, you have a lot of flexibility within the Euratom Treaty to do things, you can do virtually anything. [...] That is why it does not change, you know, people talk about changing the Euratom Treaty, but in the end they never do, because you will never agree, you will never get a consensus, I think, certainly not for many years because of differences of views on nuclear dossiers you will never get a clear consensus on how you can modify the Euratom Treaty” (Interview 2007 DG TREN).
PRE-ACCESSION PHASE:
THE REINFORCEMENT OF FUNCTIONAL PRESSURE

The Commission became involved in matters of nuclear safety in the states of Central and Eastern Europe soon after the break-up of the Soviet Union. Following a Joint Declaration that levelled the ground for bilateral relations between COMECOM states and the European Community in 1988, the European Economic Community and Euratom signed a trade agreement including nuclear material with the USSR in 1989 (see: Council of the European Communities 1988; and Commission of the European Communities 1990). With Russia and the other predecessor states of the Soviet Union, a number of bilateral agreements on trading of nuclear materials were concluded (see: Grunwald 1998: 302). Beyond this, at a G7 meeting in Munich in 1992 entrusted the Commission to support the assurance of higher safety standards for Soviet-design reactors. Therefore, from the very beginning “[t]he Commission was put into a very unique position in the development of a strategy for nuclear safety in the States which at the beginning of the nineteen nineties were not Member States of the EU. Indeed at the time the work began they were not even candidate States for future membership” (Barnes 2003: 123-24).

Bilateral links with the central European states were further strengthened by the association agreements, concluded from 1991 onwards. The Europe Agreements remained the formal legal basis on which the Commission developed its pre-accession policy in the area when these were re-defined to provide the main accession instrument after 1993. The overall aim was to ensure safety standards comparable to those in the member states. A clear emphasis of nuclear safety in the enlargement process is traceable from the Commission’s Agenda 2000 (Commission of the European Communities 1997a). The opinions on the potential candidate states included analyses of nuclear safety authorities. Monitoring continued in the Regular Reports as part of the requirements for accession and the Commission reported additionally on the matter to the European Council of Cologne in 1999. The ‘twin approach’ the Commission took was to, on the one hand, resolve the immediate most urgent problems as the safe operating of nuclear installations and the establishment of competent safety operations. On the other hand, longer-term incentives were the closure of unsafe installations, the modernisation of the most modern ones and the development of alternative energy sources to reduce the dependency on nuclear energy. A further refinement of the standards and benchmarks the candidate states had to comply with was achieved through the assistance funds of the Phare and Tacis programmes.
PART III: EMPIRICAL ANALYSIS

For the establishment of policy tools in the Copenhagen framework, it was essential that the Commission had to pin down a precise definition of safety of installations, which subsequently led to the major disruption between the Commission and the member states’ understanding of the wider responsibilities of the Community. As the Commission underlined itself “[s]ince there are no prescriptive criteria in EU law governing the design or operation of nuclear facilities, the safety of the operating plants in the applicant countries has to be judged in relation to more subjective criteria, termed ‘western standards’”.\(^{112}\) To gain the necessary legal basis the DG Environment, at the time responsible, therefore claimed the need to accede to the IAEA convention to justify monitoring in the candidate states, which evoked diverging opinions between the member states and the Commission.

The member states decided to withdraw the mandate from the Commission and replaced it with own structures in the Council to monitor the candidate states. This move was in part actually welcomed by the Commission which was lacking the technical skills for inspections that could be much better be provided by national regulator agencies (Interview 2007 DG TREN, on the shortcomings of the Commission’s human resources see also: Court of Auditors 1999: 14). The formal ground for pre-accession assessment was the Helsinki European Council of 1999 which had called on the Council “to consider how to address the issue of nuclear safety in the framework of the enlargement process in accordance with the relevant Council conclusions” (European Council 1999a: I-7). In this the European Council recalled “the importance of high standards of nuclear safety in Central and Eastern Europe” as first expressed by the G7 in 1992 and subsequently put into more concrete terms relating to the candidate states by the Commission’s Agenda 2000 (Commission of the European Communities 1997a). It followed an assessment by the Council’s Atomic Questions Group (AQG) and an ad hoc Working Party on Nuclear Safety (WPNS) under its charge in late 2000 and the first half of 2001 who issued the ‘Report on the Evaluation of Nuclear Safety in the Context of Enlargement’\(^{113}\), together with an ‘Addendum’ (Council of the European Union 2001), based on inputs by different sources.


\(^{113}\) II.1 General observations: The methodology for the evaluation process is universal with respect to Candidate States. This means that: (a) it is not limited to Candidate States with nuclear power programmes in operation, (b) it is applicable to all types of reactor designs and other nuclear installations and to the varied regulatory environments encountered in the Candidate States. It was pointed out already in the original mandate given by Coreper to AQG that the demands made to the Candidate States to achieve the expected “high level of nuclear safety” ought not to be stricter than the requirements in force in the EU. Furthermore, it is understood that this exercise does not lead to any transfer of competences from the Member States to the Community and that the competence and responsibilities relating to the safety of the design, construction, operation and decommissioning of a nuclear installation and for the safe management of radioactive waste, lie with the State which has jurisdiction for the installation concerned pp. 4-5.
In an assisting role, the Commission was asked by the presidency of the Atomic Questions Group to draw up an inventory of the Community’s non-binding acquis on nuclear installation safety and the commitments the candidate states had already taken on. The mandate was to concentrate explicitly only on installations safety, keeping however in mind that other areas were related, foremost that of spent fuel and radioactive waste (Commission of the European Communities 2000a). This stocktaking was the first systematic inventory of informal regulation, which turned out to produce a substantial body of existing agreements between member states. It is worth quoting at length how the non-binding acquis was assembled, since it is telling for the status and emergence of non-binding EU legislation:

“All we had to do was to a large extend was to go to our cabinets and pull out one report after another that had been produced by our Nuclear Regulator Working group and by the Reactor Safety Working Group, so we had the Reactor Safety Working Group and the Nuclear Regulators, and we had all these reports they had done, including common positions on safety, on pressure of water reactors and, and, and... this was the stuff, these were the reports that we used in reality to do guidelines from and all we needed to do was to pull out all these things and say: ‘look, these are the things you agreed on in the past, you adopted as working group...’, and, of course, this is acquis, there is a big acquis, it’s just not binding, but everybody agrees that these are common positions in the Community, it’s a standard thing [...] it was a very extensive work that a lot of people that looked at and were amazed – how much work we had produced and how many reports had actually been adopted, published, distributed which they had never even thought about as being part of the acquis, but it clearly was” (Interview 2007 DG TREN).

For the remaining parts, the Working Party’s report was based on the non-governmental organisation WENRA’s ‘Report on Nuclear Safety in the Candidate Countries’ (Western European Nuclear Regulators' Association (WENRA) 2000). The very establishment of WENRA in 1999 was linked to this task, as its twofold mission reflects: “Firstly, nuclear safety was included in the European Union set of enlargement criteria and, secondly, national safety approaches have been developed from IAEA Safety Standards, the Convention on Nuclear Safety, but independently”.\(^{114}\) In other words, WENRA took the role which the member states did not want the Commission to exercise in order to pre-empt the creation of new supranational responsibilities for nuclear safety. In more direct terms: “WENRA was actually established in order to combat the Commission, to try and deflect any transfer of competence, or any competence being developed in the Commission, WENRA was being set up to say: ‘look we sill do all this, you do not need to rely on the Commission, you do not need a Community activity, we have a WENRA one’” (Interview DG TREN).

The objectives of WENRA comprised accordingly the development of a common approach to nuclear safety and to act as independent agency to examine nuclear safety in the EU candidate states. Requested by the member state governments, it conducted two studies in 1999 and 2000 for which the western operators relied on their bilateral links with their central and eastern European counterparts. Beyond being referred to by the Working Party on Nuclear Safety, the reports were used for the recommendations in the accession negotiations.

This indicates one of the limitations of mandating an EU external body with the monitoring: to have any coercive effect, the external agency has to operate through the official institutions. “They produced a WENRA report, just as the Commission did ... and both reports went into the Council, but the WENRA would have liked to have done it on their own – but then, whom could they give their report to? They had to send it to the Council and the Commission because otherwise it had no standing at all” (Interview DG TREN). Thus, it was mainly through an external body that the monitoring assessments were implemented, yet, to give the reports leverage the Commission that drafted the Regular Reports and negotiated Accession Partnerships was indispensable to give them any effective meaning. The AQG/WPNS report issued in May 2001 was followed up by a decision of the Permanent Representatives Committee in July approving the procedure for the monitoring of candidate countries’ commitments with respect to the recommendations of the report. The mandate for peer reviews was subsequently implemented and completed with a peer review status report (Council of the European Union 2002b).  

A decisive difficulty in all this was the actual absence of the uniform ‘western safety standards’ the monitoring exercise officially referred to. The key problem is that amongst the western states regulation is dealt with following virtually opposite approaches. The most extreme differences can be asserted between the strong control-based German approach and the thoroughly liberal British model. The Commission hence constructed a ‘performance evaluation guideline’ “which focuses on important nuclear safety issues such as plant design and operation, the practice of performing safety assessments, and nuclear legislation and regulation, in particular the role of the national regulatory body” (Commission of the European Communities 2000b). Given that

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115 The peer review process foreseen in the Council’s report has since resulted in the publication of a progress report (ref. 9601/02) on the implementation of the Council’s recommendations.

116 “The primary objective of the project was to develop a common format and general guidance for the evaluation of the current nuclear safety status in countries that operate commercial nuclear power plants. Therefore, one of the project team’s first undertakings was to develop an approach that would allow for a consistent and comprehensive overview of the nuclear safety status in the CEEC, enabling an equal treatment of the countries to be evaluated. Such an approach, which did not exist, should also ensure identification of the most important safety issues of the individual nuclear power plants. The efforts resulted in the development of the “Performance Evaluation Guide”, which focuses on important nuclear safety issues such as plant design and operation, the practice of performing safety assessments, and nuclear legislation and regulation, in particular the role of the national regulatory body” (EC-
these objectives and standards for safety levels to be met by the candidate states were actually first formulated in this context, “[t]he outcome of this approach has had an impact not only on the accession States but on the situation in the existing Member States of the EU in a number of ways” (Barnes 2003: 124). They did so in particular because they stood on somewhat muddy grounds. This guides us back to the Commission’s initial response to the monitoring mandate.

While the Council tried to evade more Commission activity, the latter appealed to the ECJ arguing for the full accession of the European Community to the IAEA Convention on Nuclear Safety and the competence of the Community in the field of nuclear safety (Articles 30 to 39 of the Euratom Treaty). The background was, on the one hand, the member states’ firm stands that the Commission had no competences causing “frustration as much as anything else by the Commission, we were involved in the negotiation of the nuclear safety convention, just as we were involved in joining the convention for a long period of time [...] and it was just almost an insult I think, we felt restricted to kind of one and a half article of a convention we had negotiated”. On the other hand, this created contradictions, therefore “part of the driver was the increasing recognition that we were making statements about safety in the candidate countries, yet we had been told by the member states this is no competence” (Interview 2007 DG TREN). This legal dilemma created, moreover, practical difficulties in the implementation of the assistance instruments. In a very critical report, the Court of Auditors took the Commission under attack regarding its activities under Phare and Tacis: “At the end of 1997, owing to the absence of a binding legal basis, there was still no formal consensus at the European level concerning technical standards in the area of the design and operational safety of nuclear installations. The 25 basic nuclear-safety principles published by the IAEA are still implemented in accordance with each Member State’s own technical standards and regulations, which has no facilitated the action the EU has been taking with regard to the safety authorities in the CEECs and the NIS” (Court of Auditors 1999: 10).

Therefore, “effectively, why we appealed to the Court was formally over the nuclear safety convention because we said that the member states restricted our competences too much in the context of the nuclear safety convention, but I suppose the main driver in many ways was the assessment of safety in the candidate countries which suddenly highlighted the fact that ten new member states are joining, several of them have nuclear power plants and the Community could

not form a view on them formally – we could but in most member states said we had no legal basis” (Interview 2007: DG TREN).

In the Court ruling of 2002, it was decided that the Commission had competences on nuclear safety in the wider sense under Euratom (European Court of Justice 2002). It thus also confirmed that no matter whether the Commission or the Council were active, Community competences existed. In its ruling the Court went beyond what the Commission had anticipated: “in fact we were surprised in the end that the Court gave us more competences than we had expected, purely because the member states were so active in this area as a Council – they kind of defeated their own objective by taking over the work from us” (Interview 2007 DG TREN).

Already before and independent of enlargement, technological and environmental changes raised functional pressure for a re-interpretation and extension of the interpretation given to nuclear safety in the Euratom Treaty. Applying a wider interpretation to the candidate states created double standards and thus increased functional pressure. The member states’ attempt to avoid this extension of the safety concept failed, and with it the goal to prevent a new interpretation of Community competences under Euratom. More so, the ruling of the ECJ affirmed the opposite of what the member states tried to achieve by withdrawing the pre-accession monitoring mandate from the Commission. Member states changed their strategy and withdrew the pre-accession monitoring task from the Commission once the activities in the Copenhagen framework threatened to lead to new formal competences. Yet, the unintended consequence pressuring for formalisation, set off in connection with monitoring in the Copenhagen framework, was still elucidated by an ECJ judgement. Central for our analysis is that the functional pressure that increased due to unintended consequences left little options but to frame spill-in in terms of formalising the pre-existing non-binding acquis on nuclear safety.

117 “In spite of this overlap between Member State and Euratom competences in the area of the Convention, the Council did not authorise the Commission to negotiate the Convention on behalf of the Euratom. However, the Euratom acceded to the Convention according to Convention Article 30(4) as a regional organisation. The existence of Euratom competences in the areas covered by the Convention had to be declared upon accession. The declaration lists the Convention Articles which apply to the Euratom or cover fields of Euratom competence, informing the other parties to the Convention where the Euratom can act, be it exclusively or together with its Member States. It was the content of this declaration which was contested between the Commission and the Council. The Commission interpreted the legal bases for Euratom activity more widely than the Council. [...] In order to justify this interpretation of Articles 31/32 Euratom, the Court continued to rely on the principle that Community law provisions must be interpreted in a way that gives them practical effect (‘effet utile’). Thus, according to the Court the radiation protection chapter forms a coherent whole conferring powers of considerable scope in order to protect the population and the environment against the risks of nuclear contamination. In relation to the Convention, the Court concluded that, in the light of points recognised in the previous judgments—including the superior overview of the Commission over the nuclear industry – it would not be proper ‘to draw an artificial distinction between the protection of the health of the public and the safety of sources of ionising radiation’” (True 2003: 673-75).
In the aftermath of the ECJ judgement, the Commission drafted its so-called nuclear package in 2002/03. The package referred outspokenly to the new need to strengthen the supranational level in view of eastern enlargement, stressing that in the Copenhagen framework the EU, for the first time involved in nuclear safety control in independent states – and should continue to do so. The directives proposed have since been rejected by the Council (2002, adapted version 2005). Instead the Council promotes an extended consultation procedure to coordinate European nuclear safety standards. The package includes two regulations on nuclear safety, one on the management of spent nuclear fuel and radioactive waste (Waste Directive) and one setting out basic obligations and general principles on the safety of nuclear installations (Safety Directive). Both directives would have set up legally binding rules for standards already widely recognised as part of the non-binding acquis and the IAEA framework.

In this sense, especially the adoption of the Waste Directive appears not to imply much of a change for the member states. It would oblige them to report to the Commission, and would in essence replicate the reporting instrument existing in the IAEA inside the EU which, from the Commission’s perspective, “seems logical since I am more interested in what is happening in Spain than I would be interested about what is happening in Argentina for example, or in Australia, so it is a logical extension and a logical definition and ... it doesn’t impose anything dramatically different to what they already work with” (Interview 2007 DG TREN).

Rendering the Safety Directive legally binding involves more severe concessions for the member states due to a clause on decommissioning funds. Although difficulties in passing a directive including decommissioning had been foreseeable, it was included to respond to a firm, yet non-binding, request by the European Parliament, which Commissioner de Palacio (also responsible at the time for relations to the EP) decided to respond to. The shortcoming of the current Euratom regulations on decommission is that it only obliges operators to create sufficient financial backups to finance decommissioning when needed. This obligation is apparently well met with greatly sufficient resources declared for future expenses (and thus tax-freed). Euratom does, however, not regulate how to handle these reserve funds, i.e. the reserves for decommissioning do not have to be kept in segregated accounts and are thus commonly used for other invest-
ments. The directive aimed precisely at this, prescribing the segregation of funds in a separate account – a substantial financial sacrifice for the operators from whom particularly strong resistance was raised.

The role of national regulators in maintaining strong member state opposition has been decisive. Not only have they offered the alternative forum of WENRA to take on functions the Commission claimed formal authority over, national regulators have also had a particularly strong influence on governmental positions due to two factors.

First, regulators are usually placed within the public administration (even if acting widely independently) and have thus direct access to state officials. Second, and more relevantly, other societal groups taking an opposed position to that of the regulators’ and lobbying in favour of more supranational involvement did not emerge. Rather, the vast majority of environmental nongovernmental organisations are in general opposed to nuclear energy, since they usually take a fundamentally negative standpoint against any atomic matters. Therefore, support for the creation of more binding legislation on power plants also remained off the agendas of organised societal groups; whereas those actively favouring nuclear energy without any Community interference exerted effective influence on political decision-makers. The Commission, nonetheless, refers stoutly to public opinion surveys underlining the support for higher binding standards as reflected in responses to a 2005 Eurobarometer Survey on Radioactive Waste (Commission of the European Communities 2006f). This reference reflects, however, a diffused notion of public opinion and no organised voice in support of more harmonisation has emerged.120

Similarly, a split between nuclear supporters and opponents exists among member states. States favouring nuclear energy reject formal regulation because they fear that non-nuclear states will impose unwanted obligations on them. States rejecting nuclear energy are sceptical about an extension of Euratom capacities because they fear an upgrading of the positive approach towards nuclear energy the Community is understood to be propagating. This complex constellation hinders even further the achievement of the consensus required for any decision under Euratom.

The same cleavages have, however, led the European Parliament to vote with an overwhelming majority in favour of the above-mentioned request to the Commission for a proposal on decommissioning.

120 The following reasoning by the Commission has therefore been considered not to be very fruitful in the end: “For those Member States that choose to go down the nuclear path, acceptability by the public will also be an important factor. The Community has a key role to play in ensuring that the nuclear industry develops in a safe and secure manner. In that respect, the Commission considers it a priority that the Community adopt a legal framework on nuclear safety, facilitating harmonisation and compliance with internationally acceptable standards and ensuring the availability of adequate funds for decommissioning NPPs at the end of their life and national policy plans on management of radioactive waste” (Commission of the European Communities 2006d).
The split between member states has blocked any moves toward formal harmonisation and member states limited their cooperation to informal arrangements. The pro-nuclear states actively promoted WENRA to respond to functional pressure and to pre-empt more coercive Community instruments. As a matter of fact, even the Commission sustains that to date WENRA is “mostly very much in line with what the nuclear package did, but the nuclear package would have been binding, whereas they want to do this work on a non-binding basis” (Interview 2007 DG TREN).

The main official arguments for rejecting the nuclear package have been that it would lead to a duplication of existing mechanisms, and worse so, would limit the necessary flexibility in implementing these. An elaborated report by the British House of Lords offers a comprehensive overview of all the possible arguments putting the effectiveness and legality of the two directives into question. As preferable alternative, this report openly supports “harmonisation through WENRA” holding that “[a]ny future EU action on nuclear safety should be based on the work undertaken by WENRA” (House of Lords 2006b: 33). Instead of a waste directive it is held that “the EU could play a highly beneficial role in actively encouraging Member States to prepare for long-term management” (House of Lords 2006b: 38), citing Finland and Sweden as positive examples for national best practices. The bottom line is thus that the member states continue to argue that the instruments of the IAEA are sufficient or better suited to fulfil the, albeit, necessary functions and that, where new pressure arises, WENRA will be better equipped to respond. Paraphrased by a Commission official: “This is a situation where basically the IAEA is doing a great job because it is non-binding, whereas the Commission proposes exactly the same thing in a more logical and limited area and we think it’s wrong because it is binding! And, … it’s just purely political, you know: ‘we don’t want to commit ourselves.’ […] For me it’s totally illogical – but as I say, the member states see it as a kind of opening the door to community legislation, and they do not want to give in even that little bit of stamp, even if it does not change anything” (Interview 2007 DG TREN).

Despite the fact that the application of monitoring in the Copenhagen framework created considerable unintended consequences and functional pressure, member states blocked any new formal regulatory policies to spill-in. This happened essentially by rejecting an extended updated definition of nuclear safety, as applied to the candidate states. In line with the expectations derived from the theoretical model, because the Commission had no choice but to frame the policy to emerge within the EU acquis as hard legislation, spill-in was pre-empted by the member states.
They did so by delegating both the pre-accession monitoring function and the execution of a broader interpretation of nuclear safety – that could not be avoided – to an alternative less coercive forum outside the EU and thus sourcing out the very functional responses the Commission had developed and was pressuring to exercise.

**SUMMARY:**

**NUCLEAR SAFETY**

In sum, the member states continue to resist successfully any form of spill-in of capacities they attributed to, and subsequently withdrew again from the Commission in the Copenhagen framework. Unintended consequences that emerged from the implementation of enlargement have been sidelined by referring responsibilities to existing international institutions or new private organisations whose creation was actively supported outside the Community framework. The vast body of pre-existing informal acquis was systematically summarised and made accessible for the first time to provide standards for pre-accession monitoring, which increased the pressure for formalisation of these rules while it closed the door for moving further into informal regulatory policies within the EU framework. Functional pressure that existed already before enlargement because of an outdated limited definition of nuclear safety in the application of Euratom was increased due to two causes. First, the extended definition *vis-à-vis* the candidate states created double standards in demanding compliance with ‘western safety standards’ that remained basically undefined and diverging within the western member states. Second, unintended consequences reinforced functional pressure for spill-in because the ECJ confirmed the extended interpretation of nuclear safety policy to be comprised in the existing regulations of Euratom. Given the pre-existing substantial non-binding acquis and the new recognition of wider formal Community competences, spill-in could only be framed in terms of new binding legislation, or more precisely the formalisation of existing informal institutions as the only feasible response to increased functional strains.

Decisive for the outcome was the involvement of the non-state actor WENRA, which argued vehemently and very actively against further supranationalisation, offering at the same time alternative functional solutions. Moreover, the restrictive institutional rules of Euratom facilitated further the member states’ ability to reject proposed legislation that have a generous backing by all supranational institutions (see also: European Economic and Social Committee 2003) which remain fully excluded from the unanimous decision making under the sectoral Treaty. Already
during the implementation of enlargement, the means of informal governance were thus expanded. Referring to the “strong mediation between the national bureaucracy and interest groups” the Commission relied on, Saurugger points out that this “form of informal governance delivers reliable policy-outcomes against the odds of a cumbersome, super-majoritarian decision-making system. Confronted with the high danger of unsafe power stations in Central and Eastern Europe, the Commission was looking for strategies developed by actors perceived as experts in the field, as they are confronted with similar questions on a daily basis” (2003: 224).121

Hence, the theoretical expectations are met: since framed as formal, hard legislation the member states avoided the institutionalisation of Community capacities in the area of nuclear safety. Even more so, the member states have actively worked against the Commission to exercise its formal competences and propose binding legislation. The Commission, in turn, has made use of some limited own resources, especially making reference to statistical data in absence of actual monitoring functions. Yet, these activities remain ad hoc and do not amount to institutionalised new action capacity because they do not create any tools to directly adapt member states’ behaviour but may at best work through informing national publics that might then turn on national governments.

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121 The author continues pointing out the normative problems this kind of informal governance is linked to. “However, this form of informal governance constitutes also a major threat for the legitimacy of the Union, as there is no public and democratic accountability for the decisions taken by the Commission in this case. In search of expertise, the Commission has not consulted with anti-nuclear movements or environmentalist interest groups. The result is an imbalance between opinions presented which makes ex post control of decisions highly difficult” (Saurugger 2003: 224). I will take up this issue in the conclusions.
12 ANTI-CORRUPTION: OUT-SOURCING RESPONSIBILITY

Anti-corruption is a regulatory policy, accordingly during the pre-accession phase the Commission focused on monitoring the candidate states and exerted pressure on the candidate states to pass and implement legislation to fight corruption. To this end, standards and benchmarks were established in the Copenhagen framework. At the EU level some related binding legislation existed, in particular on the protection of the Union’s financial interest. Regarding the fight of corruption inside the member states, international instruments were established parallel to the EU regulations during the pre-accession phase. These international agreements established outside the EU framework took up those political problems for which the Commission had for considerable time tried to create Community competences. The pre-existing acquis and the creation and implementation of wider standards in the Copenhagen framework increased the pressure for spill-in in the form of harmonisation with little scope for framing pre-accession competences as further non-binding EU rules (Table III.9 summarises the empirical indicators).

Anti-corruption is a regulatory policy, thus we should expect an extension of capacities as non-binding rules or informal cooperation but member states should block spill-in if it implies the creation of new binding regulation.

<table>
<thead>
<tr>
<th>INDEPENDENT VARIABLE: POLICY TYPE</th>
<th>DEPENDENT VARIABLE: ACTION CAPACITY (EX POST)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Distributive Policy</td>
<td>Confirmed</td>
</tr>
<tr>
<td>Policy formulated as win-win distrib. of funds</td>
<td>New institutionalised budgetary powers of the Commission distributed to all member states or contained by conditions for recipients</td>
</tr>
<tr>
<td></td>
<td>Disconfirmed</td>
</tr>
<tr>
<td></td>
<td>New budget lines distributed along member-state class lines (→ redistribution)</td>
</tr>
<tr>
<td>Regulatory Policy</td>
<td>Confirmed</td>
</tr>
<tr>
<td>Policy formulated as constraining actors' behaviour</td>
<td>Non-binding rules and standards (lacking tools to sanction member states)</td>
</tr>
<tr>
<td></td>
<td>Disconfirmed</td>
</tr>
<tr>
<td></td>
<td>New hard regulatory competences (giving Commission tools to sanction member states)</td>
</tr>
</tbody>
</table>

Expectation: Policy objective (control of national anti-corruption policy) can only be framed in hard regulatory terms, so spill-in should not emerge.

Table III.9: Empirical Indicators, Anti-Corruption Policy

Anti-corruption policy in the EU has three targets: the Community’s financial interests, officials of the Community or officials of the member states, and private sector corruption. In all three areas legal instruments are in place, the protection of the EU financial interests being the longest established since 1995. Within the Copenhagen framework the Commission went decisively be-
beyond the established legal basis regarding corruption of officials in the candidate states. Drawing both from EU’s own and other international conventions, benchmarks and codes of conducts were developed and applied in the monitoring process demanding from the accession countries regulatory measures which could not be requested to the same extent from the member states although until 2003 the Commission attempted openly to establish higher EU norms for fighting corruption inside member states.

A significant feature of anti-corruption policy during the pre-accession phase is the strong cooperation with other international organisations running joined programmes especially to promote the implementation of anti-corruption policies. Parallel to the development of instruments in the enlargement policy, a set of international instruments emerged which the member states joined outside the EU framework. The generally higher awareness of corruption and the increasing concern with this issue in various fora explains part of the member states’ reluctance to surge ahead with actions on the EU level. As alternative international instruments emerged, the Commission eventually also lowered its claims on genuine EU legislation recommending member states rather to accede to those instruments established by the UN, OSCD, and the Council of Europe – while at the same time and in contrast further specifying the precise checklists of what candidate states should fulfil before entering the Union. For the latest entrants only, Romania and Bulgaria, monitoring of inner-state corruption even continues after accession. In contrast, ‘out-sourcing’ part of the anti-corruption control to new instruments outside the EU was the less constraining option for member states since it allowed the pre-empting of the creation of hard enforcement tools for the Commission. Other than non-binding EU legislation the shift of responsibility to alternative fora also pre-empted the potential for unintended consequences that could eventually lead to binding legislation. At the same time the Commission is moving in on the grey area of the existing competences, in particular through communication and exchange between the various DGs. In this vein, the awareness for corruption matters has risen and anti-corruption clauses are promoted as part and parcel of various types of agreements, including also increased concern with public opinion and attempts to build direct links to societal perceptions of corruption in general. These moves remain, however, dependent on the inter-service exchange within the Commission and are restricted to the legal basis the Commission has. They do not create any stable institutionalised action capacity for the Commission inside the EU while the EU’s anti-corruption stands towards third states has been strengthened.

In sum, in anti-corruption no major unintended consequences emerged, quite to the contrary the Commission successfully exerted high pressure on the candidate states which could be prevented to spill-in as binding legislation for all member states because new international instru-
ments with congruent objectives could absorb the functional pressure offering less costly (since informal under international law) alternatives to the member states. The Commission followed this trend and lowered its claims for more upfront EU capacities, while it is nonetheless actively continuing to exploit in an *ad hoc* manner means it has, in particular by promoting anti-corruption standards across the various Directorate Generals, which does not amount to institutionalised capacities in the absence of sufficient acknowledgement of policy tools by the member states.

**STATUS QUO ANTE:**

**ANTI-CORRUPTION IN THE ACQUIS**

Legal instruments on anti-corruption can be either specialised legislation, or corruption is classified as a serious crime in any other piece of legislation, e.g. related to the European Arrest Warrant or money laundering. Both need to be backed by practical facilities in terms of standards and implementing capacities, relevant in particular for law enforcement agencies such as the police, customs and border guards. The fight against corruption can be understood as part of the broader promotion of the ‘rule of law’. It can be further differentiated between high-level corruption, organised crime and corruption, and petty day-to-day corruption. The Commission’s definition of corruption is a wide one, going beyond current EU legislation focusing on criminal liabilities (i.e. active or passive bribery); besides the narrow penal definition it embraces a socio-economic definition aiming at corruption prevention in the context of ‘good governance’ (Tivig and Maurer 2006: 6).

Anti-corruption policy falls under the third pillar (Freedom, Security and Justice – previously Justice and Home Affairs), i.e. it is an intergovernmentally organised policy, unanimity applies and member states have a monopoly on initiating further integration. The European Parliament takes note of events and has commented in particular on cases of erupting scandals – it has however no official powers. Moreover, the Parliamentary Committee on Civil Liberties, Justice and Home Affairs (LIBE) issues reports under the consultation procedure regarding the European Community’s accession to the international instruments (European Parliament (Committee on Civil Liberties 2006). As for all intergovernmental policy areas, the Commission has no powers to initiate legislation other than being asked to act under the third pillar.122

122 This situation will change with the entering into force of the Lisbon Treaty that will dissolve the Union’s pillar structure, entailing that most third pillar issues will fall under the ordinary decision-making procedures while special procedures for the current second pillar will be safeguarded.
Beyond the arguably weak control of fraud through the Community’s anti-fraud office OLAF focusing on the Communities financial interests, a set of more comprehensive common standards and norms was established in the second half of the 1990s (Daams 1999: 9). These mark the first steps towards a more embracing EU anti-corruption policy. The first agreement to emerge was the Convention on the Protection of the European Communities’ Financial Interests, 1995 and its first two Protocols in 1996/97. Second, the Convention on the fight against Corruption involving officials of the European Communities or officials of Member States of the European Union from 1997 is the area of our narrower interest, i.e. the EU’s policy tools to impact on anti-corruption policy inside the member states. These two agreements progressively extended the definition of corruption. The 1992 Convention was the first to take the definition of corruption beyond the realm of the Community’s financial interests. Notably, both agreements on the EU level were not immediately implemented but the majority of member states remained highly reluctant to ratify the 1995 Convention, which eventually entered into force in 2002.

All member states are “required to put the legislation in place but there is not the follow-up in terms of detailed implementation” (Interview Commission, DG JLF). As is usual practice for conventions among member states, compliance with the conventions is regulated by a reporting system according to which the member states inform the Commission and the Council on the situation of transposition in their respective country. The Commission reviews the national laws in and inter-service exercise and drafts a report to the Council on the basis of which the Council decides how to further proceed in the issue area. Accordingly, for the 1995 Convention on the EU’s financial interests, the member states issued their reports in 2004, supported also by investigations carried out by OLAF. The entering into force of the Convention was followed by further steps towards concrete implementation, most important and recently the establishment of Eurojust, in 2002 to “fight serious crime” by enforcing the cooperation across member states at the national and EU level (Council of the European Union 2002a). Moreover, the Hercule action programme for the protection of the Communities financial interests was founded in 2004 (European Parliament and Council of the European Union 2004).

While as far as the protection of Community financial interests is concerned an EU competence has been established, this chapter focuses on the extension of the concept to include how corrup-

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123 Unité de coordination de la lutte anti-fraude, UCLAF founded in 1988 and since 1999 re-named and structured into the European Anti-Fraud Office, OLAF.

124 The Lisbon Treaty will abolish the Convention tool for member state cooperation, but it is to date still unclear how the existing Conventions will be handled.

125 Eurojust cooperation was further enhanced in the Constitutional Treaty of 2004.
tion inside the member states more generally has been contested. The 1997 Convention, focusing on public officials, entered into force in September 2005. Responding to a draft proposal in the Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on a Comprehensive EU Policy against Corruption (Commission of the European Communities 2003b) in March 2005 the Council rejected the establishment of further new Community instruments referring to other international instruments, but urged those states who had not done so to ratify the existing conventions (Council of the European Union 2005c). The long time lag in the ratification process has led to the conclusion that “[a]lthough one could say from a criminal law point of view that these instruments are getting more refined, this does not necessarily mean that it really contributes to the effectiveness of the fight against organised crime in general and corruption more specifically, especially since many of the provisions are formulated in a rather vague way” (Daams 1999: 10).

As will be argued below, part of the delays in the Community instruments has to be seen against the background of evolving international agreements with partially overlapping functions. Although these remain even further behind possible binding EU legislation with hard enforcement mechanisms against public-officials corruption, such alternatives were eventually the preferred option to answer to functional pressure. Despite the dismissal of the Santer Commission in 1999 due to fraud and corruption allegations against Commission officials, the actual instruments for criminal investigation for both Community and national public officials remain limited. Warner claims that the fact that the member states have not set up “real administrative, monitoring and enforcement powers to supranational institutions could imply that the concern of the member states is that the agents would be too effective in monitoring the behaviour of the principals. If the concern of the member states were that other states would be defecting from the treaties’ obligations, then a supranational institution should have been better situated than each of them individually to monitor the behaviour of other states. It appears that the states have made various agreements they do not really want to keep, and the best way to not keep them is to retain the bulk of administrative, monitoring and enforcement power” (Warner 2003: 70). In sum, it can be sustained that the 1997 Convention has created some legal framework on the EU

126 Although most public debate and also coercive means against corruption in the EU have been focusing almost exclusively on the Commission and leading famously even to the dismissal of the Santer College, every year “member states are the key target of the auditors’ criticism due to ‘the high level of error’ in their dealings with the EU’s budget. Member states manage and control 80 percent of the bloc’s common budget, some €32.4bn in 2006. “The supervisory and control systems in the member states were generally ineffective or moderately effective, and the [European] Commission maintains only a moderately effective supervision of their functioning,’ noted Mr Weber [President of the European Court of Auditors]. The Court pointed out in its report that ‘at least 12% of the total amount reimbursed to structural policies projects should not have been paid out,’ particularly in the area of regional development and social cohesion” (http://euobserver.com/9/25128/?print=1, 13 November 2007).
PART III: EMPIRICAL ANALYSIS

level, whose impact and binding force remain however limited and informal regarding the de facto enforcement options the Commission has at its disposal.

In the third area of anti-corruption legislation, the fight of private sector corruption, a Danish initiative triggered first a Joint Action in 1998 (Council of the European Union 1998), which lead to the Council Framework Decision on Combating Corruption in the Private Sector of 2003 (Council of the European Union 2003). Based on the member states’ transposition reports from the majority of states, the Commission has issued its report to the Council. Since the issue could be linked up to the area of competition, a number of member states have been interested in promoting further measures already mentioned in the Joined Action, one can speculate that “there is a requirement for the Council to consider whether to redo that capability to delegate or whether actually to put forward a proposal, to do that would be a major reform for everyone, and that would be by 2010” (Interview Commission, DG JLF).

Nonetheless, whether or not this will materialise is outside the Community competence and up to future intergovernmental member state decisions. As a clearly regulatory policy on the EU level, anti-corruption remains in the informal realm – in that hard enforcement mechanisms and direct coercive tools are absent – and, as will be illustrated below, has moved even more into this direction by increasing cooperation outside the more constraining EU framework in response to increasing functional pressure. Following up on the Tampere Programme, operational from 1999-2004, which lay down an action programme for the fight of corruption (European Council 1999b), the European Council of Hague spelled out a new programme for 2005-2010 (Council of the European Union 2005b). The Hague Programme includes the creation of a scoreboard to annually review measures in the area of freedom, security and justice and the creation of comparable statistics (Council of the European Union 2005d). This notwithstanding, for or the time being the legal instruments existing at the EU level remain limited and in the Commission “there is limited capacity to inquire on the situation on the ground in the member states” (Interview Commission, DG JLF) – unlike the leverage the Commission had in the pre-accession context. In contrast to the member states’ reluctance, the European Parliament has called for extended powers of the Commission as the ideal agent to monitor the implementation of international instruments (European Parliament 2003a) and, beyond that, to establish an EU prosecutor to improve the efficiency of EU-internal anti-corruption control (Tivig and Maurer 2006: 51). This responds to the main problem in the fight against corruption, namely the shortcomings in the implementation of existing framework agreements. De facto implementation depends purely on
the voluntary cooperation and responsiveness of the member states because the EU lacks mechanisms to monitor and control the harmonisation of national penal law, the execution of passed measures, and the implementation of agreements (ibid. 18).

PRE-ACCESSION PHASE: FIGHTING CORRUPTION IN THE CANDIDATE STATES

The 1993 Copenhagen Council did not explicitly mention corruption as an accession criterion. It was, however, included into the Regular Reports with a prominent own chapter in the section on political criteria (democracy and rule of law) in which it stands besides “institutional issues” (the executive, judiciary, parliament). Generally, corruption was perceived a considerably important issue for the public administrations in the central and eastern European states due to their post-socialist heritage (Bossaert and Demmke 2003: 3-4; as well as Goetz and Wollmann 2001: 868). The monitoring of corruption therefore cut across different chapters such as, for some states, Industrial Policy, Customs Union, External Policies – and foremost for all states the negotiation chapter 24 Cooperation in the field of justice and home affairs. The basis for monitoring was established by referral to the Community Conventions and international instruments alike, to the extent that these existed or emerged.

But the Commission went further in translating these agreements into more tangible standards and benchmarks. The most concrete incarnation is an Annex to the Commission’s 2003 Communication on a comprehensive policy on corruption (Commission of the European Communities 2003b). In marked contrast to the more reluctant tone the document takes on desirable measures in the member states, it offers a concise checklist on the desired policies to be implemented in the candidate states going also beyond criminal offences to promote a more general culture against corruption. To estimate the pressure for spill-in the positive check-list represents a valuable summary of what the Commission considered essential in relation but also beyond what the supranational activities that were in place, some of the “Ten Principles for Improving the fight against Corruption in acceding, candidate and other third Countries” going well-beyond its actual

capacities, for example the call for clear rules on whistle blowing, the promotion of public intolerance to corruption by awareness raising campaigns in the media and training, or the need to establish transparent rules on party financing, and external financial control of political parties (ibid.). Even more striking, the Commission has imposed a unique exception for the last two states that joined the Union in 2007 effectively continuing the double standards treatment between old and new member states. For Romania and Bulgaria, a post-accession monitoring scheme has been put in place and anti-corruption monitoring by the EU continues which is scrutinising these two states exclusively.

As part of the standard monitoring in the regular reporting which relied on information collected by the delegations in the countries, governmental reports, non-governmental organisations or other international organisations, formal missions of experts from member states visited the candidate states (on an approximately bi-annual basis) both before and after the enactment of legislation. As implementation proceeded these missions included visits to e.g. border posts or local police forces with member state practitioners or experts in these very bodies would participate in the missions (Interview DG JLF).

Regarding assistance, the cooperation with other international organisations active in the field and region was very extensive, financed primarily with Phare money. A core area were joint programmes to assist capacity building to ensure compliance, namely the SIGMA programme (support for improvement in governance and management) which was set up in 1992 in cooperation with the OECD,128 and the OCTOPUS programme run by the Commission and the Council of Europe. Especially the OCTOPUS programme gained increasing relevance for compliance control. “The first phase of the project (1996-98) concentrated on analysing measures taken by the participating countries and making specific recommendations for each country. The Octopus II programme (1999-2000) put the emphasis on implementing those recommendations and assisting European Union applicant states” (Utstein Anti-Corruption Resource Centre 2005). The new member states continue to participate in the SIGMA programme, which transformed in 2005 its “multi-country activity […] into two activities, carried out by to SAI [Supreme Audit Institutions] Presidents of the ten New Member States and SAI Presidents of the Candidate Countries” (SIGMA - European Union and Council of Europe 2005). The OCTOPUS programme was dissolved in 2000 with all candidate states becoming members of the newly established Group of

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States against Corruption (GRECO). Established in 1999, GRECO “was conceived as a flexible and efficient follow-up mechanism, called to monitor, through a process of mutual evaluation and peer pressure, the observance of the Twenty Guiding Principles in the Fight against Corruption and the implementation of international legal instruments adopted in pursuance of the Programme of Action against Corruption” (Utstein Anti-Corruption Resource Centre 2005).

In sum, the Commission’s involvement in anti-corruption policy has been considered a success, yet with limitations deriving from the very imbalance between the Copenhagen and acquis frameworks and the lack of clear implementation standards in the EU. The Open Society Institute concludes: “The EU accession process has had a major impact on legal and institutional frameworks that are involved in the fight against corruption. Commission pressure has led to important legislative changes, especially in the areas of public procurement legislation, criminal and civil procedure, anti-corruption legislation, and civil service legal frameworks. The relative clarity of the EU approach in the area of enforcement of criminal law has led to important changes in candidate States, such as increased coordination between the various organs of enforcement, training of law enforcement officials and EU-assisted reform of the judiciary. […] However in the area of anti-corruption policy narrowly perceived, as above, the Commission has lacked the mandate or any standard of EU best practice in the areas of criminal investigation and proceedings that would allow it to pressure candidate States to take steps to ensure the freedom of institutions of prosecution enforcement from improper influence, for example in Poland and Romania” (Open Society Institute 2002c: 71-72). In comparison to the Commission’s influence on member states we can hence conclude that the pre-accession conditionality substantively increased its leverage. This enabled the Commission to change candidate state behaviour even if, as for the member states, the Community has no competences for own criminal investigation proceedings.

Implementing enlargement did not create fully new functional pressure. It rather reinforced pressure for action that was an increasingly articulated theme across all European states and various international organisations. It did so foremost by the outspoken extension of EU monitoring of inner-state corruption. The difference that the Copenhagen framework made was in particular the refinement of what the Community would consider genuinely good standards and desirable legislation. Regarding the implementation structures and organisation of the policy, a novelty that developed during the implementation of enlargement was the strong inter-DG cooperation
within the Commission which lead to the elaboration of further alternative options to promote anti-corruption policy by means of mainstreaming across different policy areas.

Remarkably, the same turn that the Commission took in enlargement policy to overcome the weaknesses in its enforcement tools, namely the strong reference to the GRECO network urging candidate states to accede to these extra-EU instruments, was the eventual recommendation to member states which refused hard Community competences despite increased functional pressure.

Although the promotion of anti-corruption policy in the candidate states was supported by EU assistance, the policy is essential regulatory, aiming at corruption control. Given that the EU had already established anti-corruption conventions, implementing enlargement increased functional pressure for formalisation because standards developed in face of the candidate states’ administrations were spelled out more clearly and were bound to more concrete demands on implementation and enforcement on the national level. Moreover, not all entering states were expected to have resolved their problems at the time of accession; a credible way to continue monitoring would have to establish rules applicable to all member states. Despite this, the Commission did not pressure for more binding legislation within the Union framework but, on the contrary, even fell behind earlier claims for Community competences. Thus, no unintended consequences occurred but the Commissions stayed well within the boundaries of the Copenhagen framework, setting high standards for the entering but lowering demands on the existing member states in terms of EU means of control.

**STATUS QUO POST: EXTERNALISING ANTI-CORRUPTION ISSUES**

There are a number of direct impacts that enlargement had on the wider capacities the Commission holds in anti-corruption policy *vis-à-vis* all member states. First, most of the new legal instruments emerged as spill-in from the Copenhagen framework but were created as new international instruments. Second, parallel to the incremental changes in the Copenhagen framework in which the Commission relied increasingly on emerging international instruments foster enforcement, the Commission made an important turn its approach towards member states. As from 2003 the Commission encourages member states to join GRECO and other international agreements instead of further pushing for solutions in the Community acquis. Third, informally,
links between different services within the Commission have substantially increased their exchange, in particular through the strong cooperation during enlargement leading to an increased exploitation of legal grey areas and soft instruments for promoting anti-corruption policies in member states. Fourth, in contrast to the much more prudent approach towards harmonisation among member states, new entrants to the EU are still subject to Commission monitoring so that the pre-accession system of double standards is continued after widening.

First, how does the general trend of the establishment of anti-corruption policies at the international level manifest itself, and what impact did this have on the member states’ choices regarding anti-corruption policy within the EU? As from the late 1990s both on the European and the global level a number of agreements were established. The United Nations Convention against Corruption (UNCAC) adopted on 31 October 2003 provides common standards for national policies and practices, as well as it enhances international cooperation to address cross-border crime. The parties also oblige themselves to assist each other in preventing and combating corruption through technical support such as financial and human resources, training and research. The UNCAC entered into force on 14 December 2005. Also the United Nations Convention Against Transnational Organised Crime (UNTOC) adopted on 15 November 2000 and in force since 29 September 2003 covers corruption, recognising that it represents an integral component of transnational organised crime and must be addressed as part of efforts to combat organised crime.

In the European context the regional organisations have set up a number of conventions. The OSCE Convention on Bribery of Foreign Public Officials in International Business Transactions, signed on 21 November 1997 and in force since 15 February 1999, is focused particularly on the supply side of bribery by binding the countries that account for the majority of global exports. A coordinated framework aims to criminalise the bribery of foreign public officials in international business transactions, against which the contracting parties have agreed to introduce criminal sanctions. The Council of Europe Criminal Law Convention and Protocol on Corruption was adopted in 4 November 1998 to enter into force on 1 July 2002, unlike the OSCD convention not all EU member

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129 Of the EU member states Belgium, Cyprus, Czech Republic, Germany, Greece, Ireland, Italy, Luxembourg, Malta, Portugal, and the European Community have signed but not ratified, see: http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty18.asp (accessed 28 May 2007).


131 All 30 OECD countries and 6 non-member countries have signed and ratified (not Malta and Cyprus), see http://www.oecd.org/dataoecd/59/13/1898632.pdf (accessed 28 May 2007).
states have ratified the agreement.\footnote{Austria, France, Germany, Greece, Italy, Luxembourg, Spain, Sweden have signed but so far not ratified, the European Community is entitled to join but has not signed the Convention, see: \(\text{http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=173&CM=7&DF=06/07/04&CL=ENG}\) (accessed 28 May 2007).} Moreover, the Council of Europe Civil Law Convention on Corruption, adopted 4 November 1999 and in force since 1 November 2003, covers public sector and private sector (private-to-private) corruption. An Additional Protocol to the Council of Europe Criminal Law on Corruption followed in 2003.

This links to the second point, the emergence also of alternative enforcement mechanisms which have been created in connection to the broader regional agreements. Most relevantly, the implementation of the Council of Europe Criminal Law Convention has brought forth its own network. The Convention is being monitored by the Group of States against Corruption GRECO, which started functioning on 1 May 1999 and which to date all EU member states have acceded. Thus, the main focal points of the Convention, i.e. the criminalisation of a large number of corrupt practices, money laundering, provisions regarding the private sector, and international cooperation, are underpinned by monitoring through GRECO.

The delays to the ratification of the 1997 Community convention must be read against the background of this emerging network of international agreements. “In some ways, perhaps because of the fact that there was this cascade of conventions, actually almost slowed down the process [...] so looking back with hindsight it is probably not so surprising for countries looking at this developing: they waited until they could see what was going to come up” (Interview DG JLF). In other words, in particular as concerns enforcement mechanisms of anti-corruption agreements, the member states opted for institutionally less constraining – but regionally wider – options outside the Union. Moreover, an interesting shift in the Commission’s approach can be noticed. Instead of establishing own resources, still proposed in its first Communication on anti-corruption policy (Commission of the European Communities 1997b), in 2003 “the Commission holds the view that, at this stage of policy development, mainly those measures should be strengthened and supported at EU level, which are not already substantively covered, or not with the same degree of mandatory character as EU instruments, by international organisations. This goes in particular for initiatives of the United Nations, the OECD and the Council of Europe, where the EU has been playing a leading role and should continue to do so” (Commission of the European Communities 2003b: 5).

The change in approach by the Commission cannot only be attributed to the member states favouring alternative solutions outside the EU. It was also promoted by tensions on competences
on overlapping responsibilities between the EU and other international organisations (Interview former member College 2007). From this, the GRECO network emerged as the main instrument for monitoring and enforcement. Only “[i]n case participation in GRECO will not be considered a viable option, the Commission would consider if a separate EU mutual evaluation and monitoring mechanism on the fight against corruption could be set up” (ibid. 2003b: 9).

In fact, a group of seven member states has put forward a proposal for a Council Decision to establish a European Anti-Corruption Network (EACN) of anti-corruption bodies in the member states in late 2005, which would effectively promote cooperation among member states without harmonisation. Even if remaining in the informal realm, the proposal has met reluctant reactions by some other states who did not express general disagreement “but that, before giving the proposal its full support, it will need to clarify the scope of the proposed network to ensure that it does not overlap with existing networks and organisations” (House of Lords 2006a). This is an interesting parallel to the developments in the Nuclear Safety where, conversely, a network of independent bodies in the member states has been set up given that, unlike anti-corruption policy, the Commission’s legislative proposals consider the alternative instruments offered by other international organisations insufficient. Thus, functional pressure for a response within the EU framework could more easily redirected to fora outside the EU, evading even attempts for non-binding cooperative networks among member states.

Third, how did the Commission extend its activities within the legal framework established since the mid-1990s? Despite the more cautious take on hard enforcement and binding legislation since the 2003 Communication, the Commission did not retreat completely. Rather there have been informal attempts to promote the anti-corruption matters within the limited means it has at its independent disposal. The tools developed in the enlargement context have not played the most decisive role in this but offered a platform to develop single elements. In addition the inclusion of corruption as a serious crime into various tools of criminal law, such as the European Arrest Warrant or money laundering, the most relevant development has been the increased cooperation between different Directorate Generals inside the Commission. Based on the general directions indicated in the area of criminal law by the European Council, the Commission develops its wider strategies that will be substantiated in the next Communication envisaged for late 2008. A central new element in this has been to go beyond the narrow focus on criminal law, or in the words of a Commission official “we will be looking at – I guess the jargon is ‘mainstreaming’ – and mainstreaming, thinking about corruption in a whole lot of other areas” (Interview 2007 DG JFS).
An example for this is the checklist annexed to the 2003 Communication, putting down concrete benchmarks to evaluate a state’s legal and implantation apparatus. “It is a handy checklist for our colleagues, particularly in the external relations area, in the area of development aid ... these are the areas, they will never be specialist on corruption, but if they have a quick check-list of what are the things that are signals that things are going well, or that things are potentially going to go badly” (Interview DG JLF). Along such lines, the links between the different services in the Commission have been strengthened over the last years in order to increase the consistency also in bi-lateral agreements between the EU and third states, which has given corruption a stronger emphasis in the Union’s external relations and is expected to be extended in future in agreements between the Union and states around the world. The Council moreover raised the awareness for anti-corruption EU’s external relations (Council of the European Union 2005a) and strengthened the Commission’s external capacities by making the fight of corruption one of the objectives of the European Neighbourhood Policy (Tivig and Maurer 2006: 41).

In the same vein, also for the future enlargements some changes have been introduced, opening up a second generation of conditionality. On the one hand, the accession of most member states UNTOC and UNCAC means that these Conventions are also considered in the monitoring process of candidate states. On the other hand, anti-corruption has been moved from chapter 24 to the new chapter 23 which puts it into the context of the judiciary and stresses less the aspect of organised crime, which significantly strengthens the leverage on anti-corruption in current and future candidate states.

While in the external realm and enlargement policy the Commission has been strengthened, capacities applying to the member states have remained limited. The only substantial change is that the Commission has started to make progress in approaching crime through the development of comparable statistics, not at least to get a comparable and comprehensive overview on all member states within the boundaries of existing competences. Aiming to go beyond the currently most elaborated statistics on corruption, the Corruption Perception Index by the non-governmental organisation Transparency International, and to gather more focused information on the member states

133 Besides an expected further elaboration in this direction in the next Commission Communication, cooperation with the World Bank is envisaged in the area of promoting anti-corruption in external relations.

134 A further element in inter-service cooperation in the Commission has been the reorganisation and new creation of the DG Justice, Freedom and Security itself. Growing from a small task force for Justice, Freedom and Security when the Maastricht Treaty was signed in 1992, it was expanded into a full directorate-general in October 1999. From then on, the visibility and cooperation across the Commission has substantially increased, one example being the inclusion of anti-corruption matters in the handling of sports policies in the field of Education and Cultural matters (Interview 2007 DG JFS).

states, corruption has been chosen a pilot area for the development of more sound statistical data in the criminal area. Acting in this direction, on 12 February 2008 the Commission has issued a “staff working document examining the links between organised crime and corruption. The paper draws together existing information to identify situations where Organised Crime uses corruption as a tool for infiltrating the public and private sectors. It reviews existing countermeasures and concludes that a better understanding of the links between organised crime and corruption is much needed. The Commission will therefore launch a study to examine what is an increasingly disturbing and largely unexplored phenomenon”.136 A first Special Eurobarometer Report has been published in 2006 (Commission of the European Communities 2006f), and it is intended to substantially improve this tool over the coming years to lower the gap of “how much we watch and know in the member states as opposed to the countries that are acceding. This will help ourselves and the member states to be actually a bit clearer on what is going on across a whole range of crime areas, not just corruption” (Interview 2006 DG JFS). Yet, as indicated in Council draft document on European Policy needs for Data on crime and criminal Justice: state of play, the Commission’s initiatives on establishing comparative statistics are met by continuous disagreement amongst member states (General Secretariat of the Council 2007).137 The little support for relying on soft law underlines the argument that, in contrast to other policy areas such as administrative cooperation, the member states are reluctant to build up informal governance structures in the field of anti-corruption – therefore undermining from the outset the potential impact of Commission initiatives such as comparative statistics which will lack effect for as long as they are not responded to by the member stats.

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137 Thus, the following options are outlined by the Council: “a) to negotiate and adopt a general binding instrument (Council Decision or Directive) replacing the existing national systems and setting up an EU statistical system on data on crime, including definition of new aggregates and figures to be sent on a yearly basis to Eurostat / b) to negotiate a draft Framework Decision establishing, without prejudice to already existing national systems that would not be cancelled nor replaced, the minimum core data to be stored and communicated to Eurostat, according to EU standards (most probably on the basis of the 32 categories of crimes as standing in the annex of the EAW Council Decision) / c) to use ‘soft law’ (such as Council Conclusions or Recommendation), inciting Member States to use ‘EU standards’ when building their national statistic on crime / d) to propose a gradual and future-oriented approach, by the inclusion of an ‘article template’ on statistics into any new JHA instrument (modeled on the example of Article 33 of the third money laundering Directive). Member States would be required to provide regular statistics data in the field of any new specialized crime-related piece of legislation adopted by the Council. At this stage, options a) and c) received very poor support. It seems that a general agreement could be reached on option b), even though a few delegations advocated for solution d)” (General Secretariat of the Council 2007).
Fourth, post-accession monitoring was made a condition for the entry of Bulgaria and Romania, under the so-called Cooperation and Verification Mechanism established by a Commission Decision of 13 December 2006 (Commission of the European Communities 2006a, b). The mechanism includes safeguard mechanisms as means of last resort, which are triggered either to prevent or to remedy particular problems or threats to the functioning of the Union. The areas to which these safeguard clauses are defined in the Bulgarian and Romanian accession Treaties. Moreover, four concrete benchmarks for Romania and six for Bulgaria are listed in an annex (Commission of the European Communities 2007a). First Reports were published in June 2007 (Commission of the European Communities 2007c, b), followed by Action Programmes on how to fulfil the benchmarks of the Cooperation and Verification Mechanism in October 2007 and Interim Reports in early 2008 (Commission of the European Communities 2008a, b).

In essence, the current position is thus a continuation of a differentiated treatment of member states, new member states and external states based on double standards as far as the Commission’s capacities are concerned. Despite the attempts to create comprehensive data on national anti-corruption policies, under the general acquis the actual implementation and enforcement of measures still depends on the voluntary responsiveness of member states. The Commission’s means fall short of institutionalised new action capacity because they lack sufficient leverage to indeed adapt member state behaviour, the mechanisms of control remain without either hard mechanisms of control or sufficient receptiveness on the side of the policy takers to establish networks of informal governance. Member state reluctance is highlighted by the fact that member states refrain from informal cooperation based on peer-reviews and the elaboration of non-binding standards. Without such cooperation networks, comparable statistics will also lack a mechanism to trigger any demands on member states to react to these. In essence, functional pressure increased due to the extension of the notion of anti-corruption in the Copenhagen framework and was subsequently redirected and responded to outside the EU framework. Not even the threat of internalising corruption problems with the accession of new member states falling short of desired standards has led to a spill-in of pre-accession capacities. Instead, a different treatment for old and the newest member states has been successfully upheld in that monitoring applies exclusively to Romania and Bulgaria. This has led the Bulgarian Minister R. Petrov to claim that “double standards are not to be tolerated. They are out of the question” and thus the need to elaborate comparative measures for corruption proposing “common standards”

which would bring an “objective evaluation of every member state”\textsuperscript{139}. Effectively, the Commission’s response has been no more than to refer to the creation of comparable statistics – which, as pointed out, does not create institutionalised new action capacity and thus cannot hide the fact that the Commission continues to apply different policy instruments short of formalised official competences.

**SUMMARY:**

**ANTI-CORRUPTION**

Implementing enlargement reinforced functional pressure rather than creating it. The perception that corruption was a serious problem in the candidate states gave the policy a prominent role in the pre-accession monitoring process, which has been re-enforced in second-generation conditionality in the ongoing enlargements. Yet, dealing with the issue in the Copenhagen framework it soon became apparent that corruption was not an isolated matter of concern in the were-to-be member states. “Since the Copenhagen criteria apply only to applicants, the assessments could not (officially) be applied to members, but the development of criteria inevitably led to comparisons with members. A striking example was corruption, where the only published source (practically the only systematic source) was Transparency International, which showed that some member states (such as Belgium) were placed below some of the applicants. I recall the frisson of embarrassment when I distributed these results to representatives of member states at a meeting of the Council’s Enlargement Group” (official DG Enlargement, written exchange September 2007).

As a genuinely regulatory affair, and given that Conventions existed on the EU-level which member states fell however short of implementing effectively, formal regulation marked the only possible further response within the EU. Hence, spill-in would have led to new formal legislation. At the same time, corruption was tackled in various fora so that alternative and institutionally less costly options emerged for the member states in the form of international agreements in other international organisations. The Commission thus eventually gave in to the argument of member states and international organisations with overlapping responsibilities. The attempts to produce tools within the EU framework were given up in favour of promoting international instruments based on soft enforcement that provoked less member state resistance. Not even initiatives by

some member states for ECAN as non-binding network amongst member states have been realised so far. Instead, initiatives geared to inner-state corruption control have been redirected to bodies outside the EU framework. Standing out against this prudence and less ambitious claims on member states are the continued post-accession competences since 2007. Accession of Romania and Bulgaria increased functional pressure for supranational capacities due to persisting shortcomings in the acceding states. This pressure did not lead to spill-in but gave the Commission sufficient backing to successfully push for continued post-accession monitoring in criminal matters and corruption, therefore sustaining the double standards in the post-accession system.

There have been, nonetheless, some attempts to widen informally the Commission’s reach by mainstreaming anti-corruption policy across the different services and by building up a more reliable set of information on the issue based on the elaboration of statistical methods to gather comparable data across all member states. Notably, these informal moves are not accompanied by soft steering instruments and are little welcomed by the member states – unlike the informal tools in the first three cases presented. Hence, these tools lack accompanying mechanisms to indeed have an impact on member states. They consequently do not establish new action capacity as defined for our purpose because they rely on too limited actions by the Commission which are not institutionalised in the sense of guaranteed persistent policy tools because they are insufficiently recognised by member states.

The outcome does therefore support the theoretical expectations. Since a spill-in could only be framed in terms of hard legislation and in the absence of unintended consequences that could have strengthened functional demands for Commission capacities, no institutionalisation in the wider EU framework occurred. Additionally, alternatives emerged outside the EU allowing the member states to seek functional responses in other fora and to evade even more non-binding cooperation within the Union framework. At the same time, conditionality for candidate states and even acceding states was increased and double standards sustained. In other words, member states successfully resisted functional pressure even against the credibility-threatening practice of granting the Commission monitoring capacities over two new member states only. This extension of pre-accession conditionality inside the EU framework goes beyond the theoretical expectations since it is not even ‘covered up’ bynesting Commission capacities on national anti-corruption control in other EU policies, as for instance in the case of administrative capacity building or minority protection where specific regulatory goals are being pursued indirectly by distributive policies. Still, this does not establish disconfirming evidence but supports the line of
argument beyond what we should have expected from the legally admissible perspective of a universally applicable system of rule of law.
PART IV
KEY RESULTS

THE IMPACT OF IMPLEMENTING EASTERN ENLARGEMENT: EFFECTS ON EUROPEAN INSTITUTIONALISATION

Whether it be the sweeping eagle in his flight or the open apple-blossom, the toiling work-horse, the blithe swan, the branching oak, the winding stream at its base, the drifting clouds, overall coursing sun, form ever follows function, and that is the law.

Louis Sullivan – The Tall Office Building Artistically Considered

How does policy-making influence the institutionalised capacities of the European Union? Summarising the empirical results, the following pages will draw some conclusions on the effect of implementing enlargement on the European Commission’s steering capacities across the five case studies. The guiding questions are: which procedural and institutional patterns can be observed, and which consequences can we draw for our understanding of organisational actors in the European Union? The prerogative is accordingly to draw the attention to the mutual dependency between policy-making processes and the institutional as well as organisational structures of the EU and the Commission in particular.

The concrete empirical question raised is: what effects has the execution of eastern enlargement had on the European Commission’s action capacity? The pre-accession strategy emerging after 1993 was based on conditionality. Yet not all conditions put to the applicant states derived directly from the acquis. Instead, conditionality established double standards applicable to the can-
didate but not the member states. The central finding is that even if the Commission has extended policy competences in a strongly restricted institutional sub-set, such as enlargement policy, functional pressure to extend the适用ability of these policy-making capacities to all member states emerges and leads to the institutionalisation of new policies within the European Union’s institutional core structure or alternative less coercive policy responses outside the EU, depending on the policy type at stake.

This observation emerges from the five qualitative case studies that cover all policy issues in which the Commission’s competences in enlargement policy exceeded those held under the acquis. Whereas in three cases (minority protection, administrative capacity building, cross-border cooperation) the Commission indeed extended its activities to all member states, in two cases (nuclear safety, anti-corruption) tasks exercised during pre-accession were not further institutionalised in the EU framework. To understand when and how the Commission attains new responsibilities the two groups of cases varying on the dependent variable are compared. The findings are grouped thematically along three dimensions: policy-making (the policy evolution), actor constellations (the functioning of the Commission), and polity development (integration as process of institutionalisation).

In sum, the systematic differences between the two groups of cases and the patterns of similarities within each group highlight the relevance of the degree of formalisation associated with the spill-in of a policy. In all cases some kind of interstate cooperation was resumed, yet in two cases this happened outside the EU framework, despite strong pressure for a spill-in of capacities from the sub-set to the institutional core. The decisive difference shows in the flexibility regarding the degree of formalisation and the discrimination of the target group affected by a policy. Depending on these two features, the Commission’s capacities are extended (distributive and informal regulatory policies), or responses to functional pressure are advanced outside the Union’s structures (informal regulatory policies). Formulated inversely: if no alternative to formally binding regulatory competences targeting all member states were available, member states successfully refuted the institutionalisation of the European Commission’s capacities by creating alternative cooperative structures outside the EU to exempt the creation of hard coercive instruments.

This has more far-reaching observable consequences. First, other international organisations with similar or overlapping responsibilities to the EU play an important role as platforms for generally less rigidly enforceable alternative policy responses. Second, within the Commission the availability of informal policy-making capacities has been substantially increased, including new inner-organisational networks similar to those developed during the exercise of the horizontal
enlargement policy. Third, the fact that Commission still extends its ‘creeping capacities’ entails consequences for the horizontal relative distribution of capacities in terms of inter-institutional power relations between the various EU bodies. Finally, this leads to a more general evaluation of enlargement policy as a gate-opener for a specific kind of EU integration since it raises the likelihood for integration by spill-in, which does however not occur automatically once functional pressure emerges. Depending on the policy type and institutional pre-conditions for each case, spill-in will lead to the institutionalisation of policies in the EU or will, in the case of unintended consequences or if less costly alternatives are available, be kept out of the Union’s sphere of influence. The remaining chapters of this part will discuss the three dimensions – policy-making, organisational structures, and EU integration – in turn.
13 FORMALISATION AND SCOPE OF NEW EU POLICIES:  
THE EVOLUTION OF PRE-ACCESSION POLICY AND EFFECTS BEYOND

The first of the three dimensions along which the cases are compared is actual policy making: how were extended competences transposed into operational policies in the pre-accession context, and how did these capacities continue beyond the discrete institutional setting of the Copenhagen framework?

Although the new responsibilities based on the 1993 Copenhagen mandate to implement enlargement were in many respects linked to pre-existing supranational powers, the implementation and evaluation necessitated the establishment of new spheres of activity. The Copenhagen framework offered only limited resources to the Commission. Notably, what is by and large considered its most powerful tool, i.e. the initiation of legal acts, was not at the Commission’s disposal. Instead the Commission was restricted to monitoring compliance and offering assistance to support accession states in achieving desired policy goals. Accordingly, the main instruments of the pre-accession policy were the assistance programmes Phare, SAPARD (agriculture) and ISPA (structural policy) and the annual Regular Reports in which the candidate states’ progress towards fulfilling the accession conditions were scrutinised. These instruments were complemented by bilateral Accession Partnerships, in which the Commission together with the single states laid down individual goals to be achieved. Since entry into the EU was conditional on compliance with the pre-conditions, the Regular Reports and Accession Partnerships were a forceful steering instrument to exercise coercion on the candidate states, in particular at the beginning of the pre-accession phase. Yet, although due to this unprecedented leverage on third states enlargement policy has been depicted as the first true EU foreign policy (Smith 1999), pre-accession instruments served ultimately the purpose of integrating states. The ends of enlargement policy had in the final analysis to follow the logic of an internal and not external policy, despite the double standards it applied (on double standards in general: Wiener 2002; Grabbe 2002; Maniokas 2004; on single policies e.g.: Amato and Batt 1998; Johns 2003; Open Society Institute 2002a, b, c, 2001; Barnes 2003; Abdikeeva 2001; Wiener and Schwellnus 2004). Accordingly, let alone the general limitations of conditionality, the thrust of those claims that went beyond the common rules of the club diminished the closer states drew towards membership (on enlargement conditionality in general: Phinnemore 2006; Glenn 2004; Hughes, Sasse et al. 2004a; Grabbe 2001; Grzymala-Busse and Innes 2003; Checkel 2000; on particular policies: Sasse 2005; Schimmelfennig and Sedelmeier 2004; Schimmelfennig, Engert et al. 2003; Oudenaren Van 2001; Gelazis 2000;
Williams 2000; Nowak 1999). This shared feature of the policies under perspective implies that all of them generated functional pressure from the outset because double standards were in conflict with the credibility of the EU’s political claims regarding the reform efforts of the candidate states.

Transposing the Copenhagen criteria into concrete policies happened within these boundaries and was congruent for all cases under perspective. First, as basis for monitoring and compliance control, standards and benchmarks had to be set (van den Broek 1999). These could only in part be derived directly from the formal acquis. Consequently, the Commission drew foremost on international standards provided by other international organisations and broadly accepted by its member states, demanding, however, that the candidate states on some occasions complied with more than the number of agreements all member states were parties of. A case in point was the definition of minority protection standards (Heidbreder and Carrasco 2003; Open Society Institute 2002a) as well as the standards applied with respect to national anti-corruption measures (Open Society Institute 2002c).

Moreover, standards that had evolved on an informal basis had quasi hard binding effect for the candidate states, based on conditionality which allowed the Commission to operationalise general claims and monitor compliance down to the level of actual implementation. This is reflected in internal handbooks guiding the Commission’s monitoring activities (minority protection) or as publicised check lists (anti-corruption). In the case of nuclear safety, the Commission was called upon to draft a catalogue of ‘non-binding’ acquis, which was the first ever systematic recording of a great number of informal accords between member states (Commission of the European Communities 2000a). Further, for the collection of information for the Regular Reports the Commission established networks including national administrations, governments, EU delegations, international organisations and non-governmental actors. The actual sources for the findings of the annual reports were, however, kept under lock and key by the Commission, with the exception of the Council of Europe and OSCE who are also cited directly.

Second, assistance was linked to these more or less univocal standards to be reached. This is particularly obvious in the case of administrative capacity building. Throughout the pre-accession phase, funds were raised progressively and instruments improved. Thus, ‘twinning’ (delegation of member state officials into candidate state administration) was introduced and Phare was complemented by two more specific pre-accession instruments, ISPA as precursor for Structural Policy and SAPARD as preparation for participation in the Common Agricultural Policy. The actual
goal to ensure compliance with the EU acquis down to everyday implementation was nested into distributive policies. Of the five cases, cross-border cooperation was most strongly dominated by assistance. Promoting the objective of stable external borders, the policy supports cross-border initiatives on a local level rather than formulating particular standards to be met. The stronger emphasis on financial and technical assistance instead of control of national compliance with ‘western standards’ by means of regulatory instruments reflects also the extent to which the framing of policies in the Copenhagen framework is mirrored directly in post-accession capacities.

While political problems prone to be framed in the regulatory arena featured strongly in the Commission’s pre-accession monitoring, the distributive elements were developed in the pre-accession assistance programmes. Yet, no matter if rather regulatory or distributive in its effects, policies were first established in the same incremental manner under the wide shadow of ultimate accession conditionality.

Within the Copenhagen framework, the launch of policies was equivalent in all cases. Measurable standards were derived from international agreements or broader EU objectives and assistance programmes were set up to support specific goals. While these structures were either upheld or refined in four cases throughout the pre-accession phase, first tensions between the Commission activities and member state objectives emerged already during the implementation of enlargement in the case of nuclear safety. These tensions forecasted the different policy-specific features that determine whether a policy will be institutionalised beyond a distinct institutional sub-set or not. The strain that surfaced once the Commission was delegated the task to check on the safety of nuclear installations in the candidate states was provoked by the Commission’s insistence that in order to do so it required a formal legal basis. A feasible reading was that already the Euratom Treaty of 1957 sufficiently covered an extended interpretation of Community responsibilities, even if until then the notion of ‘safety’ had been far more restricted. In a dispute over the accession to the International Atomic Energy Agency (IAEA) Nuclear Safety Convention, the European Court of Justice backed a wider reading of Euratom to interpret ‘nuclear safety’ beyond the traditional areas of radiation protection and non-proliferation to include also the state of national civil sector facilities.

Although the Court confirmed official Commission competences (European Court of Justice 2002), the member states continued to ignore this extended legal base for Community activities.$^{140}$ The Council’s move to withdraw the pre-accession monitoring task from the Commission

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$^{140}$ The member states form all but a unison block on the issue. On the one side states rejecting nuclear energy in principle refuse any extensions of EU capacities since the Commission is generally perceived as too supportive to-
to occupy itself with the monitoring of nuclear installations in the candidate states was to signal that the Commission had no official powers. However, against the member states’ intention the ECJ judged that an activity by the Council was no less confirming a Community competence. Moreover, once having applied the body of informal acquis vis-à-vis the candidate states, pressure for a formalisation of the informal agreements increased. Therefore, the Commission pushed forward with the so-called nuclear package, a set of legal acts which would have formalised the non-binding acquis and extended the legally binding interpretation of ‘nuclear safety’ in the Euratom Treaty along the lines applied to the candidate states (Commission of the European Communities 2004a).141

Yet, despite the ECJ judgement and calls by the European Parliament and other EU bodies alike (European Economic and Social Committee 2003), no supportive majority has emerged from the Council and all initiatives for institutionalisation have been blocked. Instead, the agency of national operators, WENRA, was founded in 1999 and took over the pre-accession monitoring task on behalf of the member states (Western European Nuclear Regulators’ Association (WENRA) 2000). WENRA and the IAEA were promoted as sufficient, if not better alternatives to Community activity. The member states remained firm against all supranational pressures and subtended even the ECJ’s ruling with informal arrangements provided by WENRA outside the EU’s direct sphere of influence. Functionally, the tasks fulfilled do not differ but they fall significantly short of those coercive tools to effectively control enforcement that the nuclear package would have created. Thus, even the Commission maintains that, to date, WENRA is “mostly very much in line with what the nuclear package did, but the nuclear package would have been binding, whereas they want to do this work on a non-binding basis. [...] The member states see it as a kind of opening the door to community legislation, and they do not want to give in even that little bit of stamp, even if it does not change anything” (Interview DG TREN 2007).

Anti-corruption policy is the second case in which Community activity beyond the Copenhagen realm would have lead to the creation of new binding rules and extended sanctioning powers for the Commission. Like nuclear safety responsibilities, we see an ‘out-sourcing’ of Commission capacities. In 2003 one can observe a shift in the Commission’s so far little successful approach to national anti-corruption policies. Instead of promoting the strengthening of Community instruments, it turned around arguing for a more prominent role of other international organisation

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141 For access to all relevant documents see: http://ec.europa.eu/energy/nuclear/safety/new_package_en.htm.

Heidbreder Eva G. (2008), The Impact of Implementing Eastern Enlargement: Changing the European Commission’s Action Capacity
European University Institute
10.2870/20746
such as the Group of States against Corruption (GRECO), initiated in 1999 by the Council of Europe. In the very same document in which a abundant list of anti-corruption measures to be implemented by the candidate states was issued, the Commission ascertained that “at this stage of policy development, mainly those measures should be strengthened and supported at EU level, which are not already substantively covered, or not with the same degree of mandatory character as EU instruments, by international organisations. This goes in particular for initiatives of the United Nations, the Organisation for Economic Co-operation and Development (OECD) and the Council of Europe, where the EU has been playing a leading role and should continue to do so” (Commission of the European Communities 2003b: 5). Even if the process differed slightly from the nuclear safety case, both underlying actor intentions and the effective outcome are equivalent in the two cases in which institutionalisation beyond the enlargement realm was pre-empted. Since at the time of establishing the EU structures for anti-corruption policies in the candidate states there was also considerable movement in other international organisations around the topic, member states were generally reluctant and not supportive of Commission initiatives. Alternative solutions that emerged in other fora eventually exempted a binding acquis to emerge (Interview DG Employment 2007).

While in both cases the complete abolition of once created policies could not be realised, the member states successfully prevented new EU capacities by endorsing into cooperation outside the EU and thereby preventing new Commission capacities.

In contrast to the two cases in which institutionalisation at the EU level would have meant binding rules for all states, in the other three cases policies were formulated diversely. The different outcome in these cases cannot be attributed to the fact that they fell into the first pillar – on the contrary. While administrative capacities remain fully outside Community competences, the foreign policy elements of cross-border cooperation lay officially in the second and minority protection in the third pillar – thus all three policies are as much subject to intergovernmental decision-making as nuclear safety and anti-corruption.

The decisive difference is explained by the arenas of power the policies fall into. As already pointed out, cross-border cooperation and administrative capacity building were from the outset more distributive than regulatory in nature. This must not be taken for an absence of coercion these tools grant the Commission. Illustrating the very opposite, the integration of administrative capacity building as a condition for the dispersion of EU cohesion funds deserves particular attention. Policy objectives concerning national administrative performance were nested into supranational distributive policies. The improvement of national administrations gained increas-
ing attention in the course of the pre-accession process as recognition grew that legal transposition alone would not ensure the application of the acquis. The EU offered both technical and financial assistance to the candidate states. Although the Regular Reports considered in length the criterion “administrative and juridical capacity to apply the acquis”, the EU did not develop generic standards on what marks efficiency and efficacy of national administrations (Court of Auditors 2003a: 7; Grabbe 2001). Consequently, no tangible conditions for granting assistance could be organised along a generalised list of benchmarks derived from the acquis. Instead, the baseline criteria developed by SIGMA (OCED) gained overriding importance and concrete targets were negotiated in the Accession Partnerships for each state and policy area. Beyond capacities to guarantee the implementation of sectoral policies of the acquis, the improvement of horizontal capacities at large moved to the centre of attention in the applicant states while concurrently formal authority inside the acquis remained strictly with the member states (Mangenot 2005: 4).

Although this remains so regarding the formal ascription of supranational authority on national administrations, we witness a qualitative shift in the area of regional policy in which the Commission has gained the unprecedented capacity to interfere directly with member states’ administrative structures. Formalised for the programming period 2007-2013, the distribution of financial assistance to the so-called convergence regions and cohesion countries (i.e. the ‘poorest’ regions of the EU) from the European Social Fund has been made conditional on the integration of national administrative efficiency as policy objective (Council of the European Union 2006a, b; European Parliament and Council 2006a, b). Introducing additional conditions for funding, member states requesting EU financial means must prioritise administrative capacity building as one of their programming targets in order to receive EU resources. As previously in the Accession Partnerships, the precise conditions are bilaterally negotiated between each state and the Commission. Moreover, the new principle of transnationality obliges states to include inter-state exchange on technical matters, basically reflecting the twinning mechanism. Inspired to a great extent by single initiatives for cohesion countries as from 2002 onwards, the tools integrated into the 2006 Council Regulations on the Social and Cohesion Fund take up the core logic of those instruments exercised in the Copenhagen framework. Although the application of these conditions is limited to the relatively poorest states and regions when requesting EU funds, the inclusion of the convergence criterion marks the most decisive qualitative shift. In this the Commission has considerable discretion in operationalising Council guidelines in that it defines concrete targets together with each recipient state and evaluates national administrative capacities to implement community goals. The Commission has thus gained extended steering capacities by means of a
conditional distributive policy applicable to a restricted group of member states. Beyond the theoretical expectations according to which policies should be limited to the regulatory and distributive arena, the establishment of conditional distributive policies does not only effectively serve regulatory but also redistributive effects. Still, the policy is framed in the distributive arena in terms of Structural Fund reforms without involving political conflicts along lines of classes of member states although the convergence criterion and the nesting of regulatory objectives based on conditionality creates similar effects.

The second distributive policy under perspective is cross-border cooperation. The extension of capacities in this case results from the incremental redefinition of the policy objectives. This extended the Commission’s activities into substantial foreign policy concerns. Cross-border cooperation was already established in the 1990s, independent from enlargement policy. It served as an instrument to cushion the effects of the internal market. In this function, it was firmly limited to EU internal borders and overcoming these. The initial redistributive element of cross-border cooperation disappeared as the policy was opened to all of the Union’s border regions.

Importing the instrument into enlargement policy marked a qualitative extension leading eventually to a substantial goal adjustment. As from 1994 Phare cross-border cooperation was implemented along the borders between member states and future member states, as well as along borders between the latter. Most significantly, however, cross-border cooperation was extended also along the future external borders of the EU. As part of the assistance programmes to the former Soviet republics (Tacis) and southern neighbouring countries (MEDA) the aim was not to ‘overcome’ borders but to stabilise and better secure in particular the previously more permeable frontiers to the EU’s eastern neighbours to-be.

Steadily revised in subsequent programming periods, these programmes were eventually included into the European Neighbourhood and Partnership Instrument (applicable since 2007). The European Neighbourhood Policy (ENP) aims explicitly at bridging the three pillars of the Union and amalgamating the various foreign policy elements in one single instrument (Cremona and Hillion 2006). Both in its objectives and methodology it draws directly from enlargement policy (Kelley 2006). In particular the management by means of the Accession Partnerships within the Copenhagen Framework is replicated in the ENP Action Plans for each partner state. Accordingly, it also reproduces the Commission’s expansive role, acting beyond the acquis, which it had placed in enlargement policy (Cremona and Hillion 2006: 10). Although, in a narrow sense, still focusing on formally the same objectives of cohesion in border regions, the underlying goals of
cross-border cooperation with third states include core issues of foreign policy, most notably security and migration.

The goals and objectives cross-border cooperation is to serve in this new context have substantially upgraded the Commission’s scope to reproduce the soft capacities first exercised during the pre-accession phase. Without an official transfer of new competences, the outspoken objective of the Neighbourhood Instrument is to bridge the pillar division, not at least to promote EU security interests (Aliboni 2005; Cremona 2004). This is reinforced by the considerable discretion the Commission has in the implementation of cross-border initiatives in cooperation with local actors that marks an extension of the organisation’s steering capacity into sensitive areas of foreign policy on the operational and administrative level. A revealing example is the currently implemented programmes with Ukraine, including the training of border posts by means of delegating experts from EU member states and voluntary inspections of nuclear installations (Interview DG External Relations 2007).

The policy evolution of minority policy, finally, provides evidence for both extended distributive and new soft regulatory steering capacities. In other words, both monitoring and assistance activities were institutionalised beyond enlargement policy. Monitoring of minority rights is continued in a limited format in the framework of the European Monitoring Centre for Racism and Xenophobia (EUMC) founded in Vienna in 1998, transformed into the European Union’s Fundamental Rights Agency in 2007. Moreover, the Commission indirectly considers itself to have an oversight responsibility under Article 6 of the Treaty on the European Union (fundamental human rights), despite the unmistakable fact that no such competences are formally included in the Treaties (De Witte 2004: 110). Yet, based on the legal justification for monitoring activities in candidate states, parts of the Commission promote a much subtler interpretation based on the following reading. As from 2002 the Regular Reports referred explicitly to the Article 6 of the Treaty on European Union, implying that the Article included indirectly also the provisions of the Council of Europe Framework Convention on National Minorities (FCNM) that defines minority rights as integral part of the protection of human rights (Hoffmeister 2004). From this perspective, Article 6 hence also provides the basis for monitoring member states, which is exercised but hardly leads to action since the only tool the Commission has to react would be the suspension of membership rights under Article 7 TEU. Given that the suspension of membership rights is a means of last resort, Commission activities are rather cautious and little visible (compared to the less painful

142 They were however included into the Constitutional Treaty (Art. 1.2 “The Union’s Values”), in the draft proposal for a new Treaty, based on the European Council mandate contained in the Presidency Conclusion of 23 July 2007, contains the same clause (Conference of the Representatives of the Governments of the Member States 2007).
regular reporting). Nonetheless, the Commission’s legal service does include minority rights into their monitoring of member states (Interview Commission Legal Service 2007).

Moreover, parts of the anti-discrimination acquis are emerging as formal member state obligations, though not granting collective minority rights but framed as instrumental additive policies, above all to the economic acquis. In this vein, the Commission is currently taking hard stands on the correct implementation of the Race Equality Directive (Council of the European Union 2000b). With a view to assistance offered during the pre-accession phase – particularly targeting Roma minorities – activities have been extended to all EU member states. Linked to the anti-discrimination acquis, DG Employment is responsible for the dispersion of resources from the European Social Fund.

Beyond this, the issue of explicit and collective minority rights has entered the supranational agenda not least because of the special interests of one of the eastern member states: Hungary. Without any new formal competences on minority issues, a process of informal institutionalisation of the policy tools developed in the enlargement context can be observed, based significantly on a wide interpretation of the existing acquis. The Commission clearly moves in a legal grey area, which is nevertheless tolerated by member states that remain practically ‘immune’ to hard enforcement of minority rights since the formal policy tool to coerce (request the suspension of membership rights) is reserved for extreme breaches and leaves no scope for more soft routine scrutiny. At the same time, a continuous supervision and engagement with the new member states is guaranteed. The situation of Roma communities remained a matter of particular concern beyond accession in both old and new member states.

In essence, the Commission has gained substantive new steering capacities. Whether member states tolerate or even promote the integration of new public policies beyond the Copenhagen pre-accession framework depends on the manner in which coercion is framed and thus which policy type will be institutionalised and which implementation instruments these will create on the EU level.
14 ATTRIBUTION OF ACTION CAPACITY:
The Commission’s Inter- and Inner-Organisation

In this section attention will be drawn to the inner- and intra-organisational implications of the extension of steering capacities for the Commission. Which repercussions did the implementation of enlargement have on the organisational functioning of the Commission, and what does the extension of steering capacities tell us about the European Commission’s institutional role in the Union polity?

Let us first review the latter question on the role the Commission takes in relation to the other EU bodies and which implications the above presented policy changes imply for the Commission’s intra-organisational position, especially those that affect the horizontal relative distribution of powers. With the completion of the single market project and monetary union, the Commission’s formal discretion as legislator has diminished compared to earlier integration phases, especially those leading up to the Single European Act (1986) and the foundation of the European Union in Maastricht (1993). Parallel to a massive increase in legal substance to be administered, the scope for formally extending competences has been reduced which has been interpreted as a deliberate weakening of the Commission by the member states demarking “a fundamental change in the nature of European integration as a political issue that occurred in the early 1990s” (Kassim and Menon 2004: 24).

However, given that the economic areas in which a general mandate to establish supranational rule has been exploited excessively, this change should be understood as a stage inherent in the integration process. Neither the ECJ nor the Commission are left with much room to extend their capacities by means of legal self-interpretation (Weiler 1993: 436). On the contrary, shattered by harsh critique, the Commission had to re-define its ambitions with a strong shift to its administrative responsibilities. In this context, questions of the legitimacy (Smismans 2006; Mair 2005; Follesdal and Hix 2005; Rittberger 2004; Scharpf 2003; Bellamy and Castiglione 2003; Moravcsik 2002; Kohler-Koch 2000; Nuttall 1996) and accountability (Majone 2005, 2002b, 2001a; Moravcsik 2002) of the polity at large have gained considerable academic attention and have in practice led to a strengthening of the European Parliament (Rittberger 2004; Judge and Earnshaw 2002; Topan 2002). Similarly, the stronger emphasis on subsidiarity and proportionality have made the Commission president Santer to adopt “the slogan of doing less but doing it better” (Jones 2000: 185). The introduction of the pillar system in Maastricht has had the additional effect of stronger constraining Court and Commission in new policy areas of the Union –
this notion being even more evident in policy tools such as the *open method of coordination* associated with the Lisbon Strategy (2000).

Finally, the shift to more administrative tasks was not matched by a sufficient increase of resources (Shaw 2000: 122; Laffan 1997: 422). Likewise, Dehousse argues that relevant “figures provide a simplistic, yet arguably telling, picture of the contradictory trends at work. On the one hand, national governments keep enlarging the range of missions entrusted to the Union; on the other hand, they are reluctant to accept parallel growth in the means with which the Commission (symbol of the loathed Brussels Eurocracy) is endowed. It is known that the tension between these two logics has resulted in the managerial inadequacies – massive outsourcing, absence of control, and ultimately corruption – depicted in the report of the independent experts that prompted the resignation of the Santer Commission. However, beyond these pathological episodes, the same structural contradictions have also played a key role in the emergence of some kind of functional decentralization within the EU bureaucracy” (Dehousse 2002: cap. 3). Overburdening with tasks thus marks a further practical constraint for the *de facto* capacities of the Commission. In response to these changes in the Commission’s institutional environment, the organisation has moreover for a long time proven quite averse to internal reforms (Metcalfe 1999; Cini 2001, 2000; Jones 2000: 184; Vos 2000; Egeberg 2002; Spence 2000). In sum, there is a stronger emphasis on administrative instead of legislative functions in the face of a much wider acquis. This means that Commission powers have shifted rather than diminished. Nonetheless, in terms of formal discretion “[i]n this current epoch, therefore, all four of the EU’s major institutions play important roles that are reminiscent of those of legislatures (the Council and the Parliament), bureaucracies (the Commission), and legal systems (the Court) in national politics with bicameral legislatures (such as Germany)” (Tsebelis and Garrett 2001: 359). Markedly, the Commission’s role is increasingly reduced in the legislative realm, exercising the right to initiate legislation, but in practice it gains importance as the policy-implementing executive branch.

Overall, these changes can be interpreted as part of the maturing of the EU polity and should not simply be equalled with a universal weakening of the Commission. The extended acquis naturally increased the Commission’s responsibilities as ‘guardian of the Treaties’, external representative of the Union, and as executive. The potential to *extend* action capacity in terms of formal competences is limited to areas in which the Commission has the legal, institutional and material resources to promote own activities, i.e. considerably less since the Treaty of the European Union. Beyond this, as this study shows, there is potential room for manoeuvre for extension into less formalised capacities which do not result in new competences but *de facto* capacities to implement...
policies. As the case studies illustrate, soft regulatory or conditional distributive policies are particularly prone to this, that is: steering by means of new modes of governance in the regulatory and distributive arena which results in the extension of supranational powers without conferring substantial authority from the member state level.

It follows that we might generally expect less hard legislation on the EU level because member states have grown more careful about establishing competences for hard coercion and the areas in which the Treaties granted the Commission to initiate legislation have been widely exhausted. Even more strikingly, recent research reveals that even if initiating legislation, the Commission acts much less independently than its formal competences suggest. Not only has there “been a sharp decline in the number of proposals for new legislation since the beginning of the 1990s, due partly to the adoption of the principles of subsidiarity and proportionality” (Jones 2000: 185), more relevantly is how independently the Commission actually acts. “According to the Commission itself, ‘The Commission’s de jure monopoly on the right of initiative does not correspond to a de facto monopoly. In reality, the Commission exercises its right of initiative in an exclusive manner in a very small percentage of its proposals’” [(Commission of the European Communities 2002c: 4-5)]. Its own data reveal that merely 5 per cent of the proposals in 1998 were new initiatives from the Commission whereas the rest were responses to requests from other EU bodies, to international obligations, adaptations of Community law to new conditions, and others” (Rasmussen 2007: 248). This retrenchment of formal initiative powers affects all four sub-sets contained in a wider interpretation of the competence: the right to propose legislation, to amend proposals, to withdraw proposals, and to affect the Council majority by formal but foremost informal rebalancing of the inter-institutional roles. “Together, these developments illustrate how the agenda-setting powers of the three EU bodies have been renegotiated in practice, diminishing the Commission’s powers and increasing those of the Council and Parliament. The Parliament’s report on the draft Constitutional Treaty goes as far as to call the Commission’s right of initiative ‘quasi-exclusive’ [(European Parliament 2003b)] and former Commission Director-General Pappas [(Pappas 2003: 8)] argues that, ‘It has become apparent that the right of initiative is not being exercised by the Commission in the manner foreseen in the EC Treaty and that in practice this right has come to the institutions which have the decision-making powers’” (Rasmussen 2007: 251). Against this background, an extension of Commission capacities is indeed even more confined to soft steering and the distributive arena. The latter, however, allows the inclusion of both regulatory and redistributive policy objectives – as illustrated by the case study on administrative capacity building in particular. To achieve better compliance control in the implementation of the
EU acquis in the member states, conditional EU funding is offered to the poorest regions only. This has both redistributive and implicitly regulatory effects on national administrations, without however opening the decision-making process in the regulatory or redistributive arena since the policy results officially form reforms in of Social Fund assistance.

The finding that distributive policies are made increasingly conditional is, moreover, linked to the peculiar nature of the EU budgetary rules. Not only do all member states pay an equal amount of their GDP into the EU budget, the dispersion of money is also marked by certain idiosyncrasies. When regional policies were introduced in 1975 payments were made according to fixed quotas for all member states thus establishing a system of “indiscriminate all-round distribution” (van der Beek and Neal 2004: 590). Subsequently, the quota principle was lifted for parts of regional assistance, allowing the Commission to grant money along genuine Community principles. When, after the southern enlargement, the Mediterranean states pushed successfully for a substantial increase of regional policy funds “the main contributing countries (‘rich’ countries) were only willing to accept this increase under the condition that the main recipient countries would submit to conditions about how to spend these resources” (van der Beek and Neal 2004: 591).

The fact that setting the ceiling for member state contributions is the only effective means net-contributing countries have on the complex EU budget, control through conditionality exercised by the Commission has gained ever more relevance as distributive policies were extended with each round of widening. Due to a lack of fundamental reform of the system, eastern enlargement has not changed but reinforced this situation (ibid. 2004: 593; Mele 2003). The case study on the inclusion of administrative capacity building into the latest programming period for structural and cohesion policy demonstrates the qualitatively extended dimensions conditionality is taking. For the Commission’s organisational power this means a de facto strengthening of its authority vis-à-vis the member states and regions because it is the Commission which negotiates and controls compliance with conditionality demands on the operational level. In order to apply general conditions, the member states cannot avoid granting considerable discretion to the Commission since the EU structure does not provide the governments with the means to exercise such control on its peers. In terms of actual power, conditionality-based distributive policies hence significantly increase the Commission’s policy-shaping influence as administrator.

The second question raised in this section concerns consequences for the internal organisational functioning of the Commission. Enlargement policy is horizontal in nature and involves basically all Directorates General (DG) of the Commission that provide specialised knowledge
under the leadership of DG Enlargement. Handling an unprecedented number of incumbent members, eastern enlargement was not only delicate in the above-outlined operational terms of policy implementation, it was also an organisational challenge leading to the creation of DG Enlargement. In 1995, Hans van den Broek took on the responsibilities for *External relations with the countries of Central and Eastern Europe, the former Soviet Union, Mongolia, Turkey, Cyprus, Malta and other European Countries Common foreign and security policy and human rights (in agreement with the President)* *External missions*, a unit located in DG1 External Relations. Günther Verheugen succeeded van den Broek in 1999 to become the first Commissioner for the single-standing DG Enlargement in which DG 1A and the *Task Force for Accession Negotiations* (TFAN) were merged. Nugent and Saurugger point out that “[m]ost DG 1A officials were unhappy with the proposed new arrangement when it was announced, believing it amounted to a ‘victory’ for the TFAN over DG 1A in what had become a fierce internal struggle for control on the enlargement issue. However, there was nothing they could do to prevent the restructuring given the increased importance of enlargement on the EU’s agenda and given also that Prodi saw the new DG as a key component element of his overall reform programme” (2002: 355-56). The DG’s responsibility was extended to the Union’s new *Neighbourhood Policy* in 2003. In contrast to the classical enlargement method (Preston 1995), especially under the leadership of Verheugen, DG Enlargement rose to one of the most influential units in the Commission. Its importance was fundamentally downgraded with accession of the bulk of candidate states since this reduced the DG’s workload, if not its raison d’être as single Directorate General especially with the reinforced ENP having been reallocated to the DG External Relations portfolio in 2004. In 2005, Olli Rehn was appointed Commissioner of the downsized DG Enlargement. Consequently, a considerable number of officials who had been involved in enlargement have moved to other resorts. Especially officials working on all levels of the ENP have a strong enlargement policy background (Interviews DG External Relations 2007, see also: Kelley 2006: 32).

The case studies conducted suggest that horizontal structures – crucial for implementing enlargement – have enhanced inter-service cooperation, yet foremost where the Commission fell short of any other means to realise new capacities proper. In general, there is no direct causal link between the organisational structures between Commission services and the extension of policy capacities. Neither can the continuation of steering activities beyond the Copenhagen framework explain horizontal linkages across DGs, nor are inter-service networks a sufficient cause for the extension of a policy. Yet, it can be argued that the extensive involvement into the horizontal enlargement policy left traces in the organisational day-to-day functioning. This finding is supported especially by the case on anti-corruption policy in which inter-serviced links are upheld or
further refined. Unlike nuclear safety, for which the Commission’s competence was already curtailed during the implementation of enlargement, anti-corruption policy was exercised and improved throughout the entire pre-accession phase. In contrast to the intensification of supranational leverage within the Copenhagen Framework, an increasingly less coercive approach towards member states crystallised in parallel. Notwithstanding the continuing absence of steering tools to impact on the member states, the Commission continues to promote anti-corruption issues in a less tangible way, foremost by attempts to mainstream the issue across various policies. Based on the general directions indicated in the area of criminal law by the European Council, the responsible DG tries to mainstream the concern across the Commission services. In this vein, benchmarks developed as pre-accession tool are to disperse anti-corruption awareness across various DGs, the most promising field of application remaining EU external policies in the ENP framework (Interview DG JLF 2007).

Furthermore, especially on the matters for which it has no direct monitoring task, the Commission has promoted the development of comparable statistics. Corruption has been chosen a pilot area for the development of more sound statistical data in the criminal area, but the improved recording of statistical data as tool to increase the Commission’s knowledge on single policies in the member states affects basically all areas. More than that, as in anti-corruption policy we see a tendency to refer to statistics strategically in other cases. Concerning minority policy and nuclear safety reference to public opinion is put forward as argument in support of more Commission involvement in the regulatory arena. In the distributive policies – less suspicious to public opinion – there is however no evidence that related data has been used strategically to promote Commission responsibilities.

Similarly, mainstreaming is an implicit feature across the board but takes different shape depending on whether the policy has distributional or regulatory effects. Where the respect of certain rules or quotas is concerned, mainstreaming means that certain standards are incorporated into the activities of as many services as possible. Minority protection has been made a priority in social and educational programmes, an example provides DG for Education and Culture that has introduced a prioritisation in the Socrates programme in which “intercultural education and the combating of racism and xenophobia is a permanent priority throughout the programme for all actions, and it will be given special prominence in the forthcoming call for proposals for Socrates in 2003” (Commission of the European Communities 2003e: 10). If a policy is at stake, mainstreaming means that all activities funded by a particular heading are incumbent on the same priorities. Accordingly for the programming period starting in 2007, a global strategy has been put in
place that mainstreams ‘administrative efficiency’ across the European Social Funds actions, as elaborated above.

Obviously, a horizontal division of labour between DG Enlargement and other DGs was important in the establishment of policies during the pre-accession phase given that – if existent – it was the respective issue DGs that had expertise on the political problems at stake. This was not the case for the policies under scrutiny, as most obviously in the cases for administrative capacity building and minority protection because the Union had not been directly involved in these matters at all. Unlike the issue areas dealt with in the accession negotiations, the dynamic of integration for the policies under perspective moves in the reverse direction: policies first initiated by DG Enlargement are integrated into the wider Commission structures. To be institutionalised beyond the Copenhagen framework, these policies needed to be incorporated into one of the DGs outside DG Enlargement where they were initially developed and directed. Since linking up mainly to the anti-discrimination acquis, minority assistance is based in DG Employment, just as the distributive instruments for administrative capacity building. Cross-border cooperation has remained formally a regional policy responsibility, yet as far as external states are concerned in the framework of the ENP, the respective unit in DG External Relations is responsible – with a tendency to reproduce instruments of enlargement policy as such. For the regulatory elements of minority protection, apart from the Vienna Agency, there is no official responsibility allocated to a particular unit while the informal observatory function is nonetheless resumed by the legal service. Hence, all cases in which action capacity was extended, these were linked to pre-existing Commission competences and embedded into one of the existing DGs.

To summarise, enlargement has opened new spheres of activities in the ambit of (conditional) distributive and informal regulatory policies, which are likely to be those areas into which the Commission can also in future extend its capacities and real power. Despite the muddy legal and questionable legitimate grounds these new capacities are built on, they are not only tolerated but even requested by member states, as long as no hard coercive steering instruments lurk in the background. In contrast, internally the Commission’s organisational structures accommodate some informal capacities independent from member state toleration of support for monitoring (Eurostat) and mainstreaming of policy objectives through inter-service cooperation, which remain, however, too vague to demark real extended action capacity.
15 TRIGGERS OF SUPRANATIONAL INSTITUTIONALISATION: ENLARGEMENT AS GENERATOR OF INTEGRATION

On the most abstract level, the empirical puzzle raises questions about the interplay between the horizontal institutionalisation (widening) and vertical institutionalisation (deepening) (Schimmelfennig and Sedelmeier 2002) of the EU polity. Most literature on the links between widening and deepening deals with the effects that taking members on board has for how the vessels will sail in future, i.e. the policy-making and institutional consequences of increasing the number of players (Ahrens, Hoen et al. 2005; Aleskerov, Avci et al. 2002; Dinan 2002; De Witte 2002; Senior Nello 2002; Raunio and Wieberg 1999; Nurmi and Meskanen 1999; Hosti 1999; Tangermann 1997; Hosli 1995).

Furthermore, the ideational impact of enlargement on the support for integration has been matter of debate (Krap and Bowler 2006) and some commentators have even argued that negative perceptions caused by too rapid widening were the source of negative public perceptions on the Constitutional Treaty and integration at large (Giscard d'Estaing, 9-10 February 2007, Firenze). Especially at the beginning of the eastern enlargement process, widening was repeatedly juxtaposed to further deepening, suggesting a trade-off between the two processes (Guérot 2004; Vobruba 2003). This debate was also fought out in the decision-making bodies in the run-up to the 1993 Copenhagen decision to open for enlargement, but was resolved in generally terms in that the Commission officially linked deepening and widening as inseparable issues (Commission of the European Communities 1992; Avery and Cameron 1998). Moreover, the creation of the European Union in 1993 was a landmark decision to ensure that widening would not undermine the integration process. Overall, it is difficult to find hard evidence of EU enlargements hindering further deepening. On the contrary, widening has had a catalyst effect for further internal policy development (Ahrens, Hoen et al. 2005; Walker 2003; Baldwin, Francois et al. 1997). “From time to time ‘old members’ (those already in the EU) complain that it was easier to take decisions when the EU was smaller. That may be true (though crises were a regular feature of the EU even in its early days), but successive increases in size have without doubt allowed the EU to develop more substantial and effective policies, internally and externally, than would have been possible with a smaller group. The process of widening has often accompanied or reinforced deepening: more has not led to less” (Avery 2008: 181-82).

Academic contributions pay less if any attention to the effects of the actual enlargement process, i.e. the impact of policy implementation. As summarised, studies on the effects are limited to the
PART IV: KEY RESULTS

impact that the new institutional and preference constellations will have for the future functioning of the EU, leading mostly to the conclusion that further deepening becomes more difficult the more members the club gains. One reason for the overwhelming, though differentiated, academic consensus may be a certain theoretical bias towards rational choice explanations. If in contrast we follow a purely functional logic, widening the Union entails also a broader range of functional demands. Thus, we should expect enlargement to produce new supranational activity since new member states add new problems to the policy agenda.

This should also hold for procedural areas. If decision-making becomes more complicated and existing rules functionally inappropriate, the veto-power of single states should be reduced in the mid-term, or at the latest once decision-making deadlock has created a crisis in the policy-making processes. Furthermore, if functional needs aim at safeguarding old members’ interests, institutionalisation of new supranational competences should be realised before widening. If they regard new members’ interests, new functional responsibilities will be delegated to the EU level after accession. We can also expect a tendency for regulatory policies with a constraining function to occur rather before enlargement to ensure compliance of future members while, once entered, new member states are likely to push for new distributive policies. Sticking to the question that underpins this whole study, the query of this chapter is if and how the process of implementing enlargement itself connects to EU integration at large. Does widening cause vertical institutionalisation?

Empirically and theoretically, it can be shown that enlargement does indeed create new functional pressures, while the case studies reflect clearly that the European Commission is not the only agent to whom new tasks can be transferred (Schmitter 2003: 69 touches on the latter question conceptually).

One of the empirical findings of the systematic case selection regards the policy issues for which the Commission was given extra-competences. All five cases touch on politically sensitive issues outside the Union’s traditional core activities. More or less directly, these matters had previously been exclusively tackled by regional organisations other than the EU, such as the Council of Europe or the OECD. The thematic bias towards policies so far excluded from harmonisation inside the EU derives partially from the fact that the full acquis was covered by the accession negotiations. Hence, all these areas were tackled chapter by chapter in the in bilateral negotiations between the Commission and each candidate state. Yet, the fact that sensitive issues outside the core competences were made conditions for accession reveals also that Commission involvement backed by accession conditionality was considered necessary and more efficient than promoting...
the same objectives in the international organisations anyways already involved before in the same fields. Conversely, the higher efficacy of EU rules due to denser institutional enforcement networks and more forceful compliance control explain why cooperation in other international organisations was favoured as soon as the institutionalisation of new formal regulatory policies occurred as only viable option for institutionalisation within the EU framework. To understand when and how policies not immediately linked to the core Community competences will be institutionalised,¹⁴³ we hence need to add to the function the availability of alternative arenas. How are other organisations distinct from cooperation in the EU, and which alternatives in terms of efficiency/efficacy versus extended supranational coercion do they offer to member states?

The recent enlargement rounds have been a vehicle for defining the boundaries between the EU and other international organisations exercising related or overlapping responsibilities. Interestingly, the very term ‘acquis communautaire’ – to depict the sum of the Union’s legal body – was promoted by the need to define what precisely was the legal substance candidate states were expected to transpose.¹⁴⁴ More significantly, while in previous less extensive enlargement rounds membership was negotiated one-by-one and step-by-step with the applicant states, eastern enlargement demanded a more comprehensive approach. To give conditionality a meaning necessitated to list the ‘obligations of membership’ more concretely. The Common Market White Paper was the first crucial document in which the Commission offered a definition to the applicant states. The White Paper has beyond this advanced to become an important general point of reference to define and rank the constituent elements of the acquis (Commission of the European Communities 1995).

Beyond these efforts in the self-definition of what makes the EU’s legal framework, a more refined distinction from other bodies was fostered as a side effect of the enlargement process. Implementing enlargement, the Commission cooperated strongly especially with the relevant other regional organisations. Besides the privileged status that information of these organisations had in the monitoring process (Heidbreder and Carrasco 2003: 30), in almost all areas under examination joined projects were carried out and common implementation networks built up.

¹⁴³ The policies integrated in this mode do not confirm with what is normally depicted as ‘functional spill-over’. Unlike spill-over from one policy to a functionally related one, enlargement induced ‘spill-over’ regards the extension of policies from an institutional sub-set to the EU’s core set institutional rules.

¹⁴⁴ Dealing with a request by an US embassy, DG 1 requested clarification from the legal service if the (internally used) term ‘acquis communautaire’ could be used in official communications for what in English had to be circumscribed as “the body of Community law, or the body of law and principles governing the EU” (internal note, October 1997, see: Historical Archives of the European Union (EUI), GJLA 172 – the Acquis of the Union).
The central uncertainty that emerged during enlargement, and gained importance as capacities span beyond the Copenhagen framework, is whether the relation with the respective other organisations works by a ‘division of labour’ or if responsibilities overlap. The latter was overtly the case in anti-corruption and tentatively also in minority policy. The fear that the EU could take on overlapping competences provoked the perception that this would create competition for competences and has led to some tensions between the institutions and eventually resolved in the process of delimitating more clearly the Commission’s objectives and capacities. As pointed out before, we can observe a shift in the claims on responsibility for anti-corruption measures that were in the end attributed to the relevant international organisations other than the EU, which put an end to conflicts over competences in particular with the Council of Europe (Interview former member College 2007). In the case of nuclear safety, besides WENRA taking on more immediate tasks, the member states agreed that a general supervision function on nuclear installations was better exercised by the UN’s International Atomic Energy Agency (IAEA). In those areas in which the Commission did not attract new capacities, overlapping competences that appeared somewhat ambiguous during the pre-accession phase were thus more evidently distinguished, especially those competences that fall outside the Commission’s reach.

The differentiation took not the same shape in the policies in which capacities were extended. In these policies, joint programmes and mutual support with other international organisations have been mostly continued, or distributive EU policies remain outside the international organisation’s narrower activities. In terms of clarity, the delimitation of competences has been refined vis-à-vis external actors but has in some instances been blurred even more as far as the division of competences inside the EU is concerned.

In administrative capacity building, cooperation during the pre-accession phase was channelled through a joint programme with the OECD, SIGMA, which continues as joint initiative, primarily financed by the EU. After enlargement the new member states were incrementally phased out of the programme so that in 2007 only the two latest entrants, Bulgaria and Romania, the three candidate states, Croatia, the former Yugoslav Republic of Macedonia, Turkey, and the Western Balkan states are supported. On the operational level, Commission officials refer in-
formally to WTO and OECD indexes for administrative efficiency and efficacy as reference documents, but in general institution building as condition for the dispersion of EU funds is directed by the Commission alone (Interview DG Employment 2007); more precisely institution building is handled as part of the European Social Fund in DG Employment. This means that it has been located in the EU’s economic policy ambit for which the Commission holds an exclusive competence. This exclusive Commission responsibility appears plausible since the policy has been linked explicitly to the distribution of Community money to EU member states.\textsuperscript{147}

Cross-border cooperation was and remains a Community activity \textit{en gross}, not involving but also not conflicting with international organisations for a number of reasons. First, the latter work generally issue-oriented, i.e. different to the horizontal cross-border approach. Second, cross-border cooperation has evolved out of local cooperation across borders, i.e. explicitly not through top-down governmental initiatives. Therefore, the \textit{European Outline Convention on Trans-frontier Cooperation between Territorial Authorities}, the so-called \textit{Madrid Convention} (21 May 1980), which was initiated by the Council of Europe, marked an important innovation that offered locally operating initiatives a legal framework independent of national governments. Third, due to the local initiative character, a European dimension emerged only incrementally. Some ten regions involved into first initiatives since the late 1950s and founded the \textit{Association of European Border Regions} (AEBR) in 1971. A real spread beyond a number of initially active regions occurred only with the availability of Community funding as from the late 1980s. For the implementation of cross-border programmes, the Commission continues to rely on partners on the local or district level and AEER in particular (Perkmann 1999: 664). It is hence precisely the distributive and territorially disaggregated character of the policy that marks its genuine EU character, which does not interfere with other international organisations but is prone to mobilise cooperation with non-governmental or sub-governmental organisations.

Minority policy at the EU level, finally, features both regulatory and distributive aspects. While in the latter realm cooperation with external international and non-governmental organisations has been increased, the Union’s involvement touching on national regulatory arenas has repeatedly been a matter of contestation. The most prominent organisation dealing with minority issues is the office of the OECD \textit{High Commissioner on National Minorities}, founded in 1992. The distinction of competences between the Commission’s and the High Commissioner’s activities were not evident from the start but evolved along the specificity of the different implementation means the two organisations had at their disposal, above all the Commission’s unique condition-

\textsuperscript{147} Given this institutionalisation into the standard Community activities, a continuation of Sigma in member states would therefore lead to a duplication of activities with the EU funding both programmes.
ality-based leverage was generally considered an important additional tool besides the international instruments. Yet, beyond the Copenhagen realm especially the transformation of the Union’s Monitoring Centre into the European Fundamental Rights Agency evoked open controversies between the EU and the Council of Europe. The Commission defend fiercely the distinctive tasks the Agency would fulfil (European Parliament 2005b; Frattini 2005), which was eventually inaugurated on 1 March 2007.

Other than these demarcations of EU responsibilities from external bodies, inside the Union a precise separation of legal competences on human rights is intentionally avoided. Telling is above all the recently renewed Memorandum of Understanding (Council of Europe 2007). Against the preference of other members of the Council of Europe (foremost Russia) the Commission on behalf of the member states was strongly against a more formal agreement, “if it were a document with strong legal aspects and with legal obligations, then we would have to go through very complicated procedures between the Commission and the Council of Ministers to know who does what, who has the competences in this field. We tried, together with the member states and the various presidencies that have been at the head of the Union since 2005, to avoid a dispute amongst our layers, and we say: ‘but look at this positively’, to avoid a legal dispute [as to] who has the mandate” (Interview DG External Relations 2007). Mirroring the toleration of Commission activity in the legal grey area of monitoring minority rights in member states, it is accordingly also the practice that the Commission informally represents the Union externally in human rights matters albeit the formal competence stays in the hands of the member states. Taking into account this de facto authority of the Commission may explain part of the external demands for a demarcation of EU policy responsibilities where potential for a conflict of competences exists.

In contrast to these questions touching on regulatory aspects, in the distributive realm the Commission’s cooperation with external international and non-governmental actors has flourished. These include various projects with the Soros Foundation (including a Roma internship programme in the Commission) as well as participation in the Roma Decade Initiative (initiated by George Soros, James Wolfinson, and former Commissioner Dimantopoulou) which operate in addition to the Communities own assistance programmes (since 2006 mainly Progress).

In sum, the implementation of enlargement has served as a catalyst of three processes refining the EU legal boundaries and delimitating its competences. First, we see a process of internal stocktaking and self-definition of what makes the sum of the Union’s legal framework and content of the ‘obligations of membership’. This includes both the definition of the formal but, as the case on nuclear safety has illustrated, also the informal acquis communautaire. Second, even
more than previously, the current enlargement policy towards Croatia and Turkey has formalised some of informal competences that are (to say the least) legally questionable. Especially the transfer of the minority criterion into chapter 23 of the accession negotiations can be disputed for as long as no hard competence on minorities is contained in the acquis. Even more questionable is the post-accession monitoring of anti-corruption policy in the latest EU entrants which is effectively a continuation of the double standard treatment after accession. Third, the Commission’s activities in formally underspecified policy fields has raised scepticism by international organisations with similar competences, leading to a more precise division of labour, or an actual definition of Community non-competences. The need to define more precisely what lies in the Community’s reach or not has occurred where the Commission entered matters in the regulatory arena. Other than that, the third observable effect regards the distributive arena. Where new Commission capacities were articulated in the dispersion of financial or technical assistance, new fields for cooperation with external actors were created.

Has enlargement thus been an actual cause of integration? Whether Commission capacities spill-in from an institutionally distinct sub-system depends on the future coercive effects on member states. If we subscribe to a functional reading – that each enlargement will extend the Union’s political agenda (which is easy to trace across the history of enlargements) – the overall answer is therefore ‘yes’. Horizontal institutionalisation, i.e. extending the entities boundaries to include new states, creates new policy demands on supranational governance which will lead in turn to more vertical institutionalisation – be it in terms of more legal clarification or diffused cooperation beyond the formal core competences. Moreover, conditionality-based enlargement policy will always generate functional pressure. First, double standards inherent in accession criteria that go beyond the acquis establish functional pressure from the outset. Second, the successful implementation of policies increases functional pressure. Finally, the inclusion of new stats for which policies have been created to tackle particular political problems further increases functional demands for spill-in. In all cases, functional pressure was expressed in attempts to extend the definition of a political problem, both in content and in territorial scope. The final decision whether a policy will spill in or not depends on which policy arena it will fall into. In sum, enlargement increases substantially the likelihood of further integration and will be a cause for integration for non-binding regulatory and distributive political problems.
16 **EMPIRICAL FINDINGS:**
**POLICY MAKING AS SOURCE FOR INSTITUTIONALISATION**

Through the empirical findings of the five qualitative case studies, the conditions under which the Commission extends its capacities beyond formally restricted mandates have been demonstrated. The central question is why and how competences that were intentionally limited to the pre-accession framework could institutionalise beyond enlargement policy to apply to all member states. The analysis brought forth three sets of findings (see Annex II for a summary).

First, comparing the evolution of policies and their implementation across the cases showed that the actual **policy type** is decisive for whether a policy is institutionalised into the EU’s institutional core framework. Given functional pressure for cooperation, it depends on how a policy is framed, which again is dependent on the institutional context and in last consequence the substantial policy demand at stake. If the further institutionalisation of capacities implies the creation of new restrictive regulatory competences for the Commission, member states will successfully promote alternative less formally binding options outside the EU. Where policies are formulated in the distributive arena or in informal regulatory terms, Commission capacities will be extended.

Second, patterns in the Commission’s **organisational role and functioning** were identified across the cases. Given that the Commission’s potential to extend its competences by initiating legal acts has been substantially reduced due to the completion of the common market project and a significant strengthening of the European Parliament as legislator, informal competences in policy areas outside the traditional Community competences appear the most likely sphere in which the Commission will extend its activities in future. Such dynamics should be reinforced if the European Parliament has a long-standing interest in an issue, or precisely if functional demands (such as those deriving from enlargement) push a topic on the supranational agenda. Inside the Commission we see an increasing use of inter-service cooperation, as exercised during the implementation of the horizontal enlargement policy. On the one hand, in some cases policy goals that have not been institutionalised by a formal competence are promoted by mainstreaming policy objectives across portfolios of different DGs. On the other hand, the Commission makes strategic use of certain in-house services, especially the increased use of comparable statistical data to enhance knowledge on the member states in the absence of official monitoring responsibilities, including the reference of public opinion data where hard regulatory competences are absent but argued for by the Commission.
Third, I drew some conclusions on the effect that implementing enlargement has had on the differentiation of the EU polity at large. Arguing that each enlargement creates new functional demands at the supranational level, horizontal institutionalisation acts as a driver for the differentiation of the vertical distribution of competences between the member states and the EU. This shows in a more precise way the self-definition of the Union in terms of its legal framework and it is evident in the clarification towards external actors, be it with respect to demands on candidate states or the distinction of responsibilities from other international organisations.

These findings open a new field in the existing body of research on EU enlargements which can be classified in broadly three groups. One prominent stream in the existing body of literature concentrates on deficiencies of the Union’s system and on the question of the extent to which enlargement affects the functioning of institutions and policies. While earlier works concentrated in particular on questions of institutional and policy reform in the most affected fields, namely decision-making rules as well as EU Agricultural and Regional Policy, more recent studies widen the focus to other aspects of EU policy making. As regards the studies on institutional issues, these have partly been moulded into more general discussions on the EU’s constitutional convention and broader aspects of integration and the limits of widening as such.\(^{148}\) Complementarily, the candidate states’ attempts and achievements in adopting the Union’s criteria for accession have attracted much academic attention.\(^{149}\) In addition, a widely considered question is how EU governance affected the applicant states. In terms of a more wide-ranging view on enlargement these studies focus on furthermore on the design and strategies of EU policies towards acceding states.\(^{150}\)


\(^{150}\) (Bechev 2006; Bomberg and Peterson 2000; Friis 1998b; Friis and Murphy 1999; Gower 1999; Grabbe 1999, 2001; Malová and Haughton 2002; Pridham 2002; Smith 2003; Smith 1994, 1996). And more general: (Avery and Cameron 1998; Avery 2008; Cameron 1997; Curzon Price, Landau et al. 2000; Maresceau 1997; Mayhew 1998a, b; Niemann 1998; Phinnemore 1999; Preston 1995; Redmond and Rosenthal 1998; Richter 2001; Sjursen 2001; Sjursen and Smith 2001; Smith, Holmes et al. 1996; Smith 2000; Smith 1999; Trommel 1996; Trouille 2002; White, McAllister et al. 2002; Wiener 2002; Williams 2000; Zielonka 1998; Mattli and Plümper 2004). Some scholars have occupied themselves more specifically with the analysis of why the eastern enlargement was decided on in the first place: (Moravcsik and Vachudova 2003; Schimmelfennig 2001; Sjursen 2002; Trouille 2002).
Despite this substantive body of academic work on “the bulk of enlargement literature consists of descriptive and often policy-oriented studies of single cases – typically analysing single enlargement rounds of single organizations, single member or accession countries, or even single policy areas in the enlargement process”, in other words, there is little theoretical elaboration in which the single studies on enlargement could fit and feed into (Schimmelfennig and Sedelmeier 2002: 501). The reasons for these limitations are twofold. On the one hand, enlargement is an ongoing process and the first analyses of how the new member states impact on the working and development of the EU are still very recent (Wallace 2007). Therefore, lacking the empirical experience on the still too soon changes after accession, studies on the effects of enlargement are mainly limited to projections on the likely functioning of procedures and policies. On the other hand, there is indeed little theoretical elaboration on enlargement and how to place widening in a broader context of equally fluctuating processes of EU integration.

The design of the present study attempts to overcome these theoretical shortcomings by conceptualising enlargement policy as an integral dynamic of the EU integration process. Enlargement policy is theoretically defined as one kind of institutional sub-system that is related but distinct from the Union’s core institutional framework. Since the theoretical puzzle behind the project turns on the impact of policy-making on institutionalisation, this provided a fruitful way of including dynamics generated by enlargement in a broader explanatory concept of EU integration. Based on the theoretical model, the empirical analysis brought forth results on the conditions under which policies spill-in from an institutional sub-system to the Union’s core institutional framework. Beyond answering the underlying research question, the empirical chapters illustrate the establishment of enlargement policy as a self-standing horizontal policy and the specific features in contrast to the EC’s earlier approach to widening. The five cases studies provide original work which links the development of these little researched policies both in the enlargement and the general acquis framework and goes therefore in many instances beyond the existing literature.

In sum, the study of the effects that implementing enlargement has provided findings in terms of repercussions of policy-making on the Commission’s capacities, its internal functioning and inter-organisational role, as well as the Union’s overall polity development. Along these lines, tracing policy-making as a cause for institutional and organisational change in particular promises further valuable fields of research to enhance our understanding of the European Union.
PART V
CONCLUSIONS

POLICY CAUSING POLITICS:
CONTINUED CREEPING CAPACITIES

“Taxation without representation”
Washington DC – number plates

Based on the main findings, I will draw a set of empirical (Chap. 17) and theoretical conclusions (Chap. 18), in order to close with an outlook that relates the results back to existing and viable further research on the European Union, enlargement policy, and the European Commission. In brief, the answer to the puzzle when and how supranational capacities are institutionalised – beyond an intentionally restrictive institutional design – depends on the kind of political problem at stake, the thereupon-dependent framing of political relationships, and the specific instruments to resolve a particular type political conflict. The empirical analyses are in line with the theoretical expectations that spill-in materialises as long as new capacities constrain formal supranational authority: if policies are framed without creating new hard competences or unconditional patronage relationships, they are indeed extended from the distinct institutional sub-system to the generally applicable acquis. Apparently disconfirming are, however, the eventual effects policies produce. Especially distributive policies that are bound to conditions – both in terms of eligible regions and obligations to be met to receive EU assistance – have indisputably redistributing effects. Still, focusing on policy formulation the hypothesis is actually not falsified because policies are in actual fact framed in the distributive or regulatory arena thus circumventing the need for open redistributive conflict resolution. Hence the cases provide evidence that policies that are redistributive are nested in the distributive arena in the absence of political relationships that would allow the direct confrontation between EU decision makers and citizens in terms of policy formulation in the redistributive arena. Likewise, policies that would have involved a substantial
conferral of regulatory competences (foreign policy) to the Community were nested in the distributive arena. More directly challenging the theoretical model is the discriminatory continuation of scrutiny of new member states only as post-accession monitoring. Even more than nesting particular policy objectives in a different arena of power, the internalisation of a system of double standards is in conflict with the very assumption the model is based on, namely the rule of law and equal treatment of all member states. This unexpected result does nonetheless further underline the central thesis that member states will allow for the spill-in of new Commission action capacity as long as it is formally contained; but it raises substantive questions about legitimacy and legality of the creeping extension of Commission action capacity.

The EU is entitled and equipped to deal with only certain types of political issues. Most relevantly, redistributive policies are not institutionalised to the full. This entails that the EU lacks a political arena that establishes political relationships between the EU-level and its citizens to resolve redistributive conflicts. Constituent policies stay equally incomplete within partial polity because the key competence about the distribution of powers, a ‘Kompetenzkompetenz’, remains under the control of member state governments and as such external to the EU’s system of governance in correspondence with its formal status as international organisation.

The empirical results do not show any evidence for changes in this basic structure and division of responsibilities between member states and the EU. On the contrary, the empirical analysis highlights that in fact all policy demands that were institutionalised had been framed in regulatory or distributive terms. Despite the respective institutionalised structures to resolve political problems, policies may, however, create redistributive effects or entail a horizontal or vertical redistribution of powers. What is decisive is that redistributive effects are not reached within a redistributive arena in which state-society relationships involve the major interest representations in order to channel strongly ideological positions. This type of political relationship continues to be a vital defining feature within the single European states whereas the EU level has not established such direct interaction with citizens. The absence of a constituent arena proper is, on the other hand, best reflected in the European Parliament’s long-standing use of its budgetary powers to promote its interest in institutional matters.151 Instead of direct political relationships in the redistributive

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151 The most recent of many examples is the EU’s threat to use its budgetary powers to avoid the President of the European Council to attain too much power. This threat is thus not only focusing on Treaty reforms but on the actual implementation of the Lisbon Treaty. In the words of the centre-right Member of Parliament Reimer Boege “Budget power is always used as a weapon. This is a principle” (see EUobserver, 22 April 2008: MEPs to use budget power over EU president perks http://euobserver.com/9/26018, accessed 22 April 2008). On the potential danger of institutional issues
and constituent arenas, political processes in the EU are bound to take place in the regulatory and distributive arenas. Notwithstanding redistributive or power conferring effects, policy-making is generally either regulatory and hence brought forth through the interplay of group conflict (member state coalitions), or distributive and thus characterised by logrolling and putting together in a ‘pork barrel’ unrelated interests.

This extension of the regulatory and distributive arenas embraces alternative policy-making to substitute for the formal creation of full-fledged redistributive and constituent arenas and happens at the expense of formal rule-of law. The extension of the Commission’s de facto powers by means of widening the toolbox of policy instruments moves much of the policy-making to the fringes of formal competences. For as long as legal boundaries can be stretched and new supranational capacities – no matter how far-reaching in real fact – do not trespass the threshold of new formalised authority to coerce, the Commission can extend its powers. By contrast, where the spilling in of capacities from an institutional sub-system will inevitably create new hard legal powers, member states reject even the endorsement of officially existing competences. The Commission is acting more as a player in a natural political arena than an officially gover mentalised political arena. It is called upon to coordinate, to interpret rules of compliance, to set incentives and to create non-binding rules – yet, without making these capacities formal competences. The member states cling to their formal authority in the last instance while in fact the Commission enters some core areas of national sovereignty and institutionalises new steering instruments outside the realm of formally conferred powers. Retaining formal authority at the national level implies also that formal third party control on the EU-level is limited, and therefore also formal scrutiny of Commission activity. On paper, such subsidiary or implied supranational powers can be withdrawn at any time. In actual fact, however, the Commission’s action capacity is increased and with it the potential capability to coerce. As long as not established as a formal competence, control over the Commission is limited to the member states’ oversight and can be punished merely with the withdrawal of competences since the ECJ and EP remain not involved. Clearly, such an extension of soft regulation and conditional distribution further blurs the hybrid nature of the European system of governance. With reference to subsidiary powers, rather soon after the foundation of the Union, Dashwood criticised strongly the practice of stretching legal bases to create substantial powers without the official conferral of competences and propagated instead a narrow interpretation arguing that “the solution, I believe, is to grant the Community specific

dominating the agenda in case of a politicisation of EU policy making see Bartolini (Bartolini and Hix 2006).
powers in all of those areas. [...] This is why refusal, in principle, to contemplate the creation of new legal bases for action by the Community would be self-defeating for any delegation at the IGC anxious for a clearer and more controllable demarcation of powers under the Treaty” (Dashwood 1996). With view to the most recent tools developed and their potential legitimising value, Mörth re-confirms this contention. She attests that soft law may have a legitimising function if not applying liberal or republican standards of representative democracy but “soft law seems to fit well into a democratic system that is characterized by consensus-building with societal-based and transnational networks. In contrast to the notion of government by the people we are speaking here of government of the people”. The use of soft law in the EU, however, does not appear to conceptualise democratic governance by soft law in these terms: “perceptions toward soft law and democracy, especially in terms of the OMC [Open Method of Cooperation], showed that this issue is more or less a non-issue. It is unclear if this lack of discussion about soft law and democracy depends on a tacit approval of the use of soft law and its democratic virtues or if it is a function of avoidance or ignorance. What is clear, however, is that the institutions view soft law as belonging to representative democracy and government by the people and only marginally to a deliberative and societal network-based democratic system – government of the people. Instead the institutions emphasize how soft law complements the community method and the traditional steering mode of command and control” (Mörth 2004a: 198). The here-presented results point in the very same direction: implementing enlargement has been another source to widen Community capacities without creating unambiguous new formal powers.
17 EMPIRICAL CONCLUSIONS: 
THE CONTINUATION OF CREEPING CAPACITIES

The main empirical results were presented in Part IV; the following is to draw some farther-reaching conclusions and to discuss the findings against the background of relevant literature on the matter. Two aspects will be singled out and confronted with competing academic accounts. First, the empirical evidence regarding changes in the Commission’s capacities to coerce will be recapped. To this end, I will tie some expectations for future niches into which the Commission might extend its capacities with the empirical results illustrated in Part IV.

The second empirical conclusion focuses on policy-making in the different arenas of power. Questions about the application of alternative (more or less discretionary) policy tools within an arena and the resulting politics are touched upon. Attention will be drawn particularly on redistributive effects within the boundaries of political relationships that are distinctive for regulatory and distributive policies, which is interpreted as a strategy on the part of the member states to pre-empt the creation of structures that would address redistributive conflicts directly. I will develop both aspects against the writings of Mark Pollack, whose explanation of increasing supranational powers is based like the mine on Lowi’s arenas of power approach but differs significantly, in the empirical application and classification of EU policies.

17.1 CREEPING COMPETENCES REVISED: 
EXTENDING COMMISSION CAPACITIES SINCE 1993

Mark Pollack’s work on the “creeping competences” (1994) and their alleged end after Maastricht (2000) is the perhaps most prominent contribution to the debate on the extension of Commission powers (see above p. 26). Pollack argues that there was a creeping increase of EC competences throughout the first decades of European integration (1957-92) during which policy-making on the EU level extended into basically all political issue areas. This incremental task extension comes however to a halt due to political and economic backlash in the early 1990s. I will briefly illustrate the two break-effects Pollack refers to and how they accord with my analysis in order to then point out where my empirical results of continuous capacity extension on the EU level depart from Pollack’s findings.
First, political backlash is most evident in the introduction of the principle of subsidiarity. “Politically, the years prior to and since Maastricht have witnessed the rise of an anti-centralization sentiment among national and supranational governments which can be compared to the states’ rights movement in the United States, and which culminated in the new EU doctrine of subsidiarity” (Pollack 2000: 525). The importance that the principles of subsidiarity, as that of proportionality, bear is the break effect on the conferral of authority which will be even further strengthened in the Lisbon Reform Treaty (in line with the Constitutional Treaty). The introduction of the pillar structure in the Treaty of Maastricht had the same constraining purpose, namely to control the supranationalisation of competences. The distinguishing feature of the pillars is the decision-making mode that applies. The Constitutional/Lisbon Treaty formally abolishes the pillar division and establishes co-decision as standard procedure, but in real effect the essential difference persists in that different decision-making procedures apply to different policies. Therefore, the somewhat artificial pillar construction is done away with without abandoning the main intergovernmental/supranational differentiation between different policies. The trend Pollack describes in relation to the introduction of the subsidiarity principle is therefore not reversed but is continuously further refined.

The second external cause impinging upon the dynamic of creeping competences is that of economic backlash. “Economically, the strains of German unification, the convergence criteria for EMU, and the imminent enlargement of the European Union have combined to place severe limitation on the continued growth of EU spending policies” (ibid. 525). This interpretation is shared in quantitative terms. Yet, the attention of the preceding study has focused beyond quantitative changes on qualitative shifts in the use of supranational means, which point in a different direction. In this sense, the empirical evidence is not so much about increase of funds (i.e. a quantitative extension) but how the limited funds are distributed. The decisive qualitative shift is the linking of EU financial support to conditions, which increases the Commission’s steering capacities on member states.

These changes occur not by means of formal competence extension but are based on the extension the distributive arena. In this point, my conceptual angle on the empirical evidence departs from the one Pollack takes because it comprises the informal realm. Consequently, I also classify EU policies differently. The latter point will be elaborated in the next section (17.2), which will render understandable why I place, for example, the Common Agricultural Policy into

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152 For example, the Treaty introduces a yellow card for national parliaments that gain the right to block legislation that infringes the subsidiarity principle, Article 3b of the Treaty amending the Treaty on European Union and Treaty establishing the European Community (European Council 2007).
the distributive arena. The immediate purpose is to illustrate what is meant by the qualitative re-definition of policy tools in the distributive arena, which implies an extension of Commission capacities even under conditions in which a quantitative extension of the EU budget is put to a halt.

The development of the Common Agricultural Policy (CAP) and Regional Policy offers a telling illustration and summarises the most relevant qualitative shifts in Commission steering tools within the distributive arena as far as political relationships are concerned. Decided on in 1958 and enforced in 1962, CAP was the first and for decades budget-dominating patronage policy. It was, however, so tailor-made to profit foremost one state that it left little scope for the Community to offer privileges to any country but France, thus provoking claims to create further patronage policies and giving rise to regional policies (Structural and Cohesion Policies)\textsuperscript{153} which have taken up an ever more important share of EU spending.

The decisive move to ampler patronage Community policies that established distribution as a tool in its own terms, came in 1975 with the entry of the United Kingdom to the European Community. Pressure rose since the UK had only a small agricultural sector and thus only little entitlement for Community funds. “In view of this situation, an EU regional policy was set up to establish a source of finance from which also the UK could profit and which would establish British membership in the EC” (van der Beek and Neal 2004: 590). This marked not only the start of an active regional policy but also introduced the practice to extend patronage activities with each enlargement to ‘pay off’ those states that were perceived disadvantaged by a change of the status quo. Since then, active regional policy “has grown in importance so that currently it holds the second place as a share of EU total expenditures, after the EU’s Common Agricultural Policy. While only 3.8 per cent of EU expenditure was devoted to regional policy in 1980, it rose to 18 per cent in 1989, 30 per cent in 1993” (van der Beek and Neal 2004: 588). The trend continued, with a share of some 36 per cent in 2004, in the 2007 budget the ratio has risen to occupy 43 per cent.\textsuperscript{154}

For the expansion of the supra-state patronage arena qualitative changes that granted the Commission more discretion on the terms and conditions of distributing funds were equally deci-

\textsuperscript{153} Applying a more general definition active “[r]egional policy includes what the EU calls structural policy. In 1988, the ‘structural oriented expenditures of the EU budget’ [...] were related to several regional objectives of convergence. Hence the structural policy of the EU is mainly regional policy” (van der Beek and Neal 2004: 588). In contrast to the active kind, the Common Commercial policy regulates state aid control, a regulatory and for the EU budget neutral policy the may be termed “reactive regional policy” (ibid.)

sive as the quantitative expansion of the Community budget. During the first years the Commission had been merely the treasurer of the European Regional and Development Fund (EDRF) because the funds were dispersed according to fixed quota for each member state disregarding the actual backwardness or disadvantages of regions. In 1979 the Commission could break Council resistance to split the Fund into two parts. One part of the ERDF (still 95 per cent of the resources) remained under the old quota regime obliged to the principle of ‘equal returns’, whereas the rest operated without fixed quota leaving the decision which regions should benefit to the Community – and here the Commission. “Though qualitatively not of extreme importance with just five per cent of the ERDF, this reform was qualitatively remarkable, as the EU could for the first time run a regional policy independently from national regional policies” (ibid. 2004: 590). The southern enlargement in 1985 marked another turn due to a continuity, namely the need to create new control mechanisms because once again enlargement created new claims for EU endowments. Since the entry of the southern member states had strengthened the voice of relatively poorer countries in the Community, these could substantially increase the budget for regional spending. In turn, the states paying the higher bill pushed for conditions for recipients. Moreover, “the increase of the budget for regional operations had revealed the disturbing deficiencies of the system, which gave too little money for too many regions, all the while maintaining a rigid quota distribution among the member states” (ibid. 2004: 591), a result of the continued patronage logic underlying the policy which did not develop into a clear-cut redistributive logic.

In reaction, the EDRF was restructured, introducing above all fixed EU co-financing to replace the quota rules. “As a result of this, the position of the Commission as a policy maker was reinforced. Even though the ‘National Programmes of Communal Interest’ formally guaranteed the national autonomy in regional policy, de facto, the member states adopted ex ante the preferences of the Commission for regional policy in order to get subsidies out of the ERDF. Hence, at this stage of EU enlargement, the changes in the decision-making process on regional policy and its impact on the members’ behaviour were at least as relevant as the increase of the budget for regional policy” (ibid. 2004: 591).

Consolidating these shifts the Single European Act (1986) officially established the Regional and Cohesion Policy and introduced the reduction of regional disparities as an official policy goal of the EU. On this basis, spending on cohesion doubled between 1987 and 1992 to compensate for the anticipated losers of the Single Market. Yet, let alone further organisational reforms “the result of the political bargaining process among member states on this issue reflected more their different political interest (especially to give each member state a share of the regional funds) than an attempt to focus regional policy expenditures more efficiently” (ibid. 2004: 592).
This path was continued between 1994-2000, again with increased compensation for the cohesion countries to agree to the single currency but also to eastern enlargement, as well as new categories for eligibility for accommodating the northern members that acceded in 1995. The second essential qualitative change was hence in the mid 1980s the introduction of conditionality into patronage EU policies. “Additionality required that funds be spent in addition to planned domestic spending; concentration focused funds on areas of greatest need; programming required regions to develop strategic multi-annual plans to ensure coherence between projects funded; and partnership required that funds be administered through regional partnerships with each state, consisting of representatives of national government, regional (or local) government and the European Commission” (Bache 2007: 400).

The case study on administrative capacity is in line with this development revealing further strengthening of conditionality in the distributive arena. It marks another significant qualitative change triggered by the last round of enlargement since the Commission enters indeed into the evaluation of national administrative structures nesting certain policy goals in distributive policies. In contrast to earlier EU accessions under the ‘classical enlargement method’, there was markedly no routine extension of patronage programmes in favour of the new member states – at the same time enlargement failed to cause the termination of any existing claims for the old member states which, in redistributive terms, should have become obsolete. Hence, existing patronage policies proved very resistant while member states successfully avoided the creation of new non-conditional patronage relationships that would privilege only the new entrants.

In essence, the present study does not defy Pollack’s findings with respect to the phases of “creeping” and “end of creeping competences”. As far as the extension of formal competences is concerned, my findings actually support Pollack’s contentions. However, moving conceptually beyond the formal realm, the empirical analysis shows that competences are still creeping, yet in a much more subtle way than before Maastricht. Thus, the terminology introduced was that of action capacity to capture the policy-generated capabilities that emerge from the implementation of policy tasks rather than the legislative exploitation of institutionalised competences. The Commission is still extending its powers, but this happens not in the shape of creeping extension of competences but in the disguise of the creeping extension of capacities that extend the tools for supranational coercion without formalising these as hard competences. Creating soft regulation and conditional distributive policies are therefore privileged arenas of power that grant the Commission de facto new capacities without conferring formal authority from the member state level.
The empirical findings on policy generated soft regulatory, and above all conditional distributive steering capacities highlight the niche in which we may expect institutionalisation on the EU level to concentrate in the years to come. Given that the traditional areas in which the Community institutions had competences to extend their reach legally have been widely exhausted, and the fact that the visibility of supranational bodies has raised the awareness and effective control of the environment (Weiler 1993: 434)155 fits with the finding that member states successfully pre-empt new EU activities that lead to hard regulatory policies.

In turn, if the Commission is to assemble new powers in future: (a) these will mostly lie outside the traditionally strong policies in which EU has formal competences, i.e. the Commission will have much more restricted opportunities to extend Community activities by initiating legislation, (b) due to functional demands beyond the core economic activities, likely policy challenges will touch on political and social issues beyond the narrower economic sphere, especially those in which the European Parliament has a long-worn strong interest. Since in these fields the Commission’s legislative role is weaker than in previous stages of EU integration, we should expect informal and conditionality-based distributive policies, which guarantee the net-paying states some sort of ongoing budgetary control, to be the main field in which the Commission will extend its capacities in future, including the promotion of de facto redistributive and regulative policy objectives.

17.2 THE UNION’S IMPLICIT POLICIES: EU REDISTRIBUTION WITHOUT A REDISTRIBUTIVE ARENA

The second empirical finding regards the application of Lowi’s typology to EU policies, from which both Pollack and I start off – while offering, however, substantially different interpretations. Referring to Lowi’s original three policy types, Pollack’s main thesis is that each policy type “is dealt with in a distinct political arena, comprising different actors and governed by different decision rules; each generates a distinctive style of bargaining among the national interests represented in the Council of Ministers and the European Council; and each therefore corresponds to a distinct process or mechanism of task expansion” (Pollack 1994: 96). The general line of argu-

155 Weiler refers these claims to the EJC, yet the dimensions he develops to analyse the changing role of the Court can congruently be applied to the Commission as supranational agent, especially regarding the changed perceptions in the environment throughout different phases of the integration process (see in particular: Weiler 1982, 1991, 1993).
ment sounds virtually like the explanation developed in Part III – but I depart from Pollack’s approach reading in two decisive points, one conceptual and one empirical.

Let us first turn to the empirical application of the arenas of power approach to the EU. While my results do not contradict any of Pollack’s claims on the extension of formal competences, regarding the attribution of EU policies to the arenas of power approach there are indeed fundamental differences in that Pollack grants redistributive policies a key – if not the key role – in EU politics, whereas I claim that the EU has no redistributive arena proper. In an article comparing the US and EU polities, Donahue and Pollack argue explicitly: “In Lowi’s terms, the bulk of the EU budget is assigned to redistributive policies which transfer EU funds from mostly wealthy, net contributing Member States, such as Germany, to the primarily poor net recipients, including, most notably, Spain, Portugal, Greece, and Ireland” (2001: 109). My line of reasoning points in precisely the opposite direction, namely that none of the EU policies may be classified truly redistributive – other than in the sense that in the end all policies are redistributive in nature. Indeed, a central empirical finding of the present research is that while the authors are right about the eventual effect of the policies, the thrust of the argument here is that the formulation of policies and framing of policy tools is precisely not redistributive. Much to the contrary, the framing of policies and the tools to implement them is anything but redistributive. Pre-empting the creation of formalised political relationships to produce redistributive and constituent EU policies entails the system’s bias for informal institutions and new modes of governance when respective political problems generate functional pressure.

To defend this claim, we have to return for a moment to the theoretical definition of the redistributive arena. Pollack outlines that redistributive policies are zero-sum games in which financial resources are reallocated, which in the EU happens under the rule of unanimity. “The question, therefore, is how any redistributive policies are adopted at all, since no Member State has a rational incentive to agree to transfer resources from itself to another Member State. The answer [...] is that redistributive policies are agreed only as part of larger intergovernmental bargains whereby the net contributing Member States agree to redistributive transfers of resources to the net recipients in turn for non-financial concessions from recipients on other issues, such as market integration, monetary integration, or enlargement” (Pollack 1994: 111-12).

While asking the same question as Pollack, the red thread guiding my argument provides a competing answer. The answer, as I have suggested in detail in Chapter 5.1, is that in terms of political relationships the EU lacks a fully-fledged redistributive arena. Political conflicts are all
but resolved along broad ideological lines that create rules imposing classification and status or categorise activities. As a matter of fact, what Pollack demarks as typical for EU redistributive policies, namely that “each major redistributive policy [...] should be understood as a single element, or a side-payment, in a larger cross-sectoral intergovernmental bargain among Member States of the Community” (Pollack 1994: 111) complies not with conflict resolution typical for the redistributive but for the distributive arena, i.e. log-rolling and pork barrel deals between member states – regardless of the redistributive effects of emerging policies. While the EU is unquestionably dispersing public expenditure, the ‘distributive mode’ of EU expenditure by all means evades a straightforward classification of “haves and have-nots, bigness and smallness, bourgeoisie and proletariat” (Lowi 1964: 691). Dispersing structural funds conditional upon administrative capacity building, granting money for cross-border projects with implicit foreign policy goals and offering various financial means to promote minority policies in the member states have, of course, all redistributive effects. Yet, the funds are paid out regionally or locally, i.e. are dispersed, and coercion is remote.\footnote{Overall, the limited size of the budget also leads to conclude that the “Union’s budget does not conform to the principles of fiscal federalism [...]. Fiscal federalism would require far larger budgetary resources than those conceivable given the current constellation of political forces in the Union. [...] There are limits to EU solidarity and to potential transfers to the east. Attempts by the Commission to refocus the EU budget towards European public goods and thus to reduce the redistributive emphasis within the existing ‘EU distributive mode’, are hampered by the inflexibility of the current budgetary structure. Member states defend vested distributive interests, but are very critical of spending programmes with benefits which cannot be attributed to member states” (Laffan and Lindner 2005: 211).}

The underlying argument is hence that the EU is a partial polity that does not have all means to coerce which governance within a state relies on. With view to (redistributive) social policy, Wolfgang Streeck has accordingly argued vehemently to “once and for all break with the teleological federalism that has informed most of the past debate [...] so that ] the problem in analysing\footnote{I take this argument a step further than Salisbury according to whom “[d]istributive and self-regulatory policies are, one would suppose, invariably non-zero sum, since there is comparatively little implication of conflict or even overt self-perceived losers in such situations. Redistributive and regulatory policies, on the other hand, may approach zero-sum conditions. But if side-payments are permitted, these conditions are mitigated, and I shall argue that in American politics even redistributive policies are generally decided in distinctly positive-sum games” (Salisbury 1968: 158-59). In the reading proposed here, policy formulation that exempts political conflicts from being framed as zero-sum games shift into the distributive arena independent of the eventual effects they will create.}
European social policy changes from how empty of full the glass is [i.e. how much the EU is or will be a welfare state, E.G.H.], to what kind of glass we are dealing with and what purposes it may serve” (Streeck 1998 [1996]: 65). Excluded from the EU polity are the core redistributive aspects of the welfare state, precisely because most member states are highly developed welfare states themselves and draw their legitimacy from this fact.\(^{158}\)

Still, EU policies have reallocative effects, which leads to my second distinction. The policy types are stretched to embrace also informal institutions and new modes of governance which, such is the central conclusion, provide alternative steering tools in the regulatory and distributive arenas which serve to substitute redistributive and constituent policies, or complement and accommodate existing hard competences. This second departure from Pollack’s application of the arenas of power approach to the EU is conceptual in that the dependent variable task expansion, which Pollack draws from neofunctional theory, differs conceptually from action capacity, which we are concerned with. While Pollack’s attention is, following Haas’ definition, on the policy tasks that are made pursuant to an initial task, my attention is on institutionalised steering instruments. As pointed out at length in Chapter 4.2, this conceptual difference affects the empirical operationalisation and measurement. The resulting difference in the analysis is accordingly that my study focused on both formal and informal new capacities, the latter remaining outside Pollack’s (and Lowi’s) attention.

Viewed through these extended theoretical lenses, the redistributive effects of policies do not contradict that member states keep avoiding by hook or by crook the establishment of a redistributive arena proper. Instead, three alternative arenas move to the fore. The first, subject to a considerable body of research, are the new modes of governance developed mainly around the Lisbon agenda that offer alternative but in their efficacy questionable arena for cooperation.\(^{159}\) These new modes of governance are directly linked to the redistributive arena – albeit lacking hard constraining means – and stayed greatly outside the scope of our study. The second two alternative arenas were at the heart of the analysis. Applying more or less restrictive/discretionary policy

\(^{158}\) Streeck argues therefore that the introduction of real redistributive policies is and remains a non-issue. “Transferring jurisdiction over social protection to the Community or endowing the Community with a capacity to collect contributions or taxes, pay out benefits or provide social services was therefore never seriously considered. All of these remained and remain firmly vested in member states” (Streeck 1998: 72).

\(^{159}\) See in particular the contributions on the Open Method of Coordination (Hatzopoulos 2007; Citi and Rhodes 2007; Benz 2007; Tulmets 2005; Trubek and Trubek 2005; Schäfer 2004; Scharpf 2002; de la Porte 2002).
tools than under the standard rule of law in the regulatory and distributive arena, soft regulation and conditional distribution are the means by which the Commission’s capacities are extended.

Across all five case studies we see that where the member states can fall back on these informal arrangements, which grant them the ability to obtain formal authority on the policies, \textit{de facto} supranational capacities are still creeping.
18 Theoretical Conclusions: Integration in Terms of Informal Institutionalisation From Institutional Sub-systems

The theoretical conclusions will pick up on the two theoretical approaches that guided the empirical analysis: neofunctionalism and the arenas of power approach. The goal is to recapitulate the validity of the approaches in the empirical analysis in order to point out potential future applications of the theoretical model. In this vein, I will first turn to the potential usefulness of the conceptualising the causal mechanism of functional pressure generated by policy implementation in institutional sub-systems. Second, I will return to the extended arenas of power approach that embraces the informal realm beyond Lowi’s initial definitions to discuss its potential further applicability. Moreover, the empirical relevance of EU integration for further conceptualisation of the constituent arena is explicated and a few questions which the empirical and theoretical results raise for the democratic legitimacy of EU governance are highlighted.

18.1 The Effect of Institutional Sub-systems: Integration Through Policy-generated Functional Pressure

The impact of implementing enlargement was modelled as the effect that policy-making based on competences outside the institutional core framework has on the institutionalisation of steering capacities of an administrative political agent. Instead of creating new Treaty-based competences, supranational capacities are placed in institutional sub-systems with restricted applicability in territorial scope and over time. The underlying theoretical question is how policy-making in these distinct settings, which by design are to constrain capacities in order to prevent their integration to the core, affects EU integration at large.

The empirical results rebuff the expectation that successfully implemented capacities remain limited to the institutional sub-systems to which they are originally and intentionally constrained. In the five cases analysed, in all instances the policies that were limited in scope and time generated functional pressure for further integration. Functional pressure was intrinsic to the design of the Copenhagen criteria that footed on double standards and increased because policy making in the sub-system was perceived sufficiently successful. Moreover, the entry of those states for whom policy tools were developed to respond to specific political problems fostered functional pressure because in most instances these very problems were internalised into the EU at the moment of accession. Even if the real efficacy of conditionality must not be overestimated, this central in-
The logic of the post-1993 pre-accession strategy built was never brought into question. Conditionality was considered at any time superior to abolishing the pre-accession strategy based on it. Thus, it is an unambiguous result that the successful exercise of policies in an institutional sub-system generates functional pressure and raises overall the likelihood for further integration.

The Copenhagen Framework was depicted as an institutional sub-set. It establishes rules that are linked but not fully equivalent to the institutional core rules. In the enlargement context, the additional rules of the sub-set apply to states other than the member states. This approach allowed conceptualising enlargement within broader theories of European integration in order to overcome the theoretical blank the subject has so far lingered in.

Taking the theoretical concept of institutional sub-systems further, one can also imagine institutional spin-offs, i.e. institutionally distinct settings that create new rules for a limited group of member states. The Schengen and more recently the Prüm Agreements are examples for such rule-creation for a minority of member states. The Lisbon Treaty creates more options for flexibility through enhanced cooperation, meaning the creation of institutional spin-offs not all member states participate in. The causal mechanism that explains how the successfully perceived implementation of a policy generates functional pressure for further integration should hold also for these cases of enhanced cooperation. As long as efficiency gains may be raised if a policy is fully integrated, be it due to more effective implementation tools, better access to Community resources or economies of scale since more states participate, policy-making is expected to generate functional pressure. The approach may hence be useful for a wider range of cases likely to emerge under the future rules for enhanced and flexible integration.

Most generally, where an entity creates subordinated entities in which the same agents are delegated competences under different institutional rules, functional pressure to absorb these policies into the more universal institutional set-up is expected to emerge. Empirically, two types of such separate institutional arrangements exist in the EU. On the one hand, member states have drawn on EU institutions to govern extra-EU cooperation agreements such as Schengen or the Prüm Agreement. These represent legal entities outside the EU, say spin-offs, whose practical operating is nonetheless linked to the EU institutions. On the other hand, although not yet applied the increased opportunities for enhanced cooperation are a case in point. Under enhanced cooperation existing policies are furthered in distinct institutional sub-sets that do not apply to all member states. Enhanced cooperation and its mirror image, i.e. opt-outs for single states, are likely to play an increasing role in the enlarged Union whose potential policy extension moves
increasingly beyond the initial economic realm. The theoretical model geared to conceptualise the effects deriving from the Copenhagen Framework thus promise to be a useful tool for the analysis of a growing number of institutional sub-sets and spin-offs.

Other than spill-in from an institutional sub-system to the EU’s institutional core, an empirical result that is not wholly accommodated by the theoretical model is the creation of alternative arenas for cooperation outside the EU. As expected theoretically, in the cases in which the member states were confronted with unintended consequences regarding the capacity extension of the Commission, the former changed their strategy to prevent the latter from gaining unwanted powers. Still, both in the case of nuclear safety and anti-corruption policy we can observe that there was a response to functional pressure – yet, less constraining responses were found either in a private or alternative international arena outside the EU framework. Both are less governmentalised, more natural arenas than harmonisation in the EU and therefore less binding for member states but at the same time offering less efficiency and efficacy in terms of policy implementation and enforcement.

These empirical results relate to the self-critical revisions Haas proposed to neofunctionalism. The author argued that the interdependence of member states with external states would create incentives for externalisation based on learning processed. “Fragmented issue linkage predicts that the actors will learn merely to delay the exercise of the options in an attempt to have the best of both worlds, to seek simultaneously internal and external solutions. In doing so, of course, they would make short shrift to the Commission’s desire to exploit the issue so as to strengthen the mandate and institutional prowess of central Community institutions. In the learning mode of fragmented issue linkage, then, the treatment of the externalisation issue is inimical to continued regional integration” (Haas 1976: 199). Taking the empirical findings into account we can further refine this statement. Where unintended consequences emerge that threaten the creation of new hard competences, the push for externalisation will be privileged to more effective institutionalisation within the EU framework. Likewise, where hard coercive regulatory policies are inevitable, spill-in is pre-empted by creating EU-external solutions – even if the Commission can claim to have formal competences! Else, informal solutions within the EU are privileged to external alternatives since the former which create new de facto powers for Commission promise still more efficient policy outcomes than less coercive alternatives.
18.2 THE IMPORTANCE OF POLICY TYPES: 
THE POLITICAL INSTITUTIONAL ORGANISATION OF CONFLICT IN THE EU

The main thrust of the theoretical explanation derived from the reversal of the most commonly assumed causal direction. Instead of viewing policies to be determined by the intentionally designed institutional context – even if admitting later unintended structures due to path-dependencies – it was proposed that institutional structures themselves are dependent on the particular policy problems dealt with. Hence, the political issue at stake determines policies and the way political relationships are shaped in order to resolve a particular kind of political conflict.

Viewing the EU from the policy perspective opens a wide field of possible research. I will merely touch upon three issues to offer a tentative appreciation of the different interpretations of the EU polity formation such analyses promise to reveal. First, I will recall the extension of the approach to focus on actual policy tools, which has been shown to be useful in analysing emerging steering capacities on the EU level. Second, I will pick up the originally little-developed constituent arena in order to hint to potential theoretical insights the study of EU integration promises for a conceptually more elaborated definition of this arena. Third, the theoretical extension of the arenas of power approach beyond the realm of formal rule of law raises inevitably questions of legitimacy, which will be briefly taken up, even if these cannot be developed to the full.

First, in Chapter 5.3 the four arenas of power were attributed respective steering instruments (see Table II.4, p. 69). Steering instruments were defined both for the formal exercise of coercion within the strict limits of rule of law and the operationally more flexible and legally more blurred sub-arenas. The latter are marked by an increase of the discretionary space of policy takers in the regulatory and redistributive arenas and, in turn, increase the constraining effect of policy tools in the distributive and constituent arenas. The actual policy tools that serve to implement policies in these sub-arenas are informal institutions (i.e. informal rules) in the constituent arena, the attribution of conditionality in the distributive arena and the various forms of new modes of governance in the regulatory and redistributive arenas. This theoretical grid allowed going beyond questions of increased supranational powers in terms of formal (Treaty-based) competences to systematically observe empirically, and analyse within a comprehensive framework, the full range of possible de facto powers of the Commission.

As framework of analysis, this typology may however be fruitfully applied beyond the present study for the analysis of the exercise of coercion by implementing agencies in general. In recent years an abundant literature on the so-called ‘new modes of governance’ in EU has
emerged, focusing on steering instruments beyond hard coercion. While it has repeatedly been put into question how ‘new’ these instruments really are, no study has given systematic attention to the mutual dependency between policy types marked by the specific conflict lines each one is characterised by, and the sort of policy tools at disposition (but see Héritier 2003: 111). On the contrary, some of attempts to build up a typology explicitly exclude policy typologies from their classification (Treib, Bähr et al. 2005). Beyond the substantial contributions of these studies, mapping modes of governance starting from the different policy types allows including both ‘old’ and ‘new’ modes of governance in one single comprehensive framework. Hence, for an inclusive classification of steering beyond the nation states, it appears a promising path forward to indeed start from the particular problems that public policies target and therefore proceed from the different policy types at stake.

Second, the constituent arena remains the conceptually least developed of the four arenas introduced by Lowi. One reason for this may be the plain fact that the author developed his approach against the empirical background of the development of the USA. Here, the most fundamental constituent problems had been resolved formally by the establishment of the constitution and effectively by the outcome of the civil war. Only afterwards was the federal state filled with meaning in bureaucratic and political terms, and the creation of a federal bureaucracy materialised only fully in the first half of the 20th century. The sequencing in the EU polity development is essentially reversed. At the beginning of European integration stands the creation of the High Authority, i.e. a bureaucracy, and the EU is still going through a process of slow politicisation (the first direct elections to the EP in 1979 marking a milestone) and – as the latest events have shown unmistakably – even less dynamic, if at all, process of federal constitutionalisation. Therefore constitutional problems are every-day issues in the European polity development. A more thorough tracing of constitutional policies in the EU thus promises a rich empirical field for the conceptual refinement of Lowi’s last and least defined policy type.

Third, the theoretical conclusions cast a long shadow on questions of the rule of law and democratic legitimacy in the European Union. The findings support the conclusion that “subterfuge” in policy making “constitutes a structural feature of the European Union – given the diversity of its members and their inability to agree on the direction in which the polity should develop, with the exception that they are unwilling to relinquish sovereignty” (Héritier 1999: 97). Sharing the view that “the emergence of such escape routes has indeed become second nature to European policy-making in all its interlinked arenas” (ibid. 2) entails inevitably consequences on democratic legiti-
macy. It is not although but rather because the policy tools that spilled in from the Copenhagen framework prevent a formal shift of authority that the member states remain the sole legitimate masters. This hides the fact that these tools provide the Commission effectively with uncontrolled power since the exercise of coercion which is not formalised as a Community competence also excludes systematic scrutiny by the ECJ and the EP (see also Dashwood 1996). Therefore, these Commission capacities raise a whole new set of queries in terms of legitimacy and political responsibility for policies nested in, above all, the distributive arena in the absence of political relationships in the redistributive and constituent arena.\footnote{Also in this point I depart conceptually from Pollack (1994) who conceptualises member states as the unit of analysis also for questions of legitimacy, which is in line with an intergovernmental reading, while I stick to Lowi’s angle asking how individual citizens are affected and, in turn, represented and have access to policy formulation. In the latter respect, the EU lacks sufficient structures: “Excluding social intervention in markets from common concerns accommodates the fact that democracy and citizen participation continue to reside in the members states. Distributive and redistributive politics require democratic legitimation. The way the European Union is designed, such legitimation remains beyond reach” (Streeck 1998 [1996]: 67). Blurring the boundaries between policy arenas by creating increasingly redistributive effects by means of apparently regulatory or distributive policies further aggravates this problem of democratic legitimacy.}

The study concerned three grand themes: the foundation and effects of EU enlargement policy, the organisational development and changing inter-institutional role of the EU Commission, and the progress of EU integration in terms of supranational institutionalisation. To this end, the focus revolved around how the Commission implemented enlargement and the institutionalisation effects policy-making in the pre-accession framework generated. Pointing to possible future trends, where the Commission promoted the extension of soft powers and entrepreneurship unfolded in legally underspecified ambi
ts, policy-making indeed generates new de facto capacities and thus causes further integration; whereas any call for the conferral of legally more sober new supranational competences in response to political problems emerging from policy-making is likely to create member state resistance, and would thus demark a Commission strategy to conceal further integration.
### ANNEX I  EMPIRICAL INDICATORS

**GENERAL HYPOTHESIS**: Whether a policy under functional pressure in an institutional subsystem will spill-in to the institutional core depends on the policy type at stake.

<table>
<thead>
<tr>
<th>INDEPENDENT VARIABLE</th>
<th>DEPENDENT VARIABLE</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Regulatory Policy</strong></td>
<td>Confirming:</td>
</tr>
<tr>
<td></td>
<td>- new soft steering instruments (Commission without tools to sanction member states)</td>
</tr>
<tr>
<td></td>
<td>- new regulation outside the EU system</td>
</tr>
<tr>
<td></td>
<td>Disconfirming:</td>
</tr>
<tr>
<td></td>
<td>- new hard legislation (hard competences and tools to coerce by sanctioning member states)</td>
</tr>
<tr>
<td></td>
<td>- complete termination of monitoring at moment of accession</td>
</tr>
</tbody>
</table>

Hypothesis Regulative Policy: *Contested regulatory issues will only spill-in if formulated in a soft way.*

| **Distributive Policy** | Confirming:        |
|                        | - new budget lines giving the Commission new institutionalised budgetary powers |
|                        | - safeguards to constrain redistributive effects (application of principle of equal return / conditionality clauses) |
|                        | Disconfirming:     |
|                        | - dispersion of money along member state-class lines (→ redistributive arena) |
|                        | - ad hoc budgetary capacities (i.e. not institutionalised over time) |
|                        | - complete termination of technical/financial assistance at moment of accession |

Hypothesis Distributive Policy: *If formulated as distributive policy, spill-in will occur with safeguards to constrain redistributive effects.*

| **Redistributive Policy** | Confirming:        |
|                          | - does not occur |
|                          | Disconfirming:     |
|                          | - conflicts are resolved among broad ideological lines; |
|                          | - redistribution along lines of different 'classes of member states' is introduced |

Hypothesis Redistributive Arena: *If formulated as redistributive conflict, member states preempt spill-in.*

| **Constituent Policy** | Confirming:        |
|                       | - does not occur |
|                       | Disconfirming:     |
|                       | - reallocation of formal vertical or horizontal powers |

Hypothesis Constituent Arena: *If a formulated in the constituent arena, i.e. as conflict over the vertical/ horizontal allocation of institutional powers, member states will reject spill-in.*
## ANNEX II EMPIRICAL FINDINGS

<table>
<thead>
<tr>
<th>NUCLEAR SAFETY</th>
<th>POLICY-MAKING</th>
<th>ORGANISATIONAL STRUCTURE</th>
<th>INTEGRATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>(safety of nuclear power installations)</td>
<td>No new formal regulative capacities &lt; despite official competence (ECJ)</td>
<td>COM internal: - portfolio reshuffling, - strategic use of comparable statistics.</td>
<td>Alternative funct. response outside EU / ‘outsourcing’ to alternative fora: - WENRA (non-state association) - IEAO (international organisation)</td>
</tr>
<tr>
<td>ANTI-CORRUPTION</td>
<td>No new formal regulative capacities; Informal capacities insufficiently institutionalised &lt; yet: continuation double standards within EU framework</td>
<td>COM internal: - mainstream issue across COM services, - strategic extension statistic data.</td>
<td>Alternative funct. response outside EU / ‘outsourcing’ to alternative fora: - GRECO, CoE, OSCE, UN (international organisations)</td>
</tr>
<tr>
<td>ADMINISTRATIVE CAPACITY BUILDING</td>
<td>New formal distributive capacities + conditionality element + restricted MS target group</td>
<td>COM internal: - policy tools spill in to DG employment.</td>
<td>Distributive policy nesting redistributive &amp; regulatory pol.: - conditionality-based (limited group recipients + link to pol. objectives) patronage.</td>
</tr>
<tr>
<td>(efficiency/efficacy of national administrations)</td>
<td>COM / other EU bodies: - Council/EP general guidelines, - substantive discretion COM in implement.</td>
<td>Alternative funct. response outside EU / ‘outsourcing’ to alternative fora: - WENRA (non-state association) - GRECO, CoE, OSCE, UN (international organisations)</td>
<td></td>
</tr>
<tr>
<td>CROSS-BORDER COOPERATION</td>
<td>Distributive capacities for all MS + policy objectives extended to foreign policy</td>
<td>COM internal: - tool spill in to new policy framework (ENP), - strong overlap in human resources/ policy tools.</td>
<td>Genuine distributive EU policy nested regul. objectives for 3rd states: - cooperation in implementation with non-state actors on sub-state level (ABER) &amp; eligibility of all border regions - foreign policy demands on external states.</td>
</tr>
<tr>
<td>(local cross-border initiative for regional cooperation eradicate/stabilise borders)</td>
<td>COM / other EU bodies: - COM informally promoting foreign policy goals although Council alone official authority.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>MINORITY PROTECTION</td>
<td>Regulative capacities (related areas, hard powers: anti-discrimination, wide interpretation acquis + Monitoring with no hard sanctioning) + Assistance programmes for all MS</td>
<td>COM internal: - Mainstreaming of assistance, - Monitoring Agency (data, soft pressure) - DG enlargement strengthened (neg. chapter)</td>
<td>Regulative policy (a) nested in related areas; (b) soft regulation (monitoring) + Genuine distributive policies; + division of labour with other IOs: - binding regul. without decisive redefinition to include genuine minority rights; - non-binding regul. without hard enforcement; - patronage pol. not condit. + open to all MS; - definition of COM powers to avoid potential for overlap/conflict other IOs (CoE, OSCE).</td>
</tr>
<tr>
<td>(protection &amp; promotion of individual &amp; collective minority rights on national level)</td>
<td>COM / other EU bodies: - COM acting informally beyond formal capacities (internally: monitoring MS / externally: representing MS).</td>
<td></td>
<td></td>
</tr>
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