Models of decision-making and cooperation in European integration theory: A conceptual critique

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Abstract

This dissertation theoretically examines the variance of cooperation mechanisms in the decision-making process of the EU. I introduce a costs framework of typological conditions of interdependency – the balance between costs of preserving sovereignty rights and enhancing the decisiveness of the regional group – in order to examine the incentives of the member states of the EU to choose different strategic mechanisms with a view to maximize the utility from their interdependence. I develop deductive models that account for four strategies of cooperation (bargaining, coalition formation, regulatory management and judicial conflict-resolution) and derive analytical implications about their differential effect on the coordination of national policies at the regional level. My findings specify which strategy is likely to be used by the European states for the resolution of problems of distribution, redistribution, regulation and enforcement, and why the direction of policy coordination derived from the strategic behavior will be either centralized or decentralized.

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Models of Decision-Making and Cooperation in European Integration Theory - A Conceptual Critique

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La Faculté des sciences économiques et sociales, sur préavis du jury, a autorisé l'impression de la présente thèse, sans entendre, par là, n'émettre aucune opinion sur les propositions qui s'y trouvent énoncées et qui n'engagent que la responsabilité de leur auteur.

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Le doyen
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Impression

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This dissertation provides a theoretical understanding of how cooperative decisions in the EU decision-making process are generated and what the terms of this cooperation are. I argue that variations in consensual decisions are generated by the objectives of member states to maximise their utility from different situations of costly interdependence or coordination problems that arise in the integration context. In each coordination problem, states balance the minimisation sovereignty costs against enhancing the capacity of the regional group to act and, subsequently, they choose the strategic course of action more functionally adapted to providing rewarding cooperative solutions. On the basis of this argument, I develop deductive models that account for four strategies of cooperation (bargaining, coalition formation, regulatory management and judicial conflict-resolution) and derive analytical implications about their differential effect on the coordination of policies at the regional level.

I find that issues involving high distributional concerns, such as taxation, are likely to be dealt with by informal bargaining. This strategy allows member states to fractionalise issues into several dimensions, so as to accommodate their heterogeneous preferences. Most policy areas of the EU, however, present a certain degree of homogeneity while still having a divisive nature. In these areas, member states find efficient solutions through the formation of a majoritarian coalition capable of imposing a standard of regulation on all the member states. The analysis of the coalitional strategy sheds light on the phenomenon of “implicit voting” in the legislative process of the EU and on the differential influence of supranational institutions. With the increase of the diversity among preferences after the enlargement of the EU to 27 countries, the mechanics of implicit voting are likely to lead to more inclusive legislative decisions. In addition, the influence of supranational institutions will increase. The operation of both mechanisms results in legislative outcomes reflecting centric positions in the policy
space. Issues necessitating generalised expert information at the regional level, namely, issues related to competition policy, prompt strategies of centralised management. Finally, issues of enforcement in the EU are country-specific and are likely to be dealt with, not in the legislative process, but through concrete judicial resolutions by the European Court of Justice. In concrete cases, The Court tends to adopt a harmonising or a pro-diversity approach to coordination, depending on the level of consensus among member states in the issue. In particular, coordination in new objectives of the EU, such as the protection of human rights, will be more decentralised than coordination involving traditional economic objectives.
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1 Introduction

In the study of European integration, the analysis of cooperative behaviour has always been fundamental in understanding the resolution of problems of policy coordination that arise at the regional level of governance. Even after the enlargement of the European Union (EU)\(^1\) to 27 countries, cooperation in the decision-making process has been frequently successful, in the sense that legislative agreements are concluded (König and Junge, 2008) and the amount of legislation passed maintains a steady pace\(^2\). However, the evolution of the process of integration has made clear that cooperation does not lead to a unique direction of policy coordination. Instead, the changing relationship between the EU and its member states generates a variety of forms by which states integrate their interests into the regional organisation, ranging from soft legal instruments tailored to the specific needs of individual countries to centralised schemes of policy regulation. Thus, the fact that cooperation in the EU is frequent should not hide the reality that there is a great differentiation in the nature of cooperative outcomes (Schneider, 2008, p.383). The basic puzzle that this thesis addresses is the variation in the terms in which actors reach consensual decisions on policy coordination. Posed to unravel this puzzle, the main research question of this study is as follows: what are the relevant mechanisms of cooperation of the EU and how do they differentially affect outcomes of policy coordination?

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\(^1\) I will be using the term EU to refer to both to the European Community (EC) and to the European Union (EU), except in cases in which the specific reference to the EC is required. The distinction comes from the “pillar” structure of the Treaty of Maastricht of 1992, which established the EU. Maastricht separates economic policies of the first pillar, to be regulated by the EC legal system, from a second and third pillar which regulate, respectively, the domains of Foreign and Security policy (CFSP) and Justice and Home Affairs (JHA). From a legal point of view, the term EU should be used to refer to the three pillars. The amendments of the recent Lisbon Treaty (December 2007) modify this legal architecture, eliminating the EC. If the treaty is ratified, the EU will be the only treaty.

\(^2\) From January 2002 to April 2004 the average number of pieces of legislation passed was 155 per year. In the years immediately following the enlargement of EU-25, this amount decreased considerably (86 pieces from May to December 2004). Yet, for the year 2006, the total adoption rate was back to normal (153 pieces) (see, Hagemann and De Clerk-Sachsee, 2007, p.10).
This thesis aims to present a theoretical understanding of the mechanisms of cooperation in the EU and their impact for developments on policy coordination. My central claim is that member states in the EU use different strategic mechanism or means of conflict resolution in order to better integrate their interests into the regional organisation. To capture theoretically this proposition, I present cooperative mechanisms as strategic responses to different coordination problems that member states face. I argue that the cooperative mechanisms of the EU can be accounted for by means of four theoretical models of cooperation: intergovernmental bargaining, coalition-formation, regulatory management and judicial politics. My concern is not to test these models but to offer a reconstruction of them by means of a conceptual analysis, and to structure a comparison that permits identifying their specific contribution to understand how cooperative behaviour affects coordination outcomes within the EU.

Before introducing my framework of analysis and specifying further the characteristics of these models, it is necessary to present the key issues that arise in the study of the variation of cooperation in the European integration process.

1.1 Key issues

*Cooperation* has been defined as goal-oriented behaviour entailing mutual gains or rewards so that all actors end up better off than they would otherwise be (Keohane 1984, pp.51-52; Milner 1992, p.470; Snidal, 1985, p.926). Fundamentally, cooperation involves overcoming a conflict of interests regarding the distribution, control, enforcement or re-definition of mutual gains³. In the European integration process, member states cooperate in order to coordinate their national policies into a regional organisation. In fact, in the absence

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³ As Keohane points out, “Cooperation takes place when actors perceive that their policies are actually or potentially in conflict, not where there is harmony. Cooperation should not be viewed as the absence of conflict, but rather as a reaction to conflict or potential conflict” (Keohane, 1984, p.54).
of powerful coercive mechanisms (Hix, 2005; Schmitter, 1996b), cooperative behaviour is the distinctive trait of the regional decision-making process (Van den Bos, 1994, p.31). Yet, the regional dimension of cooperation infuses the phenomenon with special characteristics, namely that cooperation within the EU requires essential trade-offs between national and European interests. In a series of constitutional treaties, starting with the European Coal and Steel Community of 1951 and continuing through the creation of the actual European Union, European countries have created an institutional organisation that combines the exercise of state sovereignty with the policy influence of supranational agencies. The Treaties assign a central role in decision-making to individual member states through the Council of Ministers. At the same time, they confer delegated powers for elaboration, monitoring and enforcement of policy agreements to the Commission and the European Court of Justice (ECJ). Moreover, co-decisional powers are granted to the European Parliament (EP) through the co-decision procedure, used in most economic policies\(^4\).

Referring to this institutional structure, integration theory has customarily regarded cooperation from two competing generic conceptions. An intergovernmental perspective regards the accommodation of individual national policy positions by governments with unequal resources and intensity of policy preferences. By contrast, in a supranational view, the institutional process bestows its own collective logic upon the arrangement of interests of national and trans-national policy actors. Today, it has become clear that neither conception has imposed itself as being capable of explaining the variation of integration across policy domains. Intergovernmentalism and supranationalism should rather be considered as two poles in a continuum of cooperation in the EU. As Sandholtz and Stone Sweet suggest, such a continuum asserts that “there are potentially many ECs” (Sandholtz and Stone Sweet, 1998,

\(^4\) For description of the co-decision procedure, see Chapter 5.
p.9). Similarly, Schmitter ventured in 1996 that in the future Euro-polity “[t]here will be no single dominant style of policy-making for the simple reason that there will be no single Europe” (Schmitter, 1996b, p.145).

The evolution of the European polity has intensified the interlocking of supranational and intergovernmental influences in its structure of decision-making, generating a great variety of forms in which states can organise their interactions. As Héritier points out, diversity and consensual decision-making practices are the central properties of the European polity (Héritier, 1999, p.1). The impact of these interactions on integration developments depends on whether policies are successfully enacted and implemented (Mattli, 1999, p.12). Such achievements basically involve, in the EU, the development of efficient legal instruments (Lane, 2006). In the continuum of cooperation, we find policies, such as competition policy, in which states accomplish legalisation of policy coordination by developing “supranational” centralising schemes of regulation, instituting uniform legal instruments for economic actors in all member states. A greater monitoring power of the Commission and the ECJ’s exclusive jurisdiction of dispute-resolution help to secure the performance and enforcement of common policies (Wilks, 2005a). In the middle of the continuum we would find areas such as environmental policy. Regulation here has been adapted to specific domestic circumstances, evidencing a great leverage for the use of flexible legal instruments in the implementation of directives (Héritier, 1999; Holzinger, 2002). At the intergovernmental extreme of the continuum, we will locate areas where states are extremely sensitive about sovereignty costs, such as taxation and Common Foreign and Security Policy.

5 While this study supports the conception of the intergovernmental-supranational continuum, it will become clear that it does not infer from it an a priori directionality of policy integration in either sense. Thus, I do not endorse Sandholtz and Stone Sweet’s thesis that the continuum will chart “the comparative development or lack of development of different policy sectors comparatively”, meaning that the supranational pole indicates a greater degree of policy development (see Sandholtz and Stone Sweet, 1998, p.9).

6 Schmitter’s differentiation of “Europes”, however, points particularly to functional characteristics of policy domains rather than to a different location of decision-making styles in the intergovernmental-supranational continuum. Schmitter’s vision of Integration is categorically supranationalist (see Schmitter, 1996a, p.3).
This latter area shows a recent proliferation of specialised political agencies, which provide frameworks for decentralised bargaining and information gathering. Since 1998, member states have notably intensified their legal commitments for increasing the operational capacity for undertaking common projects in crisis-management (Howorth, 2007). Yet, the role that each state is to play in the implementation of joint actions is variable, depending on the functional resources that each state can supply, and on the interest of each state in particular aspects of the issue at stake. So far, actual security operations have reflected an explicit selective involvement of individual member states (see Gegout, 2005).

How does the cooperative behaviour of different actors in the EU account for such variance? The literature on European governance has approached the subject of cooperation in the EU “multilevel polity” by vaguely including all conceivable forms of conflict-resolution in a single picture. Héritier, for instance, arrives at a tangled view of cooperation when defining the EU regulatory system as a “patchwork of different national regulatory styles” (Héritier, 1996). Schmitter envisages a similar “cocktail” by asserting that “whatever the mix of national styles or functional imperatives … compromise among all participants will be the usual decisional norm, regardless of formal rules. Calculations of proportionality in relation to the intensity of interest … and reciprocity in relation to successive issues … will ease the degree of acceptance” (Schmitter, 1996b, p.146). Even blunter is Richardson’s statement that the EU policy process is “undoubtedly ‘messy’” (Richardson, 2006, p.6). In reality, it is not that such depictions are inaccurate, but they have the effect of turning the explanatory focus of the variation in EU policy coordination towards factors other than cooperative behaviour itself, such as the characteristic of the policy area or the intervention of certain types of political and socio-economic actors. In other words, these studies do not identify mechanisms of how actors cooperate. As a consequence, we find a generic and insufficiently theorised conception of cooperation. In my view, this is the major shortcoming in the current research
of cooperation in the EU. A great number of scholars assert that the EU is a “negotiation state” (see Elgstrom and Jönsson, 2000). This assertion identifies more a general structure of governance than mechanisms that explain outcomes of cooperation. Processes like “bargaining” or “coalition-formation” in the EU are defined broadly, without appropriate theories of decision-making that account for the precise logic of how these processes work.

A second shortcoming appears in studies that do identify mechanisms but do not account comprehensively for the supranational-intergovernmental tension of the EU. These studies constitute the bulk of the analysis of cooperative behaviour in the EU and are found in rational choice models of the EU legislative process, studying negotiations in the Council of Ministers and the influence of supranational institutions in these negotiations (see especially Thomson, Stokman, Achen and König, 2006). These models constitute the most elaborate theories of cooperation in the EU. However, as their proponents acknowledge (see Schneider, Steunenberg and Widgrén, 2006, p.311ff), rational choice models have limits to account for the conflict-resolution processes within the Commission or the Council bureaucracy. Therefore, they should be considered as a partial contribution for the theoretical understanding of cooperation in the multilevel polity.

A final shortcoming can be identified in case studies of cooperation which have an excessive dependency of the empirical world in their identification of the factors explaining cooperation. Studies dealing with a particular policy domain have covered important theoretical gaps and given convincing assessments of how cooperation works. These studies explain instances of cooperative behaviour, but the generalisation of their explanatory insight

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7 For instance, From’s study on the case of competition in the Elsinore ferry route shows that cooperative conflict resolution in EU competition policy mostly involves routinised organisational methods and consultation with communities of experts within the framework of the executive decision-making of the Commission (From, 2002). Golub’s analysis of the Directive 94/62/EC on packaging and packaging waste insightfully demonstrates that the resolution of conflicts to formulate and pass a decision in environmental regulation critically depended on building a winning coalition within the Council of Ministers, despite the formal decisional powers that the treaty conferred to the European Parliament (Golub, 1996).
into the effect of cooperation on the integration process may be limited to cases in which we find a similar aggregation of factors as those operating in the original empirical instance (Achen, 2006b, p.264; Scharpf, 1999, p.116).

This quick overview of the basic approaches in the literature highlights the need for a different focus to address the research problem on the variance of cooperation in the EU. From a theoretical standpoint, the relevant question that this thesis addresses is *how the characteristics of a given cooperative process are likely to generate one outcome of policy coordination instead of another*. In this view, my focus of research shifts from models based on generic and unitary conceptions of cooperation to a more concrete focus on specific *forms of cooperative processes* and their link with integration dynamics. I conceptualise “cooperative processes” essentially as conflict-resolution mechanisms that place constraints and opportunities on the strategic action of actors. As they limit the range of choice alternatives, actors will reach a solution on policy coordination on terms that will differ from the solutions reached through other processes. Particularly, cooperative solutions will range from centralised regulatory schemes to explicitly decentralised legal arrangements, accommodating divergent national demands.

This theoretical inquiry into different forms of cooperation within the EU, and their impact on integration, is not entirely new. It was influentially introduced in an article by Fritz Scharpf on “the joint-decision trap” (1988)\(^8\). In this and further works (1996, 1999, 2001), Scharpf opened the way to studying cooperation in the EU in terms of the coexistence of state-centric and supranational models. Scharpf formulates the basic question that interests us

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\(^8\) In reality, Haas (1976) is the first author that links the transformation of conflict-resolution mechanisms to the evolution of integration. Haas anticipated future “multilevel” trends by pointing to the emergence of new “rationality syndromes” in the decision-making process, whereby actors opted to fragment issues instead of following the established incrementalist method. Haas’ model, however, appears as a revision of the thesis of incrementalism, and, in spite of its richness, does not specify systematically the conditions for the choice of different methods. By contrast, Scharpf offers a model of an attractive simplicity that circumscribes greatly the problem of cooperation in the EU and allows an orderly comparison of different methods.
in the study of variance: whether different “modes of interaction”, to use his terminology, have a greater or lesser capacity for conflict resolution, and hence, for generating cooperative decisions on policy coordination. The second relevant question refers to the impact of processes on policy coordination, namely how different models of cooperation are to be interpreted as affecting integration developments – i.e., as facilitating the adoption and implementation of regional policies.

In Scharpf’s conceptual framework of strategic interactions in the EU, forms of cooperation are basically defined as decision rules, which facilitate the solution of policy conflicts the more they reduce the number of actors authorised to take a decision. Scharpf concludes that intergovernmental forms of interaction, using unanimous or supermajoritarian rules of decision, will be unable to overcome intense policy conflicts in the EU, thus leading to mild forms of policy coordination or no coordination at all. Integration developments are then possible through the adoption of supranational forms of interaction, facilitating centralised elaboration and implementation of decisions. The work of Scharpf sets the referent for defining our problématique, as, in my view, it is a powerful theoretically-based thesis about the variation of cooperative trajectories and outcomes in the multilevel polity. Yet, it leaves a few questions about how to explain cooperative behaviour unanswered.

The present study argues that the definition of interaction as decision rules is too restrictive to take into account how strategic behaviour may lead (or fail to lead) to cooperative solutions. In order to investigate how consensual solutions are reached, it is necessary to specify the strategic operations that a certain rule of decision allows. Secondly, a theoretical approach based on “intensity of conflict” remains incomplete when recognising the actors’ incentives to use – and especially, maintain – different forms of cooperation in the

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9 Strategic operations are the courses of action available to an actor or group of actors in a decisional process. In a cooperative context, strategic operations are determined by the actions of other actors and by the rules of the institutional setting in which cooperation takes place.
EU. It prevents one from looking at distinct decentralised strategies that actors may consider effective for the realisation of policy coordination. It is debatable whether a uni-directional notion of efficiency, which puts the weight on supranational-centralised solutions, captures the impact of different forms of cooperation on integration development.

A critique of the model of Scharpf opens three basic lines of theoretical revision, by which I restate my general research question on the mechanisms of cooperation and their effect on the variation of outcomes of policy coordination:

1) Can we identify coordination problems that account for the actors’ incentives for choosing different forms of cooperation to better integrate their interests?

2) Which are the strategic operations of these forms of cooperation that lead (or fail to lead) to cooperative solutions?

Finally, examining these two questions will allow us to derive implications regarding the impact of different cooperative processes on decisional outcomes in the EU, thus interpreting the variation in the dependent variable of the analysis, namely, regional policy coordination:

3) What is the nature of the outcome of policy coordination represented in the cooperative solutions?

1.2 Conceptual framework

To address these questions, this study presents a conceptual framework that captures the variation of cooperative mechanisms of the EU by establishing analytical connections between conditions of cooperation, strategies and coordination outcomes.
1.2.1 The argument

My central claim is that cooperation in the EU reflects different political strategies that states follow to better integrate their interests into the regional organisation in proportion to the divergence of their interests and capacities. I envision cooperative mechanisms as a strategic response to coordination problems of interdependence that member states face in the EU context. Drawing on the basic principles of public choice theory (Buchanan and Tullock, [2004] 1962; Mueller, 2003), I represent coordination problems as setting specific costs of interdependence – that is, a balance between costs of preserving sovereignty rights against the value of enhancing the capacity of the regional group to act. These costs set incentives for the member states to choose the form of strategic conflict resolution from which they expect the most mutually rewarding solution. In turn, the development of the process of conflict resolution will define the nature of outcome of policy coordination, as a more centralised or decentralised way to integrate the interests of the member states. Following this logic, the basic argument about variation of cooperative mechanisms in the EU that I propose is one of functional coherence: a given specific coordination problem presents unique incentives and challenges to cooperation, and therefore, will demand solutions or methods that are functional in resolving these problems.

As this argument evidences, this thesis rests on an analytical formulation of the problem of the variation of cooperation, linking functionally coordination problems, strategic processes and coordination outcomes. As noted, a major limitation of the current research is the prevalence of a generic conception of cooperation for the EU multilevel polity and of a descriptive perspective in approaching the phenomenon. An analytical formulation will permit us to identify the relevant processes of cooperation in the EU and to derive more precise
implications regarding the nature of the outcomes of policy coordination. In this view, this study makes two main contributions:

Firstly, it conceptually models four relevant processes of cooperation in EU decision-making and integrates them into an analytical framework so as to establish a comparison of their incidence in the European integration process.

Secondly, it applies and develops appropriate theories of decision-making for each of the processes identified, so as to reveal the underlying mechanisms that can account for the association of different trajectories of the processes of cooperation with different outcomes of policy coordination.

1.2.2 Analytical framework of variance of cooperation

In order to develop the theoretical argument on the mechanisms of cooperation in the context of the multi-level polity, I will adopt a methodological strategy based on the configuration of a meta-theoretical framework, establishing the analytical scheme for modelling the variation of cooperation in the EU. The construction of a conceptual framework allows us to identify categories relevant to various conceptual cooperative processes of the EU. Frameworks or typologies consist of “type-concepts”\(^\text{10}\), indicating the key dimensions in which the characteristics of cooperation differ as well as the implications for the understanding of outcomes of policy coordination. As Elinor Ostrom puts it:

Frameworks provide a metatheoretical language that can be used to compare theories.

They attempt to identify the universal elements that any theory relevant to the same kind of phenomena would need to include (quoted in Scharpf, 1997, p.30).

\(^{10}\) As Stinchcombe defines it, “[a] type-concept in scientific discourse is a concept which is constructed out of a combination of the values of several variables” (Stinchcombe, 1968, p.43).
In the original formulation of Weber (1947), typologies are defined as *analytical constructs* rather than based on attributes of empirically observable cases (see Burger, 1976). For instance, a “corporatist system of interest intermediation” can be analytically constructed upon the relation between three elements: labour, capital and the state. These three elements here are abstract concepts which, empirically, will differ from case to case. What such an analytical construct tells us is that we cannot hypothesise that policies of a corporative type will be generated in a given system of interest intermediation if one of these elements is absent or weak (see Streeck and Schmitter, 1991; see also Scharpf, 1997, pp.32-34).

The configuration of analytical constructs for our research problem starts first from a look at the basic structure of the problem of cooperation. Following basic lines of research on international cooperation (Martin, 1992, 1994; Morrow, 1994; Stein, 1983; Snidal, 1985), I portray the problem of cooperation as a *collective action problem*: individual actors will face a conflicting situation of interdependence and adopt a cooperative solution to resolve it\textsuperscript{11}. The basis for differentiating cooperative processes is that different contextual dilemmas of costly interdependence will call for different solutions (see Snidal, 1985, p.924). From this perspective, all models of cooperation must consider two dimensions:

1. *Coordination problem* that actors face
2. *Mechanisms of conflict resolution* that actors adopt to deal with the problem

Variation of cooperation is explained by the differences of coordination problems and mechanisms of conflict resolution. In order to compare these differences in the context of the integration question, my framework conceptualises coordination problems as situations of

\textsuperscript{11} Expressed more technically, the process of cooperation has a two-step logical structure. Firstly, the actors define a conflict in an initial situation of interdependence. Secondly, they transform it into a new situation which is Pareto-efficient – that is, which imparts benefits for all actors involved that are greater than they would obtain in the initial situation (see chapter 3).
costly interdependency presenting different trade-offs between sovereignty costs and value of group decisiveness. Coordination problems involving higher sovereignty costs arise when there are significant divergences of concerns among states. In these situations, states will experience major effects derived from the actions of other states. In contrast, when the concerns of states are more homogeneous, coordination problems will harbour incentives to redefine European policies in a redistributive way and/or to save transaction costs of decision. According to this comparative scheme of costly interdependence, my framework includes four types of coordination problem, which differ in the combination of sovereignty costs and value of decisiveness that they involve: distribution, selection, information and enforcement. And four types of strategic mechanisms, which will differ in their functional capacity to maximise the states’ utility of cooperation from a specific coordination problem: informal bargaining, coalition formation, regulatory management and judicial dispute resolution.

The combination of types of problem and types of mechanism generates four different models of cooperation, which will be supported by appropriate theories of decision-making. I argue that each model presents a coherent mechanism for explaining some outcomes of policy coordination in the EU but not for others. In particular, from the operation of the different mechanisms of cooperation, I will derive the following implications about the nature of the outcomes: intergovernmental bargaining is likely to result in fractionalised coordination, accommodating the diversity of interests of member states; outcomes of coalitional processes will reflect the preferences of a majority of member states; coordination from regulatory management leads to the centralised control and guidance of an expert agency; finally, coordination from case law has a particularised nature, often affecting the situation of a single member state. From these conceptions of the nature of the outcome, I interpret how the models account for the differential impact that cooperative behaviour has on integration developments. I conceive these developments as related to objectives achieved by member
states in the integration of their interests: *stability of compromises, reduction of adaptation costs, efficient performance of a common policy* and *effectiveness in the application of EU law*. Figure 1 presents the conceptual framework of this thesis, showing four different analytical connections between conditions of cooperation, unfolding strategies and cooperative solutions of the EU, as integrated in the general scheme of costly interdependence of the integration context—that is, according to the trade-offs between sovereignty costs ($S$) and value of group decisiveness ($D$).

<table>
<thead>
<tr>
<th>Coordination</th>
<th>Stability of Compromises</th>
<th>Reduction of Adaptation Costs</th>
<th>Performance of Common Policy</th>
<th>Effectiveness in Application of EU Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fractionalised Coordination</td>
<td>Judicial Dispute Resolution</td>
<td>Judicial Dispute Resolution</td>
<td>Judicial Dispute Resolution</td>
<td>Judicial Dispute Resolution</td>
</tr>
<tr>
<td>Majoritarian Coordination</td>
<td>Judicial Dispute Resolution</td>
<td>Judicial Dispute Resolution</td>
<td>Judicial Dispute Resolution</td>
<td>Judicial Dispute Resolution</td>
</tr>
<tr>
<td>Centralised Coordination</td>
<td>Judicial Dispute Resolution</td>
<td>Judicial Dispute Resolution</td>
<td>Judicial Dispute Resolution</td>
<td>Judicial Dispute Resolution</td>
</tr>
<tr>
<td>Particularised Coordination</td>
<td>Judicial Dispute Resolution</td>
<td>Judicial Dispute Resolution</td>
<td>Judicial Dispute Resolution</td>
<td>Judicial Dispute Resolution</td>
</tr>
</tbody>
</table>

![Figure 1 Integrated Framework for the analysis of cooperation in the EU](image-url)
Thus, this scheme will serve to identify and compare the relevant models of the cooperative process in the EU and to derive implications regarding their differential impact on the nature of outcomes of policy coordination.

1.2.3 Theories of decision-making

Each of the models identified will be informed by a theory of decision-making accounting for the underlying mechanisms of cooperation. Corresponding to the general argument of this thesis that focuses on the integration question, these mechanisms will account for how member states cooperate in order to protect their national interests or to enhance the regional capacity to act. Each of the theories will specify a causal construct showing why a given cooperative process is likely to produce an outcome of policy coordination and not another. These causal propositions presented by decision-making theories are derived from key assumptions that they posit about how a strategic process works. I argue that these key assumptions are associated with the conditions of costly interdependence represented in the different coordination problems. They present a predominant logic of cooperation, in the sense that they stress the most favourable conditions under which each strategic process of cooperation is expected to operate.

Thus, models referring to the four cooperative processes will be developed by drawing on existing theories of decision-making that have been applied to the EU context. Although each of the models presented here maintains the basic assumptions of these theories of decision-making, they introduce original innovations with regard to the previous literature. In configuring the models of cooperation I then critically analyse the basic tenets of the theories and, on the basis of this analysis, I introduce my own conception.

For the models of cooperation of bargaining, coalition formation and regulatory management, I apply a theoretical perspective grounded in the rational choice tradition, which
explains decisions as derived from rational choices of actors operating within defined institutional constraints. For the judicial model of cooperation, I apply theories of Legal Reasoning Analysis. The processes of informal bargaining and coalition formation are explained with game theoretical tools, which deal with the interactions between actors, each attempting to bring the decision outcome as close as possible to their own preference by taking into account the preferences of others. In the processes of bargaining and coalition formation, the individual states’ preferences within different institutional constraints are determinant, and, therefore, the game theoretical approach is the most suitable one to use. By contrast, for the study of the strategy of regulatory management, I adopt an approach of analysis based on organisational theory of decision. The strategy of regulatory management conceived here is characterised by the use of expertise as the primary resource for conflict-resolution. I consider that this expert-oriented process is best captured by examining the working of organisational procedures. Interactions involving the use of expertise include divergent assessments of what is an “efficient common solution” brought in by different institutional and economic actors, often with different policy preferences. However, the final outcome of regulatory management is evaluated by means of scientific standards that do not necessarily correspond with the policy preferences of the actors. Instead, the application of these standards occurs within, and it is highly determined by, procedures of the regional organisation. Finally, in using Judicial Reasoning Analysis for the judicial model, I separate myself from the rational choice tradition. As conceptualised here, this model examines conflict-resolution through the decision-making of the ECJ. As we will see, the actions of the ECJ can be, and have been, analysed through a rational choice approach. From this perspective, these actions are responses to political constraints set by the preferences of member states. Without denying the importance of these constraints, I believe that this approach leaves out important determinants of how and why the ECJ reaches decisions that
entail a given direction of policy coordination. In my view, the careful analysis of the reasoning of the ECJ offers a better explanation of this direction of policy coordination. In addition, Judicial Reasoning Analysis requires an exposition of the legal system from which the ECJ draws legal justifications and a detailed examination of the wording of the published judgements. This has required here to represent the model judicial politics in a major length than the other models of cooperation.

It should be noted that propositions of causality that the theories of decision-making specify are conceived at a theoretical level, before any confrontation with empirical data. For each model, I will provide a detailed illustration referring to the decision-making process in policy areas of the EU. These illustrations are aimed at clarifying the reasoning underlying each of the models. To examine the policy areas on which models are applied, I draw on secondary empirical research and on official legal documentation. In this view, the empirical material offers support to the argument on the variation of cooperation posited here. Yet, no claim is made that this material provides an empirical test for the theoretical argument. The focus of this thesis remains a conceptual critique.

As for the criterion employed to select the theories supporting the models of cooperation, I select theories which offer representations of *whole strategic processes* occurring in the decision-making settings of the EU. This means that theories of decision-making highlight a main decision mechanism that operates in the entire process of cooperation. In their modelling of this process, theories may include variables of other mechanism of cooperation. However, these variables do not constitute the dominant decision mechanism defining the process of cooperation. For instance, models representing an informal bargaining process maintain that formal rules create a setting for informal negotiations as well as the fallback options when agreements are not reached. In their representation of the

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12 For a minimal theoretical definition of causality, and its relation to the empirical problem of causal inference, see King, Keohane and Verba (1994, p.76ff).
legislative process, the capacity of member states to influence the outcome is highly determined by their respective formal voting weight in the Council of Ministers. However, bargaining models posit that the informal interactions and the institutional and/or de facto veto power of actors constitute the main decisional mechanism of decision-making, not voting (see Scheneider, Steunenberg and Widgrén, 2006, p.301). By contrast, in a coalitional process, voting rules will allow a group of actors to form a coalition that will enact a collective decision. As a consequence, voting is a fundamental decisional mechanism in a coalitional model of cooperation.

The different processes of cooperation represented in my framework are associated to the basic decision-making structures of the EU. In view of this association, these processes will correspond to the basic functions of government at the Union level (see Pollack, 2004). The structures of decision-making in the EU are as follows:

- **Intergovernmental decision-making**, used for major legislative and non-legislative decisions decided unanimously by the Council.
- **Legislative-decision making**, covering regular legislative decisions decided by QMV by the Council, upon a proposal of the Commission and the intervention of the EP.
- **Executive decision-making**, covering regulatory legislation issued by the Commission.
- **Judicial decision-making**, concerning the application of EU law across the member states.

While this separation of structures of decision-making indicates different contexts for cooperation, from the perspective of the present study, the relevant issue is whether integration developments resulting from cooperation are likely to occur in one context instead
Thus, for instance, in accordance to my conceptual framework, integration developments in issues presenting a coordination problem of selection are likely to occur predominantly through cooperation within the regular legislative process. Even if a phase of executive implementation will follow the legislative phase, in this second phase, the Commission will not have excessive influence in determining how the decisions will be implemented. By contrast, in issues in which uncertainty is the basic problem of coordination, the legislative phase is not likely to present much controversy. Instead, the main aspects regarding how the issue is to be dealt with will be left to executive decision-making.

The link of strategic processes of cooperation with decision-making procedural structures of the EU signifies that my framework of cooperation has two important limitations. The first limitation is that my framework does not cover all possible conceptualisations of cooperative behaviour occurring in the EU. In particular I have left out two relevant theoretical approaches. The first approach studies the mechanism of cooperation of deliberation or “arguing” (Risse, 2000; Panke, 2005) and associated views of interaction that focus on “socialisation” (Christiansen, 1998, 2006; Heisenberg, 2005; Lewis, 1998). The second approach consists of the exploration of “leadership” as an informal factor that facilitates, and partly determines, the reaching of distinct cooperative solutions. Leadership has recently been approached by studying the role of the Council Presidencies (Tallberg, 2008) or other institutional actors, such as the Council Secretariat (Beach, 2008; Christiansen, 2006). Both the “arguing” and the “leadership” approaches depend greatly on case studies to sustain their claims. As a consequence, the cooperative processes that they study are analytically less tractable than the processes chosen here. This does not mean that deliberation and leadership are not as important in understanding how cooperative behaviour works in the EU as decision-making processes are. This means, instead, that the comparative influence of these two factors on the whole scheme of supranational decision-making becomes difficult to
assess. The second limitation is that my analysis of cooperation is reduced to the European level of decision-making and, therefore, does not include cooperation occurring within the member states in the phases of implementation, including comitology procedures\textsuperscript{13}. These processes are especially significant regarding the transposition of directives issued in the legislative process (see Kaeding, 2007). This limitation of my framework is in part mitigated because the characterisation of the decisional outcomes issued from legislative cooperation analysed here anticipates whether member states (and which of them) will dispose of more or less autonomy to implement decisions. However, this characterisation of decisional outcomes does not substitute the analysis of the specific processes of domestic adaptations to the rules that follow the adoption of legislative decisions. Yet, the inclusion of such processes of adaptation, known as “Europeanisation”, will require an extension of the scope and complexity of the analysis beyond the reach of this study.

### 1.2.4 Models of cooperation

The configuration of the analytical connections structuring the discussion on the variance of cooperation offers a quadripartite model of how cooperation works in the EU. I present now an outline of the four explanatory models of cooperation emerging from the conceptual framework, which constitute the core of the present analysis:

**The bargaining model** of cooperation will explain cooperation in the face of distributive coordination problems. Governments will state their objectives in terms of “national interests”. In the model of intergovernmental bargaining presented here, the decisional mechanism requires the participation of all the member governments, and

\textsuperscript{13} Comitology is the system of procedures involving committees, made up of representatives of member states and chaired by the Commission, by which the Council can oversee the action of the Commission (Pollack, 2003, p.114).
outcomes will need to include the preferences of all the member governments. Governments will conceive political power as the main resource for resolving conflicts – political power being defined as overall capabilities and as relative dependence on the agreement. In informal interactions, they will attempt to influence each other through concession proposals and tactical devices, with a view to realising outcomes closer to the policy alternative they favour. Cooperative outcomes are likely to reflect the relative power of states, which will be disclosed in the interaction. Coordination solutions will be fractionalised and assessed in terms of reducing sub-optimal outcomes through stable compromises – that is, compromises that governments will not have major incentives to renege on.

The coalitional model is linked to “selection problems” of choosing between a few standards of regulation. Member states are to select an alternative and exclude others. Coalitional cooperation will take place when majority rules of voting are used in the legislative process. Majoritarian rules will allow a sub-group of states to take a decision for the whole assembly of states. Policy-oriented preferences and member states’ decisiveness determine the way in which states configure their objectives. States will form provisional blocs of states, according to the affinities in their policy-making systems, in the early phases of the process. Cooperative resources result from a capacity to contribute to a potentially winning coalition, taking two forms: the voting power allocated by the treaties to each member state and the proximity of policy preferences. There are two distinct strategic phases in the process in which a winning coalition is formed. First, in an inter-coalitional process, coalitions attempt at “targeting” those states that are influential by means of allowing new

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14 It should be noted that this definition of “bargaining” implies a restriction of the term to situations where, as suggested, formal rules are not determinant and actors, using their political power, can insist in the protection of their individual interests. My reference to bargaining theories is consistent with the classification made in the collective volume The European Union Decides (EUD) (Thomson, Stokman, Achen and König, 2006). Theories of bargaining had been applied to study coalitional interactions (Baron, 1991; Baron and Ferejohn, 1989). I include these works within coalitional theories (see Chapter 5). In contrast to the model of informal bargaining presented here, in these coalitional bargaining models, no actor possesses veto power, so that the proposal of the eventual coalition of actors that enacts a decision may exclude the preferences of some actors of the whole assembly of actors (Baron and Ferejohn, 1989, p.1182).
issues into their preference set. In a second phase, coalitions will seek (or just obtain) the support of the Commission and the EP. Solutions reflect the preferences of a majority of states. States will evaluate coordination gains in terms of the minimisation of domestic costs of adaptation, as derived from the selection of a homogeneous policy.

**The regulatory model** is basically a model of supranational regulatory/organisational management. It explains conflict resolution when there is an informational coordination problem. Interactions occur in the specialised regulatory agencies of the Commission, to which executive powers have been delegated by the member states. Objectives will focus on improving the economic performance of a common policy, by means of the control of transnational economic activities. Technical knowledge of issues or aspects of issues will be the basic resource valued for cooperation. The strategies for cooperation consist of the application of formal procedures of regulatory investigation and analytical debates about the implementation of regulatory programmes. Through these strategies, the Commission makes incremental-corrective choices leading to solutions that improve regulatory performance. The nature of the outcome will be evaluated as the welfare-maximisation of supranational policies.

**The model of judicial cooperation** deals with the resolution of disputes carried out by the national courts of the member states and the ECJ. Judicial conflict resolution is conceived as a response to coordination problems of enforcement regarding very concrete collective action problems that emerge when member states apply EU law. The EU has a “decentralised system of enforcement”, defined by the use of the 234 preliminary procedure. In this procedure, the ECJ gives an interpretive ruling following a request from a national court. The national court applies the law according to this interpretation. According to this procedure, I model the judicial dispute-resolution as a concrete dispute occurring in a national court. The dispute pits an individual party, representing EU interests, against a member state, which defends the validity of its own measures to apply EU law. In its interpretive duties, The ECJ
arbitrates a solution in the dispute. The basic strategic mechanism is assessed by how the ECJ gives legal reasons so as to justify a decision about the compatibility of member state measures with EU law, in such a way as to enhance the objectives of the EU. I focus on the judicial disputes involving “new objectives” that were not included in the Treaties, particularly, the objective of human rights protection. Coordination developments occur when those objective are recognised in the rulings of the ECJ. Coordination outcomes are evaluated in terms of their effectiveness in the application of EU law in much particularised situations.

Underlying this quadripartite model is the conjecture that actors have different incentives for engaging in political cooperation in response to various problems of interdependence. They conceive different cooperative methods as more functionally appropriate in offering efficient solutions. In summary, I argue that the diversity of cooperation in the EU can be explained by the strategic view that member states have of the integration process. This view is reflected in four different patterns of cooperation and in the more or less decentralised form of coordination outcomes issuing from them. What, more specifically, are the advantages of approaching the EU policy-making and processes of decision-making with this new framework? How does it illuminate key aspects of the way the EU operates?

1.3 Organisation of the study

This work is organised as follows. Chapter 2 presents the research problem of the variation of cooperation in the EU. It first specifies the dimensions of policy coordination in

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15 Cooperative processes involve the intervention of supranational institutions and states. Yet, I consider that member states are the actors whose incentives lead to choosing one method of cooperation or another. The interpretation of integration developments derives from the benefits that cooperative solutions give to both states and socio-economic actors operating in domestic and supranational arenas. Yet, since the choice of a method of cooperation within the EU is a political issue concerning the member states, I have treated the problem of cooperation in terms of their political strategic objectives.
the EU, representing the variation of outcomes of cooperation. Subsequently, I critically examine the work of Fritz Scharpf, so as to introduce the reader to the theoretical study of how different mechanisms of cooperation in the EU are likely to generate consensual outcomes. Taking up the critique of Scharpf’s work, Chapter 3 advances the central argument of this thesis through the configuration of an analytical framework that compares different representations of the EU’s cooperative process on the basis of functional connections between problems of interdependence, strategies and cooperative solutions. In this chapter, I will also discuss the methodology for the construction of the framework – the meta-theoretical approach of analysis – within the larger context of the theoretical research on cooperation in the EU.

In Chapters 4 to 7, I build the models of cooperation that fit into the framework presented in Chapter 3. The first model portrays the mechanism of intergovernmental bargaining by which states resolve distributional problems of coordination (Chapter 4). The mechanism shows that states take into account their relative power and, on this basis, integrate their different sovereign interests into a general compromise. The workings of the mechanism are developed through the examination of three representative works of the literature on bargaining, dealing with Treaty-amendment negotiations and legislative decision-making.

Chapter 5 presents the coalitional model. I portray the mechanism of coalition building as a process in which states re-weight voting power in order to configure a winning coalition encompassing the alternatives that a qualified majority prefers to the status quo. A second procedural phase portrays how the strategic behaviour of the EP determines the selection of a final policy among the alternatives within the preference set of the winning coalition. I apply the model to the environmental policy in the enlarged EU.
Chapter 6 analyses cooperation based on regulatory management. The model first presents how the incentives of member states to save informational costs lead them to delegate executive powers to the Commission, and secondly, how the Commission performs its regulatory tasks in the face of a complex policy environment. The case of merger control illustrates this performance, showing the method of progressive adjustments which characterises the strategy of expert management.

Chapter 7 presents the final model of judicial politics. I examine first how the system of enforcement of the EU was construed. This system lays down the legal foundations on which the ECJ relies so as to justify its judicial reasoning in the arbitration of disputes of enforcement. The analysis of the ECJ’s judicial reasoning will constitute the second part of the model. The case of human rights will be used here to show how judicial review leads to coordination developments.

This work closes with a discussion of the conclusions for the understanding of the variation of cooperation in the EU that derive from the present representation of cooperative mechanisms in the EU.
2 The Variation of Coordination in the Integration Process

This thesis theoretically examines how decisions on policy coordination in the EU are made through cooperation. In order to assess the puzzle of the variation of these decisions, this chapter first briefly outlines a definition of “integration process” and, subsequently, specifies the basic dimensions of the dependent variable of the study of this process, namely, policy coordination. These dimensions will be conceived in terms of the legal instruments that member states use to coordinate policies in the EU.

The second part of this chapter will be dedicated to the review of the thesis of Fritz Scharpf. Although review of the pertinent literature on cooperation and decision-making is included in each of the chapters presenting the models of cooperation, I have chosen to provide a general presentation of the research problem of variation of cooperation by carefully analysing the thesis of Scharpf. Indeed, Scharpf work is unique as a theorisation of the issue of cooperation in the context of a multilevel polity – involving a trade-off between supranational and intergovernmental influences (Scharpf, 1988, 1994, 1996, 1997, 1999, 2001). Scharpf applies an analytical framework based on modes of cooperation, or modes of interaction, to use his terminology. A revision of the thesis of Scharpf is at the core of the problématique of this study. I make a critical interpretation of Scharpf’s theoretical conception and explanation of cooperative behaviour. This critique opens questions regarding how we can model the effect of different cooperative processes on the variety of policy coordination in the EU, thus setting the plateau for the thesis proposed here.

2.1 Integration and legalisation of policies in the EU

The question of integration is fundamental because it points directly to the actors’ motives and expectations for cooperating regionally (Haas, [2004] 1958, p.285). In the EU
decision-making process, the actors relate the search for cooperation to a distinct rationale of regional efficiency: to achieve gains derived from economies of scale (Milward, 1992) or “politics of scale” (Ginsberg, 2001) where costs and risks are lower by acting jointly rather than alone.

Regional integration is defined as the process in which European countries coordinate national policies in selected areas by providing binding common rules and regulations within the framework of a regional organisation. As this definition suggests, actors participating in the integration process have an explicit objective of improving their own situation by means of integrating their interests into the legal framework of the regional organisation. Yet, the historical evolution of the EU has confirmed a great variation in the way in which national and supranational interests are balanced within this legal framework.

In view of the relevance that legal norms have to coordinate policies in the EU, it is appropriate to measure the advance of integration in terms of the increase in the use of legal instruments or legalisation, and to look at differences in forms of legalisation so as to evaluate

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16 I have provided here a minimal definition that can be generalised to nearly all integration theories (see Haas, 1958, pp.16; and 1971 p.6; Ginsberg, 2006, p.14; Keohane and Hoffmann, 1989, pp.15-17; Mattli, 1999, p.44; Moravcsik, 1993, p.479, and 1998 p.8; Schimmelfennning and Rittberger, 2006, p.74; Schmitter, 1971, p.235; Weiler, 1981, p.271). Yet, scholars differ in the relevance of each attribute of integration, according to what they conceive to be the main problem of inquiry. For instance, Moravcsik’s main focus is (economic) policy coordination; Haas and Weiler place major emphasis on the binding character of common rules; Schmitter (and more recently Schimmelfennning and Rittberger) explicitly defines the dependent variable of integration in terms of a selection of areas. As I have already argued, and will develop in the course of this thesis, these critical differences can be productively transformed into an explanation of the terms on which national actors decide to integrate their interests.

17 The link between benefits from policy coordination and the constitution of a legal framework was first posited in Haas’ groundbreaking concept of “upgrading the common interests”:

Accommodation on the basis of deliberatively or inadvertently upgrading the common interests of the parties takes us closest to the peaceful change procedures typical of a political community with its full legislative and judicial jurisdictions … it must mean that the parties succeeded in redefining their conflict so as to work a solution at a higher level which almost invariably implies the expansion of the mandate or task of an international … governmental agency (Haas 1961, p.368).

18 Haas’ seminal formulation of supranationalism is undefined in this respect. It combines two procedures: “intergovernmental negotiation” and the “services of an institutional mediator” (Haas, 1961, p.368). Ultimately, Haas’ conception of integration predicted the formation cross-national alliances around a given sector, and the subsequent expansion towards other sectors, according to a functional logic (see especially Chapter 8 in Uniting Europe, Haas [2004] 1958). This sector-based conception concentrates on socio-economic groups and bypasses the governmental question involving a tension between member states and the organisation.
the differentiation of integration. Abbott, Keohane, Moravcsik, Slaughter and Snidal (2000) define “legalisation” as a combination of three elements: **obligation**, **precision** and **delegation**. They conceive the concept as varying within a continuum: from “hard” to “soft” legalisation (see Figure 2). For the conceptualisation of outcomes of coordination in the EU, it is useful to conceive this continuum as parallel to the supranational-intergovernmental continuum. In this manner, we can consider legal mechanisms as indicators to evaluate the variation in the forms of policy coordination. These forms range from hard or centralised policy coordination outcomes to soft or decentralised outcomes.

![Figure 2 Continuum of legalisation of policies in the EU](image)

**Hard legalisation** will be characteristic of supranational policies. Legislation is legally binding, often precisely elaborated and the member states have delegated important rule-making and jurisdictional authority to third parties, i.e. the Commission and the ECJ. In the EU legislative process, hard legal instruments are **Regulations**, whereby the Commission can impose binding policy choices\(^{19}\). Hard legal instruments are also manifest in judicial review, which enforces regulations and directives. “Hard” judicial decisions enforcing regulations impose uniform obligations on member states in measures that are a common concern of the EU. The key implication of hard law mechanisms for cooperation is their association with the

\(^{19}\) *Regulations* are laws of “general application”, containing provisions that may be applied to particular persons and circumstances. They are “binding in its entirety” and member states must observe them in full. They are a type of legislation “directly applicable to all member states”. That is, there is no need for national implementing measures for a regulation to have binding force within the member states (Article 249 TEC, see Nugent, 1999, pp. 245-46).
executive responsibilities of the Commission and the jurisdictional power of the ECJ, as the arbiter of the application of EU law. Supranational decision-making is, to a great extent, executive and judicial decision-making. Although the discretion of the Commission may not be far-reaching in most policy areas, limited by comitology control mechanisms, hard law elements, with unconditional legal obligation and responsiveness to ECJ’s jurisdiction, are included in several economic areas of the EU.

Soft legalisation will be used to pursue specific national goals within the framework of a common policy and to reduce risk of uncertain consequences of EU policy measures. States may “opt-out” from specific obligations or have escape clauses conceded in a specific regulation. Rules can be formulated as “standards” that are only meaningful with reference to specific situations. Moreover, the choice of methods for the implementation of EU law is referred to authorities of member states. Practically all the Council directives involve some form of soft law mechanism, permitting the member states to accommodate concerns about national interests. In addition, enforcement decisions of the ECJ in preliminary rulings, which interpret the compatibility of national policy measures with EU law, may involve soft law schemes consisting of granting wide discretion to the national courts for applying EU law according to the particularities of the national context.

In summary, the intensification of legalisation indicates what actors will look for when they engage in cooperation to integrate their policies. The underlying common purpose is to enhance regional efficiency – as defined above: to obtain gains derived from economies of scale or politics of scale. In specific decisional processes, consensual solutions may be reached and integration will advance. The range of options between hard and soft mechanisms

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20 The most significant instance of opting-out is the decision of the UK, Denmark and Sweden not to adhere to the Economic Monetary Union (EMU).

21 Directives issue a set of legislative principles and objectives for specific areas that can be addressed to all or some member states. They are binding only “as to the result to be achieved” in each member state: national authorities are entitled to choose the form and method for the implementation of the legislative measure, thus giving to it directive effect.
expresses the variation of these consensual decisions, involving different ways in which European and national concerns are integrated in measures of policy coordination. Do different cooperative processes account for this variation?

### 2.2 The Thesis of Scharpf

Principally, demands for integration arise from the pressure imposed by constraints and opportunities of international policy interdependencies (Haas, 1976; Moravcsik, 1998). International interdependency generates costly externalities affecting the capacity of European governments to deal, domestically, with policy problems. In principle, supranational governance would appear as a political solution for bringing under control the policy problems which cannot be solved or positively exploited at the level of the nation-state. This would expand policy-making operations to a scale that corresponds to that of cross-border policy interdependencies. Yet, in the absence of powerful coercive mechanisms or the tacit hegemony of one state, supranational solutions depend on whether cooperation among the decisional actors within the regional organisation generates consensual decisions on policy coordination. Our research question targets a theoretical understanding of the generation of these consensual decisions. We ask what the precise mechanisms underlying cooperation leading to this consensus on policy coordination are, and how the nature of the consensus will vary as a result of the operation of these mechanisms.

Cooperative or conflict-resolution mechanisms can be accounted for by specific strategic methods used by the actors for different coordination problems. These methods also permit us to draw implications regarding the different impact that a solution of the problems will have on policy coordination. I wish to introduce the problem of cooperation by critically reviewing the thesis of Fritz Scharpf. This thesis constitutes, in my view, the most consistent explanation of the cooperative processes involving the coexistence of supranational and
intergovernmental structures. Scharpf posits a structural argument based on two dimensions to account for the variable impact of cooperative processes. Firstly, the intensity of policy conflict characterises the initial conditions of interdependence in which the actors interact. Secondly, decision rules define the form of cooperative solutions. They specify how individual and collective concerns are to be aggregated, generating policy choices. The combination of rules and conflict structurally determines the terms in which agreements on policy coordination are reached, and ultimately, the effect of these agreements on the development of integration.

### 2.2.1 Problem-solving capacity in the multilevel European polity

Scharpf conceives the problem of regional cooperation in an historical perspective, as derived from the increase of the intensity of policy conflict within the decisional system of the EU. When studying this problem, Scharpf focuses on economic integration. The central thesis of Scharpf is that the process of European integration has created a “fundamental asymmetry” (Scharpf, 1996, p.15, 1999, p.50) between negative integration and positive integration, entailing a lesser capacity of the EU to develop consensual cooperation precisely in issue-areas where political intervention is needed more. Basically, the two poles of negative and positive integration define Scharpf’s conception of the variance of policy coordination in the EU. The full realisation of the asymmetry can be placed in the mid-eighties, around the signature of the Single European Act (SEA). The completion of the European internal market and the regulatory method of mutual recognition, by which products that are lawful in the country of origin will be marketable in all member countries (Moravcsik, 1998, p.315). Under the new principle, regulatory competition
market through the abolition of national barriers to trade and distortions to competition – i.e.,
negative integration – has generated tight constraints in the problem-solving capacity of
European countries (see Streeck and Schmitter, 1991; Sciarini, 1994). As a consequence, the
demand for economic integration focuses, according to Scharpf, on creating European-based
protective policies that would shape the conditions under which market operates – i.e.,
positive integration. Yet, positive integration requires common regulations in areas where
each European country faces markedly different policy-problems. They have a higher or
lower level of industrialisation; or higher or lower factor productivity. Their policy-making
structures are also highly divergent. Regulatory regimes have higher or lower standards and
they have instituted centralised or decentralised institutionalised systems of collective
bargaining. Scharpf argues that the institutional structure of the EU is incapable of
overcoming these differences and supplying effective measures of positive integration.

The relevance of this institutional argument rests on its explanation of conflict
resolution that takes into account the coexistence of supranational and intergovernmental
dimensions of cooperation. Scharpf configures a conceptual framework in which the thesis on
asymmetric integration is elaborated. In the configuration of his framework, Scharpf’s basic
insight is to have conceptualised policy questions in terms of national divergences or
similarities. This permits him to apply a scheme of analysis constructed for policy research to
the question of how nation-states integrate into a supranational organisation for the purpose of
regional integration. Scharpf’s framework combines two dimensions:

(1) level of policy conflict
(2) institutionalised mode of interaction (Sharpf, 1997, 2001).

was to be decided by the choice of consumers among products produced under different standards. In this
manner, mutual recognition relaxed considerably the search for unified standards of regulation (Moravesik,
Scharpf portrays the intensity of policy conflict with the concept of *constellation of interests*. “Constellations” are basically “strategic structures” (Snidal, 1985, p.934). They describe policy situations in which decisional actors are involved, their alternative strategies, outcomes associated with strategy combinations, and the actors’ preferences over these outcomes (Scharpf, 1997, pp.46-47). Constellations that are harmonious will facilitate consensus, independently of the number of institutional veto positions. Conversely, conflictual constellations expectedly lead to decisional blockages (Scharpf, 1996, p.19, 1999, pp.103-104).

*Modes of interaction* are conflict-resolution mechanisms. They will shape and constrain the capacity to generate political solutions. The explanation of this institutional capacity is founded on the assumption from the economic theory of decision-making (Wicksell, 1967; Buchanan and Tullock, [2004] 1962) of saving transaction costs of decision or internal costs by reducing the number of decisional vetoes. He states:

At a given level of policy conflict, the capacity to act is greatest if a single (corporate or collective) actor is able to adopt and enforce effective policy choices unilaterally, and it is reduced to the extent that effective action may be impeded by the requirement

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24 As strategic structures, constellations of interests can be represented as “static games” from the game theory imagery. Thus, a game of pure coordination or “assurance game”, when all actors prefer a cooperative joint-strategy to any other option, will be an extreme case of harmonious constellation of interests. By contrast, a game of pure conflict, or “zero-sum game”, where the gain of one actor signifies the loss of the other, will be the most conflictive constellation (see Scharpf, 1997, pp.72-79).

25 In theoretical terms, the different interests in constellations will be close to what Tsebelis calls “partisan veto players”, that is, veto players “that are generated by the political game” (Tsebelis, 2002, p.19). Because of their relative proximity of preferences, partisan veto players may form divisive or cohesive lines of action within an institutional setting. Sociological network analysis further extends the concept of “veto player” to characterise a “structure of power” which will be constituted at the level of society, including influential interest groups as well as governmental actors (Knoke, Pappi, Broadbent and Tsujinaka, 1992; Sciarini, 1994). Yet, Scharpf rather adopts a political perspective: “it is important to keep in mind that what matter are the constellations among the parties involved in the specific interactions, rather than constellations among the underlying social and economic interest—which may or may not be represented by national governments, the Commission, or the European Parliament (Scharpf, 1999, p.103).
of negotiated agreement among the occupants of multiple veto positions (Scharpf, 2001, p.4).

For the European polity, Scharpf conceives three institutionalised modes of interaction. These modes are basically defined by the use of a decision rule that will make them more or less appropriate in dealing with specific conflictive situations. These modes include:

– **Intergovernmental mode.** The capacity of problem solving is tightly constrained by the fact that each government has a right to veto decisions. Institutional veto power is provided by the use of a unanimity rule of decision. The governments’ option to call for unanimity tends to shape decisions in ways that give prominence to sensitive “national interests”: “Even though there may be strong pressures on all governments to negotiate with ‘cooperative’ interaction orientations … uncompensated concessions are difficult to defend back home if European issues have political salience in national politics” (ibid, p.6).

– **Supranational/hierarchical mode.** This entails hierarchical direction, and, according to Scharpf, a significant capacity for problem solving. Under this mode, the Commission and the European Court of Justice (ECJ) can impose binding policy choices and judicial enactments unilaterally. Generally, governments have delegated this large executive and judicial discretion to the supranational institutions in order to secure enforcement of explicit Treaty commitments (see Pollack, 2003). However, Scharpf points out that because “the European capacity of conflict resolution is not constrained by the veto positions of national governments …[i]t is therefore possible to adopt policy choices that violate the interests and preferences of national governments and their constituencies even on politically salient issues” (Scharpf, 2001, p.6). On this basis, Scharpf argues that the Commission and the
ECJ have extended the reach of European-based economic regulation beyond the original intent of member states (Scharpf, 1999).

- Joint-decision mode. This mode gives a significant role to the Commission, with the right of initiate decisions (agenda control) and variable executive discretion, but also a reduced veto power to governments, who vote by the rule of Qualified Majority Voting in the Council of Ministers (henceforth, the Council). Scharpf asserts that “national governments have considerable power to block European legislation, but the direction of legislative initiatives and the specification and enforcement of detailed rules are largely under the control of supranational actors” (Scharpf, 2001, p.7). This combination gives a variable capacity for problem solving. In reality, the joint-decision mode consists of a policy-cycle: once a general directive is adopted following intergovernmental interactions in the Council, conflict resolution presents a mild form of the “supranational mode”: “policy … is made more specific through regulations and decisions adopted by the Commission after consulting comitology committees that cannot be effectively controlled by national governments or by the council” (ibid, p.43).

If these institutional categories indicate the relative capacity of conflict resolution of the supranational and intergovernmental cooperative procedures, it is the possibility to use them in specific constellations of interests among member states to explain whether efficient policy development will be facilitated or impeded. Scharpf examines these constellations within two sets of integration preferences that will be related to different policy areas.

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26 The statement of Scharpf that the Commission dominates the comitology process relies on the constructivist thesis of Joerges and Neyer (1997), who see comitology as an arena of “deliberative problem-solving” in which the Commission dominates the exchange of transnational information (see also Joerges and Vos, 1999). Yet, as will be commented on below, this view is unqualified as a general characterisation of comitology (for a strategic view of comitology, see Steunenberg, Kobolt and Schmidtchen, 1996; for an extended argument challenging Joerges and Neyer’s thesis of comitology, see Pollack, 2003, pp.125-130).
The first set of preferences relates to the *creation of larger and competitive markets*. These preferences reflect what the main purpose of European economic integration was: the creation of the internal market to obtain benefits from economies of scale (Scharpf. 1999, p.44ff). It follows that (all) member states had a shared interest in gaining access to markets. The constellations of interests are then relatively harmonious. Scharpf points out that they resemble symmetrical Prisoner’s Dilemma games (ibid, p.104), where, if actors can communicate, they will rationally choose a joint-cooperative strategy. Shared interests will therefore make it possible to use the supranational mode of interaction for the elaboration and enforcement of *market-creating* policies, to remove barriers to trade and allow free movement, and *market-enabling* policies, to harmonise national regulations which would otherwise constitute non-tariff barriers to trade. Member states would, moreover, support hierarchical coordination in order to solve free-rider problems and secure mutual compliance (Scharpf, 2001, p.13).

The second set of preferences consists of preferences for *protection against market competition*. Here, interests are much more cross-nationally divergent. To cope with the issue of vulnerability to competition, the EU would have to adopt *market-correcting* measures. Attempts to harmonise national regulatory standards for these measures may prove difficult. Market-correcting policies affect issue-areas like social welfare or environmental protection that are crucially sustained by political intervention, and the European countries differ greatly in their schemes of intervention.

An illustration of this difficulty is provided by the efforts to harmonise environmental process regulations. These regulations bring environmental protection and work safety by regulating the process of the production of goods. The poorest, least industrialised European countries would prefer low standards of environmental regulation in order to preserve low costs of production and remain competitive. In contrast, highly industrialised countries prefer
higher standards in order to protect their own industries. Harmonisation will imply significant costs of adaptation for both types of countries. Yet, Scharpf argues that a change would be less tolerable for poor countries (Scharpf, 1996, pp.23-25). Constellations of interests would present “asymmetrical conflict games” (Scharpf, 1999, p.108), where at least one type of country prefers the status quo to a change that does not conform to its most preferred option. As cooperation involves the resolution of distributive conflicts and attention to domestic sensitivities, the mode of cooperation that could be employed would have intergovernmental characteristics. There is, therefore, a high probability of decisional blocking. When the joint-decision mode with QMV could be used, individual member states would push for a solution close to their own regulatory standards or one that sets only minimal requirements. The resulting policy change would be, according to Scharpf, short of effectiveness (Scharpf, 1996, p.27, 2001, p.23).

2.2.2 Interpretation and Critique of Scharpf

In this section I will address critically Scharpf’s response to the central question of this research, namely how different mechanisms of cooperation influence the dynamics of integration. To sum up Scharpf’s claim: policy development in the European Union is impeded by conflicts among member states. In terms of an analysis of the processes of cooperation, this blockage depends upon the incapacity of intergovernmental modes of interaction to overcome intense conflicts of interest. Scharpf has captured the essential

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27 Scharpf uses the formula of “asymmetrical conflict games” to distinguish this type of constellation from one of “battle of sexes”. In the latter, there is a coordination conflict, but at the same time a common interest for an agreement that would eventually outweigh divergences (see, especially, Scharpf, 1996, pp.19-25).

28 This claim was first developed in “the joint decision trap” (Scharpf, 1988). In this original thesis, Scharpf analysed the incapacity of the EC decisional system by means of an analogy with the German federal system. He argued that the EC suffered a decisional incapacity to reform the Common Agricultural Policy due to a constitutional configuration that required negotiated and unanimous agreement of the constituent governments in order to pass a decision at the EC level. As a consequence, the decisional system had a strong tendency to preserve existing policies and impede policy change. Scharpf emphasises that escaping the trap in this
issues of the problem of regional cooperation. Yet, in spite of the fundamental contribution of his model, it fails, in my view, to give an adequate response to the central question of this thesis: *How different cooperative processes influence the outcomes of integration*. I wish to offer now a critical analysis of the work of Scharpf from a theoretical standpoint, suggesting two open questions about the variance of cooperation in the EU, to be treated by the alternative approach proposed here.

Two kinds of critique will be addressed here regarding Scharpf’s approach. The first is that the conception of institutional solutions as decision rules is too restrictive to envisage strategies that transform the initial conditions of conflict. More specifically, Scharpf does not specify the *strategic operations* that a certain rule of decision allows. Without such operations, the theoretical scheme will not permit anticipating accurately the strategic behaviour leading to consensus.

A second line of critique will deal with Scharpf’s centralising notion of solutions to coordination. According to Scharpf, integration progresses only as supranational/hierarchical coordination increases. I will argue that this view remains insufficient to assess the variation in cooperative processes in the EU with subsequent differential influence on the dynamics of integration. This second critique refers to the coherence in Scharpf’s argument when it is contrasted with the decision-making structure of the EU, especially regarding the variance in the way member states delegate functions to EU institutions and opt for flexible mechanisms to implement EU regulation.

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29 This is not the case with other theoretical models that are also based on institutional constraints of decision rules. For instance, the constitutional analysis of the voting in Council of Ministers by Lane and Maeland (2002a) considers operations of the rule by deducing *a priori* probable coalitions that member states may form. In an *a posteriori* approach, procedural models (see Tsebelis and Garrett, 2000, 2001; Steunenberg and Selck, 2006) consider equally these operations as derived from strategies that the Commission, the EP and the member states would carry out so as to influence the outcome of their preferred policy choice. These approaches will be discussed in detail in Chapter 5.
A theory regarding the variable influence of cooperative processes should attempt to explain the strategic behaviour that is likely to lead to mutual gains of policy coordination. The explanation of strategic behaviour would regard two aspects: firstly, the coordination problems that actors face in an initial situation of conflict; secondly, the strategic methods envisaged to reach cooperative results.

Scharpf structures the influence of cooperative interactions in the EU with a single theoretical framework, “actor-centered institutionalism”. By means of game-theoretical static games, he portrays coordination problems as more or less conflictual constellations of interests. In accordance with economic theory of decision-making (Wicksell, 1967; Buchanan and Tullock, [2004] 1962), strategic methods are conceived as institutionalised modes of interaction, defined by the decision rule that sets the threshold of necessary votes for a collective policy-choice. This definition of modes of interaction solely in terms of decision rules implies an overestimation of the capacity of some modes of interaction for consensus-reaching. The rules that reduce internal costs of decision – i.e., the number of decisional actors – will facilitate concerted action (Buchanan and Tullock, [2004] 1962). Accordingly, hierarchical rules will hold more conflict-resolution capacity (less internal costs of decision) than unanimity or supermajority voting.

Considering this model based on rules of decision, the question arises how these rules may explain a cooperative transformation or the absence of it, meaning how actors strategically use these rules to overcome conflicts of interest, or, conversely, how their use of these rules does not allow them to resolve their differences. Scharpf carries out this analysis, not by considering direct interactions of actors, but by means of a structural approach that indicates static constellations of interests on which rules are applied. Given the axiomatic definition of the capacity of conflict resolution of decision rules, Scharpf’s conclusions about the possibility of consensus are straightforward:
1) *Supranational/hierarchical rules will generally allow for effective conflict resolution and consensual results.*

Scharpf, in reality, links the use of the method to situations where conflict is already low. In the application of the supranational mode of interaction to market-creating/enabling policies, his focus is on monitoring and compliance problems. With regard to these problems, Scharpf conflates readily shared interests with the hierarchical direction to facilitate interventionist measures. The approach on decision rules entails a “positive restriction”: decisions can be taken unilaterally and their effectiveness is assumed. Therefore, conflict resolution is not really taken into account. Yet, this conclusion would change if we consider the executive operations of the Commission (and the judicial proceedings of the ECJ) needed to effectively implement regulations. Supranational direction will then involve the logic of conflict resolution, absent in the analysis of Scharpf. As we will see, this logic is recognisable in the investigation proceedings that the Commission carries out to ensure that regulations work well. Investigations require participation of legal consultants, stakeholders and national authorities that often hold opposed interests on a given issue (From, 2002; Van Waarden and Drahos, 2002). The Commission’s right of “unilateral action” becomes, therefore, greatly qualified, and hierarchical coordination may also lead to difficulties in reaching effective outcomes.

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30 A similar reasoning can be applied to the ECJ’s judicial review. Yet, the ECJ holds a firmer “hierarchical power” than the Commission, given its jurisdictional supremacy (Weiler, 1996, pp.13-14).

31 It should be noted that Scharpf is well aware of the procedural conflict resolution that characterises hierarchical coordination. In his main theoretical work, he conceives conflicts in hierarchical coordination as derived from information asymmetries between higher and lower units of a hierarchic body (Scharpf, 1997, pp.175-77). However, for interpreting supranational decision-making, Scharpf chooses to reduce the theoretical determinant of a decision to the constitutional decision rule. The implication is that there is a rule-defined reduction of the internal costs of decision, given by the fact that a single actor can adopt the decisions.
An illustration is offered by the efforts of the Commission to implement the 1989 Merger Regulation in the blocking of the ATR/De Havilland merger. The implementation of the Commission’s decision first required an in-depth investigation by the Merger Tasks Force to justify that the merger would establish a dominant position in the European Market. Secondly, it entailed conciliating the opposing views of the Commissioner of Competition Leon Britain, who launched the proposal, and the Commission President Jacques DeLors, who favoured the merger (Ross, 1995). Finally, it faced the explicit “disapproval” of France, Italy and Germany, in spite of being broadly backed by European Business (see Chapter 7)\(^{32}\). Such a conflict-resolution process, however, cannot be explained in terms of the application of a hierarchical rule of decision.

2) Intergovernmental/unanimous rules and supermajority rules will permit conflict resolution when constellations of interests present low conflict; they will run into difficulties when conflict is significant.

Intergovernmental methods are applied in measures of positive integration, where member states are sensitive about how proposed regulations at the European level will affect (a) their own established administrative routines, (b) the competitiveness of their industry and employment in the national economy and (c) demands of their national electorate (Scharpf, 1996, p.20). Given this sensitivity, regulations will require negotiation and agreement in the Council by unanimity or QMV.

The approach on decision rules here has a “negative restriction”. Scharpf points out that the strictures of the decision rule are important insofar as there is a strategic conflict.

\(^{32}\) While the decision was eventually approved, the controversies opened up in this and following processes triggered a reform of the EU competition policy towards the increase of the transparency of the Commission procedures and the introduction of flexibility in allocating merger cases between the Commission and the member states (Wilks, 2005). The evolution of merger policy will be analysed in Chapter 6.
Such conflict is presented in areas subject to market-correcting policies, as opposing rich countries with high regulatory standards come into conflict with poor countries with low standards. This is also the case for environmental process-related regulations, as mentioned before. According to Scharpf, in such situations, the strategic interaction of actors is not likely to lead to a cooperative solution because of the exigency of having an agreement among all, or most, member governments. Yet again, explanations of consensus can be found when we consider that bargaining operations may modify initial conflicts. I will examine in a little more detail this case, because I believe that Scharpf’s disregard of these operations is mostly due to a misrepresentation of the cooperative process, rather than to a rejection of the cooperative logic of bargaining.

The exposition by Scharpf of conflicting cases presents a contradiction that impedes the inference of any process of cooperation, whether successful or not. Scharpf first describes the preferences for protection against market competition that generate a “demand for positive integration”. Yet at the same time, Scharpf typifies the distributional conflict with a constellation resembling an “asymmetrical conflict game”, depicting a situation of interdependence in which there is not a zone of feasible common agreement. Figure 3 represents Scharpf’s “asymmetric conflict game”. Scharpf comments that, “for [the poor countries] the best outcome would be non-agreement … which also would be the second-best outcome for the rich countries” (ibid, p.24). In summary, Scharpf presents a situation in which, by definition, one of the actors prefers the status quo over any other alternative.

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33 The game-theoretical interpretation of the asymmetric game in Figure 3 gives us a unique solution in the lower-left cell – i.e., the Nash equilibrium. Therefore, given the structure of the static game, this outcome will be the one that both rich and poor countries will rationally choose.
The contradiction is that we cannot represent a problem of policy coordination both as a demand for integration and as a preference for the status quo. If there is a demand for supranational policy coordination, decisional actors must conceive some zone of mutual gains, i.e., a cooperative zone. From an initial conflict game actors must be able to strategically “modify the game” (Hopmann, 1978; Tsebelis, 1990, p.109; Schelling, 1960). If actors are to apply the intergovernmental mode based on the unanimity rule (or another very inclusive rule), such modifications of the game will require bargaining operations e.g. exchange of concessions, threats, commitments, promises or side-payments. As Buchanan and Tullock point out, the unanimity rule will entail incentives for actors to invest in bargaining, in the form of time and resources (Buchanan and Tullock, [2004] 1962, pp.94-96).

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34 Put another way, the “demand for integration” is not represented in the game as an alternative preference for poor countries.
35 To simplify the critical exposition, I refer here only to bargaining operations. Yet, the explanation of cooperation under less-than-unanimity rules may also involve coalitional operations.
Yet, from the static situation presented by Scharpf, it is indeed not possible to envisage an explanation of cooperation based on bargaining. Given the structure of the payoffs of the game, efforts to bargain would simply revert to non-agreement. An institutional solution based on bargaining will require changing the structure of the game so as to provide a “bargaining range”, i.e. a zone of possible mutual gains in which actors can find some distributive settlement that they both would prefer over non-agreement. Katharina Holzinger advances this kind of bargaining solution for exactly the same typological case as the environmental process-regulation that Scharpf shows:

The rich country may negotiate for the high standards for a compromise, but if it does not offer a compensation, the poor country has no reason to accept these … the rich country can easily afford compensation payments: for in absolute terms it gains much more from a shift to high standards than the poor country loses. A solution of this type will be a positive sum game, and the contract will be self-enforcing as long as the poor country is better off with this contract than with [the outcome of market segmentation] (Holzinger, 2002, p.77).

Such “compensation” will transform the payoffs of the actors, and hence constitute a modification of the game. Naturally, depending on the severity of conflicts in particular issues, side-payments may not be that “easy”. However, the important point here is that, if the operations of the mode are considered, there is no theoretical reason to reject cooperative solutions in the intergovernmental mode. In my view, Scharpf’s inattention to the analysis of strategic operations that actors may use under the decision rules of unanimity or supermajority, prevents him from exploiting the possibilities of explaining processes leading to the overcoming of blockages. Scharpf’s thesis about the lack of capacity of
intergovernmental interactions is derived from a theoretical model that imposes too strong limitations upon strategic behaviour conducive to cooperation.

The second issue from Scharpf’s model that merits discussion is the conception of the output of the various modes of interaction with regard to integration developments: whether there are differences in the terms in which the cooperative processes of the EU are conducive to consensual decisions as well as how these terms relate to the benefits of coordination.

As noted, policy coordination may admit various forms, depending on how member states integrate their interests into the regional organisation. These forms are expressed in the selection of legal instruments that may include “soft law” mechanisms in order to accommodate concerns about national interests or to reduce the risk of uncertain consequences of EU regulations. Generally, the EU treaties codify the principle of subsidiarity\(^36\) to allow for the formulation of “standard-like” rules, which are to become effective in relation to the specific domestic context in which they are implemented (see Abbott et al. 2000, p.423). But soft instruments are more varied and relevant in secondary legislation, as they appear in the often-flexible content of a particular directive. These instruments are numerous: package-deals, specific reciprocities nesting other policy areas, optionality for the timing of compliance and safeguard clauses. A concrete example is the “framework legislation” used for environmental regulations:

…framework legislation … takes on board diverse goals by not spelling out who is to bear the costs. Conflicts are thus shifted to the transposition process where different actions may be taken. Moreover, differentiated policy requirements may be tailored to the specific needs of individual countries from the outset in order to win their support,

\(^36\) The principle of *subsidiarity* mandates that in areas that do not fall under the scope of EC’s exclusive competence policy decisions ought to be made at the national level.
including the scheduling of staggered compliance for industrially later-developing member states (Héritier, 1999, p.53).

How does Scharpf’s model account for such decentralising solutions? Scharpf points out that member states opt for voting in the Council in areas of positive integration, when rules to avoid competition among regulatory systems must be developed in the light of the different production profiles and cost structures of national economies (Scharpf, 1999, p.194). Scharpf claims that, in the face of intense policy-conflict, intergovernmental interactions can lead, at best, to mild forms of integration:

Where the policy-preferences of national governments or major interest groups strongly diverge, the more likely outcome is either deadlock or a compromise at the lowest common level (Scharpf, 2001, p.8).

In the search of institutional solutions to such unsatisfactory results, Scharpf puts the weight on the use of centralising mechanisms, proposing that the approach that successfully advanced negative integration in the European Community would be more effective in defining criteria to deal with differentiated regulation (Scharpf, 1999, p.200). The defining trait of centralising solutions rests on how the control of the collective decision is made, that is, on who decides on the allocation of benefits to different actors (see Coleman, 1990, p.339). These solutions do not need to consist of uniform standards of regulation for all states. In fact, Scharpf advocates designs of regulations that would not have the same impact on all member states. Rather, the key of centralisation is that designs are conceived in a “top-down” fashion, instead of resulting from the direct negotiation of member states in the Council.

It is this difference between direct negotiations and centralising solutions that is at issue when we consider the differential impact of cooperative processes on policy
coordination. This issue is more specifically raised in the interpretation of Scharpf’s *joint-decision mode*. We already noted that this mode involves a “policy-cycle” with a first intergovernmental stage of voting in the Council and a supranational stage of implementation. The centralising conception is expressed in how Scharpf understands the implementation phase. Scharpf envisages this phase – incorporating comitology procedures – as one in which supranational coordination would “improve” the minimalist compromises decided in the Council, and hence achieve the objectives of policy harmonisation (Scharpf, 2001, p.32). Scharpf’s sequence is coherent with the logic informing his conceptual framework: modes of interaction are classified hierarchically in terms of their impact on the integration process, indicating a uni-directional notion of efficiency: integration would progress with the increased transfer of competencies to central EU institutions.

In my view, such hierarchical ordering of modes of interaction would not account for key procedural variants of EU decision-making. Scharpf’s supranational interpretation of implementation does not consider that the main focus of comitology may be the control of the discretionary powers of the Commission (Pollack, 2003; Franchino, 2001). His view on comitology draws on Joerges and Neyer’s theses (Scharpf, 2001, p.43), which highlight the bureaucratic character of the committees and their capacity to transform strategic interactions into deliberative problem solving (Joerges and Neyer, 1997). However, these authors focus on one area – foodstuffs – where the demand for technical expertise is important and member states rely on the Commission for gathering and monitoring information. Yet, as Pollack points out, in other areas such as the implementation of EU structural funds, distributive questions are clearly at stake, national delegates may have clear preferences over outcomes and there is little need to discuss scientific questions (Pollack, 2003, p.223). In such cases, we should expect domestic concerns to imprint the comitology process. More significantly, the creation (and functions) of the committees is generally linked to the agreement that has been
reached previously in the Council. Thus, for the case of environmental process-regulation that
we have been using as an example, Gehring asserts that member states are clearly vigilant of a
possible loss of bargaining power or of the risk of undesirable decisions. Accordingly, they
tend to support the institution of committees only if “the new procedure does not induce major
changes compared to the initial decision-making procedure, or … the procedure is limited to
the adoption of decisions of minor importance” (Gehring, 1999, p.204).

Considering the role that decentralised solutions coming from bargaining have in
accommodating the diversity of interests and coping with distributional effects of
coordination, it is problematic to evaluate in which sense they are solutions “at the lowest
common level”. Are these solutions steps on the way to more “supranational” institutional
integration – as Scharpf’s scheme would imply – or are they effective solutions in their own
right, i.e. schemes of policy-integration that states devise to better pursue the realisation of
their interests?

This question is critical for the understanding of the coexistence of supranational and
intergovernmental interaction in the EU. Scharpf’s hierarchical ordering of modes of
interaction begs the question of which different incentives actors would have in choosing one
mode over another. His model conceptualises the source of variation of interactions from the
“intensity of conflict” of coordination problems. Intergovernmental negotiation would be used
when states’ heterogeneous preferences prevent them from risking the “unanticipated
sovereignty costs” (Abbott and Snidal, 2000, p.438) of a full delegation of regulatory powers
to the Commission and the ECJ. Yet, efficient solutions to coordination would only come
when the interstate compromises reached in the Council are further developed through
supranational coordination. In Scharpf’s model, then, the incentives for choosing
intergovernmental or supranational cooperation are the same. Only, because of the
hierarchical ordering of modes of interaction, intergovernmentalism means cooperation by default.

I believe that the theoretical perspective based on “intensity conflict” is incomplete to account for the actors’ incentives to use (and maintain) different cooperative processes in the EU. I do not question the prominence of such conflicts in the EU, nor Scharpf’s insightful thesis regarding the origin of these conflicts, i.e., the difficulties caused by the process of “negative integration” in national policy-systems and the resulting infusion of national sensitivities into the supranational decisional-system. However, taking conflict as the determining conditional variable for the choice of ways for organising interactions prevents us from looking at the distinct political strategies for integration that actors may consider beneficial in proportion to the degree of divergence among their preferences.

In summary, this critical review of the Scharpf’s theoretical reasoning shows that his analytical framework leaves two questions open regarding the variable impact of cooperative processes on policy coordination:

–The first question refers to the conditions that differentiate the use of methods of cooperation: are there different incentives that lead actors to choose one cooperative process or another in view of integrating their interests more rewardingly? Can we identify typologically coordination problems that account for these incentives?

–The second question refers to the explanation of institutional solutions. How the strategic operations amidst different processes lead (or fail to lead) to consensual decisions? Can these operations account for differences in outcomes of policy coordination?

With a view to answering these two questions, I will propose an alternative framework to structure the comparative explanation of cooperation in the EU. Unlike Scharpf, my interest
will not be so much whether intergovernmental or supranational cooperation are likely to lead to deadlock or consensus. I will rather focus on studying the functionality of processes of cooperation in the EU.
3 Models of Cooperation and Decision-Making in the EU

This chapter presents the analytical framework for the study of the variance of mechanisms of cooperation in the EU. The thesis followed in this study is that the specification of the conditions in which strategic mechanisms of cooperation unfold will lead to an account of how decision-making in the EU leads to different consensual solutions, which points directly to the heart of the integration issue: how do interests of member states integrate into the supranational decisional system? Following on from the review of the thesis of Scharpf, I posit that the examination of cooperation in the EU must ask three questions: firstly, what are the incentives for actors to choose one specific form of cooperation instead of another? Secondly, how do the strategic operations of each form of cooperation serve to resolve conflicts so as to achieve consensual solutions? Thirdly, what are the characteristics of the outcomes of policy coordination represented in these consensual solutions?

To answer these questions, I present a theoretical argument that will establish analytical connections between different conditions for cooperation in the EU, the trajectories of strategic processes followed by actors, and the cooperative solutions that they can reach. The argument of this thesis will be developed in detail with the analysis of the models of cooperation, but it can be summarised as follows: in the context of the European integration process, conflicts of interest are embedded in different situations of interdependence from which member states expect variable costs of balancing the preservation of sovereign claims against enhancing the capacity of the regional group to act. These situations will define typified coordination problems that member states face. In engaging in cooperative interactions, states (individually and collectively) will attempt to maximise the utility from their interdependence by choosing the strategic course of action more functionally adapted – and hence, with less cost – to the coordination problem that they encounter. If successful,
these attempts will lead to different forms in which states ultimately integrate their interests within the regional organisation. This integration will be concretised in more centralised or decentralised schemes of policy coordination.

In order to develop this argument, I configure an analytical framework which will functionally connect coordination problems, strategic processes and coordination outcomes. An analytical formulation will permit us to identify the relevant processes of cooperation in the EU and to derive implications regarding the characteristics of consensual solutions for policy coordination.

### 3.1 The structure of the cooperation problem

Given my critique of Scharpf’s structural representation of a conflict-resolution interaction in the integration context (which lacked the necessary conception of a zone of mutual rewards), it is useful to review first the structure of the cooperation problem, so as to give an introduction to the following analytical framework on the variation of cooperation.

Cooperation can be conceptualised as a process in which actors with divergent preferences set initial policy objectives by taking into account the structure of their interdependence, as well as engage in strategic conflict resolution until they find an agreement that they consider mutually rewarding. Such a cooperative process has a two-step logical structure\(^\text{37}\). Firstly, the actors define a conflict in an initial situation of interdependence. Secondly, they transform it into a new situation which is Pareto-efficient – that is, which impart greater benefits for all actors involved than they would have obtained in the initial situation. In considering the problem of cooperation, it is necessary to take into account this two-step structure, because cooperation is essentially a transformation of conflictual

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\(^{37}\) The conception of the two-step structure of cooperation appears in Barry (1989), Cross (1996), Hopmann (1978) and Tsebelis (1990). The most extensive conceptual analysis of the two-step structure is Barry’s (see especially, Barry 1989, pp.293-119). Barry, however, looks at the normative interpretation of cooperation, which is not an issue of study here.
interactions into Pareto-efficient solutions, which can be said to reflect *consensual or cooperative outcomes*. The two-step structure expresses that, when an initial interaction presents a conflictive strategic configuration, actors will need to transform it into a new interaction that facilitates cooperation (Tsebelis, 1990). Such transformation requires some kind of tacit or explicit communication between actors. In the approach followed here, it requires the use of strategic mechanisms.

Figure 4 illustrates the logic of the two-step structure. In the Figure, the SQ represents the initial situation of conflictive interdependence or coordination problem. The line from A to B represents the Pareto frontier, encompassing cooperative solutions. Any move from the status quo to this line, for instance the point $g$, signifies a Pareto-efficient improvement, that is, an increase in rewards for at least one actor without a decrease of rewards for any actor. To find a cooperative solution, actors would need to transform the SQ so as to agree to some point on the Pareto frontier. If actors reach the point $g$, they will then reach a cooperative solution. By contrast, the point $f$ will not qualify as cooperative because it is not Pareto-improving: Actor Y would be made worse off in the process.

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38 I thus consider a Pareto-efficient solution as synonymous of *consensus* or cooperative agreement. The term “consensus” appears to me as adequate in this context because the Pareto-efficient solution reflects the acceptance of an agreement by all the actors even if actors do not obtain what initially was their ideal outcome. Actors recognise that the solution is the most mutually rewarding given the constraints of their interaction. In this sense, the conception of consensus used here corresponds to Coleman’s definition of the term: “consensus” will be reached when actors perceive that, in spite of particular preferences, an outcome will be baked by sufficient “power” to defeat other possible outcomes (Coleman, 1990: 858).

39 In what he calls “game of institutional change”, Tsebelis emphasises the aspect of “transformation of the game” as the characteristic of a cooperative solution (Tsebelis, 1990, 107-115).

40 The Pareto principle of efficiency thus indicates that no interest is to be downgraded in a collective decision. It is a sort of efficiency presented in limiting terms: it establishes that a given situation $x$ is superior with respect to another suboptimal situation $y$, if no actor in $x$ is worse off than in $y$ and at least one actor is better off in $x$. In the application of this criterion of efficiency benefits are evaluated individually and there is no comparison between them. Pareto called “maximum of ophemility for the community” (Pareto, 1988: §2128), the situation in which no economic-efficient move could be made without disadvantaging a single individual of the community. Unequal distribution of benefits is allowed under the criterion as long as this negative limit holds.
The function of the conflict-resolution mechanisms that actors use in cooperative interactions is precisely to generate this kind of cooperative solutions that are said to be Pareto-efficient. It can be generalised that any strategic mechanism considered in this study can realise the function of facilitating Pareto efficiency. If this function is not realised, the outcome is the breakdown of the cooperative process and the return to the status quo. My mechanisms of conflict resolution will be devices to increase the expected payoffs of either unilateral or mutual cooperation, or both.

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41Tsebelis has demonstrated that the probability of cooperation increases the more the expected payoffs for cooperation increase relative to those of non-cooperation (Tsebelis, 1990). In expected utility terms, this proposition is expressed formally thus: \( EU(C) - EU(D) > 0 \), where “C” stands for cooperation and “D” for defection or non-cooperation. He states that these are the two necessary and sufficient conditions for the likely choice of cooperation by an individual actor. The first is the increase of the expected payoffs for unilateral cooperation, even when other actors do not cooperate. The second condition is the increase in the probability of higher payoffs of mutual cooperation (Tsebelis, 1990, p.70). Following this interpretation, my mechanisms of conflict resolution will be devices to increase the expected payoffs of either unilateral or mutual cooperation, or both.
representation of the cooperative processes of the EU, however, will not consider degrees of Pareto-efficiency on the cooperative zone, as other analyses do\textsuperscript{42}. Neither does it consider that a given mechanism of conflict resolution is to lead to outcomes that are more Pareto-efficient than others, as was implicit in the work of Scharpf. The interest of my analysis focuses on the terms of cooperative decisions, as characterising more or less centralised outcomes of policy coordination. I argue that all these different solutions can be considered collectively rewarding. It is precisely this point that constitutes my central argument: member states choose specific mechanisms of conflict resolution so as to operationalise consensus in forms that offer superior solutions for the satisfaction of their interests within the regional organisation, in proportion to the degree of divergence among their preferences and capacities.

### 3.2 Analytical framework on the variation of cooperation in the EU

In accordance with the basic lines of research on variation in international cooperation (Martin, 1992, 1994; Morrow, 1994; Sindal, 1985; Stein, 1983), I portray the cooperative process as a collective action problem, where interdependent actors face conflicting situations and adopt a cooperative solution to resolve them. As Snidal points out (Sindal, 1985, pp.923-24), the representation of variation may follow two different schemes, according to whether actors face the same problem or different problems of interdependence. I will adopt the

\textsuperscript{42} I assume that, in all the cooperative processes, actors act with perfect information, so that they know the location of the Pareto frontier. Some analyses relax the assumption of perfect information and consider that between the SQ and the Pareto-optimal frontier there are “suboptimal outcomes”. These outcomes would result from actors not reaching the frontier. A customary conceptualisation of sub-optimality is the delay in reaching an agreement. Thus, for instance, under the assumption that delays are costly to actors, Dupont argues that delays reflect “disintegrative” aspects of a negotiation process (Dupont, 1994a: 50).
second approach. I then model cooperation according to two dimensions, which correspond to the two-step structure of the problem of cooperation.

(1) The *coordination problem*: the initial conditions of interdependence and conflict among actors.

(2) The *strategic mechanisms*: the way in which actors reach (or fail to reach) a cooperative solution.

A final dimension refers to how the cooperative solutions of each process are linked to the nature of the outcome of policy coordination. In my view, the assessment of policy coordination will reflect the differential impact of cooperation on the development of the integration process, that is, the form of policy coordination that actors envision as enhancing their interests. Then, there is a third dimension:

(3) The *nature of the outcome* (impact on policy coordination).

The configuration of the analytical framework thus consists of applying the first two dimensions – coordination problem and strategy – to different typical situations of the EU, so as to conceptualise the different cooperative processes in the EU, and derive implications about the variation in the outcomes of policy coordination, the third dimension. My framework combines four different coordination problems: distribution, selection, information and enforcement, and four strategic mechanisms that actors use to resolve each of

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43 In the first scheme, the same initial problem can reflect differences in degree, but actors will basically have the same incentives to cooperate. The different ways in which actors solve problems will reflect, correspondingly, different degrees of institutional development (Snidal, 1985, p.923). Schapf’s analytical design is based on this scheme. By contrast, the second scheme does not make assumptions about degrees of integration development as derived from the operation of one cooperative process or another.
these problems so as to reach a cooperative solution: intergovernmental bargaining, coalition building, regulatory management and judicial dispute-resolution. The conceptual framework thus generates four models of cooperation for the EU: the bargaining model, the coalitional model, the regulatory model and the judicial model.

The basic conjecture about variation that I posit is one of functional coherence: each specific coordination problem presents unique incentives and challenges to cooperation, and therefore will demand strategic methods that are functional in resolving these problems (Martin, 1992, p.766). In accordance to the characterisation of the coordination problems, this functional coherence implies that the different strategic methods will provide the most adequate means for member states to protect their national interests or to enhance the capacity of the regional group to act. As will be made explicit next, this conjecture of functional coherence implies that the different values of coordination and strategy do not cross-cut.

The desegregation of the cooperation in four different models combining the coordination problem and strategy will, I argue, inform about the conditions under which a given type of cooperative behaviour is likely to lead to a more centralised or decentralised outcome of policy coordination. In particular, intergovernmental bargaining leads to the most decentralised form of coordination, consisting of fractionalised outcomes in which the policy will include several dimensions, so that interests of all member states will be represented to some degree; coalitional outcomes will consist of a policy preferred by a majority of member states, thus presenting a higher homogeneity; regulatory management will result in centralised outcomes. Policy norms will be conceived to be uniformly applied to all member states and their implementation will be basically controlled by the Commission; finally, coordination from judicial decision-making presents a peculiar case. Outcomes are particularised, involving a judicial resolution which, at least directly, concerns the situation of a single member state. Yet, the direction of policy coordination derived from these particularised
solutions may be either centralised, requiring an application of EU law that will be uniform across member states, or decentralised, involving an adaptation of EU law to domestic contexts. I maintain that the logic of each cooperative process allows us to interpret the nature of these different outcomes in terms of how member states view the satisfaction of their interests. In this view, member states will see solutions as promoting the *stability of compromises*, the *reduction of costs of adaptation*, the *performance of a common policy* and the *effectiveness in the application of law* (see Table 1).

<table>
<thead>
<tr>
<th></th>
<th>Bargaining model</th>
<th>Coalitional model</th>
<th>Regulatory model</th>
<th>Judicial model</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Coordination problem</strong></td>
<td>Distribution</td>
<td>Selection</td>
<td>Information</td>
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</tr>
<tr>
<td><strong>Strategic cooperative process</strong></td>
<td>Bargaining</td>
<td>Coalition formation</td>
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<tr>
<td><strong>Cooperative solution: nature of the outcome</strong></td>
<td>Fractionalised coordination (Stability of compromise)</td>
<td>Majoritarian coordination (Reduction of costs of adaptation)</td>
<td>Centrised coordination (Performance of common policy)</td>
<td>Particularised coordination (Effectiveness in application of law)</td>
</tr>
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Table 1 Models of cooperative process in the EU

### 3.3 Comparison of cooperative processes: a costs approach

How are these analytical connections between coordination problems and strategies to be evaluated? I will support the conjecture of functional coherence by means of a cost approach inspired by theories of public choice (Buchanan and Tullock, [2004] 1962; Mueller, 2003). The cost approach will provide us with an external criterion to compare the different
problems of interdependence and the subsequent actors’ choice of strategies to resolve them\textsuperscript{44}. Public choice is based upon the economic assumption that, in politics, individuals are utility-maximisers, so that the political choices of the individual actor can be assessed in terms of the expected costs (benefits) that he or she experiences from the organisation of public activities\textsuperscript{45}. As noted, in the EU, cooperation involves a trade-off between the particularised interests of member states and the interests of the EU as a group. With a view to signify the integration context, I will thus refer to \textit{sovereignty costs} and \textit{value of group decisiveness}. Combined, they constitute \textit{costs of interdependence} characterising coordination problems in the EU\textsuperscript{46}.

“Sovereignty costs” denote the stakes of member states when participating in supranational decision-making. Abbott and Snidal characterise sovereignty costs in the following manner:

Accepting binding legal obligations, especially when it entails delegating authority to a supranational body, is costly to states. The costs involved range from simple differences in outcome on particular issues, to loss of authority over decision-making in an issue area, to more fundamental encroachment on state sovereignty (Abbott and Snidal, 2000, p.436).

\textsuperscript{44} The public choice literature mainly deals with the analysis of different decision rules. However, it also offers fundamental arguments about how actors are to strategically use these rules. My reliance on public choice principles will focus on this strategic dimension.

\textsuperscript{45} This view also implies that only the individual is able to choose, and that, therefore, collective decisions are aggregations of distinct individual choices. It should be noted, however, that individuals can and will make choices resulting in the integration of their preferences into those of a group. Once preferences are integrated, the choice of this group or groups will determine the way in which collective decisions are made.

\textsuperscript{46} Note that the “value of decisiveness” can be equivalently stated in terms of costs: decisiveness is more valued when it is \textit{less} costly. However, I believe that representing decisiveness in terms of value makes it clearer its relation to sovereignty costs. Conceiving decisiveness in terms of value expresses better the notion of “enhancing the capacity of the group to act”, which defines the variable.
In general, sovereignty costs will be higher for a member state the more it wants to preserve its individual interests in a common decision. This is likely to occur when the state is “sensitive” or attaches salience to policy issues, and when its interests and capacities differ from those of other member states. Adopting the terminology of public choice, an issue in which a state wants to minimise sovereignty costs will involve “localised spillovers or externalities” (see Mueller, 2003, p.211). Thus, in EU decision-making, the interests of a state in such an issue are expected to be significantly affected by the interference of the actions of other states and of EU institutions. As a consequence, states will find minor costs in arrangements from which they can preserve sovereign authority over the issue.

Turning to “group decisiveness” (May 1952), this variable refers to the capacity of the regional group to act. Buchanan and Tullock define the value of decisiveness in terms of saving “transaction costs of decision-making” (Buchanan and Tullock, [2004] 1962, p.58). Transaction costs are lower when the actor can expend less time and informational resources in order to resolve an issue within a group, so that decisions can be made speedily. However, as Mueller notes when referring to the optimality of the majority rule of decision, speed is not the only property of group decisiveness (Mueller, 2003, p.79). In particular, decisiveness has the property of permitting actors to redefine policy issues so as to achieve redistributive policy changes (see also Tsebelis, 1990, p.110ff). Decisiveness has also the property of providing “arbitration” in disputes where, despite the potential for mutual benefits, individual interests are extremely difficult to reconcile and/or there are strong incentives to free-ride from agreements. Scholars working on constitutional analyses in the EU have emphasised the “redefinition property” by defining decisiveness in terms of the “power to change” the status quo (Lane and Maeland, 2000) or, equivalently, of increasing the “flexibility” of the

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47 To simplify, I will refer in this section to “group decisiveness” as “decisiveness”. Yet, as we will see in Chapter 5, the variable of “individual decisiveness” is also important. It refers to the capacity of an individual to make the group act.
decisional system (Tsebelis, 2002). On the other hand, arbitration is the cornerstone of models of judicial adjudication (see Johns, 2008; Mattli and Slaughter, 1998).

Given the common metric of costs of interdependence, the basic assumption informing the compassion of cooperative processes can be stated as follows: *coordination problems differ in the combination of sovereignty costs and value of decisiveness, resulting in specific situations of costly interdependence. Strategic mechanisms differ in their functional capacity to maximise the actors' utility of cooperation from a specific situation of interdependence.*

Figure 5 reproduces the integrated framework of cooperation presented in the introductory chapter. It represents the conceptual classification of coordination problems and the functionally associated strategies, according to expected costs of interdependence. As we can see, coordination problems cross the lines of sovereignty costs and the value of decisiveness ($S+D$) at different points, showing different costs of interdependence. The arrows point to the strategic mechanisms that actors would adopt in response to these costs.

![Figure 5 Costs of interdependence of coordination problems and related strategies of cooperation](image_url)
The different schemes of costs of interdependence will be specified in the next chapters dedicated to the analysis of the models of cooperation. In order to facilitate the reading of the comparative classification represented in Figure 5, I introduce here the central traits of the schemes of interdependent costs characterising each coordination problem. At the left side of the figure, we find first distributional problems. Coordination problems of distribution arise when member states have conflicting interests about how to divide the costs and benefits of a common project, and each of them is guaranteed a property right to claim the representation of its interests to some degree. Individual states value the achievement of the common project, but each of the states will prefer a policy alternative which gives them a maximum outcome for their own preference (see Buchanan and Tullock, [2004] 1962; Morrow, 1994). This situation translates into member states highly valuing the minimisation of sovereignty costs in a common decision. Correspondingly, group decisiveness will acquire a minimum value here.

A paradigmatic example of an area where a distributional problem is likely to arise is taxation. As the public choice literature informs, taxation is a typical “good” where local communities of a polity, e.g. a federation, often diverge greatly in their preference for collectivisation, since they normally have different levels of consumption/production of a given activity, and therefore, they also evaluate differently the contribution that they are to make to finance public projects (see Mueller, 2003, pp.67-72 and 223-27). In the EU, we find a parallel of this depiction, since taxation is considered to be “central to national sovereignty” (Commission, 2000, p.5), and member states have clearly differentiated interests. Thus, the average tax receipt of the EU-27 is a 34.4 per cent GDP. Yet, the overall proportions of taxation and social security contributions vary from 28.6 per cent in Romania to 49.1 per cent in Denmark (European Parliament, 2009, p.297). States aim for coordination policies that keep harmful external effects in check (such as the “double taxation” effects that enterprises
could undergo when moving from one country to another). Yet, because of the sensitivity of the area and the existing cross-national differences, states need coordination devices whereby their own proportion of taxation remain as unmodified as possible.

Given these conditions of the distribution problem, each member state has incentives to use *bargaining strategies* by which they can push the representation of its interests in a compromise which is to include the interests of all states – although in different proportions. The association of bargaining strategies with the protection of sovereignty claims lead us to a final analytical implication: the nature of the *outcome of policy coordination* is likely to reflect fractionalisation. Outcomes will be defined by use of legal instruments that will accommodate the diversity of interests of member states.

*Selection problems* arise when groups or blocs of member states have homogenous preferences for different policy alternatives that are mutually exclusive and cannot be accommodated in a general compromise. Each policy alternative necessitates the contribution of all actors. Therefore, states have to select one alternative for the whole group and exclude the others (see Barry, 1965, p.312; Mueller, 2003, p.80). It is crucial to understand that, in a selection problem, all actors prefer the resolution of the conflict over the initial situation. Expressed more technically, this means that all the policy alternatives subject to selection qualify as Pareto-optimal solutions because “playing the game itself”, *in an expectational sense*, is considered Pareto-optimal for all states, even if some of them will end

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48 It should be noted, however, that the perspective of sovereignty costs involves a valuation for the part of the member state. This implies that, in some key issues, we will find differences regarding the classic classification of “goods” from public choice. Thus, in the case of taxation, the “goods” approach and the “sovereignty costs” approach are similar. By comparison, we find a remarkable difference in the two approaches in the issue of defence. “Defence” is normally defined as a “public good” in the public choice literature, since, in a polity, all citizens benefit equally from its provision. However, in the EU, defence is an issue where sovereignty costs are high relative to the value of decisiveness, since each member state attaches particular salience to it, and the capacities of member states in the management of defence matters show considerable contrasts.

49 This circumstance of mutual exclusivity of alternatives implies that actor experiences “equal intensities on each issue” (Rae, 1965, p.41, quoted in Mueller, 2003, 136), so that a complementary arrangement is not possible. To gain a sense of a situation of “equal intensity”, consider Barry’s example of a train carriage that cannot sustain both smokers and non-smokers, in Barry (1965, p.312).
up in a “losing coalition”. This entails that the expected benefits of the individual state, at the start of the cooperative process, must be at least equal to the value of benefits it obtained in the initial situation of interdependence (see Buchanan and Tullock, [2004] 1962, pp.169-70 and 241-43). Under the conditions of the selection problem, an individual state will not value the minimisation of sovereignty costs within the bloc of which it is member, since other members of the group have similar preferences. However, this state will value the minimisation of sovereignty costs in relation to states outside its bloc, since those other states support a policy alternative having negative effects on its interests. Considering the whole assembly of actors, we will classify the situation as presenting medium sovereignty costs, at the centre of Figure 5. Decisiveness, on the other hand, will have a relatively higher value than sovereignty costs for a bloc that foresees it can redefine policies (according to the preferences of its members) by means of a collective decision requiring the contribution of the rest of the actors. Again, because the decisional situation will include various blocs, all of which could potentially impose their preferences, the value of decisiveness will be intermediate.

The instance of a selection problem that will be examined in the coalitional model here refers to the area of environmental policy, where there are negative external effects of pollution that cannot be avoided by means of separate policies. The EU presents a divide between central-northern “environmentally friendly” states and southern-eastern “polluter states” (see Chapter 5). These two “blocs” will need to select either a pro-environmental policy or a more “conservative” policy for the whole assembly of states.

Given the cost conditions of the selection problem, member states will have incentives to use coalition-building strategies. Put another way, it will be functional for them to institute a decision rule that allows the formation of a winning coalition which will avoid generalised compromises and permit, for a defined majority of actors (say, a simple majority of \( N/2 + 1 \),
the redistributive redefinition of policies\textsuperscript{50}. Outcomes of policy coordination are likely to be characterised by the relatively homogeneous set of preferences of a majority of member states.

At the right side of the figure we find information problems. Information problems are characterised by uncertainty about the value of the available solutions for a policy in which states hold generalised interests. Each state deems that the performance of the group will increase its individual interests. States, however, are uncertain about the optimal scheme for improving the common policy (see Morrow, 1994). The existence of generalised interests is this type of coordination problem makes the value decisiveness high relative to the value given to sovereignty costs, so that decisiveness here has its maximum value. The evolution of merger control in the EU illustrates the information problem. At the beginning of the eighties, the increase in the number of merger projects at the EU level generated an atmosphere of financial uncertainty in the business communities of all member states concerning the conditions that distorted competition. As a consequence, multinational firms started to lobby for a supranational regulation that would set the common economic criteria justifying concentrations and, as a result, make more certain their expectations of benefits (see Chapter 6).

In looking for the optimal scheme to increase the efficiency of the common policy, states will have an incentive to resort to the strategy of regulatory management at the regional level. This strategy will involve delegating functions of policy elaboration and execution to a regional agency proficient in gathering and coordinating the expert and technical information needed to achieve allocative efficiency. Outcomes of policy coordination derived from the

\textsuperscript{50} As will be explained later on, the effective use of coalitional methods requires a constitutional decision instituting a voting rule. Voting allows for a winning or majoritarian coalition to impose decisions for the whole assembly of actors, but this majoritarian coalition varies from issue to issue.
strategy of saving transaction costs are likely to reflect centralised control and guidance of the expert agency.

Finally, enforcement problems concerns the need for states to secure contracts reached in the constitutional and legislative arenas and, therefore, to assure compliance with the law by all the states (see Moravcsik, 1998; Johns, 2008). Problems of enforcement are problems triggering the “securing agreement process”. In the “decentralised enforcement system” of the EU, enforcement problems arise when a member state is to apply EU law, and its national law presents a potential conflict of conformity with EU law. These problems are isolated from those occurring in other states. As a result of this concreteness and isolation, they are either difficult to contemplate ex ante or extremely costly to resolve in the legislative arena. Under these conditions, states value a unique system of jurisdictional arbitration that is to be applied in each member state. Sovereignty costs here are evaluated in reference to the EU common law, so that we should expect that states whose national laws are less adapted to EU law would value more the minimisation of sovereignty costs. Yet, because of the generalised interest in overall compliance, supranational jurisdictional decisiveness will always be valued over sovereignty costs. These considerations imply that enforcement problems will be located at the right extreme of Figure 5, indicating a high value of decisiveness relative to sovereignty costs. The critical difference (which cannot be duly represented in the figure) with regard to the interdependent situation that we find in informational problems is that, in problems of decentralised enforcement, the value of decisiveness will be considered within the particular setting of each member state51.

51If we consider the case of a centralised system of enforcement – which in the EU applies to judicial review at the Community level – we will conclude that interdependence costs present exactly the same pattern as an information problem of coordination, with maximum value given to group decisiveness. The motivations of actors to value decisiveness, however, will be different, consisting of securing compliance, instead of eliminating uncertainty.
An example of a concrete enforcement problem is the *Cinéthèque* case\(^{52}\), concerning the conflict of compatibility between the EU provisions of free movement of goods and a French policy restricting this provision, and seeking justified derogation from it, by reasons of public interest. The case concerned the prohibition by the French authorities of the sale of videocassette movies for a period of one year following their release in movie theatres. Note that the adduced reason of public interest, namely, encouraging the production of French movies, concerned the particular French situation. The issue of cinematographic production might not be relevant in other member states.

The concrete nature of enforcement problems gives incentives to states to resort to a *strategy of judicial dispute resolution* in which national courts apply EU law in each member state, following the interpretation of the supranational judicial institution, ECJ, regarding the compatibility of the national and EU laws. The main characteristic of *coordination outcomes* issuing from judicial politics is their particularised nature. Policy coordination will take a centralised or decentralised direction according to how the law is to be applied in the particular case in which a problem of enforcement arises. The ECJ role of arbiter gives a centralised quality to regional enforcement. However, The ECJ has the central goal of achieving effectiveness in the application of EU Law. In this view, decisions from concrete case law will be aimed at avoiding disruptions between EU law and the particular national law that may hinder the effectiveness in the application of the law. As a consequence, the ECJ is likely to be sensitive to issues where the compatibility of EU law with domestic laws requires minimising sovereignty costs and will tend to grant ample discretion to national courts in applying EU law in these issues\(^{53}\).


\(^{53}\) In the example of *Cinéthèque*, the ECJ accepted France’s measure as a justified derogation from the restriction to free movements of goods. Thus, in interpreting how the provision on free movement was to be applied in this particular case, the ECJ took into account the need of minimising France’s sovereignty costs.
3.4 The explanation of the cooperative process: theories of decision-making in the EU

Each of the models identified will be informed by a theory of decision-making accounting for the underlying mechanisms of cooperation. Each of these theories offers a theoretical proposition of causality, linking a representation of a process of cooperation to the generation of a typified and distinct outcome of policy coordination.

In configuring the models of cooperation, I conduct a conceptual analysis of the basic tenets of the existing theories of EU decision-making and introduce my own scheme on the basis of this analysis. The theoretical investigation, then, has been carried out following the logic of the analytical connections represented in the four models of cooperation identified in my analytical framework of coordination problems and strategic mechanisms. This perspective constitutes an added thrust to the existing theoretical discussion on cooperation in the EU. In this view, although the models developed here maintain the basic assumptions of the considered theories of decision-making, the theoretical tenets have been given an original use to treat key issues of each of the four EU cooperative processes represented and, with this same purpose, innovations with regard to the previous literature have been introduced. Thus, the bargaining model combines a strategic phase of an exchange of concessions with a tactical phase in which actors settle final compromises by means of individualised compensations. The coalitional model represents the formation of a winning coalition in the legislative process, and in particular, in the co-decision procedure. My portrayal of the coalitional interaction consists of member governments re-weighting their voting power to form a strategic coalitional structure in which one coalition will “dominate” the others. This dominant coalition will engage in bilateral bargains with “target actors” so as to configure a winning coalition in the Council of Ministers. In order to integrate the influence of the supranational institutions, I have added a procedural phase to the coalitional process. In this
phase, the EP will influence the final decision, constrained by the position of the most powerful actors of the winning coalition in the Council. Strictly speaking, the intervention of the EP in this phase does not involve a mechanism of coalition formation. Yet, since it contributes to shape the final coalition that is to enact a decision, this intervention is integrated into the logic of the coalitional process; the regulatory model takes up the theories of agency delegation posited by Majone (1996) and Franchino (2001) in order to define the policy context in which executive conflict-resolution will be predominant. As noted, regulatory methods are important when there is a generalised interest in the performance of a policy. By means of a conceptual analysis of neo-functionalist theses, I present the (pluralist) theory of the process of preference-formation that generates these interests at the regional level. Finally, I push the theories of delegation a step forward and introduce a scheme of the Commission’s strategy to perform the expert management of its regulatory tasks. This strategy consists of a series of “analytical debates” (Jenkins-Smith, 1988) between the Commission regulatory agencies and the regulated parties; the judicial model portrays the decision-making of the ECJ as the balancing of conflicting reasons when confronting national measures potentially challenging EU law. It also shows a relatively unexpected sensitivity of the ECJ to the domestic situations of the member states when applying EU law.

For each model of cooperation, I will provide detailed empirical illustrations referring to the decision-making process in policy areas of the EU. These illustrations are chiefly aimed at clarifying the reasoning underlying each of the models. They do not represent instances of an empirical test. The reliance on an empirical context, however, is necessary for adapting theoretical abstractions to the circumstance of the integration context. Without this empirical information, it would have been impossible to represent the problem of cooperation as one involving a trade-off between national and European interests. In this sense, the reference to policy areas of the EU provides evidence for the plausibility of the theoretical argument.
In correspondence with the representation of the processes of cooperation of the analytical framework, I have selected theories of decision-making that treat *complete strategic processes* occurring in the decision-making settings of the EU, and which, therefore, take into account how the rules and procedures of these settings contextualise cooperation. This reference to the settings of decision-making implies a restriction in the meaning of expressions such as “bargaining”, “coalition”, “exchange of expertise” or “arbitration”, whose use has considerable variance in political science. In most academic works on the EU, these expressions have a generic and descriptive meaning and are referred to in a more global conception of the EU as a system of governance characterised by the prevalence and frequency of negotiations (e.g., Elgström and Smith, 1999; Meertz, 2004; Wallace, 1985). These studies keep their main interest in the conceptualisation of the EU polity, instead of focusing on explaining the mechanisms operating in EU politics. This is the case, for instance, in the “negotiation-network approach” (Pfetsch, 1998; see also Kohler-Koch and Eising, 2002). Works adopting a polity perspective have an unquestionable value in understanding how the EU works. However, they have not led to the construction of models explaining why and how actors engage in cooperative behaviour. In this respect, the focus on different decision-making theories attempts to offer a more precise theorising of the mechanisms underlying cooperation in the EU.

### 3.4.1 Decision-making structures in the EU

The different processes of cooperation correspond to the major functions of government of the EU. These functions are achieved within four main decision-making settings of the EU in which legislation is made and enforced. I thus agree with the statement that the decision-making process of the EU structures cooperation (Van den Bos, 1994, p.31). The forms of decision making of the EU are as follows:
– Intergovernmental decision-making. This form of decision-making is used in legislative and non-legislative decisions that are made unanimously by the Council. It covers issue areas in which no discretionary (executive) power has been delegated to the Commission (see Franchino, 2001). The Commission, however, configures the decisional proposals upon the request of the Council of Ministers or the European Council. For legislative decisions, the EP always needs to be consulted and, in some decisions, its assent is compulsory. The Treaty Establishing the European Communities (TEC) specifies the areas requiring unanimous consent of the member states. These areas are amendments to the Treaty, enlargement, CFSP, Asylum and immigration issues, taxation, financial issues, and most aspects of social policy, and budgetary decisions. Informal bargaining predominates in intergovernmental decision-making.

– Legislative decision-making. Regular legislative decisions are decided by Qualified Majority Voting (QMV) by the Council of Ministers upon a proposal of the Commission and the variable participation of the EU. The EU uses three legislative procedures: assent, consultation and co-decision. Here the analysis will be limited to the most relevant procedure, co-decision, in which the Council and the EP must agree upon a final decision. The majority of EU issue-areas are nowadays decided by regular legislative decision-making, including most aspects of the CAP, internal market, environment, transport and consumer protection. The predominant method of cooperation here is coalition building.

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54 The European Council is the institution comprising the heads of governments of the EU, and has the function of defining the general political guidelines of the EU and providing “the Union with the necessary impetus for its development” (Article 4 Treaty on the European Union). The European Council meets twice a year under the chairmanship of the head of state or government of the member state which holds the Presidency of the Council. The European Council is not subject to the jurisdiction of the ECJ and has a major role in non-legislative decisions, especially those concerning the provisions of CFSP.
– **Executive decision-making.** Administrative and regulatory legislation is issued mainly in the form of Commission regulations and decisions (Nugent, 1999, p.358). This is the field of regulatory cooperation.

– **Judicial decision-making.** Issues of enforcement – application and interpretation of law, are settled in judicial disputes. The most relevant judicial procedure in the EU is the 234 preliminary procedure, by which national courts apply EU law in member states after requesting a preliminary interpretive ruling to the ECJ. In the EU, the interpretation of law has a coordination quality. A number of stalemates in EU legislative arena have been resolved after the ECJ has given rulings in concrete cases, since these rulings have had the effect of “backing up” a given direction of policy coordination being discussed more generally in the political game. As Shapiro and Stone point out, “[i]n many cases, the putative audience for the European judges is the legislative itself, which awaits judicial evaluation of its product” (Shapiro and Stone, 1994, p.403; see also Jupille, 2004).

In considering the link of these forms of decision-making to cooperative processes, it should be kept in mind that the reference to functions of government or decision-making makes sense when they are critical in the legislation of a given area, given the coordination problem in which this area is embedded. What is crucial for the scheme of cooperation is to **identify the function of government in which cooperative behaviour will be most relevant in determining the consensual decisions that lead to integration developments.** For instance, it is clear that regulatory changes in the area of telecommunications require voted decisions issued from regular legislative decision-making. However, since the nineties, this area has become liberalised to such an extent at the European level that, nowadays, we should not expect significant conflict between policy alternatives in the Council (see Héritier, 1999). Instead, member states keep generalised interests in the area, and therefore, have incentives to enhance regional decisiveness by giving ample discretion to the Commission to develop executive
decision-making. Thus, in this area, cooperative processes that are significant for integration are likely to occur predominantly in the executive phase of decision-making. This also implies that, since issues are relatively uncontroversial, the Commission will have more influence in the legislative configuration of proposals in the legislative phase of decision-making.

On the other hand, the reference to entire policy sectors is not always adequate. As Wallace et al. point out, aspects of a policy area of the EU may present a degree of centralisation that makes executive decision-making significant. However, in other important aspects, the area may remain decentralised and subject to intergovernmental decision-making (Wallace, Wallace and Pollack, 2005). This is the case, for instance, in the Economic and Monetary Union (EMU), where, while there is strong delegation of powers to the European Central Bank for decisions of monetary policy, fiscal and macro-economic policy-making remains largely national. In terms of my classification of coordination problems, this translates into a monetary policy presenting the conditions of an informational problem of coordination; by contrast, in fiscal policy, the distributional problem will be prevalent (for a fine-grained classification of executive delegation in different aspects of policies see Franchino, 2001).

3.4.2 Key assumptions of theories of decision-making

In correspondence with the forms of decision-making, I will consider four distinct sets of theories to configure my models of cooperation. I argue that these theories are governed by key assumptions about how a strategic process of cooperation works, which are associated with the conditions of costly interdependence present in the different coordination problems. In this view, the scheme based on costs of interdependence will also function as a criterion to compare theories according to their analytical formulation, that is, according to how their key
assumptions employed to represent the cooperative process lead to different implications about the nature of consensual solutions (see Morton, 1999, pp.49-50).

The key assumption of cooperative bargaining theories of decision-making, such as those employing the Nash solution\(^\text{55}\), is that cooperation reflects compromises involving the participation of all the actors (Achen, 2006a, p.99; Elster, 1989, p.50). A cooperative solution, therefore, includes the interests of all the actors in the form of “the grand coalition” (Myerson, 1991, pp.417-481), although this coalition does not need to represent the interests of actors in equal degrees. I conceptualise the bargaining mechanism as an informal decisional mechanism by which actors have institutional and/or de facto veto power. This conceptualization of the bargaining mechanism follows the designation of “bargaining model” employed in EUD (Thomson, Stokman, Achen, and König, 2006, see also Moravcsik, 1998).

The interest of this conceptualisation is to represent a mechanism of cooperation that shows how member states are able to protect their individual (national) interests. In this sense, the assumption of the “grand coalition” provides the basis for an explanation of the strategic process in which each government in the Council “stubbornly” defends its interests, and attempts to give concessions chiefly concerning those aspects of a policy to which they attaches less salience. As we have seen, the structure of costs in a distributional problem, reflecting important divergences among the interests and capabilities of member states, provides incentives for this kind of cooperative behaviour.

Coalitional explanations hold the key assumption that actors have redistributitional goals which can be attained by the possibility of enacting decisions by voting on an issue (Mueller, 2003, p.79-84; Riker, 1962, pp.29-31; Tsebelis, 1990, pp.114-15). Actors enter a process of coalition formation in order to aggregate the sufficient number of votes that will permit them to impose a majoritarian choice alternative, and to exclude competing

\(^{55}\) For a definition of the Nash solution, see Chapter 4.
alternatives from the collective decision. Most analytical theories that treat coalitional mechanisms of decision employ tools of spatial theory of voting and cooperative game theory. Yet, I include among coalitional theories non-cooperative “majority-rule bargaining models” (Baron, 1991; Baron and Ferejohn, 1989) (see Chapter 5). In fact, the basic theoretical property that defines the coalitional mechanism, as opposed to informal bargaining, is that “the rules of the game” allow decisional coalitions among actors, and this property applies to both cooperative games in coalitional form and to non-cooperative models of coalitional bargaining (see Rapoport, 1970, Chapter 2). As the coalitional method is defined by the procedure of the vote, most of the assumptions posited by studies dealing with the rule of majority voting hold in a coalitional explanation. In particular, these studies have demonstrated that the effectiveness of the use of the coalitional or voting method depends on the assumption that there is a certain degree of homogeneity in the preferences of actors, or at least of an important sub-group of actors (see Mueller, 2003, pp.97-204). Both the assumptions of redistribution through voting and homogeneity apply in explaining how cooperation unfolds under the conditions presented by the cost structure of a selection problem – indicating a conflict between separate alternatives that cannot be complemented.

The key assumption of theories of regulatory management is that, when uncertainty and complexity surround a policy issue, delegation of powers to an independent expert agency will save transaction costs of managing and coordinating information, leading to

56 The formation of a winning coalition requires an agreement on which set of preferences are to define this coalition. The process of reaching the majority that will beat all other alternatives will be slowed down, perhaps indefinitely, the more heterogeneous the preferences of the actors are. This phenomenon is known as the inevitability of cycles in a “majority game”. The possibilities of cycles are reduced if assumptions about homogeneity of preferences or, equivalently, about the existence of a certain degree of “social consensus” on the community are made. An important theorem based on the homogeneity assumption has been provided by Caplin and Nalebuff (1991). These authors demonstrate that, under certain specific assumptions about homogeneity and if additional requirements on the way actors configure their preferences are met, a voting majority rule of 64 per cent will completely eliminate the possibility of cycles. The 64 per cent rule has the obvious appeal to analyse EU decision-making under QMV (with a majority rule of around 74 per cent). However, as Achen notes, Caplin’s and Nalebuff’s theorem does not include institutional features of agenda-control, which in the EU are determinant. As a consequence, the application of 64 per cent rule to the EU circumstance has only an informal justification (Achen, 2006b, p.270).
improvements in allocative efficiency that make all actors better off (see Epstein and O’Halloran, 1999; Franchino, 2001; Majone, 1994, 1996, 2001, 2005). In the EU context, the expert agency is the Commission. The conception of the strategic process will thus focus on the Commission operations for the implementation of regional executive programmes. The assumption of saving transaction costs through agency-delegation clearly corresponds to the conditions of an informational problem, where the costs of group decisiveness are valued as minimal.

Finally, the key assumption of the model of judicial politics is that the supranational jurisdictional system provides reliable arbitration in interpreting and applying the law in cases of enforcement where there is a conflict of compatibility between national legal measures and EU Treaty and statutory provisions (Mattli and Slaughter, 1998; Weiler, 1994). The mechanism explaining cooperation in judicial politics that will be analysed here consists, precisely, of the performance of the function of arbitration by the ECJ, which balances conflicting legal reasons to make final decisions on how EU law will be effectively applied in a member state. As noted, problems of enforcement in the decentralised system of the EU present a scheme of costs favouring regional decisiveness within each member state. The assumption of supranational arbitration is thus related to this scheme of costs.

The association of these assumptions with the corresponding scheme of costs of interdependence provides a criterion to evaluate implications of different theoretical operationalisations of consensual decision-making, giving us a basic insight into the mechanisms that are likely to produce the different outcomes of coordination indicated above: factionalised outcomes from intergovernmental bargaining, majority outcomes from coalition building, centralised outcomes from regulation and particularised outcomes from judicial case law.
In positing that these key assumptions support the explanation of how the different processes of cooperation work, I do not intend to say that they state necessary and sufficient conditions. Rather, my claim is that the key assumptions present a predominant logic of cooperation, in the sense that they stress the most favourable conditions under which each strategic process of cooperation is expected to operate. In my view, however, the identification of these predominant conditions offers a strong theoretical justification to defend the argument here that understands the variation of cooperation in the EU as linking determined coordination problems and strategies to different cooperative solutions.

3.5 Discussion of the analytical formulation on the variance of cooperation in the EU

My analytical vision is based on an argument on the variance of cooperation in the EU that presents certain originality. As a consequence, I will now address two issues that merit critical discussion. The first issue refers to what I consider to be the most plausible objection to the analytical scheme presented here, namely that the analytical connections based on the costs scheme do not hold. I will outline a defence against this objection. The second issue concerns the contrast of the choice of the analytical approach for comparing theories with alternative approaches of comparison based on empirical testing. I will justify my choice and argue that there are basic complementarities between the two comparative approaches.

3.5.1 Do models of cooperation cross-cut?

The objection that the analytical connections presented here do not hold can be discussed at two levels. A first level is conceptual. The objection points to the determinism of the conceptual framework that functionally associates a given problem with a given strategy, and instead denies this functionality, conceiving the possibility of various cross-cuts between
problems and strategies. A second level refers to the use of theories of decision-making. Here the objection implies that competing theories may explain how actors cooperate to resolve the same coordination problem; or, conversely, that the same theory of a strategic process may explain the resolution of different coordination problems.

I will address first the second objection, referring to the issue of competing theories of decision-making. I believe that this issue is relevant in regard to a comparison between models of informal bargaining and coalitional models applied to the interactions of governments in the Council of Ministers. In the existing theorising on the EU decision-making, we find that bargaining explanations have been extensively applied in situations in which actors are to vote in order to decide a collective policy – that is, to resolve a selection problem. The most representative bargaining theories that have been applied to the EU decision-making process assume that a “grand coalition” forms as a result of actors engaging in informal negotiations, irrespective of the procedural rule of voting (see Achen, 2006a; Arregui, Stokman and Thomson, 2006). In my view, when applied to decisions made by majority voting, this approach confounds informal bargaining with “implicit voting”, that is, the mechanism whereby state representatives establish effective majorities in Council negotiations preceding a final agreement, so that the actual vote may not even take place. The fact that actors enter informal discussions does not mean that they do not take into account that a vote is formally to be taken and that, as a consequence, some alternative policies will be excluded. The nature of implicit voting is coalitional. “Implicit voting” means that actors consider their respective “voting power” when they have to procedurally configure a majoritarian or “winning coalition”57. Naturally, the occurrence of implicit voting is as difficult to document as the occurrence of informal bargaining, since we do not have

57 A “winning coalition” is the coalition containing the necessary votes for passing a decision in a given voting system. In the EU, under the rule of Qualified Majority Voting, this coalition must aggregate 3/4 of the votes. For the precise definition of the concept of “voting power”, see Chapter 5.
systematic records of how decisions are formed at the level of negotiations taking place in advance of a voting session (see, however, the statistical analysis of this phenomenon offered by Golub, 1999). Yet, the procedural constraint of confining the decision of the group to the formation of a winning coalition provides us with a rationale to model the process upon the logic of voting. By contrast, informal-bargaining explanations are governed by the logic of veto, whether this is an institutional or a de facto veto – i.e., bargaining power\textsuperscript{58}. Even if actors chose not to actually veto a decision, the fact that coalitions are possible mitigates the rationale for individual behaviour posited by the logic of veto. Analytically, if institutional veto is considered determinant, the actor whose position stands closest to the status quo will have disproportionate power. And yet, it is confirmed that theoretical models stressing the prevalence of institutional veto power do not perform well in the analysis of QMV procedures (see König and Junge, 2008).

Admittedly, bargaining models that focus on de facto veto power (i.e. bargaining power) have an advantage here because bargaining power is often held by governments with more voting power. Indeed, most models of informal bargaining measure the capabilities of actors as voting power. They thus “borrow” a conceptualisation of power which, procedurally, is coalitional. In particular, in the bargaining cooperative models included in the collective volume The European Union Decides (EUD) (Thomson, Stokman, Achen and König, 2006), the Shapley Shubik Power Index (SSI) is employed to calculate the power of the governments in a bargaining process. Such calculation is not really faithful to the conception of the index, because it introduces information other than that included in the formal decision rules. I do not go as far as to suggest that this is an invalid measure of the power of governments acting under unanimity. Actually, given the socio-economic characteristics of the member states, voting power and capabilities are fairly correspondent (see Carrubba, Gabel and Hankla, 58 For an analysis of the notion of “bargaining power”, I refer the reader to Chapter 4.

\textsuperscript{58} For an analysis of the notion of “bargaining power”, I refer the reader to Chapter 4.
2008, p.441). However, a problem arises when the formal procedure of QMV is applied, so that member states with considerable voting power can be excluded from a majoritarian coalition. This exclusion of powerful actors is not conceivable under the logic of informal bargaining. In addition, bargaining models also apply voting power scores to measure the influence the Commission and the EP. As we will see, the agenda-setting power of these institutions is fundamental in the coaltional mechanism. Yet, by using for institutions the same measure of power that is used for the member governments, bargaining models assume that institutions can be treated as voters in the Council. This assumption is debatable. In summary, I consider that the conceptualisation of capabilities as voting power misreads the influence that formal rules has in voting processes. At best, it offers only an approximation of how the QMV procedure works. In fact, the lack of attention to formal rules renders models of informal bargaining less accurate when applied to voting sessions under QMV. This is evidenced in case studies (Achen, 2006b, p.266), and, more generally, in the fact that models of informal bargaining perform far better when they analyse a unanimous procedure than when they are applied to QMV procedures (see discussion in next section).

The concept of bargaining power can eliminate the notion that recalcitrant actors will have disproportionate power because of their right to veto, and, therefore, offer a more realistic explanation of the cooperative process. Nevertheless, in terms of specifying causal mechanisms, the rationale of bargaining power remains inappropriate to explain cooperation through voting. When coalitions are allowed, a state has no incentive to invest excessive time and resources in the representation of its sovereign interests. I will offer a more formal demonstration of the prevalence of these incentives in the discussion of the coaltional model.

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59 Thus, in the more “realistic” version of the use of this index (called SSI 2nd variant by the authors of EUD) the EP is given 31 per cent of voting power in the co-decision procedure, while the Council has 69 per cent (see Thomson and Stokman, 2006, p.50). By means of this measurement, bargaining models are able to disguise the formal role of the institutions in the process. By contrast, in the procedural models, this formal role translates into a formal type of influence, namely agenda control.
(chapter 5). Suffice now to note that, because of the existence of implicit voting, the predominant logic of a coalition building applies. Therefore, the formation of the “grand coalition” does not offer a consistent decision mechanism for the resolution of a problem of selection.

Turning to the cases in which coalition formation would solve distributional problems of coordination, we find studies stating that actors, acting under the rule of unanimity, form coalitions in order to pressure other actors to accept a given distributional arrangement (see Moravcsik, 1998; Koenig-Archipuchi, 2004). These coalitions in which governments gain support from other governments are defined as “process coalitions” (Dupont, 1994b). The concept of coalition, thus, does not refer here to the strategic mechanism of a voting session. Instead, a “process coalition” is a tactical device that governments use under the scheme of a bargaining strategy. Particularly, as Moravcsik has shown in his empirical account of Treaty-amendment negotiations, this tactic is employed to make a “threat of exclusion” and force reluctant governments to compromise (Moravcsik, 1998). The bargaining logic posits that actors will be better off by insistently claiming a major share of their individual interests in the outcome. From this perspective, supporting other actors is a tactical device to further individual claims; distributional rewards will then derive from side-payments or reciprocal support on future occasions given by, or tacitly promised by, the actors who obtained support in the current negotiation (see Bueno de Mesquita, 1994). We can conclude, therefore, that the resort to process coalitions in the face of distributional problems is not in contradiction with a bargaining strategy, which remains prevalent.

Regarding other possible cross-cuts, involving the use of expertise and judicial reasoning, in view of the existing literature, we can affirm that the issue of discussion here is the meaning given to the strategic concepts of cooperation, rather than the application of alternative theories of decision-making. We thus turn to the conceptual level of the objection
to the analytical framework presented here. From this perspective, a number of studies have asserted that coalitional interactions are relevant in the resolution of information problems of coordination. In particular, Jenkins-Smith’s and Sabatier’s “advocacy coalition framework” (Jenkins-Smith and Sabatier, 1993) posits that coalitions of specialists compete to impose their (expert) beliefs on how a common policy is to be conducted. Yet, the meaning of “coalition” here does not regard a “coalitional strategic process”, in which actors are to form a majoritarian coalition in order to select a policy alternative. Instead, it refers to a variable that will be relevant, precisely, in a strategy of regulatory management, where, in the face of uncertainty, actors are to decide about the most efficient way to elaborate and execute a common policy. Therefore, it does not contradict the predominant logic of this strategy. In fact, as already mentioned, the concept of “analytical debate” from Jenkins-Smith’s and Sabatier’s framework will be used here to model the strategic interaction in the regulatory model. However, it will remain within the logic of a regulatory strategy.

Other studies have suggested that the recourse to expertise in order to analyse the facts relevant to the negotiated issues is an important element in the resolution of distributional problems of coordination (Walton and Mckersie, 1965; Sebenius, 1992). In addition, legal scholars point out that the ECJ, in deciding on enforcement issues, often justifies judicial reasons on the basis of the technical (economic) expertise provided by the Commission and other specialised agencies (Joerges, 1997; Shapiro, 2005, pp.248-254). These examples show crosses between, on the one hand, coordination problems of distribution or enforcement and, on the other, strategies involving the use of expertise and/or legal reasoning. Yet, the postulate of the predominant logic applies here again. The use of expertise in the face of a distributional problem is included in the logic of bargaining. Expert knowledge is here a sort of bargaining power. It assists the actor in “framing” a distributional agreement in his or her favour, or in facilitating issue-linkages which will give him or her a major share in the aspects of a policy
that he or she prefers (Walton and Mckersie, 1965, pp.174-75; Sebenius, 1992, p.355). Likewise, in the face of enforcement problems, the predominant logic of conflict resolution is determined by the arbitration of the ECJ, whether the reasoning of the ECJ relies on technical analyses or on other sources.

We can see, therefore, that these cross-cutting variables complement the predominant logic of a given process, but are not central in defining it. This study does not deny this kind of complementarities, as when an element typical of a strategic process is included into another, but it maintains that each process keeps its logic in the face of these “intrusions”.

3.5.2 **Explanation and prediction**

The second relevant issue of discussion is the contrast of the analytical investigation of theories with empirical research. In exploring the occurrence of different coordination outcomes in EU decision-making, this study analytically differentiates alternative theoretical representations of cooperative processes and compares how the mechanisms of cooperation that they specify are likely to explain consensual solutions. Yet, the analytical approach is not the only approach for comparing theories of cooperation. Theories have often been compared by careful empirical research designs that test the performance of competing theories for the same database. Here, I will limit the discussion to the empirical comparison based on a forecasting approach that we find in the EUD (Thomson, Stokman, Achen and König, 2006). This work is, to this date, the most representative work dealing with empirical comparison of different theories of the EU legislative process.

The perspective of evaluation based on forecasting is different from that based on the analytical formulation of theories. This difference is duly noted by the authors of EUD (Thomson and Hosli, 2006, p.10). The analytical approach compares the way in which theories *explain* outcomes. The forecasting approach compares how well theories *predict*
outcomes (see Schneider, Steunenberg and Widgrén, 2006, p.308) and makes a statistical evaluation of the performance of various theories. Theories are applied to the same decisions. A large number of cases are considered and the issue is to evaluate how well each theory approximates the actual outcomes on average. This does not mean that the forecasting approach disregards the explanations of theories. Rather, it postulates that the better a theory predicts outcomes on average the more explanatory power it has. Yet, the approach does not directly compare, nor does intend to, the analytical structure of the explanation that different theories present.

In the concluding chapters of EUD, Achen (2006b) offers a “hierarchy” of models based on their relative performance. He shows that, generally, the more unsophisticated bargaining models – computing informal generalised exchanges of concessions among actors – offer better predictions than more nuanced coalitional models and procedural models, which take into account the incidence of the rules of majority voting and the agenda-setting power of EU institutions. These findings lead authors to the following discouraging conclusion:

Ad hoc predictions and “rules of thumb” have limited explanatory value … [T]he median and the mean [bargaining models] might predict EU decisions reasonably well, but they give no insight into the underlying causal mechanisms. Why did the decision end up in the middle of actor preferences? Only theoretically informed models that model individual human choices – micro-foundations – can give an answer to that question. Prediction and explanation are not the same thing … [O]ur insightful models do only modestly well with evidence, while those that track the data, like the mean, median or even the compromise model, provide only limited insight into the causal processes (Schneider, Steunenberg and Widgrén, 2006, p.308).
A closer look, however, shows that the conclusion that “insightful models” (i.e. procedural and coalitional models) perform worse than the simpler bargaining models is unjustified. Let me explain why. Firstly, it should be noted that when we evaluate the performance of theories for all kind of decisions, we might offer conclusions about the general applicability of the theories. However, this generality may mask the lack of accuracy of predictions (see Morton, 1999, p.40; King, Keohane and Verba, 1994, pp.103-5). Secondly, if “actual outcomes” are not characterised in any way (for instance, by how far they differ from the SQ, or by which actor preferences are most represented) it is not possible to draw a conclusive interpretation about differences in prediction for a variety of consensual decisions. If we wish to explore the explanatory power of theories, we need to show whether those theories explain certain outcomes better than other outcomes (Scharpf, 1997, p.33). With this aim, the analytical investigation based on a meta-theoretical conceptual framework attempts to make pertinent categorisations about the conditions under which the processes of cooperation take place, and from these categorisations, derives conclusions on how different theories may be able to explain better one or another outcome.

However, the analytical approach and the forecasting approach, while they have different objectives, are not mutually exclusive. Indeed, they can be complementary. The analytical investigation allows us to derive implications about the typified conditions under which a specific theory of decision-making explains outcomes. On the other hand, a forecasting evaluation can statistically test whether this specific theory does better than other theories, under the same conditions. As noted, I do not undertake this testing task in this study, which deals only with conceptual analysis. However, EUD makes a move in this direction, by categorising their forecasting evaluation by policy area and by legislative procedure. Although limited in their analytical depth, these categorisations provide
qualifications of their general forecast, and allow us to see a certain correspondence with the analytical framework presented here.

Their first categorisation by policy area is made on the basis of the number of cases in their database. The authors consider three areas: internal market, agriculture and “other areas” (see Achen, 2006b, p.279). Their results confirm those of the general forecasting. However, the criterion for categorising policy areas here is of limited use. The number of cases does not permit a meaningful comparison of policy areas, as other possible classifications based on functional characteristics would have permitted. By contrast, the categorisation by the variable of the procedural rule offers a more determinant distinction between conditions of cooperation. Interestingly, in the results of the forecasting evaluation by procedural rules, we find an indicative confirmation of the propositions of my analytical framework. Thus, taking as a reference their “compromise model” and their “procedural model”, which are good approximations of my “bargaining” and “coalitional model”, respectively, we can see that the compromise model has an average forecasting error significantly smaller when applied to decisions made by the unanimity (Mean Absolute Error (MAE) of 19.24) than when applied to the analysis of the co-decision procedure, requiring QMV (27.28). By contrast, the procedural model predicts better under the co-decision procedure (26.38) than under the unanimity rule (33.54) (see Achen, 2006b, p.276).

As shown before, in the framework here, the use of the unanimity rule is a characteristic of the bargaining process. Unanimity is required for sensitive areas, which I classify as corresponding to the existence of a “distribution problem”. On the other hand, the

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60 As suggested, the coordination problems can be related to policy areas. Yet, other possible functional classifications have been provided (e.g. Héritier, 1999 and Wallace, 2005)

61 I choose the reference of the “compromise model” because it approximates to the Nash cooperative bargaining model, which will be referred to in this thesis. I choose the “procedural model” by Steunenberg and Selick because it represents well the classic agenda-setting modelling strategy, which I use in my coalitional model. The interested reader can see the performance of other models in Achen (2006b, p.276).

62 For simplicity of exposition, I only present the results obtained by Achen with the Mean Absolute Error (MAE) baseline – which is the average size of the forecasting mistake. The interested reader can see the results with other baselines in Achen (2006b).
co-decision procedure is associated with coalitional processes. Co-decision is generally applied to areas presenting a “selection problem”, when the choice of a policy alternative through voting is mandatory. In this view, when just restricting our attention to procedural rules, the conclusions of the forecasting approach are not far from the conclusions of my analytical approach. Thus, I posit that, because they are associated with different conditions of cooperation, each of the two representations of the decision-making process are likely to explain a type of consensual outcome but not another. Along these lines, although the forecasting by procedure does not give information about the characteristics of the outcomes, it does also suggest that the causal mechanisms of models of informal bargaining and procedural models are likely to explain different kinds of decisional outcomes.

I am not stating here that there is to be a precise correspondence of interpretation between the analytical approach and the forecasting approach. As noted, the two approaches differ in what they attempt to compare in theories, and in how they approach this comparative task. Yet these highlighted forecasting results for the particular category of procedural rules guide us to a fruitful avenue of research in the direction of complementing the two approaches of comparative analysis. In this spirit, we may look at other categorisations that indicate differences in conditions of cooperation and, subsequently, statistically test whether different theorisations of consensual decisions adjust to these differences.

In summary, the conjecture that derives from my analytical framework of models of cooperation in the EU is that the differences in the strategic ways to reach a consensus reflect the strategic objectives of governments in pursuing forms of coordination that better serve their interests. The realisation of these objectives will, ultimately, reflect the impact of processes of cooperation in integration developments, reflecting more or less centralised policy coordination. The question of whether centralised or decentralised solutions result in
“more integration” is difficult to interpret. Yet, the notion of “impact of cooperation” is linked to the effective enactment and implementation of solutions (Underdal, 1991). In my view, cooperative processes that lead to solutions that can facilitate implementation of policies through the use of functionally appropriate legal instruments, are likely to enhance policy development. The different terms of consensus derived by each cooperative process is expressed here as choices for “soft” or “hard” legal instruments for policy coordination. I argue that these choices are manifestations of how member states view the effectiveness of coordination in proportion to their differences of interests and power.
4  The Bargaining Model of Cooperation

4.1  Introduction

This chapter presents the bargaining model of cooperation. The model draws on intergovernmental theories of decision-making. It looks at the strategic interaction among member states in EU treaty-amendment decisions and in legislative and non-legislative decisions for which the Treaty requires a unanimous vote by the Council of Ministers. The bargaining explanation focuses on informal deal-making interactions by which governments accommodate national interests and shape the terms of consensual solutions. In this view, procedural rules are secondary. The bargaining theories considered here assume that “political power is different from formal voting power or the legal power to initiate proposals, and it matters more than either” (Achen, 2006a, p.89). In this perspective, the bargaining model assesses the states’ influence on the outcome according to the power that they bring to bear in the negotiation, so that this outcome will ultimately reflect the realisation of the relative power of the states.

N-persons bargaining theory rests on the key assumption that cooperation is either total or totally absent (Elster, 1989, p.50). More precisely, the only coalition that can form is the coalition of all the actors or “the grand coalition”, representing a consensual compromise in which all interests are represented in some degree. This assumption will establish the predominant logic of conflict resolution in the bargaining model. The “grand coalition” assumption is coupled with a second fundamental assumption: Pareto-efficient solutions are intrinsic to a cooperative bargaining process. Pareto-efficiency is assumed upon the voluntary

63 For a commented exposition of the assumption of the “grand coalition” in the Nash solution, see Myerson (1991, 417-481). For the EU negotiations, Achen justifies the application of the assumption on the basis that “states have permanent interests but not permanent friends” (Achen, 2004a, p.99).
character of negotiations. Thus, Moravcsik considers efficiency from the outset of the negotiations: “since coercion is limited and any rational government would veto an outcome that leaves it worse off, we can assume that negotiations are Pareto-improving as compared to unilateral or coalitional alternatives” (Moravcsik, 1998, p.61). Similarly, Achen argues that “a failure of negotiations is far more expensive than just a return to the reversion point [or the status quo]” (Achen, 2006a, p.101).

In the conceptual scheme proposed here, the model of bargaining combines two dimensions: a distributional problem of coordination and a bargaining strategic mechanism. I argue that the problem of distribution presents distinct incentives for actors to adopt a cooperative mechanism based on a unanimous procedure that accommodates the interests of all actors involved, although these interests will not be equally represented in the final outcome. The strategic mechanism is modelled as a process of offers and counteroffers of concessions in which states attempt to influence each other to shift their positions towards the outcome closer to the alternative policy that they favour (Arregui, Stokman and Thomson, 2006, p.125). Following Schelling’s tactical approach to bargaining (Schelling, 1960), the model complements this process of iterative offers with the use of tactical devices by which states try to force specific sovereign claims in the last stages of the negotiation. As noted, the determining factor in a bargained resolution is political power. In this sense, the unfolding of the strategic process is to explain how actors unveil a structure of power that was not apparent in the initial situation of conflict (see Barry, 1989, p.103). Upon this structure, states assess how their different claims are to be integrated in a generalised compromise. Given the

64 In his “challenge bargaining model”, which will be referred to later on, Bueno de Mesquita (1994) does not take efficiency as an assumption, but as derived from the development of the process. As Moravcsik, this author states that member states value the EU as an institution. However, he points out that states face the dilemma of insisting on their own preferences at the expense of risking costly confrontations with prospective supporters and future allies. Such a dilemma demands an analysis of the actors’ perception about whether states would be more or less willing to risk confrontations. Change of perceptions will be a key explanatory factor of efficient negotiation outcomes.
prevalence of these different claims, the outcome of coordination is likely to take the form of fractionalised policy in which a general framework allows room for different ways to implement this policy within the member states, according to their domestic imperatives.

4.2 The distributional coordination problem

Distributional problems arise when actors have divergent preferences about how to divide the costs and benefits of a resource – i.e. a common policy (see Morrow, 1994). Each actor is guaranteed the right to preserve its own interests against those of other actors. Actors recognise that their individual and collective gains will be increased by a joint decision, but each will attempt to obtain the largest portion of the gains, meaning a policy alternative closer to their preferences.

Conceptually, the distributional problem can be expressed as a division of a resource (Barry, 1989). The cooperative surplus or resource is assumed to be constant, and hence, the utility function of each actor regarding the resource is continuous. This means that any division will involve the representation of all actors’ preferences, but to different degrees. Figure 6 illustrates the problem of negotiation between two actors. The maximum cooperative surplus that the resource can afford is represented by the line between the preferences of A and B. Any division point along this line will favour one actor more than another, but will give a share of the resource to both of them. The shares of the resource will probably not be equal. Any failure to agree on the division will represent a sub-optimal outcome, the SQ.
The assumption of continuity shows the characteristics of the problem. As an initial structure of conflict, a problem of distribution entails extreme and opposite demands of the parties over the outcome. A cooperative agreement will always imply for each actor a reduction of their initial demands and a gain relative to no agreement.

As just noted, the structure of the distribution problem involves actors having opposite demands over the outcome. This is a result of marked differences in actors’ interests and capabilities. While actors will benefit from a joint agreement, these differences in interests and capabilities imply that actors foresee considerable negative effects from the reduction of their initial individual demands. In the integration context, individual demands can be conceived as sovereignty claims that each member state holds. That is, as claims that concern the preservation or enhancement of national interests. Issues where distribution is at stake thus present considerably external effects on the sovereign interests of a state, that is, issues have different “geographical or localised spillovers” (see Mueller, 2003, pp.209-11). This implies

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The assumption of continuity of the utility functions of actors helps to distinguish conceptually the distributional problem from the problem of “selection”. In the latter the possible outcomes are clearly distinct. In distribution problems, because the resource is conceived as constant, any decision will involve some “fractionalisation” of the policy. As we will see, this is not the case when actors have to select between few distinct policies. With multiple actors, the distributional problem will result in a greater fractionalisation of the common policy.
that sovereignty costs will be high for member states and that states will be fairly certain of the magnitude of these costs when negotiating an issue (see Buchanan and Tullock, [2004] 1962, pp.74-75).

In the scheme of costs of interdependence, the distributional problem then involves a value placed in the minimisation of sovereignty costs relative to the enhancement of the capacity of the group to act. Each actor will place a high value on negotiating the common project in a way in which they can minimise, as much as possible, the sovereignty costs involved in accepting the project. Accordingly, they will see a minimal value in the control of the group (the “social” control) over their consent.

Governments negotiating in the EU decision-making process then face two related cooperation problems. Firstly, because preferences are in opposition, the substance of the policy finally decided will probably involve an unequal distribution of benefits, and actors would need to agree on a criterion that justifies such inequality. Secondly, because all interests are to be included, reaching acceptance of a policy decision will require devising compensation. In fact, when many actors are involved, it is unlikely that the content of the policy will reflect the single project of one or a few actors. Compensations transform the content of the policy, and may entail a great differentiation in the way in which it will be adopted, according to different sovereignty claims.

As noted, we should expect distributional problems to arise in issue areas where states are jealous of their sovereign autonomy and, therefore, extremely “sensitive” about how their interests are to be integrated in the cooperative solution. For these areas, the member states have not delegated discretionary (executive) power to the Commission (see Franchino, 2001). Consultation with the EP is required and, in some decisions, its assent is compulsory. The Treaty Establishing the European Communities (TEC) specifies the areas for which unanimity is required. The most relevant areas are amendments to the Treaty, enlargement, CFSP,
Asylum and immigration issues (Article 77 TEC), taxation (Article 113), financial issues (Articles 64, 218, 219) and most aspects of social policy, such as social security, protection of workers, conditions of employment for third-country nationals, employment as a concern of EU law (Article 153). Budgetary decisions require a special procedure known as “multiannual financial framework” (every seven years) needing both the unanimous decision of the Council and the approval of the EP.

In this chapter, I have chosen to illustrate the reasoning of the bargaining process of cooperation by referring to Moravcsik’s study on Treaty-amendment negotiations (Moravcsik, 1998), and to two works analysing legislative issues, which were characterised by a distributional problem and for which, at the time they arose, agreements required unanimity in the Council of Ministers. These issues were the introduction of a date for setting a standard for the limitation on gas emissions of medium-size automobiles, negotiated in 1984/85 (Bueno de Mesquita, 1994), and the conservation and management of common fish resources, negotiated in the period 1976–1983 (Conceição-Heldt, 2004). Each of the works selected provides a good representation of different key aspects of the bargaining process. Moravcsik’s study is unique in the analysis of governments’ preference formation. In this sense, it offers a source to identify underlying dimensions in the preferences of the states, so as to represent their relative positions in a negotiation. However, Moravcsik does not offer an analytical model to represent the strategic interaction among states. Bueno de Mesquita’s model represents this interaction, as derived from the power that actors bring to bear in the cooperative process. Finally, Conceição-Heldt’s study assists us in illustrating the strategic operations of bargaining, consisting of the sequential exchange of concessions and the use of tactical devices.

It should be noted that the last two works refer to legislative issues arising in policy areas for which, presently, the Treaty does not generally require unanimity, namely the
environment and fisheries. Yet, at the time of the negotiations, both the issue of standard emissions for cars and the issue of fixing quotas for the management of and access to fish resources were extremely sensitive issues for the member states and, as noted, presented a clear distributional problem. In fact, as has happened in other areas, it was only after the resolution of key distributive problems that member states envisaged a change towards QMV to resolve most of the issues expected to come up in environmental and fisheries policies in future occasions (see Conceição-Heldt, 2004, p.86).

4.3 The bargaining strategic mechanism

Given the conditions of the coordination problem, member governments wishing to protect their individual interests will have incentives to adopt a bargaining method to resolve their controversies, since bargaining will allow them opportunities to negotiate issues that are of particular interest to them. For the individual government, bargaining involves investing time and resources in order to find a collective solution that is most advantageous to it. The motivation to minimising sovereignty costs – or, equivalently, the value given to individual interests over the capacity of the group to take decisions – does not necessarily signify, in my view, that “transaction costs are low” (Moravcsik, 1998, p.52), but that they are relatively unvalued. As a consequence of this, individual actors have incentives in investing resources in bargaining until they perceive that no more benefits can be attained from a common agreement (Buchanan and Tullock, [2004] 1962, p.100). This kind of cooperative mechanism clearly calls for an explanation of how the distribution problem is to be solved.

Bargaining opportunities are maximised by the use of the *unanimity rule* and under the correspondent principle of *institutional veto power*. The unanimity rule assures that, in a final agreement, an option is chosen that is preferred by all the governments over any other option. “Veto power” guarantees the individual government that its interests will be preserved in the
collective choice. Each government, having protected property rights, will find it profitable to “stall” the negotiations and continue investing resources in bargaining as long as opportunities to better their interests exist. In principle, these opportunities may not have a definite limit. However, during the strategic process, governments come to acknowledge to what extent they can push the preservation/enhancement of their interests. Ultimately, what determines the terms of a consensual solution is the clarification and recognition of the elements that give each government *de facto* veto power over the outcome with regard to a specific policy issue. As we will see next, *de facto* veto power is greatly determined by the capabilities of actors.

4.3.1 *Structure of objectives*

The bargaining process starts with an initial configuration of objectives by governments, preceding the strategic interaction. This configuration consists of two steps: domestic preference formation and adoption of negotiating positions regarding the issues in the agenda.

4.3.1.1 *National interests and domestic preference formation*

Objectives are first defined individually and prospectively by each government, by aggregating domestic preferences of social and economic actors into a *unitary* ‘state preference’, which “designates a stable ordering among underlying substantive outcomes that may result from the international political interaction” (Moravcsik, 1997, p.519). The notion that state objectives are *prospective* is important to understand the eventual strategic shifts of positions in a substantive negotiation. Thus, Moravcsik asserts that “goals are defined not across alternative policies or strategies but across future states of the world” (Moravcsik, 1993, p.481). It follows that, even if substantive preferences of states may remain fixed, their link with prospective goals may entail important revisions regarding the degree to which those
preferences can be realised in the situation of interdependent decision-making. As Moravcsik puts it, “a government may accept an outcome worse than the status quo ante if that outcome improves on the future outcome that would have resulted from unilateral policies” (Moravcsik, 1998, p.61).

The individual conception of objectives implies that preferences are basically defined as “national interests”. Substantively, a state’s national interest cannot be conceived in harmony with those of other states. Tactically, states may form “process coalitions” (Dupont, 1994b), with a view to persuade other states to leave a position of resistance to an agreement. Such coalitions, however, do not imply similarity of preferences, but a statement of mutual support when a partial compromise is envisaged. Thus, Moravcsik interprets the coalitional tactic in EU Intergovernmental Conferences (IGCs) as linked to threats of exclusion. A group of states may propose to form coalitions, which would result in institutional arrangements within the EU framework to follow a targeted course of action independently of others. This is the case with “two-track” prospects, which may create a threat of exclusion and would therefore force reluctant states to compromise, since negative externalities created by exclusion may be unsustainable, especially in the long term (Moravcsik, 1998, p.64). On the other hand, Bueno de Mesquita interprets that tactical coalitions are “forced” in the interaction, as governments make tacit threats of confrontation to others if they do not support their proposed settlement (see Bueno de Mesquita, 1994).

Given the importance of sovereignty costs, bargaining preferences formed on the basis of cross-sectorial linkages are practically excluded or will be extremely difficult. As Moravcsik points out, “[w]here domestic gains and losses produced by linkages are only
imperfectly fungible through compensation across issues, linkage becomes a complex and politically risky strategy” (Moravcsik, 1993, p.505)\textsuperscript{66}.

The explanation of the content of “national interests” has been explored by theories of *domestic preference formation*, notably by Moravcsik’s liberal intergovernmentalism (Moravcsik, 1993, 1997, 1998; see also Frieden, 1999 and Hall, 2005)\textsuperscript{67}. Moravcsik claims that states’ preferences emerge from intra-state processes of a «pluralist» competition, in which the domestic groups most affected by trans-national economic transactions attempt to influence the foreign policy of their governments. Producer groups, with more capacity to mobilise and exert political pressure in a given issue area, will find their demands better represented (Moravcsik, 1993, p.488). Subsequently, governments pursue regional cooperation “as a means to secure commercial advantages for producer groups, subject to regulatory and budgetary constraints” (Moravcsik, 1998, p.38)\textsuperscript{68}.

### 4.3.1.2 Positions in the negotiation table: asymmetrical interdependence

The second step in defining objectives regards the translation of preferences into specific *positions* in relation to the issues on the collective agenda of the negotiation. The initial strategic positioning will present a pattern of *asymmetrical interdependence* (Keohane and Nye, 1977, p.18; Moravcsik, 1998, p.62), reflecting a differential intensity of preferences

\textsuperscript{66} Arregui, Stokman and Thomson propose a bargaining explanation, “the position exchange model”, entirely based on the concept of issue-linkage (Arregui, Stokman and Thomson, 2006). Yet, the authors interpret the phenomenon basically as a tactical device of vote-trading overly generalised among states in the Council, without resulting in the configuration of new “package-deal policy”. The same tactical meaning can be found in the literature on negotiation analysis, where issue-linkage is interpreted as a device for “overcoming distributional obstacles” (Tollison and Willett, 1979, p.448) or as “the attempt by one or another party to vary the values of [potential] issues” (Sebenius, 1983, p.286).

\textsuperscript{67} Realist intergovernmental theories of integration consider the “national interest” as an entity historically defined (Hofmann, 1995, p.100; Milward, 1992; Grieço, 1996). They focus solely on the activities of heads of state to deduce states’ strategies in EU negotiations aimed at preserving states’ autonomy. Thus, except for the abstract notion of autonomy, the underlying dimensions in government preferences are left unexplored.

\textsuperscript{68} Moravcsik’s conception of preference formation focuses on peak interest groups. Other authors, however, have put more emphasis on institutional actors – namely, national parliaments – to explain the configuration of the position of governments (Martin, 2000; Milner, 1997).
of states for cooperation and differences in overall capabilities at the start of the process of negotiation. These two factors, intensity of preferences and capabilities, determine the strategic structure of interdependence of actors.

The intensity of preferences of member states is portrayed in terms of their relative security levels (otherwise called “reservation points”). The security level of a state is the minimal agreement that it is willing to accept in a joint decision. For a cooperative bargaining to take place, the states’ security levels have to be compatible (Young, 1975, p.132; Dupont, 1994a, p.45). For instance, in a negotiation between two governments about a standard of regulation, one would set its security level for lower standards, and the other for higher standards. There is no need to bargain if both prefer a higher standard. The same structure is to be found in a bargaining involving many states: each state takes a position that is divergent from those of all other states and each position is compatible to all others. Formal analyses have modelled compatibility in the multi-actor structure of the EU by assuming that an issue can be defined in terms of a uni-dimensional continuum (see Thomson, Stokman, Achen and König, 2006). Actors, then, will take a position on this continuum representing the outcome they prefer, and will give less value to the alternatives located farther from their own position. This conceptualisation relates to the assumption that each actor has single-peaked preference functions, so that an actor’s utility diminishes steadily the farther in Euclidian distance a possible outcome is from his or her own preferred outcome or “ideal point” (Black, 1958).

4.3.1.3 Bargaining power

The strategic significance of the security levels (or the intensity of preferences) is that they will make states more or less dependent on the agreement, hence giving them more or less de facto veto power or bargaining power. “Bargaining power” is the leverage of one state over the others, given the utility that they attach to the prospected outcome of a negotiation,
so that the more a state has to lose from the failure of the negotiation, the less firm its security level is, and the less bargaining power it has.

This crucial notion of bargaining power is captured formally by Nash’s representation of the “bargaining problem” (Nash, 1996 [1950]). In Nash’s two-person model, the bargaining power is established by the “threat potential” that an actor A has of leaving an actor B at B’s security level – the minimum payoff that B can assure for himself or herself. Actors with a larger security level will have more bargaining power, because the utility loss that they derived from the failure of a negotiation will be less than the utility loss of actors with smaller security levels, assuming Von Neumann and Morgenstern utilities. To see this, consider that a resource to be divided by two actors has a maximum value of 100$. A “powerful actor” attaches a utility of .5 to a division of the resource into two halves, or 50$ for each actor. By contrast, a “weak actor” derives the same utility of .5 just for one quarter of the outcome, or 25$. This difference in utilities expresses that the weak actor will be more anxious to be sure of getting something than the powerful actor. His or her security level is smaller and he/she will have more to lose from the breakdown of the negotiations.

The pattern of asymmetric interdependence based on bargaining power is important because it provides an strategic metric to evaluate the recognition of the states of the existence of a possible “efficient” or mutually rewarding solution, and therefore, of the limits in the profitability of continuing to invest in bargaining operations. As suggested, the initial situation of asymmetric interdependence will give less bargaining power to those states that have more intense preferences or desire for cooperation (relative to their outside options) and are willing to make disproportionate concessions at the margin to get decisions adopted. Thus,  

69 Von Neumann and Morgenstern utilities are conceived as “lotteries”. Utilities are measured by comparing how an actor will prefer one outcome to another, when these two outcomes have different probabilities of being actualised. Thus, if we set the utility of 10$ at 1.00 and the utility of no money at 0.00, then, for an actor who is indifferent between getting for certain 5$ and an equal chance to getting 10$ or nothing, his/her utility of 5$ is .5. (For a discussion of this conception of “utility”, see Luce and Raiffa (1957, p.12-38).

70 This example is adapted from Barry (1989, p.14).
Moravcsik, who informally applies Nash’s reasoning to Treaty-amendment negotiations, concludes that:

The power of each government is inversely proportional to the relative value it places in the agreement relative to the outcome of its best alternative policy – its “preference intensity” (Moravcsik, 1998, p.62).

EU decision-making theories have pointed out two relevant sources of bargaining power. The first is the relative *domestic constraints* that governments have in a negotiation. The second is the *overall capabilities* of governments, permitting them to exert influence on decisions. I now present how these two sources are conceptualised.

Taking into account the importance of sovereignty costs and the relevance of domestic socio-economic and political groups in revealing these costs, Moravcsik (1998) and other scholars (Bailer and Schneider, 2006; Dupont, 1994a; Hug and König, 2002; Milner, 1997) have argued that the relative intensity of preferences over the agreement is likely to derive from the domestic constraints that a government has in establishing and/or changing its negotiation position. This logic is captured by Putnam’s notion of “two-level game”, whereby a government position at the negotiation table is determined by the size of its *win-set*, i.e. the set of potential agreements that would be ratified by domestic constituencies (Putnam, 1988). Thus, governments with larger win-sets will have less stringent reservation points and will value more intensely reaching a cooperative agreement, while those with smaller win-sets are expected to be more reluctant to change their initial positions. We can see then that larger win-sets are equivalent to smaller security levels.

To give a concrete example from Moravcsick’s theory, in agricultural policy, France holds a greater interest than other member states in cooperation, because of the importance of France’s agricultural producers and consumers. As a consequence, in the negotiations for the
creation of the Common Agricultural Policy (CAP), the strategic behaviour of the French
government signalled an intense preference to secure the common agreement. Conversely,
German farmers, less competitive regionally, imposed tight constraints on their government,
giving it more *bargaining power* to negotiate a high agricultural price support for the CAP
(Moravcsik, 1998, Chapter 3).

In considering the notion of bargaining power, it is important to note that the intensity
of preferences or desire of the agreement is defined by the availability of outside options for
an actor. Domestic constraints refer to this availability of options. Yet, a second conception of
these options is arguably more significant, namely, the *overall capabilities* of states.
Capabilities give governments the possibility to invest time and resources so as to exert
influence over other governments. By means of these investments, a “capable government”
may change the relative intensity of preferences over the agreement of other governments. Its
capabilities may show others that, if it is willing to make investments in bargaining, so as to
get a favourable settlement, it can do so. As a consequence, other governments will need to
evaluate their utility or preferences over the agreement with reference to the prospective
outcome that the “capable” or powerful government may propose. The outside options of
those other governments relative to the agreement have less value than the options of the
powerful government. As a consequence, their dependence on the agreement will also be
greater, and their security level lower.

The possibility of changing the structure of intensity of preferences by investing in
bargaining implies an important distinction with regard to the conception of the “desire of the
agreement” posited by the thesis of domestic constraints. By indicating its domestic
constraints at a given moment of the negotiation, a government may make clear to others that
its desire for a common settlement is reduced because of these constraints. Yet, this reflects a
relatively “immobile” way of representing this desire, in the sense that the government has no
easy means to change these constraints – and it is precisely because of this situation of having the “hands tied” (Schelling, 1960), that its influence is apparent to others. From the sole perspective of the domestic constraints, we may conclude that the governments who can afford to be most recalcitrant have more bargaining power. Thus, a small state with few interests at stake in an issue would hold more bargaining power than other states, and could extract more concessions in exchange for its support of the final agreement (see e.g., Bailer and Schneider, 2006, p.154). However, if we take into account that outside options are also shaped by overall capabilities, a government who, at a given stage of the negotiations, more intensely prefers the agreement can either offer compensation to other actors so as to shape the policy according to its preferences or, more importantly, make or threaten to make specific investments so as to change the strategic structure of interdependence in such a way that other governments will end up being more dependent over the agreement than this government. In most bargaining models of the EU decision-making process, the variable of capabilities is integrated into the utility functions of governments from the outset. This is also the case for some models considering also domestic constraints (e.g. Bailer and Schneider, 2006). In this view, even in an initial situation, capabilities give an indication of the relative intensity of preferences of governments or bargaining power. Most of the bargaining models applied to the EU decision-making process, such as the “base model” (Stokman and Van Oosten, 1994), the “compromise model” (Stokman and Van Oosten, 1994) and the “Nash Bargaining model” (Bailer and Schneider, 2006) take capabilities, as represented by the voting power of member states, as the variable that most affects differences in utilities among states, and hence, the distribution of rewards in an outcome.

Moravcsik’s liberal intergovernmental theory does not incorporate the variable of capabilities in the governments’ utility function. In his account of IGCs he gives the priority given to the structure of domestic preferences as revealing the relative desire of the
agreement. Distributional outcomes reflect, then, the preferences of states with a domestic context that gives them, comparatively, more attractive alternatives to the agreement, e.g. Germany’s in the negotiations of the EMU, or, conversely, involving major concessions of those states which more intensely preferred the agreement, e.g. France’s concessions of high support prices to secure the CAP. Moravcsik is able to give a coherent explanation of IGCs outcomes because he focuses on the interactions of three states, France, Germany and the UK, which hold similar overall capabilities or economic resources. Therefore, the effect of this source of power is naturally reduced.

By contrast, the notion of dynamically investing time and resources in bargaining is nicely portrayed by Bueno de Mesquita’s “challenge model” (Bueno de Mesquita, 1994). In the challenge model, actors take the “expected outcome” as the reference for their gains/losses in the legislative negotiations in the Council of Ministers. The expected outcome is assumed to be the position of the weighted median voter, i.e., median of the positions of actors weighted by their capabilities and the level of salience they attach to the issue (Bueno de Mesquita, 1994 pp.77-82). Thus, if “nobody does anything” the initial distribution of positions will lead to this cooperative outcome. It follows that a state that intensely prefers the agreement will have incentives to invest in bargaining. It will challenge other states to shift their positions so as to change the location of the median voter towards the alternative closer to its own preference. In this situation, the bargaining power of reluctant and “weak” states would rather reflect the costs that actors with (initially) more intense preferences and overall capabilities will incur in order to adopt a common policy.

71Despite the coherence of his framework, it seems to me that Moravcsik does not adequately grasp the incidence that capabilities may have in shaping the relative intensity of preferences of actors, just as any other relevant variable defining their utility functions may. For Moravcsik, the notion of capabilities is mostly defined in terms of the Realist approach of international politics, which consider capabilities to be the determinant factor defining the structural power of states. Thus Moravcsik interprets that either the outcome is explained by domestic policy preferences or by capabilities. He rejects the factor of capabilities in favour of a preference-determined conception of interdependence. In his understanding of the Nash solution, he does not seem to conceive that the utility of an actor in a negotiation can compound policy preferences and capabilities (see Moravcsik, 1998, p.498).
The case study to which Bueno de Mesquita applies his model is the negotiations in the Council, voting by unanimity, for the introduction of delays for regulatory standards reducing automobile emission of polluting gases. At the outset of the negotiation, the position of the median voter supported a 7-year delay. Yet, France, Italy and, especially, the UK demanded a delay of 10 years. These countries were large automobile producers facing severe problems in competing in the international market. Therefore, the limitation of emissions would have generated extra costs of production and endangered their competitiveness. These countries had large capabilities, measured by their weighted votes in the Council. They could, then, challenge other member governments to shift their positions in the issue. The challenge model predicts that the position of the median voter increases from around a delay of 7-year to 8.35 or 9.05 years (ibid, 98). Thus, according to the model, powerful states, which initially held the disadvantage of having a more intense preference over the agreement than other states, as expressed in their being farther away from the median voter, could influence the cooperative outcome towards their favoured alternative. The actual outcome was a delay of 8.83372.

72 Arregui, Stokman and Thomson (2006) have applied the “challenge model” to the database of EUD, comprising 66 Commission proposals discussed in the Council in the period from January 1999 to December 2000. The challenge model is compared to other bargaining models, and it does not fare well (ibid, p.145). However, this is not because of the focus on capabilities, but because of how the strategic process is conceived. The other models considered, namely the “compromise model” and the “position exchange model”, also include capabilities as the most relevant independent variable. Their solutions tend to reflect balanced compromises near to the median voter. Such predictions seem to reflect the fact that, in the EU, the distribution of capabilities is quite widespread among states and that the issues discussed in the Council show low polarisation. It is this latter aspect that may explain why the challenge model does not do better when we consider its statistical performance. The rationale underlying the strategic conception of the challenge model is that powerful actors resort to threats when they need to attract actors who are “distant” in the policy space. This process is more likely to occur when issues are polarised. As a consequence, in situations of low polarisation, the challenge model is expected to perform less well than the other models, whose strategic rationale is the accommodation of the actor positions (see ibid, p.135).
4.3.2 Strategic process: exchange of concessions and tactical manipulation

In the strategic bargaining process, actors transform an initial situation of conflict into a cooperative outcome. The concrete operations of this process are first unfolded in a sequence of exchange of concessions by which member states attempt to influence each other to shift their positions towards the outcomes closer to the policy alternatives that they prefer. Secondly, actors will use tactical devices to nail down concrete compromises.

4.3.2.1 Exchange of concessions

According to the logic of distribution, the basic strategic problem for an actor is how to make confident expectations about the degree to which other actors will accept their proposals over the outcome. Each actor will struggle to ask no more than a demand which will otherwise be refused and which would lead to non-agreement, but no less than what the other actors will grant her/him. As Schelling puts it:

> if one is about to make a concession, he needs to control his adversary’s expectations; he needs a recognizable limit to his own retreat. If one is to make a finite concession that is not to be interpreted as capitulation, he needs an obvious place to stop. (Schelling, 1960, p.71).

In a bargaining interaction, no actor is expected to make a concession that is contrary to their interests, and no actor is assumed to forgo the opportunity to demand a concession that it perceives as attainable and is in its interest.

In bargaining processes where actors have information available about the payoff or benefits that they can get (i.e. complete information in game-theoretical terminology), the initial structure of asymmetric independence determines the actor’s expectations for an exchange of concessions. I will only refer here to bargaining under complete information.
Bargaining models of incomplete information are rarely used to analyse the EU decision-making process. The assumption of complete information is a strict one. Yet, it can be defended on the grounds that the important stages of the cooperative process to be analysed are the last stages. At these stages, governments will have a good idea of their respective intentional choices (see Tsebelis, 2002, p.251).  

Cooperative bargaining models of complete information derive an axiomatic solution from assumed conditions characterising the initial strategic structure. The most significant axiomatic solution is the *Nash cooperative solution* (Nash, 1996 [1950]). The Nash solution to the bargaining problem is stated as a unique compromise that two actors involved in a division of an infinitely divisible resource would reach. The solution is the maximisation of the product of the utilities of the two actors. Expressed formally, let the game be defined as \((F, v)\), where \(F\) is the set of feasible options and \(v\) is the disagreement point. The Nash solution of the game is implied by the satisfaction of four formal conditions or axioms: the rescaling condition, Pareto optimality, symmetry and independence of irrelevant alternatives. Let \(\Phi\) be the alternative that satisfies those four conditions, and therefore maximises the product the actors’ utilities. Then, the Nash solution is expressed thus:

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73 Bueno de Mesquita also suggests that models of incomplete information, formulated according to the usual conventions of games of incomplete information or Bayesian games, present difficulties of tractability if they are to be applied to a great number of actors (Bueno de Mesquita, 1994, p.104). His “challenge model” is a model of incomplete information that uses a method to represent “learning” different from Bayesian updating.

74 The *Rescaling condition* states that the solution is invariant with respect to the units in which utilities are measured. Thus, if we multiply the utility of an actor by, say, 10, the solution will come to the same partition of the resource. The only variation is that the product of utilities would be ten times larger. The *Pareto-optimality condition* is well known: the solution is to give the maximum cooperative surplus possible to both actors. The *Symmetry condition* states that if the positions of the players are symmetrical, the solution should treat them symmetrically. The *Independence of Irrelevant Alternatives condition* states that, when an alternative is chosen as the solution, then, if the area of negotiation is contracted but this alternative is still available, it will be chosen again (see Luce and Raiffa, 1957, pp.124-28; Myerson, 2001, pp.275-79; Nash, [1996] 1950, p.159; for a discussion of the plausibility of the assumptions see Luce and Raiffa, 1957, pp.18-27).
\[ \Phi(F,v) = \arg \max_{x \in F} (x_1 - v_1)(x_2 - v_2) \] where \( x_1 \) and \( x_2 \) are the utility functions of actors 1 and 2 and \( v_1 \) and \( v_2 \) are their utilities at the non-agreement point (Myerson, 1991 p.279).

Thus, if two actors are in the same position in the initial situation (i.e. have the same utility functions) the Nash solution simply “splits the difference”, giving each one half of the outcome. By contrast, with an asymmetrical structure of power, the Nash solution will allocate relatively fewer benefits to the actor who stands to lose the most from the failure to agree. Thus, in the 100$ example above, presenting an asymmetrical distribution of bargaining power, if the powerful and the weak actor bargain over the division of money, the Nash solution gives about 70$ to the powerful actor and about 30$ to the weak actor\(^75\). As Luce and Raiffa argue, a basic thrust of the Nash solution is that it is devoid of interpersonal comparison of utilities. As a result of this, it represents “a ‘fair’ arbitrated value of the bargain when the strategic aspects are taken into account” (Luce and Raiffa, 1957, p.130).

The Nash solution can be extended to \( n \)-actors, and it may become a powerful solution concept for analysing dynamics in the EU decision-making process (Bailer and Schneider, 2006, p.176)\(^76\). Scholars have devised alternative solution concepts for analysing bargaining in the EU, but it can be said that the underlying logic of these solutions does not differ greatly

\(^75\) The maximisation of the product of their utilities is of \( .7 \times .7 = .49 \), and, as noted, the division is located around 70/30. Then, if, for instance, the weak actor were to propose a solution at 70/40, the product of utilities would be of \( .6 \times .78 = .468 \). This product falls short of maximisation. Since the powerful actor would derive less utility from the proposal, he or she would not accept it. There are baselines other than the security level that may set the bargaining power of actors, and which, accordingly, give different extended solutions. Well-known alternative solutions to the bargaining problem are those of Brathwaite, Kalay and Smorodinsky or Shapley and Raiffa (for a comparative conceptual analysis of various solutions, see Barry (1989). Yet, the Nash solution has proven to be a reliable solution.

\(^76\) For a formal exposition of the Nash solution with more than two actors see Achen (2006a) and Bailer and Schneider (2006). For an application of the solution to the EU decision-making process see Bailer and Schneider (2006). As noted, an informal use of the solution is found in Moravcsik’s study of Treaty-amendment negotiations. The assumptions posited by Moravcsik for the empirical analysis of the bargaining in these negotiations are consistent with the model presented by the Nash solution (see especially, Moravcsik (1998, pp.62 and 498)).
from the one posited in the Nash solution. In this sense, for instance, Achen convincingly 
argues that the compromise model (Stokman and Van Oosten, 1994) is an approximation to 
the Nash model (Achen, 2006a, p.103). The compromise model represents the solution 
outcome as the mean of the average of states’ positions, weighted by their capabilities and the 
salience they attach to an issue. Formally:

\[ O = \frac{\sum_s s \cdot V \cdot X_i}{\sum_s s \cdot V_i} \]

where \( s \) represents salience, \( v \) is power and \( x \) is the ideal point of the 
actor \( i \) (Stokman and Van Oosten, 1994, p.115).

Arguably, the advantage of the compromise model over the n-persons Nash solution is that, 
for the EU, it has a more intuitive appeal and tractability than the Nash model.

As noted, cooperative models of bargaining derive a strategic interaction from a set of 
conditions that characterise the initial situation of interdependence. Alternatively, non-
cooperative models represent this interaction as a “strategic program”, by specifying the 
moves that actors can make in the negotiation. In fact, what most cooperative game solutions 
do is to summarise what many different non-cooperative models would produce (Achen, 
2006a, p.97). For the EU decision-making process, the vast majority of bargaining models are 
cooperative models that apply an axiomatic solution. To represent the process of bargaining in 
the Council of Ministers as a strategic programme would require a non-cooperative game in 
extensive form. Yet, as Achen point out, “[t]hat process, with its many formal and informal 
channels of power and influence, cannot be encompassed in a manageable extensive form in 
any case. Instead, bargaining models from co-operative theory become the only sensible 
procedure for studying complex, informal bargaining processes” (ibid, p.97; see, however, the 
model by Bueno de Mesquita, 1994).
Yet, in order to specify the strategic operations of the bargaining process of actors, it is necessary to outline how the sequence of concessions unfolds so as to lead to the final solution. To represent these strategic operations, it is useful to refer to the (non-cooperative) sequential model designed by Rubinstein (1982). Rubinstein formulates the bargaining process with complete information as a game between two actors who alternate making offers that the other party may accept or reject. Each new proposal that actors make involves a concession from their initial demand, hence signifying a partial compromise. Concessions will presumably increase at each round. The negotiation can continue for a period of time. It ends with a final acceptance on a given offer by one of the actors. If actors cannot agree, the negotiation finishes in deadlock.

A significant implication of the sequential model is the notion that, in each response that they give, actors may reveal how strongly they value the agreement and how much investment in bargaining they are willing to make. As already mentioned, the initial strategic structure can give us a foundation to deduce the determinate strategies of actors. Yet, this requires formulating assumptions about how actors form their expectations, so as to specify a concession-mechanism. For instance, Nash-Harsanyi’s approach to the bargaining problem (Nash, 1996 [1953]; Harsanyi, 1975b) assumes that the actor who is willing to accept the smaller risk of the breakdown of the negotiations will make a greater concession at any given moment of the process. We can see that this concession-mechanism is a direct derivation of the definition of bargaining power of actors in the initial situation. Harsanyi defends this concession-mechanism by arguing that the individual makes rational expectations about the other’s strategy by placing himself/herself in the position of the other actor. This is the postulate of “symmetrical rationality”:

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77A relevant alternative concession-mechanism is the lapse of time or “patience” of actors, whereby an actor would increase his/her concessions if the other actor responds more slowly to his/her offer than expected (Cross, 1996).
In a bargaining situation a rational player cannot expect a concession from a rational opponent if he himself would refuse such concession were their objective positions and their utility functions exactly interchanged (Harsanyi, 1975a, p.78).

From the application of the postulate of “symmetrical rationality”, it follows that, when actors follow identical rules of behaviour, the piecemeal process of exchange of concessions will lead to the unique convergent outcome of the Nash solution, which maximises the product of the actors’ utilities. Rubinstein’s original sequential model is consistent with this postulate. It approximates the Nash solution, provided that actors are equally patient and that the interval between successive offers is negligible.

Figure 7 shows the application of the Rubinstein model in the negotiations for the EC Common Fisheries policy that fixed uniform quotas for the catch of EC fish stocks (Conceição-Heldt, 2004).

<table>
<thead>
<tr>
<th>Proposal of EC</th>
<th>UK rejects proposal and sends new demand</th>
<th>New proposal of EC adjusted to new demand</th>
<th>UK accepts Compromise</th>
</tr>
</thead>
<tbody>
<tr>
<td>(31%)</td>
<td>(45%)</td>
<td>(36%)</td>
<td></td>
</tr>
</tbody>
</table>

**Figure 7 Sequential process of exchange of concessions between a majority of member states (EC) and the UK in the negotiations for a Common Fisheries policy (adapted from Conceição-Heldt, 2004, p.74)**

The negotiations lasted seven years, from December 1976 to January 1983. All states recognised the necessity for conservation and management of fisheries resources but they disagreed about how to fix national quotas and how to settle access to fishing grounds. An
important stage of the negotiation process was the exchange of concessions between the majority of member states and the UK, who was a veto player (see Conceição-Heldt, 2004, pp.73-75). The majority of states (EC) favoured the unrestricted application of the principle of equal access to all fisheries stocks. The UK demanded restricted access, in order to preserve certain areas for their exclusive use. In the bargaining, the UK initially demanded 60 per cent of the total allowable catches. The EC first offered 31 per cent, which was a quota more favourable than that offered to any other state. The UK rejected this proposed settlement and counter offered a demand of 45 per cent. The EU finally proposed an offer of 36 per cent, which was accepted by the UK. According to Conceição-Heldt, the British negotiator realised that the EC was not ready to comply with his demands for 60 per cent of the total fish quotas, and tried to push his preferences to the extreme of a feasible settlement. In other words, the UK was not willing to risk a breakdown of the negotiations by staying firm in its first demand. On the other hand, the institutional veto power of the UK allowed it to extract a more favourable settlement than that proposed first by the EC. The EC was forced to weaken the principle of equal access in order to induce the UK to lift its veto. The relative bargaining power of actors was thus unveiled by this exchange of concessions and, ultimately, to a compromise solution.

4.3.2.2 Tactical devices

The second relevant set of bargaining operations consists of the use of tactical devices. The tactical approach is founded on Schelling’s critique of the postulate of “symmetric rationality” (Schelling, 1960, p.278). Schelling argues that effective bargaining power is to be revealed in the specific moves that actors make during the negotiation, and that such moves

78 Note that because the process is conceived between just the EU and a Veto player, Conceição-Heldt is able to apply tractably the non-cooperative model to the EU decision-making process as a two-persons bargaining model.
may reveal asymmetries not only with regard to the legal form of the game but also in the move structure. Given such a move structure, actors need to find a *tacit* clue or “focal point” from the moves of other actors that indicates to them when expectations will converge. An empirical implication of the tactical approach is that actors may stop the bargaining when they *perceive* a contextual focal point, without maximising all the potential gains of cooperation predicted by bargaining solution concepts, such as the Nash solution.

In my view, the tactical approach should play a specific role in explaining *concrete* concession acts which, for the EU, we can reliably associate with characteristics of the member states. For instance, the reluctance of the UK to compromise has been a constant in the history of the EU, and this justifies the search for explanations into the way in which the UK is likely to concede in a concrete bargaining, by looking at the tactic of the “threat of exclusion” by other member states (see Moravcsik, 1998). The fact that in EU negotiations all actors are potential veto players supports the bargaining theory’s key assumption that a cooperative solution encompasses a “grand coalition” of all the players. Yet, by the same token, the prevalence of veto players makes it difficult to *generalise* a pattern of bargaining power that explains a determinate agreement. In this event, tactical devices that are used for individual compensations play an important role in explaining the terms of consensus in negotiations.

Schelling proposes that actors may tactically manipulate the initial structure of the payoffs of the game in order to send signals about their expectations over the outcome (Schelling, 1960). The most important tactic is the *commitment*: a firm statement by an actor that he/she will not compromise beyond a certain level. A firm commitment may be stated by changing the game’s payoff structure. For instance, the actor may voluntarily reduce his or her own benefits included in the various initial alternatives, except for those of the specific

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79The “mathematical symmetry” of the Nash solution is just one possible focal point among others (Schelling, 1960, p.283).
alternative to which the actor commits (see ibid, pp.150-155, for a formal analysis of this tactic). The second relevant tactic is the threat: to apply a punishment or withdraw a reward or side-payment if the other actor does not agree to one’s favoured solution. The threat is distinguished from the commitment by its conditional character. As Schelling puts it:

[w]hile the commitment fixes a course of action, the threat fixes a course of reaction

… A threat can therefore be effective only if the game is one in which the first move is up to the other player or one can force the other player to move first” (ibid, p.124).

A final tactical device is the promise, the logical inverse of the threat. Promises are directed at increasing the rewards that other actors associate with the agreement, whereas the threats would increase the costs of non-agreement (Hopmann, 1978, p.162). It should be noted that tactics, while introducing manipulation of perceptions, also rely heavily on a conception of power. However, they appeal to external power (i.e. capabilities), rather than to structural or positional power. Thus, for instance, an effective threat requires actors to arrange incentives so as to make it credible, namely attaching to it ancillary actions that are of no consequence in themselves to the threatened party but which demonstrate a real capacity to carry out the threat (Schelling, 1960, pp.40-41).

Tactical devices help to explain how agreements are often reached through very specific side-payments and safeguard clauses accommodating the approval of reluctant actors. Such meticulous compromises reveal how the shape of cooperative solutions is linked to the reduction of sovereignty costs, and hence how solutions depend on taking into account domestic factors. An example of these dynamics is shown in the mentioned negotiation for the adoption of an EU Common Fisheries policy. The UK pushed for a concession in the form of a dominant preference for British fishermen in the fishing areas of Shetland and Orkney boxes (Conceição-Heldt, 2004, p.73). This concession, appealing to the specific situation of the UK,
clearly reveals the existence of a *sovereignty claim*, not just a policy-preference claim. The reference to the British fishermen, who traditionally had fished in these waters, involves a tacit threat made by the UK: the potential pressure of domestic interest groups entailed a domestic constraint credible enough to elicit concessions on the part of the rest of the member states in the Council.

**4.4 Nature of the outcome: stability of compromises and fractionalisation**

From the unfolding of the process of bargaining, we can draw the implication that the terms of consensus on policy coordination are likely to reflect generalised compromises that are stable and have a significant degree of fractionalisation. Bueno de Mesquita defines a *stable outcome* as:

> an outcome from which there is not a meaningful possibility of change given the estimated expectations of the actors (Bueno de Mesquita, 1994, p.92)\(^\text{80}\).

Stability is derived from the fact that all member governments obtain a degree of satisfaction regarding the representation of their interests within a recognised structure of power. This structure of power has been unveiled during the negotiations and becomes finally apparent when governments reach an “equilibrium” position from their exchange of concessions and tactics, so that no government would have incentives to claim more than they have obtained. This position then becomes the cooperative solution of the process. A bargaining solution or compromise is then close to Coleman’s definition of consensus: consensus will be reached when actors perceive that, in spite of particular preferences, an outcome will be backed by sufficient power to defeat other possible outcomes (Coleman, 1990, p.858). In a consensual

\(^{80}\) This is the meaning of a collaborative *equilibrium* that is efficient (see specially, Banks and Calvert, 1992).
solution that is to integrate the interests of all the governments, the conflation of power and stability seems clear: if agreements were against the interests of governments who held power, it would be likely that they deviate from it or force future revisions, hence questioning the stability of the compromise. In this view, adopting common policies first requires the preferential attention to the “intense preferences” of the most resourceful governments. These preferences are likely to guide the way in which proportions of the resource are allocated among actors.

In policy-making terms, this “guidance” translates into a cooperative outcome which, in its general conception, reflects the direction of policy coordination that the most powerful states advocate. An illustration is the outcome that we have seen in the legislative process analysed by Bueno de Mesquita. In this case, governments reached an agreement consisting of a directive that set limitations for the emission of exhaust gases to be imposed on medium-size automobiles. At the time of the decision, the EC was composed of ten states and environmental measures were to be decided by unanimity. For reasons of ensuring the integrity of the internal market, all states favoured a minimal agreement setting a standard limit for gas emissions. The direction of coordination set by the directive approximated the preferences of three of the most powerful states in the Council, namely France, Italy and the UK. As we have seen, this direction consisted of an extended delay for the introduction of the directive and was opposed to the initial “weighted median voter position”, advocating more swift action. Yet, this policy direction was a minimal requirement. For all matters concerning the choice of technologies by which the results were to be achieved, the directive left discretion to the industry within the member states (Bueno de Mesquita, 1994; Van den Bos, 1994, p.35). This implies that the interests of all actors were integrated to some degree.

The stability of compromises is facilitated by a second related characteristic of the nature of bargaining coordination outcomes: their “fractionalisation”. This characteristic is
already manifest in the fact that generalised compromises are “minimal”, leaving ample room for implementation within each member state. Yet, fractionalisation is more concretely revealed in the specific compensations that permit sealing a deal and which are forced because of the institutional right of any member government to veto a decision. Thus, besides the recognition of power, common policies will require individual compensations. Centralising solutions are not likely to offer incentives to accept agreements when sovereignty claims are relevant, and, therefore, would not be effective. Instead, the solutions issued from bargaining mechanisms point to an explicit attention to the differential capacities and interests of member states, and therefore, to decentralised policy coordination. In this respect, the tactical approach suggests an important corollary for capturing the terms consensus here: if governments can arrange the issue under negotiation so as to include several dimensions, specific reimbursements can be devised for each government, so that all governments may benefit from compromises that give each of them “a piece of the pie” adapted to their national interest. These reimbursements or compensations may have a variety of forms: side-payments, escape clauses, optionality for the timing of compliance and/or reciprocities nesting other policy areas. The common trait of these options is that they constitute soft legal mechanisms devised to adapt the common policy to different national contexts.

Both the generalised compromises, derived from a power structure, and the fractionalisation, derived from compensations, call for an interpretation of the impact of bargaining on integration in terms of differentiation. Given the coordination problem of distribution, which points to the sensitivity of member states, bargaining allows for soft legal solutions that temper sovereignty costs, so as to permit the adoption and implementation of common decisions. As suggested, the main advantage of these solutions is that they provide stability in maintaining agreements, because no actor will have incentives to renege on them.
When such stability of agreements is present in a cooperative solution, it is likely that we find the empirical result that Moravcsik infers from intergovernmental agreements:

No participants complained that the outcomes were suboptimal and no participants or subsequent commentators identified significant gains ‘left on the table’ that a different process might have realised (Moravcsik, 1998, 66, p.91).
5 The Coalitional Model of Cooperation

5.1 Introduction

The coalitional model of cooperation focuses upon the voting dynamics of the regular legislative process of the EU. The basic processes that the coalitional model treats are the voting sessions under majoritarian rules of decision that allow a sub-group of states or coalition to enforce a decision for the whole group of member states. In the scheme presented here, member states have incentives to resort to coalition building when they recognise similarities of policy preferences with a significant number of other member states. The similarity of preferences among sub-groups or blocs of states implies that those groups will benefit if they redefine issues in a redistributive way. For the individual state, this entails finding a collective solution reflecting the preference set of the sub-group to which this state identifies the most. This redistributional goal is the key assumption of coalitional theories of decision-making, and the basis for positing the underlying predominant logic on cooperation through coalition building. States build coalitions in order to enhance the value of the policy options they prefer, and seek (or just obtain) support of supranational institutions to get a final majoritarian collective decision. Cooperation in coalition formation is facilitated by the possibility of excluding minoritarian policy alternatives.

In this chapter, I configure a coalitional model consisting of a combination of propositions from cooperative models of decision-making, which focus of the weighting of voting power within the Council, and procedural models, which integrate the strategic agenda-setting of supranational institutions as determining the final outcome. I conceive the strategic interaction leading to a cooperative process as involving two phases. Firstly, an

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81 This chapter presents a revised version of the model laid down in García Pérez de León (2008).
inter-coalitional interaction in which groups of states in the Council of Ministers will attempt to capture pivotal actors in order to form a winning coalition, in the form of a Council common position. This “capture” will entail a modification of the initial sets of preferences of the groups. I will argue that what makes the process of voting in the EU truly cooperative is the necessity to include a large number of actors in a winning coalition. In this sense, while the logic of coalitional conflict resolution based on the possibility of exclusions is maintained, exclusionary dynamics in the EU are selective. In the second phase of the process, supranational institutions will exert influence – by means of their agenda-setting power – to tip the balance towards a final policy decision. The nature of the outcomes of policy coordination derived from coalitional cooperation consists of policies that favour the preferences of the majority of the member states. In a given decision, costs of policy changes are capitalised by those states that remain in a minority.

The model will be applied to the legislative process in the issue-area of environmental policy. Environmental policy is an instance in which coalitional behaviour has been observed in the past as pitting southern countries, favouring low levels of environmental regulation, against northern countries, favouring pro-environmentalist legislation. In the EU-15, because of the presence of powerful states in both groups, winning coalitions were characterised by a compromise between both groups, leading to a moderate-progressive direction to EU environmental policies. With the enlargement of the EU to the East (EU-27) there has been an increase in the heterogeneity of preferences in the Council, potentially hindering the continuity of a progressive EU environmental policy. The model presented here posits that member states have adapted to the enlargement by a re-weighting of voting power in the process of coalition formation in the Council. My basic argument is that governments have a “policy-seeking motivation” (Felsenthal and Machover, 1998, p.171) – corresponding to the key redistributive assumption of coalitional theories. This implies that coalitional behaviour
will be driven by the willingness of states to make the Council pass legislation. Accordingly, in order to configure a majoritarian and decisive coalition, governments re-weigh the constitutional distribution of voting power so as to adjust their formal capacity of reaching decisions to the new political situation generated by the enlargement. The outcome of this process shows that the enlargement has changed the North-South divide slightly. The coalitional dynamics now lead to a reinforcement of a “centric” coalition of member states, which gathers support from a significant number of Eastern member states. While the dynamics of coalition formation have changed under the enlargement, the final cooperative solution has similar centric characteristics than it had under the EU-15. Consequently, moderate-progressive policies continue to be the dominant coordination outcomes in the legislative process.

In the remainder of this chapter, I will proceed by first defining the coordination problem of selection. I will then develop the theoretical model of coalition-formation, applying it to the case of environmental legislation. The chapter will conclude with the specification of the nature of the “majoritarian” outcomes of policy coordination, derived from a process of coalitional cooperation.

5.2 The selection coordination problem

The selection problem arises when actors need to choose a set of principles for policy regulation among those already existing in different national policy-making systems. It is the problem that has characterised most recent developments in economic policies in the EU. The basic condition for the emergence of a selection problem is that states focus on policy preferences, not on national interests involving strict sovereignty claims. States acknowledge that there are important similarities in their policy-making systems. The coordination problem is that each state will prefer to adopt a policy model that will be closer (more similar) to its
own domestic regulatory model. It is important to distinguish the selection problem from the “distribution problem”. The focus on policy preferences and on existing similarities will reduce the selection options to a minimum of policy choices. As I noted in Chapter 3, this implies that we must assume the occurrence of a certain degree of homogeneity in the preferences of sub-groups of states, and that these sub-groups include a significant number of members (see Mueller, 2003, pp.97-104). The selection problem does not arise when there is a large array of sets of policy preferences. In such cases, policy preferences would be practically indistinguishable from national interests. In order to identify a selection problem, it is critical that states project few alternative policy outcomes, usually two, in the final stages of the decision-making process. Even if initially states may hold individual preferences based on national interests, the relevance of policy similarities leads to an alignment of states around few alternative choices. I argue that the problem would arise when states have reached a certain level of regional compactness: national policy systems are similar enough so as to permit a focus on policy models of regulation which abstract away from more fine-grained sovereign considerations. Following the recognition of a similarity of policy preferences with other member states, an individual member state can envisage bringing up a new issue, which, if supported by a majority, will create a “new deal issue”, that is, a policy that changes the status quo in a redistributive direction that reflects its own preferences (Tsebelis, 1990, 114-15).

In our scheme of costs of interdependence, the characteristics of the selection problem translate into a trade-off between sovereignty costs and costs enhancing the capacity of the

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82 Lane has attested the high compactness of the EU as a bloc by looking at the countries’ similarities in basic indicators of economic, social and political development. An analysis of variation between regional blocs reports that the EU has the highest core in its GDP mean: 21,297 US$. The average GDP of all countries in various regional groups is about 8000 US$. To give two comparative references, the North American Free Trade Agreement (NAFTA) scores 20,287 US$, and the Association of South East Asian Nations (ASEAN), 6086 US$: in the Human Development Index (from 0 to 1), the EU scores (.917), NAFTA (.887) and ASEAN (.676); Human Rights scores, from 1 to 10, are: EU (9.61), NAFTA (8.86) and ASEAN (3.80); The trading or openness index, computed with percentages of imports+exports/GDP, displays scores of more that 50 per cent for the EU and the NAFTA, while the ASEAN scores are here higher, with more that 100 per cent (Lane 2006, pp.163-168).
group to act. For the sub-groups that can form and expect to “win” a decision, the capacity of
the group or its decisiveness will be valued over minimising sovereignty costs. It is important
to note this ordering of costs applies to all states involved in a selection problem. When states
decide to resolve a selection problem, they all necessarily prefer this resolution to the initial
situation in which they are. Thus, no state will be worse off than at the beginning of the
conflict-resolution process, even if they may end up in a losing coalition. As each state has the
possibility of forming a majoritarian coalition with like-minded states, each state may
reasonably expect a redistributioinal collective solution that reflects its preferences. In this
sense, all the policy alternatives considered in the problem are Pareto-optimal in an

The selection problem can be represented more precisely by specifying the following
necessary condition: at least a sub-group of actors is to be affected in a similar or identical
way by the actions of others, that is, there must exist at least a separate externality other than
the externality involving all the actors (see Mueller, 2003, pp.31-32). Expressed more
formally, this means that, in a selection problem, the “coalition of all the actors” is not stable.
This coalition is not within a “core” because there are other subsets of this coalition that can
form and provide its members with higher benefits than they can obtain in the “grand
coalition” (see Mueller, 2003, 31-2).83 Suppose that three actors, A, B and C, are involved in a
selection problem. Assuming symmetry, we can then represent the condition of “sub-group
externality” by positing the problem as a game with the following characteristic function84:

\[
\begin{align*}
V(A) &= V(B) = V(C) = 0 \\
V(A,B) &= V(A,C) = V(B,C) = 1 \\
V(A,B,C) &= 1
\end{align*}
\]

83 The “core” is defined as “the set of feasible outcomes (payoffs) that no player (participant) or group of
participants (coalition) can improve upon by acting for themselves. Put differently, once an agreement in the
core has been reached, no individual and no group could gain by regrouping” (Kannai, 1992, p.356).
84 This example is adapted from Buchanan and Tullock, ([2004] 1962, 144).
This characteristic function expresses that only a coalition of at least two members can get the value of the game. Now, if the members of a two-actor coalition choose to share their gains symmetrically, we say that the game has the following set of imputations, all of which are possible solutions or outcomes\(^85\):

\[
(\frac{1}{2}, \frac{1}{2}, 0) \quad (\frac{1}{2}, 0, \frac{1}{2}) \quad (0, \frac{1}{2}, \frac{1}{2})
\]

The grand coalition would have the following imputation: \((1/3, 1/3, 1/3)\). This imputation is dominated by the other imputations of our game. That is, any of the actors can find a better strategic response to improve their situation. Thus, the grand coalition is not within the core because actors can obtain more benefits in a two-member bloc than if they chose to form the grand coalition.

Strategically, the problem of selection implies that actors have to select one set of policy preferences and exclude all other alternatives (in the game above, this would translate into selecting one of the three dominant imputations). Such a selected set of preferences will correspond to the principles and economic guidelines for action of a given member state or a group of them, defining how the common policy is going to be carried out in the rest of the member states. We can represent the strategic problem as a triadic competition: two actors each have a well-defined set of preferences and these sets are nearly incompatible. The two actors will compete to capture a third actor who will tip the common decision towards one

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\(^{85}\) In the n-persons game theory by Von Neumann and Morgenstern (1944), an “imputation” is defined as a payoff vector of a game that satisfies the requirements of individual rationality and collective rationality. The “individual rationality” requirement states that no player will accept any payoff in a game that gives him or her less than he or she can obtain by not playing the game. The “collective rationality” requirement simply states Pareto optimality: the sum of gains to all individuals in the group must be at least as much as they can get by joining the big coalition, and never less. Von Neumann and Morgenstern suggest that a set of imputations qualifies as a “solution” of a cooperative game (see Rapoport, 1970, pp.85-92). The sense of this “solution concept” is that the imputations of the set constitute dominant strategies, that is, they cannot be defeated by any other conceivable imputation in the game.
alternative or another (see Cross, 1967, p.185). Figure 8 presents the selection (triadic) problem in the form of a spatial diagram. X and Y are alternative set of preferences in an issue-area representing a divide in the European policy space, for instance a split between high and low environmental regulatory standards. A, B and C stand for the ideal points of the three actors. In a triadic problem, we assume that two actors out of three are de facto sufficient to enact a decision. Now, A and B have nearly incompatible preferences, for Y and X respectively, while the actor C is a “pivotal” actor, standing somehow indifferent between X and Y. The graphic shows that the status quo is located within the triangle formed by lines uniting the three actors’ ideal points. Any decision on these lines would be an improvement with regard to the status quo. Yet such a decision could only include the preferences attractive for two of the actors, but not for all three actors. Thus, a decision at d would exclude actor B’s preferences. A decision at f would exclude A’s. The final decision involves then a selection of a policy among two.

86 This assumption serves to portray the problem of selection among nearly incompatible set of preferences. I will refer to the selection problem in the context of decisions employing majoritarian voting. Yet, this is not strictly necessary to categorise a coordination problem as one of selection. In my scheme, majoritarian voting is a method that actors choose in order to solve the problem. My contention in this regard is that, when an incompatibility of few sets of preferences is identifiable, actors will face the selection problem. Accordingly, the necessary condition that I posit for defining a selection problem is that of the existence of a separate externality.
There are two factors that lead to cooperative interactions: the similarity of preferences and the decisiveness that decision rules give to actors – i.e., their capacity or power to make the group take a decision. The first problem that actors face is then to identify the similarities of preferences so as to configure two policy-groups with a defined policy set. A given set of policy preferences will have a central value that cannot be accommodated to the other set of preferences. As we have seen, such accommodating dynamics direct the logic of a problem of distribution. By contrast, the selection problem results in an exclusion of one of the set of preferences or alternatives. Once groups of like-minded actors are formed, the second problem that actors will face is that of capturing the decisive actor or actors outside their own group, which can make their alternative being selected, at a minimal possible cost or with minimal modifications to the policy. The final common policy, then, should reflect a set of preferences which is close to the policy systems of a majority of member states.

We expect to find a selection problem mainly when there are observable policy differences among member states that permit categorisations of conflicts among a few (usually two) incompatible alternatives. Although positioning of countries over issues are not clear-cut, these conflicts cover a large range of policies or aspects of policies in the current
European policy space. For instance, social welfare issues divide countries favouring high spending (Denmark, Netherlands and Sweden) against those that prefer low spending (Greece, Spain and Italy) (Dobbins, 2008, pp.52-56). Another important policy is the CAP. On the eve of the enlargement, debates pit proponents of the abolition of subsidies (The UK, Sweden, Demark, the Czech Republic) against countries who wish to maintain them (Poland, the Baltic countries, Greece, France) (ibid, p.42). I will refer here to the case of environmental policy, which shows a split between countries preferring new pro-environmentalist regulations and countries rejecting the enactment of new measures.

5.3 The coalitional strategic mechanism

Given the structure of the selection problem, actors have incentives to choose a cooperative method in which solutions derive from the formation of policy-coalitions, and hence allow for the possibility of redefining a policy. Such a method is provided by majoritarian voting procedures, by which like-minded states with a sufficient number of votes can form a winning coalition and enforce a collective decision. Under unanimity, all actors are needed to reach a decision. By contrast, under simple majority or qualified majority voting, a sub-group of states can induce a policy change by building alternative alignments with like-minded states. Forming a winning coalition is a specific form in which actors chose to solve the coordination problem of selection: it permits the choice of one set of policy preferences and the exclusion of another. As some preferences will be excluded in a majoritarian solution, it is clear that coalition building involves a different motivation than the distributional motivation of protecting as much as possible sovereign interests. As Buchanan and Tullock point out:
The adoption of less-than-unanimity rules sharply restricts the profitability of investment in bargaining. In a real sense, the introduction of less-than-unanimity rules creates or produces alternatives for the collective-choice process … [Under a majority rule] the individual in the majority will have little incentive to be overly stubborn in exploiting his bargaining position since he will realize that alternative members can be drawn from the minority. Bargaining within the majority group will, of course, take place. Such bargaining is a necessary preliminary to coalition formation. However, the bargaining range, and hence the opportunities for productive individual investment of resources in strategy, is substantially reduced (Buchanan and Tullock, [2004] 1962, p.103).

Note that coalition building does not exclude bargaining altogether in a process of cooperation. Instead, coalition building reduces the “range of bargaining” that actors have. However, this reduction, in itself, establishes a conceptual differentiation of the economics for the mechanism of cooperation used. The strategic view of member states when they are compelled to join a group in order to make a decision is different from that in which they can act alone. In the first case, actors will look at accommodating their preferences to those of a group that can form a winning coalition. In the second case, actors have incentives to insist on the representation of their individual claims within the whole assembly of actors, and will not seek to accommodate their preferences to any specific group.

Thus, when a majority coalition is formed, its members will have limitations in claiming a better position within it. To see this, consider the problem of selection with three actors above, and suppose that the coalition AB forms a majority, so that the decision has this allocation of benefits: (½, ½, 0). We noted first that a member here, say B, will obtain more benefits than in a generalised compromise, which would give him/her only 1/3 of the unity, instead of 1/2. Now, what happens if the member B is concerned about the enhancement of its
particular sovereign interests and attempts to claim a more favourable distribution within the majority, for instance \((1/4, 3/4, 0)\)? It is easy to see that member A could convince the previously excluded member C to form the coalition \(\overline{AC}\), so that the new allocation will be \((\frac{1}{2}, 0, \frac{1}{2})\), and the member B will be left with nothing.

Thus, the choice of enabling “alternatives” indicates that the motivation of enacting a set of policy preferences will prevail over that of favouring the claim of specific sovereign interests. In fact, if actors were motivated to protect their sovereignty claims, as in an informal bargaining interaction, they would be favoured if alternatives were restricted, i.e. with a unanimity rule. Thus, referring to our three-actor game, if the unanimity rule applies and actors bargain, the solution will be the grand coalition, \(\overline{ABC}\), with the allocation of benefits of \((1/3, 1/3, 1/3)\). An individual actor can now always assure a 1/3 gain, and never be left without representation of its interests.

5.3.1 *Incentives for the choice of the coalitional method: constitutional regimes*

It is important to note that incentives for the choice of coalitional *methods* are projected at a constitutional stage, independently of the issues at stake. The choice of coalitional methods is associated with the willingness to change a *status quo* that is dissatisfactory in terms of the capacity of the group to enhance states’ interests. Thus, incentives for coalition building are all about having strong policy-preferences related to the EU as a group:

If [states] favour no changes or small changes for the SQ, then they will opt for unanimity, whereas if they wish to change the SQ, then they will favour simply majority. If there are considerable differences between the players in terms of some relevant characteristics, then they will have strong preferences for some quantitative voting scheme (Lane, 2006, p.154).
This “quantitative voting scheme” is the one that prevails in the EU, a qualified majoritarian constitution with weighted voting. The enlargement of the EU has opened the debate about whether such a scheme will continue to make useful a “coalitional method”. Analytically, constitutional studies have demonstrated that, with 27 states, the room for policy change will be reduced almost to the level of a unanimity scheme (Lane and Maeland, 2002a). Ultimately, the viability of the current QMV rule for inducing decisive coalition building may depend on whether the preferences of the 27 member states are (or become) homogeneous.

5.3.2 The strategic model of coalitional cooperation

I delineate a model of coalition formation in the Council of Ministers of the EU based on an extension of the Banzhaf Power Index that accommodates empirical information about the preferences of new states. In order to advance a deduction of the outcome of the legislative process, I complement the coalitional analysis by introducing the intervention of the European Parliament (EP) in the final stage of the process. As suggested, the basic argument underlying the model is that coalitional behaviour is driven by the willingness of individual member states to enhance their preferences by entering a winning coalition capable of making the group pass legislation. In order to develop the argument of the model, I will first discuss the basic approaches on coalition theory and their application to the EU legislative process.

5.3.2.1 Theories of Coalitions

The basic issue that the analysis of strategic coalitional interactions addresses is the representation of the process of decision-making in which a rule of decision allows a

87 “Quantitative voting” refers to the system of voting in which there are variations in the weight of the votes of each actor; “qualitative voting” refers to the system in which each actor has one vote (Lane, 2006, p.154).
majoritarian group of states (a winning coalition) to enact a policy for the whole assembly of states. The initial theories of coalition formation rely on cooperative game theory and spatial modelling to analyse the formation of winning coalitions as a function of the members’ size (Von Neumann and Morgenstern, 1944; Riker, 1962). Cooperative games in coalitional form do not consider explicitly how the outcome of the coalition formation process is arrived at. Instead, they assume that actors can make binding commitments among themselves and specify the various rewards (payoffs) that actors can obtain through these commitments. The fundamental prediction of cooperative game theory is that only coalitions including those members whose support is needed in order to obtain the majority of votes required (i.e. Minimum Winning Coalitions (MWC) will form (Von Neumann and Morgenstern, 1944; Riker, 1962)).

Coalitional theory has recently shifted to non-cooperative tools to emphasise the procedural aspects of the coalition formation process by which a decision is made under majoritarian rules of decision (Baron and Ferejohn, 1989; Baron, 1991). Assuming that actors act non-cooperatively, these theories model a “coalitional bargaining” and predict outcomes that are self-enforceable. While most non-cooperative theories reach the conclusion that MWCs will form, they are able to derive additional implications about the composition of the winning coalition as a function of the procedural rules that govern the coalitional bargaining process. In particular, as specified below, the power of proposing a policy proposal (rule of recognition) and the power to select a policy among the range of alternatives that are accepted by the other actors in a voting committee (agenda-setting) are the most relevant procedural powers that determine the final outcome.

88 Spatial theories revise the notion of minimum winning coalitions by introducing the notion of “minimum connected winning coalitions” (Axelrod, 1970). “Connected coalitions” would not exclude a member whose preferences are located between two members of the coalition. With the requirement of “connectness” a minimum winning coalition may have more votes than those required by the voting rule.
In the context of the EU regular legislative process, both cooperative and non-cooperative models have been applied. Cooperative game theories have devised voting games for the EU legislative process and developed various solution concepts to account for the minimum winning coalitions that can form (Berg and Lane, 1997; Boekhoorn, Van Deemen and Hosli, 2006; Turnovec, 1997). Although they apply different solution concepts, all these models treat all Council members, the Commission and the EP as voters in a hypothetical committee. In this manner, they thus assume that the agenda-setting influence of the supranational institutions is amenable to the same power measure that we apply to the vote (see discussion in Chapter 3). On the other hand, the non-cooperative models that have been applied to the EU context (i.e., procedural models) have not, strictly speaking, offered explanations of coalition formation. However, these models do account for how a winning (majoritarian) coalition will enact a policy decision. In order to do so, they have concentrated on agenda-setting (Combrez, 2000, 2003; Tsebelis and Garrett, 2000, 2001; Steunenberg and Selck, 2006). Procedural or agenda-setting models take the process of coalition formation, by which a Council’s majority is formed, as given. They concentrate on how the agenda-setter will strategically move, given the constraints imposed by this majority. These procedural models generate equilibrium outcomes specifying the location of a final vote, hence defining the member states’ preferences that will configure a final winning coalition in the legislative process.

Recently, a number of works have acknowledged the qualitative differences existing between the processes of coalition formation within the member states in the Council and the processes of agenda-setting involving the intervention of supranational institutions (König and Proksch, 2006; Schneider, 2008, p.285; Widgrén and Pajala, 2006). Based on this distinction, “mixed models” have represented the decision-making process in two steps. The first step of the process portrays tacit coalitional agreements among member states in the
Council. These agreements represent positions that a majoritarian coalition of member states will accept. Hence, the representation of the first step helps us to detect the sub-set of potential outcomes of the decision-making process. The second step considers the formal rules by which the Commission and the EP exert its agenda-setting influence and determine the final unique solution of the legislative process.

In my view, this two-step partition of the process provides a valuable insight into the causal mechanisms of the decision-making process. As will be explained below, the specification of the influence of the agenda-setter requires devising a set of feasible alternatives that a majority of member states prefer to the status quo. The agenda-setter will be able to make a different strategic selection of the policy that it prefers depending on the constraints imposed by this choice set. These considerations indicate the suitability of exploring a first phase of tacit coalition formation in the Council by which member states rule out certain alternatives to the significant choice set, thus specifying the constraints that will be imposed to the application of procedural rules, in the second phase of the legislative process.

On the other hand, I have specified that the focus here will be on the coalitional process in which member governments voting in the Council are assumed to have a policy-seeking motivation. This means that the voter presumably compares the expected payoff to him/her of the passage of a bill with that of its failure (Felsenthal and Machover, 1998, p.171). In the EU legislative process, there are not perquisites inherent in being in the winning coalition (Garrett and Tsebelis, 1999, p.295). Instead, governments care about the group enacting a policy programme. However, this policy programme is to be composed of a specific set of policy preferences. The process of coalition formation will explain how member governments will configure this set and which member preferences will be better represented within it.

In order to model the coalition formation process that configures a winning coalition in the Council of Ministers (i.e., the first phase of the legislative process), coalition theories
provide us with two sets of modelling strategies based, again, on cooperative and non-cooperative game theory. Non-cooperative game theory has represented the process in the form of “majority-rule bargaining models” or “coalitional bargaining models” (Baron, 1991; Baron and Ferejohn, 1989; Banks and Duggan, 2000). In contrast with the models of informal bargaining studied in Chapter 5, which represent a mechanism for establishing a distributive compromise among all the actors in the Council, the bargaining conception of coalitional bargaining models focuses on how a winning coalition is configured when actors apply a majority rule of decision. Thus, bargaining will occur under a predominant strategic logic that is coalitional. Even if we maintain that actors care about the distribution of their preferences within the winning coalition, the fact remains that the process of bargaining here consists of the configuration of this coalition. Consequently, this notion of the bargaining is consistent with the predominant logic of coalition formation. As noted, the coalitional logic states that actors seek a redistributional arrangement and that, therefore, will be better off by joining a majoritarian coalition that enforces it rather than by remaining alone. This redistributional perspective clearly applies to coalitional bargaining.

A representative example of a majority-rule bargaining model is Baron’s and Ferejohn’s model of bargaining in legislatures (Baron and Ferejohn, 1989). Originally, this model treats the problem of how actors are to agree to share cabinet portfolios in a government applying a majority rule to decide the allocation. However, the model can be also conceived as a coalitional bargaining game in which actors are to decide how to include their different policy preferences within a policy programme. Because it is an important alternative to the coalitional model proposed here, it is worth examining this model in some detail. The majority-rule bargaining game requires devising a selection rule, which determines the actor who will make the proposal (the formateur or proposer). Thus, Baron and Ferejohn

89 The model is easily extensible to a decision-making process under QMV (Baron and Ferejohn, 1989, p.1193).
90 For a majority-rule bargaining model dealing with the configuration of a policy programme see Baron, 1991.
consider a protocol with a random recognition rule. The rule stipulates that, in each period, each actor is chosen to make a proposal with equal probability. In each period, the proposer makes a proposal about how to allocate the shares of a unity employing a majority rule of decision (or, from a policy-oriented perspective, how to represent the policy preferences of different actors into a single policy programme). The proposal of the proposer is either accepted by a majority, in which case the game ends with the proposal as the outcome; or rejected, in which case, discounting occurs and the bargaining continues to the next period with a new proposer.\(^{91}\) Baron and Ferejohn analyse “stationary equilibria”, by which it is assumed that a proposer always proposes the same distributional proposal every time he or she is recognised, so that the future proposals of this proposer have the same characteristics as his or her first proposal. This entails that the continuation value of the voters, that is, the utility that they derive from rejecting a proposal and letting the bargaining continue, amounts to the expected value of the game. With these assumptions, the model derives a unique equilibrium in which the game ends in the first period with a proposal accepted by a majority: the proposer proposes the value of the game to a majority of actors, that is, \(1/N\); he or she keeps a share equivalent to \(1-1/N\); and the rest of the actors receive nothing.\(^{92}\) Consider the three-game actors, presented before, in which the rules of the game induced actors to form a winning coalition composed of two actors, while a third actor was excluded. According to Baron’ and Ferejohn’s model, the proposer will receive \(2/3\) of the unity, the rest of the coalition \(1/3\), and the excluded actor nothing. We can see a significant implication derived from the model: the proposer would affect the coalitional bargaining in such a way that he or

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\(^{91}\) In game theory, the “discounting factor” \((\delta)\) expresses time preferences that actors have when they negotiate, so that they value the utility that they receive in the current period more than the future utility. Thus, when an actor’s discount factor is high, he or she is more patient. It is assumed that patience is an advantage in bargaining interactions.

\(^{92}\) I only treat here the model under a closer rule, where no amendments of a proposal are allowed and the majority is a minimum winning coalition. Under an open rule, where amendments are allowed, the bargaining process can derive outcomes that are greater than minimum winning, since the proposer needs to spread the allocation of resources so as to deter amendments (see Baron and Ferejohn, 1989, p.1195ff).
she will always guarantee a major representation of his or her preferences in the majoritarian coalition.

Majority-rule bargaining models have not been applied to study the legislative process of the EU (and will not be applied here). A reason for this rests on fact that, as opposed to national legislatures, envisaging a strict bargaining protocol in the Council of Ministers that would specify a rule of recognition poses considerable difficulties. As Bailer and Schneider argue:

In the European Union, and especially within its most important actor, the Council of Ministers, the rules that guide the interaction between the negotiators are so sparse and feeble that every commitment to a particular negotiation mode is incredible (Bailer and Schneider, 2006, p. 160)

However, because of their capacity to represent the strategic sequence of negotiations, majority-rule bargaining models have a clear appeal. They may add significant insight into the mechanism of how a winning coalition is configured. This is especially true if policy considerations are taken into account. Thus, as the spatial application of the model by Baron (1991) suggest, policy distances among actors in the policy space would condition the strategy by which a proposer would select his or her partners in order to form the majoritarian coalition. Yet, the conception of bargaining presented by these models is not without disadvantages. In particular, in addition to the previously mentioned need to assume a bargaining protocol, the disproportionate advantage of the proposer would be controversial in the EU context. It is not clear whether member states, and especially big states, would

93 This advantage of the proposer will decreases with the application of a QMV rule.
94 In Baron’s spatial model, a proposer would prefer closer partners. However, a distant party that has no possibility to being designated as proposer will be chosen as a partner preferably, since this party will not be able to demand significant policy concession that alter the policy preferences of the proposer (Baron, 1991).
voluntarily assign the role of proposer to any other state in the Council. In this sense, the prediction of major policy rewards for the proposer might misrepresent the configuration of preferences of the majoritarian coalition. On the other hand, these considerations should not discard altogether the use of the majority-rule bargaining models for the EU. Studies have indicated that certain states, namely, Germany and France, are seldom excluded from a legislative decision (Hosli, 1996). In this view, an issue to explore in future research is whether certain states in the Council, and in which issues, can be considered to have a tacit power of initiative similar to that of a proposer. In summary, to evaluate whether majority-rule bargaining models can be exploited to investigate the EU legislative process, more descriptive research focusing on the identification of possible “tacit proposers” is needed.

Turning to cooperative models, these models consider the MWC that member states can form in the Council with the application of a majoritarian decision rule. The basic format of a game in coalitional form, such as a voting game, is given by a characteristic function that assigns the entire value of the game to a winning coalition and nothing to a complementary losing coalition (the technology of the “voting game” will be defined below). Voting games offer solutions to the legislative process in a probabilistic form, often indicating that several winning coalitions have an equal probability of being formed. Taking a voting game as the starting point, works applying cooperative models have refined coalitional probabilities by taking into account the distance between actors in the policy space and have developed other coalitional solution concepts based on a relation of dominance among coalitions (see Boekhoorn, Van Deemen and Hosli, 2006; Owen, 1995). In contrast with coalitional bargaining models, cooperative models do not contemplate the existence of a protocol that regulates the process of coalition formation. As a consequence, there is not a specific advantage that a member state will have because of its institutional position. Instead, the difference in the capacity of member states to represent their preferences within a majoritarian
coalition will be basically derived from their relative voting power and their position in the policy space.

The model portrayed here is a mixed model in which cooperative game theory tools are used to portray a coalition-formation process within the Council that leads to a Council’s winning coalition. The coalition formation phase is conceived in several steps. Firstly, a spatial voting game is devised and a Modified Voting Power Index is used to calculate the policy coalitions in the Council that are likely to form, according to the voting power of actors and their proximity of preferences. The modified power index will result in a strategic structure of coalitions, in which there will be a dominant coalition gathering a greater number of votes than the rest. This relation of dominance will give us a rationale for applying selectively a “Base model of bargaining” (to be specified below): the dominant coalition will target bilaterally member states which can give sufficient support to form a unique winning coalition in the Council and will bargain policy concessions with those states so as to include their votes within this coalition. The second phase is modelled according to a scheme of agenda-setting. As noted, “pure” procedural models of the EU process take the government preferences that impose constraints on the agenda-setter (the EP and the Commission) as given. Following the central assumption of “veto power theory” (Tsebelis, 2002), they define these constraints as being the position of the less forthcoming government in a majority. In contrast, in the mixed model presented here, constraints on agenda-setting will be defined as the outcome derived from the process of coalition formation of the first phase of the legislative process. In my view, by analysing the process of coalition formation, and by subsequently identifying the constraints on the choice alternatives of the supranational institutions from this process, we can gain important input to explain how the final procedural phase of decision-making unfolds.
5.3.2.2 Environmental policy: a precarious equilibrium

The issue-area of environmental policy presents the characteristics of a selection problem. It is also an area which is representative of the debate on the impact of Enlargement in the EU decision-making process. The essential collective choice problem in environmental issues is one of regulating the effect of mutual negative externalities provoked by different domestic levels of production and consumption activities (Héritier, 1999, p.51). European-based policies attempt to eliminate high levels of air pollution, waste disposal and health and safety hazards. Yet, the proper standard of regulation is a matter of controversy. As we have seen in the review of Scharpf’s work, the poorest, least industrialised European countries would prefer low standards of environmental regulation in order to preserve low costs of production and remain competitive. In contrast, highly industrialised countries with a pronounced commitment to environmental policy prefer higher standards in order to protect their own industries.

Environmental policy has empirically shown one of the few stable coalitional patterns in the EU-15, consisting of a divide between Northern and Southern member states\(^\text{95}\). Traditionally, EU policies tended to remain at a minimal level of regulation because of the capacity of Southern members to block legislation\(^\text{96}\). With the entry of Norway, Sweden and Finland into the EU in 1994, the coalitional divide turned to a more equilibrated pattern. As Holzinger points out, it was nearly impossible to form a winning coalition in the Council that did not include the (opposed) votes of the UK and Germany (Holzinger, 1997, p.81). The need to include the preferences of pro-environmentalist states in legislative decisions can be

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\(^{95}\) The north-south divide has been identified also in roll-call data analyses, which treat decisions in all policy domains of the EU (Mattila and Lane, 2001). Yet it is in environmental policy where it appears as more recognisable.

\(^{96}\) It should be noted that the major weight of the “South coalition” was mostly caused by the inclusion of the UK among the countries that favour less stringent environmental regulation.
considered to be one of the main causes of the late development of environmental policies in the EU, constituting now a progressive “aquis communautaire” (Jordan, 1999).

With the enlargement to Eastern Europe, scholars have questioned whether such a coalitional equilibrium would be maintained or if it is to be broken. Given the characteristics of the new member states, an increase of heterogeneity in the configuration of preferences of the Council is expected (Dobbins, 2008). Basic indicators, such as the GDP or the domestic systems of interest intermediation, have raised fears that Eastern countries may not align themselves with the old member states in advancing EU legislation (see Sedelmeier, 2002; Skaerseth and Wettestad, 2007). This would mean that prospects of successful coalition-formation would be paralysed, or that successful coalitions, including most of the new members, would bring the direction of policy change to minimal levels, near the status quo (Holzinger, 2002; König and Bräuninger, 2004). Yet, in contrast with this gloomy scenario, studies on actual voting behaviour (Best and Settembrini, 2007; Hagemann and De Clerk-Sachsee, 2007; Mattila, 2008a, 2008b) have reported that the period immediate after the enlargement shows a continuation of past trends of legislative performance, without a significant reduction in the volume of legislation enacted by the EU. Moreover, new member states have not formed a new consistent group and have tended to align themselves with old member states in most policy decisions (Best and Settembrini, 2007). Although it is still too soon to draw conclusive interpretations from voting behaviour in the EU-27, this continuity suggests a notable flexibility in the decision-making process of the EU in the face of enlargement. The model presented attempts here to explain how the coalitional behaviour in the EU has contributed to this flexibility.
5.3.2.3 **Decision-making process under the EU co-decision procedure**

Most of the EU environmental legislation is applied through the co-decision procedure, under Article 175 (ex 130) and Article 95 (ex 100a) TEC. I will, therefore, concentrate on this procedure to model the decision-making process. The co-decision procedure, as revised in the Amsterdam Treaty, is specified in Article 251 (ex 189b) TEC, and it is used to enact Council directives. Passing legislation under co-decision requires a qualified majority vote in the Council of Ministers and an agreement of a majority of the EP. The track of the procedure is the following: the Commission submits a proposal, which is read by the EP and the Council. The Council adopts a *common position* on the proposal. Once this position is adopted, the Commission cannot make further amendments, and the final decision depends on the interaction between the Council and the EP. The EP can reject definitively the Council position or accept it. As a third option, The EP can propose amendments. If the Council does not accept the amendments of the EP, a *Conciliation Committee*, integrating representatives of both institutions, is convened. A proposal passes if it is voted by a qualified majority of the Council and an absolute majority of the EP.

5.3.3 **The model of decision-making**

Following the co-decision procedure, I portray the decision-making process as consisting of two phases:

**First phase.** *Coalition formation* within the Council to reach a common position. Following a proposal of the Commission, member governments consider the possibilities to form preliminarily coalitions, which represent their preferences. These coalitions will then enter a strategic process in which they target potentially decisive member states from the other coalitions in order to enhance their voting power. The coalition-formation phase ends
when a common position is reached, consisting of a range of alternatives that a qualified majority of member states prefer to the status quo: the Council’s qualified majority winset, $W_{C,qmv}$ (Steunenberg and Selck, 2006: 64).

**Second phase. Intervention of the EP.** Under the co-decision procedure, the support of the EP is finally a determinant to tip the balance between rival alternatives in the Council and determine a final outcome. Following the modelling approach of Tsebelis and Garrett (2001), I focus only on the final stage of the procedure, involving a bargaining between the “pivotal member of the Council” and the EP in the Conciliation Committee.\(^{97}\) Yet, the procedural model presented here differs significantly from Tsebelis’ and Garrett’s in the identification of the Council’s pivotal actor. Tsebelis and Garrett regard this actor as the least forthcoming government of the $W_{C,qmv}$, closer to the status quo. Here, the pivotal actor is defined in terms of the preference set that gathers more voting support in the common position of the Council. As a consequence, it is likely to reflect the preferences of powerful states in the $W_{C,qmv}$, instead of the preferences of the most recalcitrant government, unless this government is also the most powerful one. As will be presented below, the rationale for the choice of the pivotal actor as the common position instead of the less forthcoming state is that member states bargain the configuration of the common position of the Council’s winning coalition. The terms of this coalitional bargaining establish that powerful states within the Council’s winning coalition will be more difficult to substitute if they chose to leave the coalition than states with less

\(^{97}\) Tsebelis and Garrett argue that the Commission agenda-setting powers under the co-decision procedure, as reformed in the Amsterdam treaty, are irrelevant. Other authors have modelled the co-decision procedure by considering the agenda-setting power of the Commission on the basis of its right to initiate a bill (Crombez, 2003; Steunenberg and Selck, 2006). As will be specified next, in the scheme proposed here, the influence of the Commission is implicitly contemplated in the proposal it submits at the first stages of the procedure. Yet, with a view to modelling co-decision as an agenda-setting process, it is pertinent to focus on the final stage.
voting power. It is natural to assume that their weight in the winning coalition will prevail over those states that would be easier to substitute in the winning coalition.

**5.3.3.1 The coalition formation in the Council**

In the first phase of the decision-making process member states attempt to agree on a common position by assessing how their preferences can be included into a winning coalition. A first assessment of possible coalitions will be exclusively policy-oriented, envisaged on the basis of policy proposal from the Commission. I do not examine further the preferences of the Commission in configuring this proposal. Under the co-decision procedure, the capacity of the Commission to strategically vary its proposal is limited to the first stages of the procedure. Yet, I consider that the Commission and the bureaucratic bodies of the Council of the COREPER will enter into preliminary exchanges to place a proposal that takes into account the perceived interests of the member states. The COREPER and the Council working groups receive first the proposals by the Commission. Therefore, the interaction between the Commission and the COREPER is critical to configure the preferences of states over a given issue to be voted on (see Christiansen, 2006). These interactions are taken here as implicit. It is important to note that coalition-formation models deal with “implicit voting”. This means that the process represents the calculations of actors about what the result of a voting session would be. Yet, actual voting may not even take place if decisions are reached at the bureaucratic level of the Council. Actually, most Council decisions, the so-called A-points (Agreed points), are taken at the level of the COREPER. The issues of the agenda that are passed to the ministers for voting, B-points (non-agreed points), are of a significantly smaller number. For convention, I call the actors of the Council “member governments” or “member

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98 The Committee of Permanent Representatives (COREPER) is the main bureaucratic body of the Council. It consist of the deputies of the members states. Its main function is to prepare the agenda for the voting sessions.

99 As in 2006, legislative decisions adopted as A-points constituted 82.3 per cent of the total.
however, the same model of implicit voting applies if the bureaucratic representatives of the Council act on behalf of the governments and take decisions themselves. Member states align themselves in different policy positions derived from a proposal of the Commission, forming preliminary “ideological” or policy coalitions. In the states’ weighting of coalitional possibilities, there are two variables that are relevant. The first is the \textit{decisiveness} of individual actors in the Council. Constitutional rules in the EU allocate to each state a different voting power, which will make them more/less influential, and hence, more/less able to make a coalition winning. The second variable is the preliminary \textit{proximity of policy preferences} among states, which would thus be aligned in a few groups. The final coalitional structure will be determined by evaluations of how individual decisiveness will be integrated into the configuration of blocs. As resulting from these evaluations, it will be a \textit{strategic coalitional structure}: member states will consider which blocs are more likely to form winning coalitions, that is, which blocs hold more capacity to be decisive or would need less supplementary votes to be decisive in a voting session. This structure will allow us to make deductions about the subsequent strategic inter-coalitional interaction, which will lead to the final support of a proposal by a qualified majority of member states in the Council.

\textbf{Decisiveness: constitutional voting power}

The variable of \textit{decisiveness} is conceived constitutionally. The basic question here is which winning coalitions may form in the Council, given the formal resources of member governments (the votes) and the institutional constraints (the decision rule). Cooperative game theory explores a probabilistic solution to this question, simplifying the decision-making situation in the form of a \textit{voting game} (Felsenthal and Machover, 1998; Lane and Maeland, 2000; Hosli and Van Deemen 2002). A voting game is defined by a) a set of more than two voting \textit{actors}; b) two possible subsets or \textit{coalitions} that may form from this set: a \textit{winning
coalition, and its complement, a losing coalition, and c) two possible outcomes: winning or losing. The winning coalition is assigned the total value of the game, while losing coalitions get nothing. Formally, the expression of a voting game is:

\[ G=(N,W) \text{ where } N \text{ is the number of actors and } W \text{ stands for the winning coalition}^{100}. \]

A winning coalition large enough to get the value of the game is a Minimum Winning Coalition (MWC). As noted above, this is a coalition such that the defection of any member makes the coalition no longer winning.

There are two levels of decisiveness that actors will consider: a collective level and an individual level. At the collective level, actors look at the winning coalitions that the group needs to pass a decision – the decisiveness of the group, established by the type of constitutional regime. A regime is collectively more decisive, or has a greater “power to act” (Coleman, 1986), when the probability of forming a winning coalition increases \(^{101}\). The constitutional regime of the EU is a weighted majority system. There are two rules that specify a winning coalition in this system:

\[ v(S) = \begin{cases} 1 & \text{if } S \text{ is winning} \\ 0 & \text{otherwise.} \end{cases} \]

\(^{100}\) In its normalised form, the solution of the game is defined by the Shapley value (see Owen 1995, pp.261-66), whereby the value of the game is given by a characteristic function \( v : 2^N \rightarrow \{0, 1\} \).

\(^{101}\) The group decisiveness, \( \sigma \), is defined as the proportion of winning coalitions in the total of possible coalitions:

\[ \delta = \frac{d}{2^n}, \text{ where } d \text{ denotes the number of winning coalitions.} \]

For a voting regime to enact decisions, the winning coalition has to include more than half of the votes. The maximum of decisiveness is given when just one actor with all the votes can form the winning coalition, such as in a dictatorship or a hierarchical model of decision. Minimal actors’ regimes, however, are uninteresting for the analysis of voting. In voting regimes, the maximal boundary of group decisiveness is given by simple majority, where half of the members of the group constitute a winning coalition, \( \sigma = \frac{1}{2} \). The minimal boundary obtains with a unanimous regime, with only one possible winning coalition, the coalition of all actors, \( \sigma = 1/2^n \).
(1) The number of votes, \( w \), allocated to the member states. The weighted system employs quantitative voting, by which the votes of states have different weights.

(2) The decision rule deciding the quota, \( q \), of votes needed to pass a collective decision. The rule of interest here is a qualified majority, that is, a 3/4ths majority.

With the quota and the votes, we can model a constitutional regime as follows:

\[(q; w) = [q; w_1, w_2, \ldots, w_n].\] In order for a decision to pass, the aggregation of weighted votes has to be equal or greater than the quota, \( w \geq q > 0 \). Such aggregation constitutes the winning coalition in the regime. As an abstract illustration of a regime requiring a qualified majority, consider: \((q; w) = [5; 3, 2, 1, 1]\). Five votes out of seven are required to pass a decision. Therefore, the coalitions encompassing the two first members, \( 32 \), and that one formed by the first and the last two members, \( 311 \), will be the two possible MWC in this regime.

The EU Council, under the Nice treaty, comprises 27 states after the enlargement. Their votes are weighted in proportion to their population size, ranging from the 29 votes for Germany to the 3 votes for Malta. The quota to reach a decision is 73.9 per cent of the votes. A winning coalition then has to encompass 255 votes out of the total 345 votes. The EU weighted system has the following form:

\[[255; 29; 29; 29; 27; 27; 14; 13; 12; 12; 12; 12; 10; 10; 10; 7; 7; 7; 7; 7; 4; 4; 4; 4; 4; 3]\]

At the second level, actors evaluate individual decisiveness. The share of votes is not equivalent to the influence over the outcome. It may be the case that no matter how a member

\[102\] This example is borrowed from Felsenthal and Machover (1998, p.50).  
\[103\] Compare a regime with a unanimity rule of decision, requiring all votes to pass a decision. Then, \((q; w) = [3; 1,1,1]\). The only MWC is the grand coalition comprising all states, \( \Pi \).
state votes it can never be *decisive* in the formation of a winning coalition\(^{104}\). In their configuration of objectives, governments are interested in an *a priori* assessment of how individual actors can be decisive in the formation of winning coalitions:

In order to enhance their preferences [decision-makers] would want to enter a winning coalition and preferably be decisive in such a coalition, i.e., exercise voting power. Players may wish to know their voting power before they look on coalitions on one issue, whichever that may be (Lane and Berg, 1999, p.318).

The measure of individual decisiveness of states is given by their *voting power*:

Voting power is the capability of a player (voter) to be decisive in a voting session …

In order to be decisive a player must cast his/her votes in such a manner that it is decisive for deciding the status of a coalition as winning or losing (Lane and Maeland, 2000, pp.35 and 32).

Thus, voting power gives us an expectation of the influence among member states in a voting session. It measures the *a priori* probability that the vote of an actor has in deciding the status of a coalition as winning or losing. It is important to establish the link between voting power and incentives for coalition building, because voting power can either enhance coalition formation or prevent coalitions from being formed. Voting power has then two variants: either an actor has *power to block* decisions by voting “no”, or an actor has *power to change* decisions, by voting “yes”. While the *power to block* decisions allows actors to protect their

\(^{104}\) This was, for instance, the case of Luxemburg in the first six-member ECC. The constitution of the ECC gave 6 votes to France, Germany and Italy; two votes to Belgium and the Netherlands, and one vote to Luxemburg. The quota was at 12 votes: \([12; 4, 4, 4, 2, 2, 1]\). We can see that the MWC were to include the three big states, or two big states and two medium states, \([4, 4, 2, 2]\). Luxemburg was simply no needed to pass a decision despite the fact that it had a right to vote. It had no voting power.
interests, it is not a form of influence by which actors can push through collective decisions that they like. The “pushing” capability is given by the second form of voting power: the actor’s power to change. In order to measure the power to change, I use here the Banzhaf measure of voting power, which is conceived in terms of probable combinations of coalitions. The original formulation of the Banzhaf index measures the “absolute power” of actors. Felsenthal and Machover define absolute power as follows:

>[The absolute power of the member \(a\)] is the a priori probability that, in a division of a bill, the votes will be so disposed that if \(a\)’s vote were to be reversed then the fate of the bill would also be reversed … voter \(a\)’s ability to influence the outcome of a division is to be measured by the a priori probability that \(a\) will be in a position to tip the balance (Felsenthal and Machover, 1998, p.40, emphasis added).

The absolute power of an actor, thus, takes the two forms of swing that an actor can make: he or she can turn a winning coalition into a losing coalition by leaving it, or can turn a losing coalition into winning by joining it. This dual power indicates the decisiveness of an actor, not in relation to other actors, but in relation to the decision of the group. In this sense, an actor maximises his/her voting power when it can prompt the group to act – i.e., when it can “tip the balance”. As Lane points out, “the capacity of a player to act is positively related to both group decisiveness and the absolute power of the player” (Lane, 2006, p.155). We obtain the absolute power score of an actor by dividing the number of coalitions in which the actor is critical by the total number of possible coalitions in which he or she participates. Formally, the expression for the Banzhaf’s absolute power for an actor \(i\) is:
\[ \beta_i = \frac{\eta_i}{2^{\eta-1}} \] where, \( \eta \) is the number of swings\(^{105} \)

For the explanation of coalition-formation, we will use the “normalised Banzhaf Power Index”, which is derivative of the “absolute power” measure: we rescale the measure, so that the sum of the voting power of all actors amounts to 1.00. Thus we obtain an index of the relative power of the actor in the constitutional regime, that is, his or her share of the total power of the regime. Formally:

\[ \beta_i = \frac{\eta_i}{\sum_{x \in N} \eta_x} \] where \( N \) is the whole assembly of voters

Consider the abstract QMV system represented above: [5; 3, 2, 1, 1]. There are 8 possible coalitions. The first member has an absolute power of 5/8; the second member of 3/8 and the last two members of 1/8. Normalising, we have the following distribution of power: 5/10, 3/10, 1/10, 1/10. The basic idea in this measure of power is that the first actor would be able to push the group decision in the direction that he or she prefers with a probability much greater than the last two actors. Thus, an actor would be influential insofar as he/she is decisive in the collective decision. More significantly for the coalitional strategic dynamics, this form of decisiveness will also be crucial to other actors. I posit that, upon the assumption that all actors prefer a policy change to the \textit{status quo}, actors will look for coalitions with the capacity to act with a view to advance their own policy preferences.

\(^{105}\) The “power to block” is formally defined as \( \theta_i = \frac{\eta_i}{d} \) where \( d \) is the number of winning coalitions.

The relation of the individual voting power and the group decisiveness is confirmed by the equality stating that the absolute power of an actor corresponds to the product of his/her doubled blocking power – i.e. the swing for leaving a coalition plus the swing for joining it – and the probability group decisiveness:

\[ \beta_i = 2\sigma \theta_i \] (see Felsenthal and Machover, 1998, p.49; Lane and Maeland, 2000, p.38-39).
A more used alternative measure of power is the Shapley-Shubik Index. For the EU, it gives us similar measures to those of the (normalised) Banzhaf index. Yet, the logic of measurement is different, based on the number of possible permutations in a regime. As Felsenthal and Machover point out (1998, p.171ff), it also implies a different motivation of actors towards coalition-formation. The Shapley-Shubik Index does not establish the same link between group decisiveness and individual decisiveness. Instead, its formulation implies a “rent-seeking” motivation on the part of the actors. This is because it measures power on the basis of possible permutations in a regime. As a consequence, the order in which actors vote matters. Each permutation has only one pivotal actor, who holds a specific bargaining power by being the one who can seal the outcome of the group. As a consequence, the motivation of an actor in joining a coalition has a distributive meaning, thus altering the “policy-seeking” motivation which, in my view, corresponds better to the redistributional goal of a coalitional process.

Table 2 shows the constitutional distribution of voting power in the EU-27. We can see that, for a coalition to be winning, it will have to include a great number of member states. Assuming that actors will prefer to pass a decision over the status quo, such a high threshold makes the regime very inclusive, so that decisions require extended cooperation. However, since it is always possible to exclude some actors from a collective decision, the predominant coalitional logic of decision-making remains: coalitional behaviour will dictate the direction of the policy towards a given set of preferences and not to others.
<table>
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<th>Country</th>
<th>Votes</th>
<th>Bz. Normal</th>
</tr>
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</tr>
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<tr>
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<td>Italy</td>
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<td>Portugal</td>
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<td>Luxemburg</td>
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<tr>
<td>Malta</td>
<td>3</td>
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<tr>
<td><strong>Total</strong></td>
<td><strong>345</strong></td>
<td><strong>1.000</strong></td>
</tr>
</tbody>
</table>

Decision Rule: 255 (73.9 %)

Probability of group decisiveness: 0.020

Winning coalitions: 2718774
Coalitions: 134217728

(Source: Lane and Maeland, 2002b)

Table 2 Constitutional voting power in the EU-27 under the Nice Rule
**Policy coalitions: Extended Voting Power**

The constitutional distribution of power assumes that all coalitions are equally likely to be formed. Constitutional analysis is most relevant when uncertainty about the policies is great. Yet, in concrete political situations, actors may have some information about how proximate their preferences are. The relevant question then is: which coalitions among states are more likely to be formed given the policy preferences of states? In order to integrate policy preferences into the analysis of coalition formation, we modify the axiomatisations of the Banzhaf Power Index by assuming the existence of a “coalitional structure” (Owen, 1977). A coalitional structure identifies groups of states that are expected to vote in the same direction and which, as blocs, aggregate a certain amount of voting power. Coalitional structures, therefore, re-weigh individual voting power into *bloc voting power*.

We take into account this variation by extending the *a priori* power index in the form of a *spatial voting game* (see Owen, 1995). The basic idea is that the positioning of actors in an issue space modifies the voting power that actors hold constitutionally. We consider the *ideal positions* of actors in a \( m \)-dimensional issue-space. An actor has more possibilities to form a winning coalition the closer his or her ideal position is to other (powerful) states. By contrast, an actor will reduce his or her voting power the more distant he or she is from other actors. A spatial voting game is formally expressed thus:

\[
(G, W \{ x_i \}) \text{ where } W \text{ is the winning coalition and } x_i \text{ is the ideal point of player } i.
\]

---

106 In devising these blocs, we should note first patterns of continuity in the history of the EU which are not policy-related. The most important is the structural power of three big member states: Germany, France and the UK. From the empirical record of EU decisions, it can be presumed that big member states are going to be included in the winning coalition almost invariably in any issue area (Wallace, 1985). Particularly, France and Germany have a *de facto* veto. No decision in the EU has ever passed without agreement of these two countries (Hosli, 1996).
One would expect that member states are likely to form policy-coalitions with the other states whose stances in the issue are proximate to their own. We treat blocs of states as voting actors, and the new power index is computed according to the probability of these blocs to form winning coalitions. The evaluations about proximity of preferences are conceived here in a structural way, before any strategic action is undertaken. In other words, we assess coalition building here from estimates about the initial positioning of actors, and not from the way in which actors are expected to shift their positions in order to realise a winning coalition which favours their preferences. In this sense, blocs of states in a spatial voting game can be conceived as “protocoalitions” (Owen and Grofman, 1984, p.137). In the re-weighting of the Banzhaf Power Index, a bloc may contain various decisive players. I just posit that blocs will be more or less powerful in proportion to the power of the actors that form them.

Several studies have introduced similar transformations of the Shapley-Shubik Index and the Banzhaf Index for studying coalitional behaviour in the EU, considering changes derived from the formation of “connected coalitions” in the Council (Bilal and Hosli, 1999; Hosli, 1996; Hosli and Van Deemen, 2002; Pajala and Widgrén, 2004), or focusing on changes in individual voting power (Pajala and Widgrén, 2004; Winkler, 1998). My approach is similar to Pajala’s and Widgrén’s “normal swing variation” of the Banzhaf index, which regards a change in power of groups according to the share of votes that they aggregate (Pajala and Widgrén, 2004). Yet, the analysis of these authors concentrates on individual changes of power, while the focus here is the formation of winning coalitions. As will be specified below, individual voting power is considered here only in estimating the bloc’s preference set. In terms of power, I conjecture that a member state will see their capacity to realise its preferences increased when its “ideological bloc” is powerful.  

107 The focus on individual power may lead to the so-called “paradox of large size” (Brams, 1975, p.178), stating that an actor may lose individual power by joining a bloc. In fact, his or her decrease in power may derive from the fact that in the new group there are other actors that are more powerful than he or she is. But such
The construction of a spatial voting game involves the resolution of the question of how we conceive the issue policy space. This question may be resolved in a purely abstract way, by making plausible speculations of how states configure their preferences (e.g., Pajala and Widgrén, 2004). However, I consider it more telling to refer to empirical information. Because we introduce this empirical information, our analysis of voting power becomes \textit{a posteriori}. As Bilal and Hosli (1999, p.6) point out, there are two different approaches that one may follow. A first approach relies on domestic empirical parameters, such as the GDP (König and Bräuninger, 2004) or the importance of interest groups in the configuration of domestic policies (Bilal and Hosli, 1999), which indicate relevant differences and similarities between member states in the Council. The assumption is that, when a sub-set of member states are subject to comparable domestic pressures, we should expect them to vote also in a same direction and constitute a bloc in the Council. The second approach rests on an observation of member states’ revealed preferences. I focus on this second approach, relying on two kinds of observations: information about positions to be adopted in the area of environmental policy and information about general past voting behaviour.

From a data set configured with interviews with experts, Dobbins (2008) has provided an analysis of the policy positions that old and new members states are expected to adopt in environmental issues. Following the method introduced in EUD (Thomson, Stokman, Achen and König, 2006), Dobbins conceptualises controversies raised by policy proposals on regulation as an issue continuum, from more conservative (0) to more progressive (100), represented in a one-dimensional space (see Figure 9).

distributional effects do not count when the goal is to pass a collective policy and the actor agrees with the substance of this policy (for discussion of the paradox of large size see Felsenthal and Machover, 1998, p.226).
In figure 8, we can see that the positional analysis gives us a heterogeneous picture of the environmental divide. There is, however, a clear demarcation of northern countries, which prefer more regulation, and a location of a majority of new member states as adopting “conservative” policy positions. Yet, the basic heterogeneous picture, which presents an almost-uniform distribution of positions, makes it difficult to deduce the direction of environmental policy.

I consider that data about the positions of their countries provided by experts do not represent the only indication of preferences. A second factor intervening in the configuration of preferences of governments comes from their familiarisation with the working methods of the Council. Various studies have pointed out that the daily work in the Council tends to make states more compromising (see Lewis, 1998). Actors may regard that opposing decisions may be costly in the long run, especially if this opposition regards confrontations with powerful member governments (Bueno de Mesquita, 1994, pp.74-75). Moreover, these cautious considerations of consequences for future decisions may not only concern one single issue area. They may extend to other policy areas. Beyond such utility calculations, however, the basic point to retain is the existence of a bureaucratic “savoir-faire” in the EU political arena that impinges on the national ordering of preferences.

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108 Dobbins’ data include 25 member states. I have just added the probable positions of Bulgaria and Romania to the scheme provided by Dobbins, according to the key environmental indicators provided by the OEDC (2009).
To provide an indicator of the “working environment factor”, I look at data on voting behaviour in the Council in an extended scope of policy areas. Analysis on roll calls in the Council (Mattila, 2008a, 2008b; Hagemann and De Clerk-Sachsee, 2007) have shown that contestation of decisions is rare. In the period from May 2004 to December 2006, member states passed decisions without contestation in 85.8 per cent of the legislation (Mattila, 2008a). Mattila includes in his calculations of opposition all types of legislative acts: regulations, directives and decisions. In the period considered, there were a total of 416 acts (Mattila, 2008a, p.5). It should be noted that the acts that most interest us are those taken by QMV. These amount to 125 in the same period considered by Mattila (see the European Council’s “monthly summary acts”, in http://ue.eu.int). However, for the purpose of gauging the working environment of the Council, it is more appropriate to note all kinds of decisions. Regarding the types of oppositions, Mattila considers negative votes and abstentions. Hagemann and De Clerk-Sachsse include as oppositions “formal statements” of countries, thus providing larger percentages of contestation (38 per cent). Yet, as we can see in the monthly summary acts of the Council, most countries which issue formal statements in particular decisions are also those who oppose the same decisions. Accordingly, the indication of contestation provided by Hagemann and De Clerk-Sachsse presents a certain degree of redundancy.

The general pattern of contestation before and after the enlargement permits us to make some inferences about coalitional behaviour. Firstly, new member states do not contest more decisions than old member states, as their positions closer to the status quo would suggest. Only Poland emerges as a clear contestor. Northern states, particularly Sweden and Denmark, continue to be the countries that more frequently abstain or vote against a majority. Secondly, big member states have changed their contestant tendency, and, in the period after the enlargement, they have opposed decisions less frequently than medium-sized member
states (Hagemann and De Clerk-Sachsee 2007, p.18). This shift is particularly important in the case of Germany (ibid, pp.15 and 17). These trends are synthesised in the following multidimensional scaling analysis by Mattila (Figure 10).

![Figure 10 Two-dimensional spatial roll call model of Council voting (source: Mattila, 2008b)](image)

Mattila interprets the vertical dimension as an old-new division, and the horizontal dimension as a north-south division. The two dimensions combined suggest three groups of states: northern member states, older central and southern European members, and new Eastern members with the UK (Mattila, 2008a, p.14). We can see that, in this general pattern of voting behaviour, we find a more normalised distribution of preferences than we saw in Dobbins’ positional analysis. Member states crowd more clearly the central space of the figure, and only Northern counties seem to form a demarcated bloc. Thus, given these data

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109 The analysis of Mattila does not include the data about Bulgaria and Romania. Yet, it is unlikely that their inclusion would modify substantially the shape of the Eastern group.
on voting behaviour, I adjust the positional scheme, with a view to re-weighting power index measures. I propose that two basic changes can be reasonably introduced:

1) Poland, Sweden and Denmark, the most frequent contesters will stand as “outliers” and will not enter the coalitional interaction. More precisely, this role of contesters will make them a permanent “opposing coalition”, which is not amenable to compromise.

2) Germany will adopt a centric position. This generalised centric position of Germany applies also if we consider environmental decisions in isolation: According to Hagemann’s and De Clerk-Sachsee’s report (2007, p.31), Germany does not have a rate of opposition in environmental policy greater than in other issue areas. This shift of position of Germany in a more centric direction is also confirmed by Liefferink’s and Andersen’s qualitative accounts of the member states’ behaviour since the accession of Nordic countries in 1994: “Less than before, Germany appears to be inclined to take the lead in environmental matters … At this moment, the most ‘activist’ member in the environmental field is probably Denmark. In the coming years it may be joined increasingly by Sweden” (Liefferink and Andersen, 1997, p.30).

The main effect of these modifications is a strengthening of the central positions in the policy space. The Nordic member states are displaced and we can envisage that the core of “progressive” environmental policy stances becomes more moderate.

Given this empirical information on positioning and general voting behaviour, I partition the policy space into four proto-coalitions. The most conservative position in environmental policy is taken by the Southern-eastern coalition, integrating Spain, Portugal,
Hungary, the Czech Republic, Estonia, Slovakia, Latvia, Cyprus, Romania, Bulgaria and Malta. A *Core coalition* will take a moderate-progressive position. This bloc is initially integrated by Germany, Greece, Belgium, Ireland, Luxemburg, France and Italy. It is plausible to expect that, being indifferent (in terms of policy preferences) between a conservative and a moderate position, the UK, Slovenia and Lithuania would join the potentially most powerful group, thus completing the Core coalition. The *Northern Coalition*, Netherlands, Finland and Austria will adopt an extreme pro-regulation position. Finally, the group of *Outliers* (Denmark, Sweden, and Poland) do not constitute a policy bloc, but their position as contestants make them functionally equivalent for the analysis of coalition formation. Thus, by taking into account the working environment in the Council, we establish the positional policy space in the following manner (Figure 11).

![Figure 11 Coalitional structure in environmental policy](image)

With this coalitional structure, we modify the *voting weighed system*, which now has the following form: [255: 40; 109; 162; 30]. Re-weighting the Banzhaf voting power measures, we can see that the Core coalition and the Southern-eastern coalition have each 1/2 of the voting power of the Council, while the Northern coalition and the Outliers have no power and are now dummy players (see Table 3). The member states’ change of power is calculated with the “normal swing variation” of the Banzhaf index, by weighting a member
share of votes in a coalition by the power of the coalition. For instance, in the Core coalition, the normal swing variation for France (29 votes) is computed as $29/162*0.5 = 0.089$. It is important to note that the individual voting power will change with any variation of the coalition structure. Therefore, I will focus on this value in the last stages of coalition formation in the Council.
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<td><strong>1.000</strong></td>
</tr>
</tbody>
</table>

**Table 3 Modified Voting Power: coalitional structure**

**Inter-coalitional strategic interaction: targeting**

The proximity of preferences may not suffice to form a winning coalition. As shown in Table 3, neither the Southern-eastern coalition nor the Core coalition reach the necessary quota of 255 votes. They are both “blocking coalitions”. Moreover, while the Outliers and the Northern coalition do not have any voting power, it is important to retain that, in case of dismembering of the other coalitions, they can potentially contribute to a blocking minority totalling 90 votes. Yet, the configuration of preliminary policy blocs allows us to define a
strategic structure of coalitions, upon which we can deduce how actors make evaluations to form a final winning coalition in the Council. The assumption posited to conceive this strategic structure is that policy blocs will have an internal structure of voting power that will make them more or less dominant in the strategic process: those blocs that need fewer votes to form a winning coalition will be more stable; those needing more supplementary votes will be at more risk of dismemberment and end up as the excluded minority group (for a similar reasoning see Holzinger, 1997). In the present case, the Core coalition, needing only 93 votes, is in a strategically dominant position with respect to the other coalitions, and will lead the strategic process of forming a winning coalition.

Given a strategic coalitional structure, I conceive the unfolding of the inter-coalitional interaction as the strategic operations between the dominant coalition and individual states of the opposing coalitions. The dominant coalition modifies its internal structure so as to attract those states which can make the coalition a winning coalition. Thus, the basic strategic operations of a coalition will be to offer incentives to an alternative state to leave his or her primary group and join the coalition. The inter-coalitional interaction is conceived here as a process of targeting. “Targets” are defined as actors from other groups that may potentially provide sufficient votes to the coalition so as to form a winning coalition. The strategic process is thus a direct deductive derivation of the voting power index scheme, since both the roles of the coalition and the target are defined by their voting power. It is then a strategic interpretation of the Power Index probabilistic solution concept. The core coalition focuses primarily on the objective to pass a proposal and offers selective incentives to those member states of the other coalitions – presumably the bigger states – with more capabilities to make the group take action.

I formulate the strategic process of targeting as a series of bilateral exchanges between the Core coalition and targeted member governments. To model the outcome of the exchange
between the coalition and the target, I employ the *Base model of bargaining* (Stokman and Van Oosten, 1994, p.114). The base model takes the average of the positions of the two actors weighted according to their voting power. As a formula,

\[
o = \frac{\sum x_{ia} v_{ia}}{\sum v_{ia}}\]

where \(x_{ia}\) stands for the ideal point of actor \(i\) in policy \(a\), and \(v_{ia}\) for its power.

The base model is sustained by the assumption that strategic behaviour is based on a weighting of power. Therefore, it allows us to model the strategic process following the same logic of the Power Index. The application of the Base model here, focusing on bilateral exchanges between a coalition and a target, differs from the usual application of axiomatic cooperative bargaining models, which refer to the interaction of all the member states in the Council. Thus, the main logic of the model of cooperation remains coalitional.

The main objective of the Core coalition is to pass a policy, so it will attempt to obtain the necessary votes to complete a qualified majority of 255 votes. Each addition of votes to the Core coalition will signify a modification of the preference set of the coalition. Actually, new added states will modify this preference set in the direction of their own preferences in proportion to the votes to which they contribute to the coalition. The coalition will seek to modify as little as possible its set of preferences. Consequently, it would prefer to bargain with actors whose position is less distant in the policy space and who have less capacity or power to shift the outcome into the direction of its most preferred outcome. Yet, if this intra-coalitional preference is to hold, it must be true that the closest and less influential actor targeted is decisive enough to make the coalition win. To make the group decisive, a coalition needs the support of sufficiently powerful states. As a consequence, *like-minded states will*
only be accepted in a coalition if they have the sufficient voting power so as to allow the coalition to be collectively decisive\textsuperscript{110}. In addition, the coalition will find it less costly to bargain with fewer states. Therefore, I argue that when two states combine the same amount of voting power as a single state, the coalition will strategically prefer to target the single state. From the point of view of the targeted actor, decisiveness will also be motivationally precedent to policy-closeness. This is because, following the logic of the Banzhaf index presented above, a state maximises its power to change a policy if it can make the group pass a decision. Even if its preferences are weakly represented within a winning coalition, the state still will obtain more rewards if the group makes a decision that include this state’s preferences than if it does not\textsuperscript{111}.

Given these strategic preferences, the core coalition has various options. In the first place, in principle, the coalition will just target the most powerful actors of any group until it completes the necessary 255 votes. Accordingly, primary targets would be Spain (27 votes), Romania (14), the Netherlands (13), Portugal (12), Czech Republic (12) and Hungary (12). In the second place, members from the Southern-eastern coalition are less distant in the policy space and will be targeted preferentially. Moreover, empirical arguments may lead us to

\textsuperscript{110} I thus, do not assume that winning coalitions must be “connected coalitions” (Axelrod, 1970; Garrett and Tsebelis 1999; Boekhoorn, Van Deemen and Hosli, 2006, p.88). As already suggested, the requirement of “connectness” is likely to generate oversized winning coalitions. This is not the case if we drop such a requirement and consider that actors will target primarily the states with greater voting power. My position on “connectness” is, at a more general level, supported by Laver and Schofield study on coalition-formation in parliamentary systems (Laver and Schofield, 1990). They find that, of 123 instances of coalitional governments in Europe in the period 1945-1987, 77 were minimum winning coalitions (MWC), while 62 were minimum connected winning coalitions (MCWC). Only 9 of the MCWC governments were not also MWC. As Mueller notes, these classifications confirm that the MCWC hypothesis adds little predictive power (Mueller, 2003, p. 283).

\textsuperscript{111} To see this consider the changes in the distribution of individual voting power that, say, Spain, will experience when joining a coalition. Spain would find its “individual voting power” reduced when joining the Core coalition. Applying the “normal swing variation”, we find that Spain would pass from having a voting power score of .123 in the Southern-Eastern coalition to a score of .105 in the Core coalition (see Table 3 and Table 4). Spain, however, would find strategically advantageous to join the Core coalition because this coalition will be likely to pass a decision for the whole group. As a member of the winning coalition, Spain will find its preferences represented in the final decision. In contrast, remaining in the Southern-Eastern coalition would entail no representation at all.
expect that the Netherlands will not be inclined to abandon its group. Mattila shows that the Netherlands, when opposing a decision, tends to vote with Nordic countries. Between May 2004 and 2006, when the Netherlands decided to oppose a proposal it did so in 67 per cent of the cases with Sweden, in 40 per cent of the cases with Denmark and in 40 per cent with Finland (Mattila, 2008b, p.31). This is indicative of the cohesion of the Northern coalition. Taking this same indicator of tendency to oppose in pairs or trios, the cohesion of members of the Southern-eastern group is practically insignificant. On the other hand, the Core coalition will have to modify its preference set in the process of targeting that leads to the definite common position in the Council. It may anticipate a progressive stand of the EP in environmental issues is the second stage of the decision-making process. As a consequence, it may opt for balancing its preference set towards a more conservative stance in the inter-coalitional bargaining, so as to pre-empt a pro-regulatory shift that may result from the inter-institutional interaction.

I expect that the Core coalition will integrate the following targets: Spain (27 votes), Romania (14), Portugal (12), Czech Republic (12), Hungary (12), Bulgaria (10) and Slovakia (7). Together, they provide 94 votes, one more than the 93 needed to form a winning coalition. Beside the Northern members and the Outliers, this strategic capture leaves out of the final compromise the following states from the Southern-eastern bloc: Latvia, Estonia, Cyprus and Malta. The progressive stance of the Core coalition will be affected significantly towards a more conservative position. Yet, we can see that the targeting process allows for exclusions. In practice, agreements with targets are likely to take the form of domestic-tailored policy concessions. These concessions have been a common device to accommodate the new countries into final decisions, and have mainly consisted of transitional arrangements and funding support through the Structural and Cohesion Funds. For instance, in the case of the Large Combustion Plant directive (Directive 2001/80/EC), whose general implementation
scheme started in 2004, Czech Republic, Estonia, Hungary, Lithuania, Poland and Slovakia received deadline concessions for compliance that varied from the 2017 deadline granted to Poland to the 2007 extension obtained by Czech Republic and Slovakia (see Skjaerseth and Wettestad, 2007, p.269).

As noted, these concessions are modelled here as bilateral exchanges. I use first the measures of member state power obtained with the normal swing variation (see Table 3) to predict the policy position of the Core coalition, computed with the Base model. The Core coalition adopts first a position at the point 40.92 in the policy space. The subsequent targeting process leads to a $W_C^\text{qmr}$ in the Council of 256 votes, with a probability 1.00 to pass a decision (see Table 4). In this winning coalition, all actors are decisive, since leaving the coalition by any of them will turn the coalition into losing. Yet, it should be noted that the regime has not changed, remaining a weighted voting system with a quota of 73.9 per cent. As a consequence, not all the member states would equally affect the coalition if they left. Intuitively, we may think that actors with more votes will be harder to substitute if they leave. Therefore, the effect that member states have by leaving will be proportional to the votes to which they contribute to the coalition. This effect is captured by the normal swing variation: a member’s voting power in a decisive group simply equals its share of votes in the group, and will, accordingly, see its preferences represented in proportion to this share of votes (see Table 4). Using these values of power in the Base model, the prediction of outcome from the bargaining between the Core coalition and the seven targets is a policy position at 30.77\textsuperscript{112}. We re-state this position as 30, representing a meaningful outcome in the policy continuum\textsuperscript{113}.

\textsuperscript{112} The computations to reach this outcome are as follows: the Core coalition’s voting power is of $162/256 \times 1 = .632$. The targets’ power is of $94/255 \times 1 = .368$. Applying the Base model, we have $[40.92 \times .632 + 13.38 \times .368]/1 = 30.77$. It can be seen that this policy position is inclined in the direction of the members with more voting power, i.e., the Core coalition’s members.

\textsuperscript{113} The identification of “meaningful outcomes” depends on the information we have about the positions that member states adopt upon a proposal of the Commission. For instance, in a given policy continuum, we may identify only three outcomes, 10, 60, 100. In such a case, if our bargaining model produces a forecast of 40, we
This is the Common position of the Council, and will also analytically identify “the pivotal member” in the $W_{C^{qv}}$.

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<th>Members</th>
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<th>Members’ votes</th>
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Total 27 345 1.00 0.00

Table 4 Modified Voting Power: Winning Coalition – Qualified Majority

interpret this outcome by adjusting it to the nearest meaningful point, which is 60 (see Achen, 2006a, p.100). In the policy space borrowed here from Dobbins, 30 is a meaningful outcome, preferred by the UK, Slovenia and Lithuania.
5.3.3.2 The intervention of the European Parliament: agenda-setting

The second phase of the legislative process considers the inter-institutional strategic dynamics under the co-decision procedure, in which the EP acts as agenda-setter. The relevant question now is how can the EP influence the collective choice of a policy within the $W_{C}^{agg}$?

The EP has a tradition of being pro-environmentalist (Liefferink and Andersen, 1997, p.22; Holzinger 1997, p.79; Golub, 1996). Such a “progressive” stand of the supranational institutions configures the so-called “supranational scenario” (Tsebelis and Garrett, 2001). To the extent that the EP can exert influence, the outcome would shift in a relatively more progressive direction.

To analyse the inter-institutional strategies, I will draw on procedural models of EU decision-making, which understand the EP influence as derived from its the “agenda-setting power” in the legislative process (see especially Tsebelis and Garrett, 2001 and Steunenberg and Selck, 2006). Basically, a model of agenda-setting consists of a sequence of moves between two institutions in a legislative environment. The agenda-setter has the power to make a proposal that the other institution will either veto or accept. The formal power of the agenda-setter is constrained by the range of policies that can be vetoed by a decision-rule. Under a unanimity rule, agenda-setting power will be minimal, but it will increase under a majority rule. Under the co-decision procedure revised in the Amsterdam Treaty, the EP is a co-legislator. In the final stage of the process, the Conciliation Committee, composed of both Council and Parliament, becomes the agenda-setter to all intents and purposes (Tsebelis and Garrett, 2001, p.23). The EP has a role of agenda-setter in conjunction with the Council. How does the EP’s shared agenda-setting role translate into legislative influence? Let us examine how the co-decision strategic process unfolds (Figure 12).
Figure 12 The co-decision procedure

I represent the co-decision procedure following the model of Tsebelis and Garrett (2001). We differ in the identification of the pivotal member of the Council. Tsebelis and Garrett locate the pivot as the actor within the qualified majority who is closer to the SQ. In my model, the pivotal actor is identified as the outcome of the common position predicted by the Base model. In the Conciliation Committee, the final decision will be determined in a bargaining process between the pivotal actor of the Council and an absolute majority of members of the EP. Consider the preference configuration for environmental policy, now introducing the preference of the EP, in Figure 12. In the supranational scenario, the EP has its ideal point, EPo, located to the right of the SQ, and generally, to the right of all the member states. From the left, the group of states around the position 30 is the decisive group in the Council and determines the set of policies that a qualified majority of states prefers to the SQ, the $W_{C}^{env}$\textsuperscript{114}. Position 30 is the ideal point of the pivotal member in the Council, Ci.

\textsuperscript{114} According to the customary assumption of spatial models, we assume that the preference sets of the member states are equivalent to the points in the interval between the SQ and the points of the member states' point of
Since the Northern states prefer more “progressive” policies than the decisive group, they do not constrain the set in the direction to the ideal point of the EP. The range of feasible policies is then bound to the right by the point that makes the pivotal member of the Council indifferent between its preferred policy and the SQ, at 60. Beyond this point, the pivotal member of the Council will not accept a solution. The simplest way to advance an estimate of the equilibrium outcome of the Conciliation Committee, CCo*, is to represent it as a “split-the-difference” solution, i.e. \( \frac{CC_i + EP_o}{2} \) (see Tsebelis and Garrett, 2001, p.25; Laruelle, 1998).

In the configuration above, this would be the point 65. Yet, since the EP is constrained by the \( W_{C^{env}} \), the legislative outcome will be located at the indifferent point of the pivotal member of the Council, so that CCo* is the position 60\(^{115}\).

Thus, the EP influences the final decision adopted as the environmental EU policy considerably. This policy will be more progressive than the common position adopted in the Council. Yet, it is worth noting that such a position is still far from the EP’s ideal preference. There has been much debate about how to characterise the power of the EP as “co-legislator” in the co-decision procedure. Particularly, some authors argue that the EP stands on an “equal footing” with the Council (Tsebelis and Garrett, 2000, 2001). In my view, it should be emphasised that such equality can only be conceived in the final stages of the legislative process. In the analytical scheme represented here, there is first an inter-coalitional process within the Council that drives a qualified majority in a determined policy direction, in our case, a “centric” or moderate direction of environmental policy. As a result, the influence of the EP is constrained by this set, presented in the form of a Council’s common position. Whether this position is more conservative or, conversely, more progressive, it will always

\(^{115}\) Note that if the point \( \frac{CC_i + EP_o}{2} \) fell within the \( W_{C^{env}} \), then \( \frac{CC_i + EP_o}{2} = \text{CCo}^{*} \).
signify a determinant constraint to the strategic choice of the EP. Analytically, the significance of its agenda setting will decrease with the increase of homogeneity of the preferences of member states in the Council. It will increase the more disperse the preferences within the Council are (see Mattila and Lane, 2001, p.36; Tsebelis, 2002, pp.35 and 53). In the case considered here, there is considerable heterogeneity in the distribution of the member state preferences in the $W_{C \text{qmv}}^*$, even if the process of coalition formation has significantly reduced this heterogeneity in relation to the initial positioning of the states (see Figure 9 supra). Therefore, the influence of the EP is appreciable. Yet, as we have seen, the constraints imposed by $W_{C \text{qmv}}^*$ entail that the EP is still short of obtaining the benefits that would derive from a “split-the-difference” solution (at point 65 in the policy space). Therefore, the EP and the Council are not on equal footing.

In addition, there are empirical reasons to maintain that the proposals of the EP in the Conciliation Committee do not generally involve capital changes of the previous Council’s common position. The sequence of changes in the legislative process always depends on a proposed text (Spence, 1995). Making changes in a proposal at the final phase of the legislative process would usually imply altering a text that has been backed up by a qualified majority after several modifications, including previous “readings” of the EP. Therefore, for the EP, it will be more difficult to maintain its initial preferred position as the legislative process advances. Golub illustrates this point in his study of the Directive 94/62/EC on packaging and packaging waste:

During the three conciliation meetings which were held between July and November 1994, representatives from the Parliament, supported by a minority coalition in the council, tried unsuccessfully to reopen the debate on various [previously defeated]
amendments … The directive which was adopted contained all the major features found in the common position (Golub, 1996, pp.14-15).

We can conclude, therefore, that the EP, acting in the Conciliation Committee, is not likely to launch a proposition to change provisions of the proposal out of its initial preference, but out of the text presented by the Council as a common position. In this sense, the analytical conception used here of an inter-coalitional phase in the Council that sets determinant constraints to the EP’s choice is justified.

5.4 The nature of the outcome of coordination: reducing costs of adaptation

Coalitional cooperation involves a trade-off between protection of national interests and the enhancement of the capacity to enact policies at the EU level. The coalitional mechanism requires that states accept the possibility that some preferences are to be excluded from the final collective decision. I have argued that states accept this possibility when their preferences are policy-oriented, instead of configured on a basis of particular national interests. More precisely, states acknowledge that the policies that they prefer are similar to those of a significant number of other states. In principle, the more compact or homogeneous the policy preferences of member states are, the more they would like to opt for coalitional mechanisms. I have conceptualised this compactness as the existence of a small number of policy alternatives to which actors attach their preferences.

As noted, the decisional methods that enhance opportunities for coalition building are voting procedures, complemented by the delegation of agenda-setting powers to the Commission, and partially, to the EP. It is important to emphasise that the choice of these methods is constitutional. States institute a majoritarian rule that makes the winning coalitions
decide for all the states and for any possible issue that may arise in the future. States expect that, in the long run, they will end up in more winning coalitions than in losing coalitions. At the moment of the constitutional choice, states do not have consolidated policy preferences. Instead, coalitional methods are chosen because actors, having a general motivation for redefining or change issues redistributively, do not know the issues that may arise in the future and the position that they will take on them. In concrete decision-making situations, the issue at stake will be to determine which set of preferences is to configure the decision of the group – that is, which will be the winning coalition. Thus, the constitutional choice of the mechanism involves valuing the group’s capacity to act, but the definition of the group actions in concrete situations involves a process of conflict resolution in which a winning coalition is formed.

The implication for the nature of the outcome of policy coordination issued from any concrete coalitional process of cooperation is that this outcome will reflect the preferences of a majority of member states. As Tsebelis argues, actors build coalitions when they attempt to bring up “new deal issues” in the legislative process. If they obtain sufficient reinforcements from other actors, they will create a new majority that changes the previous status quo (see Tsebelis, 1990, pp.113-15). New deal or majoritarian policies are policies that have a certain degree of homogeneity or compactness. They do not require the inclusion of all the particular preferences of member states. As majority voting allows for exclusions, it restricts the opportunities for the individual actor to stubbornly claim a major representation of his or her particular interest, hence permitting the imposition of a relatively homogeneous set of preferences.

In my view, in the EU circumstance, the main benefit that majoritarian cooperative solutions will entail for member states is the reduction of the costs of adaptation in elaboration and implementation of common policies. Firstly, in the decision-making process, the
elaboration of a decision on a common policy is speeded up by the combined effect of institutional agenda-setting and a majoritarian voting procedure. Secondly, in comparison with an EU common policy configured as completely new, an EU majoritarian policy is made up according to principles and economic guides of action existing in national policy-systems. For national policy systems closer to the alternative selected, the costs of adaptation incurred in the implementation of the policy will be less than those that a complete new common policy will suppose. “Excluded” states, on the other hand, would generally have to comply with the decision. Thus, in the example of environmental policy, we have seen that the majoritarian policy set reflects a “centric” outcome (at the point 60 of the policy space). Coalition building has allowed for the exclusion of the extreme policy preferences of the northern countries and of a number of eastern countries. Yet, within the majority, countries such as France and Italy have modified slightly their initial stances (located around the point 40). The adjustment is larger for eastern states, such as Romania (whose initial preferences were located at the point 10). These adjustments provide indicators of the costs of adaptation to the new policy for different member states.

In regard to the impact on the integration process, the adoption of European policies through coalition building will be less uniform than that of centralised policies reached through regulatory management. Coordination policies require the inclusion of “soft law” mechanisms. Such mechanisms will be especially necessary because, in the EU, the exclusionary dynamics typical of coalition formation are selective: the use of QMV requires the inclusion of the preferences of a large number of member governments in the collective decision. However, in coalitional policies, soft law mechanisms will be less prominent than in policies negotiated through bargaining. The coalitional mechanism of cooperation accounts for cases in which policy-coordination outcomes are not as fractionalised as those resulting from the all-encompassing compromises of the informal-bargaining mechanism. Majority
solutions require less adaptive devices than bargaining solutions, and the implementation of the policy involves fewer intricacies so as to conform to national particularities.

Yet, the degree of inclusion of soft law mechanisms in coalitional solutions will be variable. Coalitional cooperation will require less soft law mechanisms (i.e., will be more centralised) when actors are closer in the policy space and, therefore, need less modifications of their initial preferences or “ideal points” in order to configure a majoritarian policy. This closeness signifies that there is a major homogeneity in the preferences of actors. Analytically, more preference homogeneity translates into a major capacity of the cooperation mechanism to reach collective decisions. Steunenberg (2002) has offered an estimate that supports this proposition, by analysing

the hypothetical effects that a major probability of the occurrence of a normal distribution of preferences would have on the decisiveness of the EU-27. According to his calculations, under the Nice regime of QMV and 27 member states, as we pass from a uniform to a normal distribution of preferences, the probabilities of passing collective decisions increase from 48 per cent to 82 per cent (Steunenberg, 2002, p.110).116

It follows that when preferences are heterogeneous and we approach a uniform distribution of preferences, coalition building will become a less flexible method to generate cooperative solutions. It can be argued that, under these conditions, we would encounter many policy alternatives that dilute the notion of a selection problem of coordination, and, consequently, that actors would resort to informal bargaining, thus disregarding the rule of voting. However, this argument is analytically misleading. As long as possibilities of

116Steunenberg computes these probabilities by applying an index, the strategic power index, which relates the actors’ preferences or “ideal points” to the location of the status quo in the context of the application of a legislative procedure, namely a QMV-procedure represented as a “Council-Commission game” (Steunenberg 2002, pp.99-100; for the original formulation of the “strategic power index” see Steunenberg, Schmidtchen and Kobolt (1999). This index is game-theoretical. It should not be confused with the Voting Power Index, which measures probabilities of coalition formation, not the strategic interaction between institutions. Actually, using the Voting Power Index’s measure of coalition formation in the Council, we obtain a probability of passing a decision for a uniform distribution of preferences under the Nice rule much lower, namely, 0.020.
exclusion exist, the structure of a selection problem holds, and so the predominant coalitional logic of conflict resolution. What changes under conditions of heterogeneity and with the inclusive rule of QMV is that, in the process of coalition formation, the configuration of a winning coalition will require more modifications of individual preferences than under conditions of homogeneity. Thus, in our example regarding EU environmental policy, we have assumed that the coalitional logic operates because actors have a “policy-seeking” motivation and want the group to make a decision involving a redefinition of the policy. Guided by this motivation, actors enter a process of re-weighting of voting power, combined with the intervention of the EP, in order to make the collective decision. As we have seen, this re-weighting entails modifications of initial preferences or “ideal points”. Modifications will be more substantial the more heterogeneous the initial preferences of member states are. This heterogeneity is precisely what we encounter in the EU-27. Yet, to repeat the point, the occurrence of policy modifications does not alter the tenet that the predominant logic of the process is coalitional. The unfolding of this coalitional process characterised by preference modifications is shown in the analysis here: a core coalition of states engages in strategic and selective reforms of its preferences in order to complete the necessary votes to form a qualified majority in the Council. The use of the Modified Banzhaf Index, complemented with the bargaining Base model, has allowed us to identify, with some precision, the direction of the policy after several reforms of the policy set of the Core coalition. In conclusion, the coalitional analysis has generated an outcome estimate in which the preferences of the “old” most powerful actors remain representative in a centric majority, which favours a moderate-progressive approach to EU environmental policy.
6 The Regulatory Model of Cooperation

6.1 Introduction

The regulatory model of cooperation has its first roots in neofunctionalist theories of integration, which explain the process of integration as the institutional management of generalised trans-national demands for policy coordination. More recently, supranational cooperation has been circumscribed to the theorising of the regulatory tasks that the Commission performs in its executive decision-making functions. Regulatory functions are essential to correct market failures that arise in the complex and uncertain trans-national economic space. In this view, regulatory theories applied to the decision-making hold the key assumption that the delegation of powers to an independent expert agency saves transaction costs of managing and coordinating information. In this manner, these agencies can provide schemes of allocative efficiency that correct market failures and make all economic actors of the EU better off\(^{117}\). This notion of saving transaction costs constitutes the predominant logic of cooperation in the regulatory model presented here. As already mentioned, the study of regulation in the EU has primarily focused on the Commission. Accordingly, in the model of regulatory cooperation presented here, the performance of regulatory functions occurs in the specialised regulatory agencies of the Commission, to which executive powers have been delegated by the member states. Objectives focus on improving the economic performance of a common policy, by means of the control of trans-national economic activities. Technical knowledge of issues or aspects of issues is the basic resource valued for the resolution of

\(^{117}\) "Allocative efficiency" is the economic postulate stating that the correct allocation of resources to productive activities increases the satisfaction of the collective needs of all the members of a given community (see Samuelson, 1947, quoted in Mueller, 2003, p.564). A market is said be allocatively efficient if it is producing the right goods for the right consumers at the right price. Ideally, this situation occurs where market failures are completely absent.
regulatory problems. The strategies for problem solving consist of applying formal procedures of investigation to the implementation of regulatory programmes. In this process, the Commission engages in cooperative analytical debates with economic actors subject to investigation and performs incremental-corrective choices leading to solutions that improve regulatory performance of supranational policies.

In this chapter I will offer a conceptual model of regulation that takes as a starting point the theories of agency delegation of Majone (1996) and Franchino (2001), and develops them a step further to include a theoretical conception of expert-based conflict resolution. The conceptual model attempts to sustain two claims: the first is that supranational regulation in the EU is confined mostly to the liberalisation of the internal market. The second is that the effectiveness of the expert management, centralised in the functions of the Commission, is largely dependent on the European and global economic environment. This dependency entails that supranational regulation is subject to continual corrections.

In the first part of the this chapter, I will analyse the informational problem of coordination, positing the basic theoretical arguments stating that informational needs provide incentives for member states to delegate regulatory functions to an expert agency. This section will also indicate the type of EU policies for which member states are likely to adopt regulatory cooperation. Following Franchino (2001), I argue that these policies are those in which informational management is needed at the regional level. The second part of the chapter will be dedicated to the analysis of the regulatory strategy of the Commission as an expert agency. I will first indicate that the strategic objectives of the Commission are defined by the goal of achieving allocative efficiency through the management of the economic activity, and that the demand for this goal can be identified with the existence of a pluralist organisational context of interest intermediation. The appraisal of pluralism in the integration context will be based on a conceptual analysis of neofunctionalist theories of integration.
Secondly, the strategic operations leading to consensual solutions will be presented. This will require defining the incrementalist strategy of decision-making posited by organisational theories of decision and, subsequently, looking at the concrete mechanisms by which this strategy unfolds in the EU – typically involving the management of expertise by which the Commission carries out the performance of its executive/regulatory functions. I argue that these mechanisms can be suitably captured by the analysis of “analytical debates” (Jenkins-Smith, 1988) between a regulatory agency and the parties to which regulations are imposed. I will finally illustrate the working of the regulatory strategy by tracing the evolution of the EU Merger Control Policy. The chapter will close with a final section on the nature of the outcome of policy coordination, indicating the “centralised” terms of consensus derived from the use of regulatory cooperation.

6.2 The informational problem of coordination

Morrow defines the information problem as one that “occurs when actors are uncertain about the value of the available solutions and can benefit by sharing knowledge” (Morrow, 1994, p.388). The information problem arises in issue areas in which each member state will have “generalised interests”, that is, each state considers that the performance of the EU as a group will increase its individual interests. States, however, face a complex policy environment and are uncertain about the best course of action to improve the common policy.

The prevalence of generalised interests reduces the value of minimising sovereignty costs to a minimum. This proposition applies especially when these generalised interests come from economic groups within the member states that envisage more favourable outcomes from regional policies than from national policies\(^{118}\). On the other hand, the context of

\(^{118}\) Abbott and Snidal suggest that those domestic groups perceive “negative sovereignty costs” from international agreements (Abbott and Snidal, 2000, p.439).
uncertainty enhances the value of relying on a regional organisation capable of resolving ambiguities and producing more confident expectations regarding the costs and benefits of engaging in trans-national trade. In this view, the information problem presents a structure of the costs of interdependence in which the actors will highly value group decisiveness over considerations of sovereignty costs.

As we have seen, the existence of generalised interests of member states is the main factor advocated by Scharpf to explain their choice for supranational coordination. Yet, Scharpf does not explain the logic underlying this causal association, or more simply, where generalised interests come from. According to the contracting theory of collective decision-making (Buchanan and Tullock, [2004] 1962; Barry, 1965), it is the existence of uncertain conditions surrounding a policy that is at the origin of the prevalence for generalised interests for the choice of common rules to implement this policy. As the argument goes, generalised interests in a policy come from the fact that individual actors cannot foresee the consequences of policy choices in terms of how they will be affected by them, that is, actors do not know the position they will occupy in the future and approach their arrangements “as if” they were undifferentiated individuals. As Buchanan and Tullock put it:

The individual is uncertain as to what his own precise role will be in any one of the whole chain of later collective choices that will actually have to be made. For this reason he is considered not to have any particular and distinguishable interest separate and apart from his fellows. This is not to suggest that he will act contrary to his own interests; but the individual will not find it advantageous to vote for rules that may promote sectional, class, or group interests because, by presupposition, he is unable to predict the role that he will be playing in the actual collective decision-making process

119 More generally, this is a basic argument of constitutional theory. In the discussion of coalitional methods, we have seen that actors prefer less inclusive constitutional rules, such as majority voting rules, when they are uncertain about whether they will end up, on average, in winning or losing coalitions. The choice for a method concentrating the decisional power into a single agency leads this argument about uncertainty to the extreme.
at any particular time in the future … His own interest will lead him to choose rules
that will maximise the utility of an individual in a series of collective decisions with
his own preferences on the separate issues being more or less randomly distributed

By contrast, if actors act under conditions close to “perfect information”, that is, if
actors had reliable expectations about their position in the future or could foresee any
contingencies that a policy would raise, they would actually hold particularised interests in a
policy and, in their collective decision-making, would seek to specify in detail policy
measures that take into account their distributive concerns (Barry, 1965, pp.200-202; see also
Barry, 1989, pp.128-133). In this line, Morrow’s analytical conception of coordination
problems concludes that, when actors have similar interests, the importance of the information
problem rises relative to that of distribution (Morrow, 1994, p.413).

These arguments suggest that the trade-off between uncertainty (or informational
needs) and sensitivity (or distributional concerns) is fundamental to understand the logic of a
conception of efficiency based on the performance of a common policy. In this view, the
analysis of cooperation based on saving transaction costs will involve a direct comparison
between the informational problem and the distributional problem (and by extension, between
the redistributional traits of the selection problem).

How, more specifically, does the problem of information arise in the European
economic space? As already suggested, informational needs develop basically in the context
of trans-national economic competition among multinationals, which have to deal with the
costs of meeting separate and often inconsistent regulatory national standards. In principle,
market dynamics may generate efficient outcomes through “regulatory competition”, that is,
“the alteration of national regulations in response to the actual or expected impact of
international mobile goods, or factors on national political activity” (Sun and Pelkmans, 1995,
pp.68-69). Regulatory competition involves adaptations of national states to each other’s practices. Such adaptations can be interpreted as “attempts to compete for the mobile factor, which will arbitrage across various existing market opportunities” (ibid, p.69). This “arbitrage” may lead to a favourable market-driven convergence. Yet, the complexity of the policy space generates conditions of costly and imperfect information, which become even more acute with the increase of intra-EU trade. Under these conditions, actors do not know what would be the optimal way to efficiently adjust their regulations. Attempts at spontaneous coordination of regulatory competition may slide towards too little or too much regulation (ibid, p.85). The case of processes leading to lower standards of regulation is known as “race to the bottom” dynamics, in which each state will adapt their regulations at a lower level of stringency so as to attract capital to its national market. Initially, firms having lower costs of production will benefit from these races. Yet, as the regulatory competition intensifies, they may be forced to sell their products at prices that are less than would be efficient. Thus, at the conclusion of the race, the involved states may have all adopted a suboptimal lax standard of regulation (see Dehousse, 1992, and for a critique to the argument see Revesz, 1992). Firms also face the risk of progressively adopting more stringent regulations in some member states. This is the case of “races to the top”, which occur when consumers have a preference for products of a certain quality which are highly regulated. For instance, consumers may prefer cars that are environmentally-friendly, and whose production entails extra costs to reduce polluting effects (see Scharpf, 1999, pp.91-96). In these cases, countries with high regulatory standards may set the pattern that other countries attempt to imitate or even raise. The outcome favours firms that produce highly-priced goods. Yet again, the escalations of regulatory competition may set a price for regulated products over efficient levels also for the firms that have their headquarters in highly-regulating countries. A third possibility is that
domestic political opposition pressures governments into adopting protective measures against regulatory competition, with the result of halting market exchanges.\footnote{According to Scharpf, in the case of process regulations, “races to the top” are unlikely because the costs of production do not affect the quality of the product (and its attractiveness to consumers). As a consequence, political pressures are the only way by which countries can restrict deregulatory races (Scharpf, 1999, pp.96-97).}

In this uncertain environment, states and firms face three problems. Firstly, they lack political information concerning the preferences and potential influence that other actors may bring to bear in devising a common policy. Accordingly, entering into private exchanges of information to bargain efficient regulatory levels for market interactions may be extremely costly. Secondly, the exchange of information may be hampered by the lack of coordination of legal and technical knowledge appropriate to resolve regional policy problems. Thirdly, states lack knowledge about possible contingencies that may arise in the elaboration and implementation of a policy. Given these uncertain conditions, states would have incentives to delegate executive functions to an independent agency capable of gathering information from different sources, providing expertise regarding the relevant criteria to coordinate efficiently a given policy area, and assuring a programme of action for responding to changes in the policy environment.

Figure 13 represents a problem of information involving two states and an agency, showing the incentives that states have for delegating managerial functions when facing uncertainty. Each state, X and Y, have private information about ways to regulate a common policy. This information may be linked, for instance, to knowledge about the legal intricacies of their own regulatory system. We can note, however, that their policy choices, P1 and P2, fall outside an efficient zone of coordination. Hence, none of these options would be accepted by both parties. In fact, each party is uncertain about which is the zone of efficient coordination. Given this lack of information, their efforts to directly coordinate their policies are likely to revert to the SQ. Moreover, “races” of regulatory competition may lead to

\footnote{According to Scharpf, in the case of process regulations, “races to the top” are unlikely because the costs of production do not affect the quality of the product (and its attractiveness to consumers). As a consequence, political pressures are the only way by which countries can restrict deregulatory races (Scharpf, 1999, pp.96-97).}
escalations towards even less efficient outcomes than the SQ, around the point $t$. By delegating regulatory functions to an independent regulatory agency, which can incorporate expertise into the decision-making process, cooperative solutions may be found in the efficient zone of coordination at the point A, that are attractive to both parties.

![Figure 13 Informational problem of coordination](image)

In the context of European Integration, these cooperative solutions involve issuing supranational regulations for implementing the single European market, eliminating restrictive barriers to trade and, subsequently, setting minimal common standards to facilitate the convergence of national regulatory practices.

### 6.3 The regulatory mechanism

In the context of European integration, the coordination problem of information relates to incentives for actors to delegate regulatory powers to supranational institutions. Given the uncertainty surrounding an issue, member states may want to minimise costs of elaboration and execution of common policies by delegating legislative and executive functions to an
agency on the basis of its independence from distributive concerns and its expertise in management. In line with this reasoning, I posit that the informational problem mediates the regulatory explanation of cooperation in the EU. Regulatory (supranational) cooperation in the EU is limited to a specific regulatory mode of policy-making\(^{121}\). The regulatory mode of decision-making focuses on the achievement of economic efficiency by means of the elimination of market failures. Majone cites four sets of market failures: (a) monopoly power, entailing price-fixing practices that distort adequate resource allocations, (b) negative externalities, by which actions of one firm impose costs on other firms without adequate compensation, (c) information failures, which occur when consumers, workers or small investors lack sufficient information to evaluate competing jobs, products or other potential assets and (d) inadequate provision of public goods, which occurs when private producers lack incentives to produce public goods (1996, pp.28-29)\(^{122}\).

The regulatory mode gains relevance when there is a relatively uniform demand for European-based rules to control trans-national economic activities. The issue for regulatory or organisational decision-making is to devise the most efficient way in which these rules are to be configured and implemented. Regulatory cooperation is founded on the reliance of member states on an agency that employs managerial and technocratic methods to resolve coordination problems. Regulatory cooperation has an explicit focus on policy performance. This focus

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\(^{121}\) It should be specified that the majority of EU policies involve regulatory activities. The definition of regulation used here for regulatory decision-making comes from political economy. A more general definition of regulation would include policies that are stated in general terms, as opposed to group-related distributive policies. In his classic classification of policies, Lowi (1964) conceives regulatory policies as having an impact on all individuals. Regulatory decisions, therefore, “must be made by the application of a general rule and become interrelated within the broader standards of law” (ibid, p.691). Lowi’s classification, however, abstracts away from the decision-making process that generates the “general rule” for the regulation of the policy. In this sense, according to our scheme of cooperation, policies would often present selection problems of coordination before being enacted. The fact that policies have a general impact on all individuals does not signify that actors agree on the standard that is to set the rule for its regulation in these areas.

\(^{122}\) Public goods are characterised by properties of non-exclusion and joint consumption, that is, one person’s use of the good does not subtract from the benefits available to others (Ostrom, 2002, pp.29-34). Thus, while an individual may not contribute to the production of the good he or she can enjoy it without any cost and cannot be excluded from this enjoyment. Public goods, such as public health, must be provided for the well functioning of a society. However, because they are non-excludable and non-subtractable, there are not sufficient economic incentives in the market to provide them at a sufficient level.
will be the integral trait of the executive functions of the Commission. There is, therefore, a transposition of the concept of cooperation from legislative to executive functions, and it is the degree of success/failure of executive activities that will give a measure of the impact of regulatory cooperation on integration developments.

### 6.3.1 The delegation problem

The question of why and to what extent member states, as legislators, rely on organisational methods to resolve coordination problems is addressed by theories of delegation and discretion, in terms of a Principal-Agent dynamics. The study of delegation has its origin in models of legislative-executive relations in American politics. Concretely, these models inquire about the motivations of the members of the US Congress, as principals, to delegate discretionary powers for the elaboration and implementation of policies to bureaucratic agencies (see Epstein and O’Halloran, 1999; Franchino, 2001; Majone, 1994, 1996, 2001, 2005; Pollack, 2003) have applied delegation models to the relationship between the member states and the Commission. In accordance with contract theory premises, delegation models posit that the uncertainty about the consequences of policy actions drives the legislators’ motivations to delegate executive powers to an agent, and also to extend the degree of discretion for the use of these powers (Epstein and O’Halloran, p.38). There are two basic types of uncertainty: actors may be uncertain about whether other actors may comply with the contract and about the information needed to improve the quality of a common policy. Accordingly, two factors may be singled out as the most important incentives that

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123 We have seen that, in bargaining or coalitional models, concerns of stability of compromises or reduction of costs of convergence among national policy systems are more relevant to cooperation. Concerns of policy performance are mostly relegated to administrative activities within member states, once cooperation is achieved in the EU decisional system. By contrast, in the organisational model, cooperative processes are means of improving performance.
influence the decision of member states to delegate discretionary authority to the Commission (Pollack, 2003, pp.28-29).

a) Credible commitments and demand for an independent regulator

b) Imperfect information and demand for policy-relevant expertise

The rationale of credible commitments states that member states might have agreed to a decision in a particular issue area but have difficulty in assuring the credibility of their commitments. They would want to delegate executive powers to an independent agency, the Commission, which would monitor that each member state upholds its end of the agreement, and which would enforce ex-ante specified sanctions whenever they do not. States would also want to secure the agreements over time. Commitments are subject to problems of “time inconsistency”, which occur when governments have incentives to renege on, in the short-term, their long-term commitments. Time inconsistency is likely when national governments are replaced in office by other actors who hold different policy prospects (Pollack, 2003, pp.29-30).

The search of policy-relevant information is a form of transaction costs derived from the complexity of policy issues. The production of efficient legislation requires gathering and analysing technical and legal information, which is costly to ascertain. Member states delegate powers to agencies that are assumed to provide policy-relevant expertise and thereby improve the efficiency of regulations. The more discretion the agency receives, the more it is able to incorporate expertise into policy decisions (Epstein and O’Halloran, 1999, p.43). Extensive discretion also reduces the legislators’ workload and increases the speed of implementation, since the agency can make final policy decisions without having to consult with legislators first (ibid, p.48; Pollack, 2003, p.106). As I have argued above, when
considering informational needs in a contract, actors would ponder trade-offs between uncertainty and sensitivity. Regarding this issue, delegation theory has pointed out that informational needs may be tempered by the opportunity costs that member states will incur in terms of favouring their particularised interests. Thus, Epstein and O’Halloran hypothesise that, when delegating authority to an executive agency, “legislators trade off informational gains against distributive losses” (Epstein and O’Halloran, p.49; see also Krehbiel, 1992 and, for the EU, Franchino, 2001, pp.12-13). Incentives to delegate executive authority are then mediated by the information that member states possess so as to elaborate policies that favour their own constituency. The assumption is that it will be less costly to specify detailed provisions whenever they possess information about implications of policies in national contexts. By contrast, when there is great complexity and uncertainty surrounding an issue, legislators will benefit from the managerial services of an agency. In the EU context, the relative relevance of informational needs over distributional concerns can be assessed by the quantity or stringency of the oversight mechanisms (i.e. comitology procedures) that the member states institute in concrete regulations in order to control the conditions under which the Commission is to implement these regulations. Thus, the greater the distributional concerns of the member states, the more important the comitology procedures specified, and, accordingly, the less discretion the Commission will have in implementing secondary legislation.

Which kinds of incentives, credible commitments or informational needs, are more relevant for the choice of the regulatory form of cooperation in the EU? Credible commitments are significant in Treaty-delegation. Yet, I consider that informational needs are more relevant to extend delegation in secondary legislation, when regulatory cooperation
The basic rationale of secondary-legislation delegation is to avoid transaction costs in the implementation of policies when the complexity of the policy environment increases. It is then that the need for expert-driven regulation arises. As Landis asserts:

> With the rise of regulation, the need for expertness became dominant; for the art of regulating an industry requires knowledge of details of its operations, ability to shift requirements as the condition of the industry may dictate, the pursuit of energetic measures upon the appearance of an emergency and the power to realize conclusions as policy (Landis quoted by Majone, 1996, p.16).

Intergovernmentalist authors (Moravcsik, 1998; Pollack, 2003) assert that it is the willingness of governments to secure agreements, and not informational needs derived from the increase in volume and complexity of economic interactions, which explains the use of a regulatory/organisational mode of cooperation, lead by the executive tasks of the Commission. Thus, Moravcsik has vehemently argued that there are not significant transaction costs in the exchanges of information among member states relative to the benefits of agreements (Moravcsik, 1998, p.63; 1999). This thesis is coherent for Treaty-negotiations, when, even though supranational institutions could hold informational advantages (something that Moravcsik denies), these would arguably be nullified by sovereignty considerations of member states. Moreover, Treaty legislation does not specify how concrete regulations are to be elaborated and implemented. As a consequence, the basic incentive related to informational needs (saving transaction costs) is not dominant here. Yet, the same argument

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124 Credible commitments will be especially relevant as incentives for delegating powers of adjudication of dispute resolution and interpretation of rules conferred to judicial institutions (Abbott and Snidal, 2000, pp.426-430, see also Keohane, Moravcsik and Slaughter, 2000; Pollack, 2003). In my view, the choice of judicial arbitration relates to a specific form of cooperation in which the key coordination problem of actors focuses on enforcement. When engaging in judicial litigations, actors cooperate by advancing claims based on a common legal discourse. The validity of their claims is to be decided by the ECJ rulings. I analyse the judicial model of cooperation in Chapter 7.
does not hold regarding secondary legislation, where the Council lays down concrete regulations and delegates to the Commission functions of elaboration and implementation precisely to reduce the costs and improve the quality of decision-making (Majone, 2001, pp.114-15)\textsuperscript{125}. Pollack, for his part, does not deny the relevance of informational needs, although he emphasises the aspects of avoiding workload and increasing the speed of decisions and downplays factors relating to the need of expertise (Pollack, 2003, pp.102-103). Essentially, Pollack favours the credible-commitment thesis also for secondary legislation. His argument is that the areas in which the Treaties have delegated powers to the Commission in order to secure commitments – namely, competition and commercial policy – are also those in which delegation from secondary legislation is greater. On this basis, he concludes that “the logic of credible commitments in these areas operates not only in the treaties but also in secondary legislation” (ibid, p.102). This argument is inconclusive. The fact that delegation in secondary legislation correlates with Treaty-delegation does not mean that the motivations for delegation are the same in both cases. Treaty-delegation involves functions of initiating legislation and monitoring. Motivations of credibility are likely to guide the logic of delegation here. By contrast, as noted, secondary legislation involves functions of elaboration and implementation. The logic of delegation here is likely to be guided by motivations based on informational needs (see Majone, 2001).

This different logic of delegation for the same areas is confirmed in the cases of regulation of competition policy and the liberalisation of utilities. There are two factors, the \textit{pressure of the business community} and the \textit{activism of the Commission}, that do not involve a direct commitment among the member states and instead point to the logic of informational needs. To be sure regulations are not enacted without the voting of the member states, but the two factors previously mentioned appear as crucial in pushing the acceptance of new

\textsuperscript{125} Moravcsik does not study secondary legislation. Therefore, we cannot assess if his argument on credible commitments also holds for this second sphere of legislative delegation.
regulations by member states. Firstly, in aspects concerning intra-community trade, studies have attested that, in the eighties, an increase of trans-national activity preceded the enactment of secondary legislation. The volume of exports within the EU was of Euro 100 billion in 1970, Euro 700 billion in 1988 and Euro 900 billion in 1994 (Fligstein and Stone-Sweet, 2001, p.41). The number of interest groups accumulating in Brussels rose from 200 to 600 in this same period (ibid, p.44). Legislation enacted by the EU has soared particularly since the eighties, from 500 directives and regulations in 1980 to more than 2000 in 1990 (ibid, p.43). This trans-national activity developed even if member states’ policies for liberalisation of the economic activity “differed substantially … in terms of their origins, motivations and intensities” (Young, 2005, p.97). For instance, the UK’s neo-liberal model contrasted with the socialist modernisation programme of Spain. The demands for regulation of the business community are likely to be linked to a need for expertise, since regulation involves technical operations to set up valid economic arguments for regional efficiency and information about the legal aspects of coordination.

Regarding the activism of the Commission, scholars have pointed out its persistent efforts in gathering support for reforms through lengthy processes of consultation with the academic, legal communities and interested stakeholders, and in repeatedly pushing member states to enact these reforms (see Thatcher, 2006). This activism is also manifest in how the Commission uses its agenda-setting powers in the legislative process. As Héritier points out in the case of the regulations of transport and communications, the Commission deployed the strategy of “linking-up” proposals for liberalising the market of utilities to the Single Market Programme, “which enjoyed considerable ideological support”, in order to press for a favourable vote in the Council (Héritier, 1999, p.33). In my view, whenever member states respond positively to trans-national activity and Commission activism, it is because there are informational incentives to develop further regulatory measures rather than because of the
need to secure commitments. On the other hand, if informational needs were not that prevalent, member states would be willing to “protect” their commitments when extending regulatory measures. In this respect, Majone suggests that, when delegation is broad in secondary legislation, member states also generally reduce the discretion of the Commission through comitology procedures (Majone, 2001, p.115). When such restrictions on discretion are important, as is the case in environmental policy, we will not have a cooperative process in which the regulatory activities of the Commission predominate relative to those of national administrative services.

6.3.1.1 Economic regulation and type of policies

What types of policies are to be dealt with by a regulatory mode of policy-making lead by the Commission’s executive action? There are two related aspects that require discussion. Firstly, the kinds of policies which are likely to encompass either distributive or regulatory concerns. Secondly, the translation of these concerns into integration dynamics, that is, the association of distribution with national interests and regulation with supranational-wide interests.

The conception of regulation has its basis on a concern for economic efficiency, understood as the correction of market failures. According to Selznick’s classical definition, *regulation* means “the sustained and focused control exercised by a public agency, on the basis of a legislative mandate, over activities that are generally regarded as desirable to the society” (Selznik, quoted in Majone, 1996, p.9). Which economic activities are likely to be subject to efficient regulation? According to the classification of policies based on distribution of costs and benefits devised by Wilson (1980) and employed by Pollack and Majone for the EU (Pollack, 2003; Majone, 1996), regulatory schemes would be more likely when actors expect concentrated costs and diffuse benefits from a policy. This would be the case in policies that benefit consumers or wide groups of society and can pass the costs on to a small
segment of society, such as social policy, health and some environmental areas. Distributive policies apply when benefits and costs are concentrated, as in the area of taxation. Finally, lobbying-capturing politics will be likely when actors expect concentrated benefits and diffuse costs from a policy. This will be the case of issue areas where there are small, well organised groups.

Majone (1996) and Pollack (2003) have applied Wilson’s scheme to the EU. Thus, Majone refers to EU social policy as a regulatory policy, arguing that the incentive to organise is only strong to opponents of the policy, and that a policy entrepreneur can mobilise the public sentiment in favour of regulations (Majone, 1996, p.77). In my view, however, the national-regional tension of the EU makes Wilson’s scheme inadequate to classify regulatory policies in the EU. Particularly, the association of regulation with economic activities characterised by concentrated costs and diffuse benefits hardly applies in a regional context, where the notion of “wide groups of society” is absent. The resources to mobilise the public sentiment are very limited in the case of the Commission. In this view, contrary to what Majone implies, social policy in the EU remains regulated mostly at the national level¹²⁶. Likewise, EU environmental policy does not have a uniform pattern of regulation because of the great diversity of cultural and political national scenarios.

Nonetheless, Wilson’s classification is useful to indicate negative limits to regulation in the EU. Incentives for supranational regulation may be offset whenever relevant economic actors are willing to spend resources in lobbying in order to capture the agency, or when they prefer the option of private regulatory competition and to bargain among themselves the terms of their gains and loses. Thus, private regulatory competition would be more prominent in distributive issue areas like the European Social fund or taxation where the benefits and costs of a prospective policy are concentrated. Member states, or firms operating under favourable

¹²⁶ Majone seems to have abandoned his argument regarding social policy based on Wilson’s scheme in latter works (see Majone, 2005).
national regulations, would have incentives to bargain among themselves (Pollack, 2003, p.106). As for lobbying attempts to capture the Commission, they would be more intense when firms expect concentrated benefits and diffuse costs. This is the case in the area of the pharmaceutical industry (see Greenwood and Ronit, 1994). In both distributive and capture politics, we should expect regulatory policies to be less effective. However, to such a limiting classification it must be added any area in which the sensitivity of member states is high. This is, as noted, the case of social policy (see Scharpf, 1999). At the EU level, policies addressing sensitive areas will apply distributive, nationally tailored measures, which will be issued from the legislative process and, therefore, will involve the predominance of either a bargaining or a coalitional method of cooperation127.

What is then the field of application of the EU regulatory mode of policy-making? In my view, Franchino proposes the key criterion for classifying policies that are to be subject to economic regulation at the EU level. Franchino (2001) maintains that informational issues may create incentives to delegate executive powers either to the Commission or to member states’ administrative bodies. States would give more discretion for elaborating and implementing legislation to the Commission “in issue areas that require general and managerial skills at the supranational level” (ibid, p.14). By contrast, when implementation requires more specialised and technical knowledge, executive powers for implementation would be delegated to member states’ authorities. Thus, Franchino’s proposition just corresponds to the thesis here linking regional generalised interests to the choice for a supranational regulatory strategy.

In this view, in order to assess to which areas supranational regulation applies, we should then specify their requirement for general and managerial skills at the supranational level. Franchino has measured that member states have delegated more powers to the

127 This, however, does not classify these policies as inherently distributive. On the contrary, within the national policy context, protective regulations would be applied to those policies that affect wide groups of society.
Commission in competition policy than in other areas. Competition policy is associated with provisions related to the effective functioning of the Single European Market (SEM), facilitating the abolition of national rules, policing market interactions and setting minimal standards for positive integration. It is in issues concerning the SEM that the volume of transnational economic activities is large and European law is required to regulate them. In addition, as a policy that establishes standards of conduct for the subsequent realisation of other goals, competition policy has the characteristics of a “meta-policy” (Wilks 2005a, p.114), setting the level playing field for trans-national activities in different policy areas. Consequently, it is understandable that supranational regulation in issues such as environmental sustainable development, health and safety in the workplace or equal employment opportunities for men and women have extended from the legal basis of the clauses of free movement of goods, capital, services and labour of the SEM programme (the basic provisions of the SEM programme are described below).

6.3.1.2 Objectives of regulation: statutory regulation and pluralism

Objectives in the regulatory model of decision-making are related to the increase of economic efficiency through the regulation of the economic activity at the regional level. Neofunctionalist theories are the first theories in conceptualising the objectives of supranational-decision-making as the improvement of the performance of the organisation.

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128 Franchino measures the discretion by the share of provisions delegating powers in an act weighted by the constraints (or control mechanisms) imposed on executive action. For the analysis of the Commission’s discretion, the controls that are relevant are those imposed on the Commission implementation powers through comitology procedures (Franchino 2001, pp.20-21, for discussion see Pollack (2003, pp.91-107). Franchino measurements give the Commission an average discretion of 20.6 per cent for competition policy covering rules for undertakings, 9.71 per cent for merger control and 7.37 per cent for commercial policy. By contrast, for environmental policy, the average discretion is of 2.13 per cent and there is no delegation of authority in the area of taxation. In the two latter areas, member states are largely exempted from applying general provisions. The member states’ average discretion is 30.92 per cent for environmental policy and 29.29 per cent for taxation. By comparison, their discretion for merger control is of 2.91 per cent (Franchino, 2001, pp.45-46).

129 For a specific explanation of this extension regarding the policy of equal employment opportunities for men and women, see Mazey (1995).
Objectives of the regional organisation are related to the transformation of preferences of national socio-economic actors. Gradually, these actors appeal to supranational technocrats or “reform mongers” (Schmitter, 1971) in order to better realise their interests (Haas, [2004] 1958; Schmitter, 2004). However, as the precedent discussion on delegation has shown, the competencies of the supranational bureaucracy are limited to those policies in which socio-economic actors look for general and managerial skills to regulate their economic operations. This restriction requires defining more precisely the regulatory objectives of the Commission.

In my view, the efficiency goals of supranational decision-making are related to a specific mode of regulation, *statutory regulation*, which is conceived as the expert-based control and supervision of the private economic activity by independent regulatory agencies.

In this section, I will analyse the objectives of regulatory decision-making in two steps. Firstly, I will discuss the meaning of statutory regulation. Secondly, the configuration of regulatory objectives will be treated in terms of the pluralist process of preference formation involving exchanges of information among trans-national economic actors and the regional organisation.

**Statutory regulation**

Expert-based regulation is the basic means by which the Commission seeks to improve the common policies. This regulatory model of decision-making conforms with neofunctionalist explanations of how organisational decision-making drives the integration process (Haas, [2004] 1958, 1976). Yet, neofunctionalist authors do not rely on any theory of regulation to sustain their propositions. As a result, their theses are too general to explain a concrete link between integration developments and regulation. As Majone points out,

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130 Haas hypothesised the eventual formation of a political community with state-like characteristics. However, his account given in *Uniting Europe* ([2004] 1958) keeps the decision-making activities of the organisation within the limits of regulatory tasks such as limiting cartel-formation and price-fixing practices and establishing quotas.
because of the assumption that all sectors of the economy are interdependent, neofunctionalism fails to explain why the expansion of competencies of the regional organisation is selective and particularly underdeveloped in areas requiring distributive policies, such as research and development and taxation. According to Majone:

the methodological mistake of neo-functionalists consisted in the failure to distinguish between different policy types, or even more simply, between regulatory and direct-expenditure programmes (Majone, 1996, p.63).

Majone’s criticism is pertinent. In my view, however, it serves to limit the scope of application of neofunctionalist theories of integration rather than to invalidate their theses. Neofunctionalism simply does not offer any model to explain integration developments in distributive policies. The distinction between regulatory and non-regulatory policies rather demarcates and refines the neofunctionalism conception of integration as driven by pluralist interest intermediation and decision-making by indirection and pragmatism (Haas [2004] 1958, p.xii). Such conception relates to the lack of resources of the Commission and the great diversity of the European policy space (Schmitter, 1996b). Given these two traits, the regulatory model of the EU would not be characterised by centralised schemes based on public ownership, but by the use of statutory regulation. Under statutory regulation:

public utilities, and other industries deemed to affect the public interest, remain in private hands but are subject to rules developed and enforced by specialised agencies and or commissions. Such bodies are usually established by statute as independent authorities, in the sense that they are allowed to operate outside the line of hierarchical control or oversight by the departments of central government (Majone, 1996, p.15).
Unlike Keynesian models of regulation based on public ownership, statutory regulation consists of the twin measures of decentralisation of public services in order to encourage competitiveness and the subsequent control of economic performance by specialised agencies (Majone, 1996, p.1). While the promotion of competitiveness is the basic reason for elimination of restrictions to private competition, the control of economic activities follows suit, since competitors owe their own existence to regulatory constraints imposed on their larger rivals (Majone, 1996, p.2).

The significance of statutory regulation will define executive decision-making as driven by processes of conflict resolution in which expertise becomes the standard of evaluation of efficiency. Statutory agencies must be endowed with certain procedural characteristics that assure their credibility as capable to provide a strategy for improving policy performance. These characteristics are as follows:

- Clear and narrowly defined objectives
- Accountability by results
- Strict procedural requirements
- Professionalism
- Transparency
- Public participation
- Inter-agency rivalry (Majone, 1996, p.5).

In the case of the Commission, studies assess that these characteristics have served as ex-ante conditions whereby member states would assure that the Commission implements policies within specified legal boundaries. As we will see in the review of the evolution of EU competition policy, the performance of the Commission in conducting regulatory tasks has
been evaluated especially according to the accountability of its results, its professionalism, its
procedural requirements and its transparency (McGowan and Wilks, 1995; Morgan and
McGuire, 2004). The process of institutional and policy change in this area, towards
decentralisation of procedures and the inclusion of national regulatory agencies (McGowan,
2005; Wilks, 2005b), have followed corrections of failures in adequately fulfilling conditions
defined by these characteristics.

The prevalence of statutory regulation in the EU is attested to in the historical
evolution of the integration process. The Treaty of Rome set the objective of establishing the
Single European Market (SEM), founded on the elimination of the negative impact of
divergent national rules on trade. Initially, the Commission tended to regard “total
harmonisation” – the adoption of detailed, identical rules for all member states – as the key
method for operationally realising this objective. As Young points out, the Commission soon
recognised that the approach pursuing uniform rules was not realisable in the context of
diversity of the European policy space, and turned to a more pragmatic approach and pursued
“optional” harmonisation, insisting on uniform rules only when an overriding interest
demanded it (Young, 2005, p.96). In fact, with the increase in intra-community trade, member
states increasingly devised new measures to protect their industries. The harmonisation
approach, with its formalist tendency and emphasis on technical details turned out to be
unable to keep track of the proliferation of national protective rules, which mostly undid
previous progresses on harmonisation. By the late 1970s there was a decline of intra-EU
imports relative to total imports (ibid, p.96). On the other hand, the Commission simply did
not have the budgetary resources to carry out the interventionist measures that total
harmonisation demanded, such as a uniform industrial policy and a labour market policy.
Given these limitations in resources, it was not possible to undertake “stabilising”
programmes of a Keynesian type aimed at preserving satisfactory levels of economic growth, employment and price stability (see Majone, 1996, pp.54-55; Streeck and Schmitter, 1991).

In reality, a hierarchical approach based on full harmonisation has never been the hallmark of the Commission’s decision-making, even if it could have been contemplated as an ideal objective. It is then unconvincing to approach the subject of supranational decision-making in the EU by referring to theories of public administration based on income redistribution or in macro-economic stabilisation, as we have seen with Scharpf (see also Streeck, 1999)\textsuperscript{131}. Instead, the Commission’s organisational management of the SEM programme is better approached by theories of regulation. The regulatory functions of governments concern “attempts to increase allocative efficiency by correcting various types of market failure: monopoly power, negative externalities, failures of information or an insufficient provision of public goods” (Majone, 1996, p.54). This focus on regulation was patent in the shift of policy that the Commission took after its draft of the White Paper on the Completion of the Internal Market, formally adopted by Milan European Council in June 1985 (Young, 2005, p.98). The White Paper restricted harmonisation to only minimal essential requirements and advanced the new approach of “mutual recognition”, by which producers who conform to a standard in one member state must be recognised in the markets of other member states. The White Paper contained 300 measures to accomplish the SEM, emphasising the free movement of goods, services, capital and labour that would declare the creation of an area without internal frontiers\textsuperscript{132}. These provisions signalled that a regulatory approach based on liberalisation and subsequent control of intra-European economic

\textsuperscript{131} The only policy configured according to the harmonisation model is the Common Agricultural Policy, which, as in 2004, absorbs 42.7 per cent of the EU budget (Rieger, 2005, p.165).

\textsuperscript{132} The provisions of the White Paper do not assure their implementation. Particularly, the free-movement of labour is subject to various types of non-tariff barriers derived from engrained political, social and cultural practices in each member state. Member states retain full sovereignty (with any change at the EU level requiring unanimity) in matters closely associated to free movement of labour, such as social security payments, unemployment insurances, and financial contributions for job creation.
activities, instead of intervention, was to define the supranational economic policy, making the area of competition policy the main catalyst of progress in economic integration.

**Pluralism as fractionalisation and pragmatism**

Where the demands for regulatory management come from in the integration context? Supranational regulatory objectives are first shaped by the demands of translational economic actors. Starting with neofunctionalism, integration theory has conceived this demand according a pluralist system of interest intermediation. Schmitter defines pluralism in the following way:

...a system of interest representation in which the constituent units are organized into an unspecified number of multiple, voluntary, competitive, nonhierarchically ordered and self-determined (as to type or scope of interest) categories which are not specially licensed, recognized, subsidized, created or otherwise controlled in leadership selection or interest articulation by the state and which do not exercise a monopoly of representational activity within their respective categories (Schmitter, 1979, p.15).

In reality, the pluralist thesis is directly related to the regulatory mode of governance in the EU. As noted, the regulatory function of a government attempts to enhance allocative efficiency by correcting market failures. By means of these corrections, such as control over monopolies or price-fixing, regulation offsets the effects of market forces on the divisions of rents among a plurality of interests. Under this scheme, allocative efficiency is to be achieved by balancing the activity of various interest groups and promoting competitiveness. In contrast, under a system of corporatist or statist system of interest intermediation, stabilising functions (preserving satisfactory levels of growth) and redistributive functions (transferring resources for one group to another) would be more relevant in the socio-economic
organisation of the EU. Some well supranationalised policy areas of the EU, namely the CAP, correspond to a corporatist system (Pappi and Henning, 1999). According to Streeck and Schmitter (1991), configuring a European corporatist scheme was the first ambition of the Commission, to be designed mostly on a French *dirigiste* organisational model of public policy, but soon it became clear that the fractionalisation of the European policy space, the weakness of “organizability” (Traxler and Schmitter, 1995) of labour and the lack of coercive resources of the Commission impeded the emergence of generalised corporatism at the EU level.

Before regulatory theories started to shape the understanding of the supranational decision-making in the EU, neofunctionalist authors established a link between pluralist transitional activity and technocratic organisation. Yet, there are noteworthy differences in the conception of pluralism of neofunctionalist authors. On the one hand, in *Uniting Europe* (Haas, [2004] 1958), Haas formulates pluralism as the political and socio-economic fragmentation within nation-states, placing an emphasis in the conflicts derived from this fragmentation (ibid, pp.5 and 290). These conflicts are the main factors that drive actors to seek trans-national alliances and to support regional policies as a means to better realise their interests. In this process, national trade associations in the field of industry, while having mainly pragmatic and short-term interests, were the most active actors and led the supranational-based pressure that nurtured the increase of organisational competencies of ECSC/ EC institutions. *Uniting Europe*, however, does not state that trade associations of a regional scale are consistently formed in the early processes of integration. Rather, the cooperation of different national actors in the trans-national arena is issue-specific, instrumental and tactical in nature. Haas says:

133 Neofunctionalism placed a major emphasis upon the institutionalising effects of this link, pointing to the eventual formation of a state-like “political community” (Haas, [2004] 1958; Schmitter, 1971), rather than to the emergence of a specific regulatory mode of governance.
...because of their functional specificity and preoccupation with immediate issues, regionally organized employer groups in a pluralistic setting will outgrow dependence on and loyalty to the nation state before they develop a regionally defined body of values. They will band together supranationally and co-operate “tactically” on issues on which their interests naturally converge, and they will organize accordingly. But they will not immediately outgrow their separate national ideological experiences and habits (ibid, pp.352 and 354).

In 1968, Haas confirmed that the fragmented and tactical pattern of cooperation continued and, on this basis, he stated that the method of incremental decision-making that favoured supranational institutionalisation was, by its very experimental nature, subject to possible reversal (Haas, [2004], 1958, p.xxiii).

On the other hand, in Schmitter’s work (see Streeck and Schmitter, 1991 and Schmitter and Streeck, 1991, Traxler and Schmitter, 1995), supranational pluralism appears as a long-term consequence of the process of the crumbling of corporatist national systems of interest intermediation started in the seventies. Thus, if for Haas pluralism was the cause of supranational developments, Schmitter and his collaborators conceive pluralism as the effect that these developments had on the organisational national context of interest intermediation. In this view, although Schmitter does not state a thesis in this direction, we should interpret that the configuration of a pluralist organisational system is closely linked to the demand for regional regulation of market failures.

According to Schmitter and Streeck (1991), the dismantling national corporatists systems facilitated the emergence of an extremely fragmented and “disorganised” pattern in the way interests groups sought to influence supranational policies. Yet, pluralism in the European context lacks the institutional features of the national ideal-type of pluralism, the
United States. The governmental structure of the EU is not only fragmented but also lacks the necessary coercive capacity that would guarantee that the pressures and support of private actors translate into determinate decisions. Schmitter and his collaborators portray a model of pluralism in which pressure of actors is driven by functional specialisation instead of by power based on the possession of political or economic resources\textsuperscript{134}:

We find growing evidence of ‘Disorganized Capitalism’ at the Community level, without the elements of official recognition, ensured access, hierarchy and monopoly. In such a disjointed and competitive setting, interest associations are not necessarily privileged interlocutors, and higher-order peak associations may not be preferred over more specialized ones. They must compete for influence with a variety of other units: national states, parastatal corporations, subnational governments, large private firms, and even lobbyists and lawyers intervening on behalf of individual clients. The policy outcomes become less predictable, and majorities become more difficult to mobilize. The power coercion is blunted, but so is the capacity of state to overcome private exploitation (Schmitter and Streeck, 1991, p.67).

Such a logic of specialisation contrasts with pluralist models whose locus is the nation-state, in which scholars have theorised the government-interest groups’ relation in terms of the support given by the interest groups to the government in exchange for control of policy actions (see, for instance, Pappi and Henning, 1998). The relevance of control of policy actions would define the aims of interest groups essentially as the capture of the organisation, so as to obtain favourable legislation in the issues in which they are interested. In my view, this model of exchange cannot be generally applied to the EU, where the Commission lacks

\textsuperscript{134} This notion of functional specialisation was also dominant in Haas’ work: “variations in national policy provide a power determinant, not in absolute terms, but only with respect to the functional strength of particular states in relation to the specific task of the organization” (Haas, 1961, p.376).
the political resources and the bureaucratic hierarchical organisation so as to constitute a firm political venue for interest groups. Instead, the functionally specialised and disjointed model of pluralism presented by Schmitter et al. corresponds better to the regulatory governmental functions that the Commission fulfils. Furthermore, the basis of exchange of information would be consultation and advise-seeking, instead of capturing lobby (see Mazey and Richardson, 2001). According to the regulatory mode of policy-making, economic and social actors would be demanding tasks related to entrepreneurship, technical management and monitoring from the supranational agencies, rather than control of policy choices.

However, neofunctionalist pluralist models are vague regarding how specialised interests relate to different forms of regulation of the EU. Regulation in which the Commission is the central executive actor does not cover all sectors of EU policy-making. Franchino’s insight into the delegation patterns in secondary legislation is pertinent here. Executive functions of the Commission are prevalent where member states perceive a need for generalised technical management of policies, while implementation at the national level is preferred when the kind of technical expertise needed is specifically related to particular national contexts (Franchino, 2001). These differences also clarify the specialised demands of trans-national economic groups. Groups that mobilise in the European policy space are mostly exporters (Fligstein and Stone Sweet, 2001, p.10). They would seek generalised technical management, especially related to the economic criteria and legal procedures that they would need to apply to and comply with in order to coordinate their interactions at the EU level. Competition policy, commercial policy with third-countries and, to a great extent, transport and telecommunications are the central areas in the provision of this management.
6.3.2 Strategic operations: incrementalism, regulatory investigation and analytical debates

The strategic process of the regulatory model consists of the operations for the implementation of executive programmes, involving conflict resolution mechanisms by which the Commission makes gradual corrections in the way regulations are devised, with an aim at improving the performance of common policies. In analysing the strategic operations of the regulatory mode of cooperation, I will look at the following aspects. Firstly, the general hypothesis of strategic cooperative change, which is given by the neofunctionalist concept of “spill-over”, and concretised by the incrementalist theory of decision. Secondly, the Commission’s executive operations that serve to implement statutory regulation. The Commission’s regulatory performance will be explained by means of two central categories: the formal investigation procedures in the Commission’s decision-making and the “analytical debates” (Jenkins-Smith, 1988; Jenkins-Smith and Sabatier, 1993) between the Commission and parties subject to regulation. “Analytical debates” define an expert-driven form of strategic interaction, in which economic and legalistic expert arguments are the basic resource to reach cooperative solutions to problems of regulation. Finally, I will employ the example of merger regulation to trace this strategic process aimed at increasing efficiency in the supranational regulation.

6.3.2.1 Spill-over and the incrementalist theory of decision

The general hypothesis stating how gradual operations of the organisation develop supranational consensual solutions is contained in the neofunctionalist concept of functional spill-over. Basically, “spill-over” means that initial steps towards integration in a given functional area trigger economic dynamics towards integration within this area or in functionally related areas (see Haas, [2004] 1958, pp.291-99; Schmitter, 1971, p.243;
Niemann, 2004, pp.30-46). For example, the initial integration of coal and steel sectors would prompt the subsequent integration of transport policy in order to assure the efficient distribution of raw materials. As a strategy for integration development, the relevance of “spill-over” rests on the link that it establishes between dissatisfaction of past performance and subsequent response consisting of increasing the regulatory powers of supranational institutions. As expressed by Schmitter’s definition of spill-over:

Tensions from the global environment and/or contradictions generated by past performance give rise to unexpected performance in the pursuit of agreed-upon common objectives. These frustrations and/or dissatisfactions are likely to result in the search of alternative means for reaching the same goals, i.e., to induce actors to revise their respective strategies vis-à-vis the scope and level of regional decision-making (Schmitter, 1971, p.243, see also Haas, 1961, p.368).

“Spill-over” is a general hypothesis of change. In itself it does not indicate the operations by which actors perform such a change. To specify such operations, neofunctionalists rely on the incrementalist theory of organisational decision-making by Braybrooke and Lindblom (1963) and Cyert and March (1963). “Incrementalism” is a method of decision-making based on a series of incremental judgements, as opposed to a single judgement made on the basis the rationalistic consideration of all relevant alternatives. Actors do not set a goal to maximising the level of performance of a policy but make marginal

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135 Studies on neofunctionalism have identified in the theory different types of “spill-over”: functional (sectorial expansion), political (elite involvement) and cultivated (institutional activism). A recent revision is found in Niemann, 2004. A common critique to the concept of functional spill-over has been its cross-sectorial projection. In fact, the evolution of the EU process has confirmed that integration developments on policy areas are kept separate (see Schmitter, 1996a). In this sense, Niemann rightly points out the relevance of functional spill-overs originating within sectors instead of across sectors (Niemann, 2004, p.30 and pp.364–65).

136 The notion of “dissatisfaction” determines the causal logic of functional spill-over as a response of sub-optimality: “Spill-over was driven by the postulated fear by actors of suffering losses unless further sectors were integrated (Haas, ([2004] 1958, p.*xxiii)).
corrections and stop when they find a “satisficing” level\textsuperscript{137}. Braybrooke and Lindblom introduce two basic notions in their strategic conception of incrementalism. The first is the \textit{remedial nature decisions}. Performance improves through error-correction, based on the identification of “ills from which to move \textit{away} rather than goals \textit{toward} which to move” (Braybrooke and Lindblom, 1963, p.102). The second is the notion of \textit{marginal dependent choice}. This means that the decision-maker proceeds by taking precedent decisions – i.e., the \textit{status quo} – as a reference, and compares alternative policy choices to the \textit{status quo}. In taking his/her decisions the decision-maker computes the increments by which value outputs or value consequences of alternative policies differ from each other, but the values themselves are not evaluated. The question for choosing is “how much a value is worth sacrificing to achieve an increment in another” (ibid, p.88). A modification of the \textit{status quo} is only made in those marginal aspects that suppose an improvement, without changing the substance of the policy. Hence, dependence on an established programme and on past experience is fundamental.

Cyert and March’s organisational method is not conceived so much as a deliberate strategy of change than as an adaptive behaviour of the organisation. As Shapiro points out, such an approach allows us to see the negative side of incrementalism, namely that decision-making is often slowed by the dependence on routinisation and the bias towards the \textit{status quo} (Shapiro, 2005, p.233). Cyert and March suggest a more precise definition of the \textit{status quo} than Braybrooke’s and Lindblom’s “precedent decisions”. The \textit{status quo} is conceived as \textit{acceptable-level goals} (Cyert and March, 1963, p.113). The decision-maker conceives objectives within limits that should not be surpassed and variables that merit focus (see also

\textsuperscript{137} “Satisficing” refers to a level of performance that is less than the maximum projected, but that is accepted given the difficulties of attaining the maximum. The notion originates from a critique of the assumption that a rational decision-maker would need unlimited computational capabilities in order to maximise his or her utility (Simon, 1957, pp.241-260). In Integration theory, Haas explicitly adopts this pragmatic understanding of goals. Instead of focusing on rationally ideal ends, actors will chose whatever works best in a given situation and would adapt means to ends (Haas [2004] 1958, p.xxvi).
Thus, operations to perform a regulatory policy are then designed by specifying critical variables, which must be kept within tolerable ranges. This strategic view of the regulatory or organisational method differs from the rationalistic-maximising conception of strategy of bargaining and coalition-building methods, in which actors configure an ordering among a complete set of possible goals. Instead, regulatory goals imply a “negative” logic: in order to cope with the uncertainty and complexity of the policy environment, the organisation sets up goals within established boundaries, in the form of regulatory programmes. The open-ended nature of regulatory programmes indicates that these boundaries are essentially a baseline for evaluating efficient performance. Going beyond these boundaries could unleash events that escape the control of the organisation, generating inefficient results. Yet, regulatory performance may be improved through the gradual implementation of the programme. An example of the notion of “acceptable-level goals” is the thresholds for concentrations of the Merger Control Regulation of 1989, which will be examined below. These thresholds were of five billion Ecu of global turnover, and 250 million Ecu of European turnover. The turnover thresholds set reference boundaries for investigation of mergers, but did not determine decisions on particular cases. As we will see, the regulatory programme was revised after an incremental process of policy-making and the thresholds were reduced further.

A second relevant contribution of Cyert and March to incrementalist theory is the concept of standard operating procedures (ibid, p.113), which are rules of thumb that the agency follows in order to cope with complex and uncertain policy environments. Standard procedures facilitate the handling of a great number of decisions, but also can serve as a device to legitimise insufficient policy analysis. In the long-term, it can be precisely the injudicious use of these procedures that forces punctuated and more non-incremental changes, such a radical reform of the programme.
Haas’ adaptation of the incrementalist theory to the integration process appears in Chapter 8 of *Uniting Europe* ([2004] 1958, pp.283-317) and in “Turbulent fields” (1976). His most complete exposition of the incrementalist method appears in the following passage of the 1968 preface to *Uniting Europe*:

The functionalist who relies on gradualism and indirection in achieving his goal must choose a strategy that will unite many people and alienate a few. He can only move in small steps and without a clear logical plan, because if he moved in bold steps and in masterful fashion he would lose the support of many. He must make decisions “incrementally” often in a very untidy fashion. The more pluralistic the society in which he labours, the more groups there are that require satisfaction and the more disjointed and incremental the decision-making process will be … the technical decisions always incorporated in the major choices must be made by technocrats; indeed, the role of the technocrat is indispensable in a process as close to the heart of the industrial economy as is the formation of common markets (Haas [2004], 1958, p.xxiv-v).

6.3.2.2 **Regulatory operations of the Commission: investigation and analytical debate**

How is the incrementalist strategy presented in the regulatory activity of the Commission? Most of the insights of incrementalist organisational theory take into account the working of fully-fledged bureaucracies or corporate firms. The Commission, however, is a “maturing bureaucracy” (Christiansen, 1998). Moreover, as I have maintained, organisational

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138 Haas develops incrementalist propositions more systematically in his study of adaptation and learning in international organisations (1990).

139 It is important to note that Haas recognizes the limits of the strategy in a setting that is not sustained by a state-like governmental or a corporate structure, and which depends greatly on the satisfaction by the organisation of the interests of it “clients”: “The very fact that the attachment of many elites to united Europe is pragmatic and rests on incremental processes makes the supranational method dispensable. As long as the benefits of the common market are more important in people’s mind that the means used to achieve these benefits, institutions and procedures can be sacrificed” (Haas [2004] 1958, pp.xxvi-ii).
decision-making in the EU is limited to the statutory regulation and mostly regards the implementation of the SEM. In this perspective, the area of competition policy provides the ideal-type of statutory regulation in the EU. I will then focus on strategic operations belonging to agency regulation in this area, as involving a general process of error-correction and the use of expert information. These operations will be assessed here through two sets of categories of analysis: the procedures of investigation of the agency and the analytical debates between the agency and the regulated parties.

*Procedures of investigation* are the formal procedures followed by the Commission in implementation of Competition policy. Decision-making procedures in the Directorate General IV of Competition are organised in a series of instruments for processing concrete competition cases. These instruments are as follows:

- **Notification.** Firms are asked to notify their agreements or practices. Cases can also be initiated upon complaints of third parties. The Commission has the option of using its own discretion to investigate specific cases, but essentially, the role of the Commission in this phase is reactive. Yet, Cini and McGowan point out that “[f]ailure to notify is something of a gamble for firms, because if the practice is detected it could result in substantial fines” (Cini and McGowan, 1998, p.98). Once a notification is received, the Competition DG performs agenda-setting tasks, determining the salience of potential breaches to rules and setting priorities for further investigation (From, 2002).

- **Investigation and analysis.** Once the Competition DG decides that there is a case to answer, it requests information to the firms involved in potential anti-competitive behaviour and starts an investigation in two phases. The first phase consists of an inspection to collect complete evidence about the case. The Competition DG informs the national authorities of the proceedings, which permit them to express their concerns. As Cini and McGowan point out,
“there is little restriction on the Commission terms of the information it can seek” (ibid, p.105). Generally, the Competition DG requires active collaboration from the firm officials to undertake its search of information. Yet, it has the right to issue orders for on-the-spot inspections and even surprise visits, the so-called “dawn raids”. If responses are considered incomplete or if the firms do not agree with the investigation, fines can be imposed again for incomplete submission.

The second phase of investigation consists of the opening of formal proceedings. The Commission starts proceedings with a “Statement of Objections” if, after the preliminary phase, it considers that the firms, effectively, are breaching competition rules. The second phase involves an in-depth analysis of the case, in which the Competition DG carries out tasks of a prosecutor, interpreting the relevance of the documentation and considering the firms’ arguments in “oral hearings”. Oral hearings are administrative conflict-resolution processes, in which economic and legal issues are raised, and often substantiated by the declaration of expert witnesses. The Commission and the defendant firms present their cases and a Hearing Official acts as an arbiter between the two parties.

– Decision-making. After the formal proceedings the Commission adopts a decision aimed at securing the conformity of agreements with Community law and enforce competition policy. The Commission can either forbid the firms practices as illegal or authorise them, often on a conditional basis.

The second category for the analysis of regulatory operations is provided by the concept of “analytical debate” from the advocacy coalitions’ theory (Jenkins-Smith, 1988; Jenkins-Smith and Sabatier, 1993). The interesting trait of this concept is that it allows us to examine the strategic dimension of the expert-driven regulatory process. Analytical debates are strategic interactions that occur across coalitions of policy specialists, “advocacy
coalitions”, operating in organisational settings (Jenkins-Smith, 1988, pp.169-70). Jenkins-Smith defines analytical debates in the following way:

Advocacy coalitions within subsystems engage in ‘strategic interaction’ in policy debates designed to enhance prospects for adoption of key elements of the coalition’s beliefs and interests into governmental policy (Jenkins-Smith, 1988, p.170).

In order to contextualise the concept it is necessary to go back to the portrait of uncertain conditions that are at the origin of the choice for supranational regulatory, and particularly, to the choice of the mode statutory regulation, in which expert knowledge is the basic tool for policy-making. According to Peter Haas, under conditions of uncertainty, policy makers turn to different and new channels of advice in order to advance policy coordination (Haas, 1992, p.12). Such channels are embodied by “epistemic communities”. An epistemic community is defined as a “network of professionals with recognised expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue area” (ibid, p.3). Within this context of policy analysis, Sabatier (1988) introduced the concept of “advocacy coalition”. As differing from the epistemic communities, advocacy coalitions have a more active role in policy-making, tending to defend strongly their beliefs about how a policy is to be conducted. Policy-making in a given policy subsystem can be dominated by a hegemonic single coalition, strong enough to impede policy-change even at the cost of the loss of general efficiency. Efficient policy change may originate from processes of policy-oriented learning within or across coalitions. “Analytical debates” refer to the latter: the interactions among competing coalitions that may (or may not) lead to policy leaning and subsequent change.

There are two points in which “analytical debates” are relevant for the analysis of operations of statutory regulation. The first is that the basic cooperative resource in the debate
is expertise. In our case, this expertise regards economic and legal arguments that are used as standards of evaluation for the validity of efficient solutions. This request of economic and legal expertise to reach cooperative solutions distinguishes the regulatory process from bargaining and coalition building, where the resources valued by actors are political power and similarity of policy preferences, respectively. The second point is that analytical debates treat changing processes in short-term periods “which can often be as little as two months” (Jenkins-Smith, 1988, p.170). It should be noted that incrementalist changes and spill-overs in regulation are to be evaluated after long periods involving a series of decisions, such as the long-term implementation of a programme. For instance, changes in the programme *Poland and Hungary: Aid for Restructuring of Economies (PHARE)*, involving the economic legislation for the accession of central European countries to the EU, occurred in the period 1989-97 (Niemann, 2004). By contrast, the examination of “analytical debates” permits us to see how regulatory operations work in the framework of a single case of regulatory investigation, which would be a step in these long periods.

Jenkins-Smith considers three central factors that condition the way in which the analysis is used in an interaction and the likelihood of policy learning and change, as seen in the next three points:

– **Level of conflict.** Analytical conflict is defined as the “degree of incompatibility of basic beliefs of competing coalitions” (Jenkins-Smith, 1988, p.177). Jenkins-Smith advances the hypothesis that policy change will be difficult where stakes of actors are high and the core beliefs of the coalitions are perceived as threatened. In case of intense conflict, the analysis will be used as a political resource and substantive modifications of policies are unlikely. On the other hand, Jenkins-Smith notes that low levels of conflict simply have the effect of depriving the issue from significant attention, with the result that no change is incited (ibid,
By contrast, moderate levels of conflict are conducive to learning and change. When conflict is moderate, core beliefs are not directly threatened by the issue debated. This occurs in situations where coalitions draw support from multiple interrelated beliefs, so that the attack on one of these beliefs does not jeopardise the core value of the coalitions. Each coalition is then stimulated to provide information and analysis with a view to shifting the outcome in terms of their own belief system. Following this release of information, coalitions may modify their understanding of the issue and approach their views.

- **Analytical tractability.** Issues are analytically tractable “when the techniques of analysis, theory and data regarding an issue are well developed and widely agreed upon [and] the validity of …[policy relevant] assertions can be assessed with respect to a common standard. Also of importance is the existence of an agreed-upon value or goal with which to compare options” (ibid, p.194). According to Jenkins-Smith and Sabatier, analytical tractability is greater where quantitative data or experimental methodology can be employed (Jenkins-Smith and Sabatier, 1993, p.52). Analytical tractability has the effect of moderating the level of conflict by narrowing down the basis for consensus. Conversely, “intractable issues permit a wide range of plausible analytical positions” (ibid, p.195), thus resulting in the promotion of disparate and conflicting claims.

- **The nature of the analytical forum.** The characteristics and number of actors involved in the debate would also condition consensus-reaching. An *open forum* will include multiple interested actors, notably actors from different professional milieus. It will lack shared norms of scientific investigation and will permit the expression of a wide range of points of view. Conversely, a *closed or professionalised forum* “admits participants on the basis of professional training and technical competency” (Jenkins-Smith, 1988, p.199). Ideally, analysts would come from the same profession and be committed to the same scientific norms. In open forums, analytical conflict will be hardly reduced. By contrast, in
professionalised forums, consensus is propitious, although their selective screening of participants may also result in the exclusion of potential policy-relevant values for the management of the issue at hand (ibid, pp.204-5).

6.3.2.3 Merger Control as a case of regulatory decision-making

I will now illustrate the incrementalist processes, the decision-making operations of the Commission and the strategic exchange of expertise by tracing the creation and evolution of regulation of the EU Merger Control Policy. I will show the short-term strategic interactions of the analytical debate in the concrete merger case General Electric-Honeywell.

In the implementation of merger controls, we can gauge the gradual modifications that the Commission carried out with a view to increasing the efficiency of the policy. In particular, the policy change in merger control can be assessed in two corrective events. Firstly, the notion of “dominant position” for evaluating anti-competitive effects of a merger was extended from the current dominance that a firm exercised in the market to the prospective dominance that a merger would entail, thus increasing the range of application of regulation by the Commission. The second event is the accumulation of criticism about the capacities of the Commission to deal with an increasing workload and about its application of inconsistent criteria to evaluate the economic efficiency. This criticism generated pressures that finally led to a reform of the Commission’s decision-making procedures, involving a task-delegation to National Regulatory Agencies, a change of strategy consisting of focusing on significant cases of dominance and the reinforcement of economic analysis across the Competition DG, which was traditionally dominated by a legalistic approach to regulation.
The Treaties delegate to the Commission extensive powers for control and policing anti-competitive practices by individual firms by means of Articles 81 and 82 TEC\textsuperscript{140}. Anticompetitive practices refer to the formation of cartels and abuse of a dominant position in the market. Firms that carry out practices like price-fixing or market-sharing may hinder the productive activities of other firms and provoke inefficiencies in the market. The Treaties did not specify any power of the Commission to regulate mergers between firms. Yet, the EU Merger Control Policy was a concrete derivation of the provisions of Article 81 and 82 that regulated concentrations strengthening a dominant position. Merger control started with a measure of secondary legislation: in 1962 the Council adopted Regulation 17, which gave the Commission the authority to investigate and prohibit cartels and concentrations. Measures on merger control were first built up from an interpretation of the concept of “concentration”. A coherent merger policy was adopted in 1989 by a Council regulation, centralising merger control powers in the Commission.

The process leading to the Merger Control Regulation of 1989 was paved with a series of key cases of investigation and subsequent rulings of the ECJ, showing the first workings of the regulatory mechanism of conflict resolution and giving rise to a demand for supranational policy reform by the multinational firms operating in the European arena. The hallmark case that initiated the process was Continental can\textsuperscript{141}. The ECJ rejected a decision of the Commission to block the merger between the Continental Can group and the Dutch packaging company TDV on the basis of insufficient proof. Yet, it interpreted Article 82 in a way favourable to the Commission, stating that concentrations were to be prohibited if they had the effect of extending the existing dominant position of one firm. The specification that one of the firms would have to be already enjoying a dominant position within a given market was

\textsuperscript{140} The second set of articles of the EU Competition policy (Articles 90-92 TEC) is addressed to member states and regulates compatibility of state aids with the common market.

important. The concept of “dominant position” was not lawfully interpreted as resulting from the concentration of two or more small companies of equal size even if it created a monopoly. A firm was to be already dominant in a “relevant market” and the Commission needed be prove that its prospective acquisition of another company constituted an abuse of the pre-existing dominance. As Pollack points out, the Commission had post hoc jurisdiction over mergers but not the authority to request notification of prospective mergers and to prevent the creation of a dominant position (Pollack, 2003, p.285).

Given this restriction on the prevention of market failures, the Commission persistently campaigned for a reform (Cini and McGowan, 1998, p.118), drafting in 1973 a regulation proposal to review mergers that exceed Ecu 1 billion of combined annual turnover and Ecu 50 million turnover by the smaller of the companies. The draft was opposed by the member states in the Council. The UK, France and Germany were concerned about the increase of authority of the Commission and its interference with national regulatory authorities (ibid, p.118). More generally, in industrialised member states, the principle that large concentrations were suitable instruments to increase the global competitiveness of European firms was prevalent (Bulmer, 1994, p.424), as was explicitly declared by France in the controversies following the blocking of the Aérospatiale/De Havilland merger (see Pollack, 2003, pp.293-94). The turning point that changed this situation and caused a demand for a supranational regulation was the ECJ ruling of the 1987 Philip Morris judgement, in which the ECJ interpreted that a merger was to be prohibited if a dominant position was to be created from it. After this decision, the Commission extended its executive control to an important number of mergers, imposing new conditions for clearing them, as it did by forcing British Airways to give up some of its routes to its competitors after its takeover of British

142 The ban of the merger between the tobacco companies Philip Morris and Rembrandt was decided after the complaints of two competitors, BTA industries and R. J. Reynolds. Cases 142 and 156/84, British American Tobacco Company Ltd and R. J. Reynolds Inc. vs. Commission of European communities. [1987] ECR 4487.
Caledonian in 1988 (Cini and McGowan, 1998, p.119). According to Bulmer (1994, p.432), the Philip Morris decision generated financial uncertainty in the business community concerning the economic criteria justifying concentrations, and, as a result, about the benefits of embarking on merger projects. Firms were left confused about what were the legal responsibilities of the Commission and the regulatory authorities of the member states. Moreover, there was a considerable augmentation in the number of merger projects during the eighties. The Commission data attest that there were 115 mergers in 1982-3, 492 in 1988-89 and 622 in 1989-90 (Cini and MacGowan, 1998, p.118) This increase of activity reinforced the need for specifying economic and technical criteria to assess concentrations so as to ascertain the conditions by which they distorted competition. Multinationals started to lobby for a supranational regulation that would create a one-shop-stop and eliminate the prevalent ambiguities.

The Merger Control Regulation of 1989 constituted a framework to address these issues. Looking at the regulation in the light of the incrementalist theories of decision-making, we can see that the regulation established a programme of action and standard operation procedures to deal with it. The programme specified technical objectives within the boundaries of acceptable-level goals. These boundaries were presented by the designation of turnover thresholds which justified incompatibility of a prospective concentration with the Common Market and were to trigger the executive action of the Commission (Article 2(3) of Regulation/89). The thresholds of Regulation/89 were as follows:

- The combined aggregate worldwide turnover was of Ecu 5 billion.
- At least one of the two firms had an EU-wide aggregate turnover of Ecu 250 million.
At least one of the two firms had 2/3 of its aggregate EU-wide turnover within one and the same member state.

The *working operating procedures* for merger control were adapted from the existing procedures for cartels and anti-competitive practices: notification, investigation and decision-making. Thus, these same procedures were to be applied by the agency Merger Task Force (MTF), created with the Regulation. Any merger exceeding the above-mentioned thresholds had to notify the MTF, which would proceed to investigate whether the merger would impede or enhance competition and innovation in the EU. The investigation might just approve the merger in phase-1 of the inspection, or it might involve a second phase-2 with an in-depth analysis.

The tracing of the merger policy allows us to draw several conclusions about how the regulatory model of cooperation operates. Firstly, the basic *functional spill-over* in competition policy consisted of the emergence of the merger policy itself from functional pressures generated by the performance of competition policy. Secondly, a *first incremental change* in the executive working of the Commission (supported by the rulings of the ECJ) can be assessed in the accumulation of decisions that finally led to the passing from the conception of an existing dominant position to that of a prospective dominant position. This change of policy, in turn, led to *a second incremental change*: the enactment of the 1989 Merger Control Regulation. Thus, the draft of the regulation was based on the evaluation and correction of the past performance of regulatory work. This work proved insufficient to assure efficient functioning of the market. Yet, the fact that the regulation mostly translated decision-making procedures already existing for cartel-busting and anti-competitive practices, along with the fact that the thresholds accepted (Ecu 5 billion world turnover) were considerable higher than those proposed initially by the Commission (Ecu 1 billion world-wide turnover),
signal that the change was a *marginal dependent choice* and did not constitute the establishment of a whole new regulatory programme.

Since the 1989 Merger Control Regulation was enacted, the Commission cleared most of the notified mergers. In fact, about 95 per cent of all EC merger decisions are phase-1 approvals (Damro, 2001). The first blocked merger was the Aérospatiale/De Havilland merger in September 1991, involving the take-over of the Canadian turboprop aircraft manufacturer, De Havilland, by the ATR consortium, lead by Aérospatiale (France) and Alenia (Italy) (see Pollack, 2003, pp.292-296). The Aérospatiale /De Havilland case is relevant because it breaks the precedent path of approvals and instead blocks a prospective potential monopoly. In this sense, it signified an affirmation of the regulatory power of the Commission. Another relevant conclusion that can be derived from Aérospatiale/De Havilland is that it showed that regulatory decision-making is a process of conflict resolution in which consensual solutions of the agency are often elusive and the effectiveness of these solutions is by no means guaranteed. Thus, the case aroused a significant level of political controversy within the Commission and between the Commission and the member states. The Commission followed an intense process of conflict-resolution within its collegial structure to vote the blocking of the merger. Once passed, the decision triggered the opposition of Germany and France. As Pollack point out, the Commission was not politically reasserted after the decision (Pollack, 2003, pp.297-98), and future developments showed the need to decentralise its decision-making structure in order to facilitate collaboration of national regulatory authorities.

**Analytical debate: GE-Honeywell merger case**

The GE/Honeywell merger shows expert-driven strategic operations in a short-term period. I will use this instance to present the “analytical debate” typical of the regulatory
method, and the way in which it may lead to consensual solutions. The case involved the investigation and subsequent blocking of the merger between General Electric and Honeywell in July 2001. Both companies operate in the economic field of Aircraft engines. General Electric (GE) has a leading position in the supply of civil aircraft engines and it is the military engine supplier to the US Air Force. Its division GE Capital Aviation Services (GECAS) is one of world’s largest buyers of civil aircraft. Honeywell is a diversified technology and manufacturing company and its aerospace division enjoys a strong market position in flight control systems or avionics. The prospect of the merger of the two companies clearly exceeded the thresholds of the Merger Control Regulation, as it would have resulted in a combined world-wide turnover of Euro 180 billion and an EU-wide turnover of 29 billion. Therefore, there was no discussion about the legitimacy of the investigation. Yet, as happened in the Aérospatiale/De Havilland case, the blocking signified a rupture with the precedent pattern of lenient authorisations. In particular, the decision contrasts with another gigantic transatlantic case, the Boeing/McDowell Douglas merger, which the Competition DG cleared after important divestures in 1987. In the case of GE/Honeywell the merger was rejected in spite of several modifying proposals and advancement of consistent economic arguments pointing to the efficiency effects of the merger.

The investigation process leading to the rejection is explained by a controversial analytical debate between the Competition DG and GE. In view of their respective solid policy understandings, these two actors can be defined as “advocacy coalitions”. Regarding the first category of the Jenkins-Smith scheme, the level of conflict, we attest that conflict between the Commission and GE was intense, showing a confrontation between two cores of

143 For the empirical record of this section, I draw extensively from the study of the merger by Morgan and McGuire (2004)
144 Boeing enjoys exclusive twenty-year contracts with a significant number of US airlines. Even if Boeing argued that this domain should not be a concern of the Commission because it did not affect the EU market, it finally accepted a key divesture in the form of not signing any new exclusive contract for the period of 10 years (see Damro, 2001).
beliefs. On one side, GE, backed by the US Department of Justice, defended the efficient effects of the merger as an instrument promoting innovation in the market. On the other side, the Competition DG IV of the Commission held a strict legalistic regulatory credo, insisting on the anti-competitive consequence of the creation of a dominant position. In fact, the very legal notion of “dominant position” was the core belief of the Commission.

The legalistic position of the Competition DG is a distinctive trait of its regulatory policy-making, as the agency has in the Community law the basis of its legitimacy and power (McGowan, 2005). This trait is reinforced by the structure of decision-making. In delegating extreme powers to the Competition DG, member states have established practically no control mechanisms to oversee its power. It enjoys unambiguous legal authority in implementing specific Treaty articles, without having to respond to the Council or the EP (Wilks, 2005a, p.197). Moreover, in the executive decision-making of the agency, the procedure of investigation has quasi-judicial characteristics (Cini and McGowan, 1998, p.102), and private actors have criticised the fact that, in its regulatory functions, the Competition DG combines the roles of jury, judge and executor (Pollack, 2003, p.291; Morgan and McGuire 2004, p.54).

In regard to the conditions mediating the analytical debate, such primacy of law is strengthened by the nature of its analytical forum, the second category of the Jenkins-Smith model. This forum is characterised by its openness and by the dominance of legalistic epistemic communities. As Van Waarden and Drahos point out, the Competition DG relies heavily on channels of advice provided by “an expert community formed by the development of competition law itself” (Van Waarden and Drahos, 2002, p.928). The supremacy of EU law and the normative commitment to regulating markets makes this epistemic community different from the original Peter Haas’ “scientific” communities—such as one formed by economists.
According to Morgan and McGuire (2004, p.45), the fact that the Commission operates in an open forum militates against effective implementation of regulation. These authors argue that the reliance on external sources to deliver policy makes the Commission vulnerable to agency capture. I consider that this is not a sound argument. Pluralist theories of economic regulation state that when agencies are subject to pressures from multiple groups regulatory policies have a balancing effect that offsets the tendencies of the Olsonian logic of oligopoly capture (see Pelzman, 1975). Instead, it can be argued that the Commission simply has no control over its forum. In this sense, the Commission may lack the sufficient level of internal hierarchy so as to be able to monitor effectively various sources of advice. In my view, however, in the concrete controversy of the GE/Honeywell investigation, the fact that the Competition DG was dominated by legal professionals was a more determinant factor than the fact that it operated in an open forum. Legal analysis, indeed, may not be the most appropriate toolkit for treating the issue of economic efficiency raised by the merger.

Turning to the last category defining analytical debates, *analytical tractability*, it is evident that the discussion on the economic efficiency of GE/Honeywell showed a high level of analytical tractability. The debate focused on the effects of “mixed bundling”, that is, the commercial practice of offering price discounts on packages of products in addition to selling them individually (Morgan and McGuire, 2004, p.46). The Commission argued that the commercial strategy of bundling envisaged by GE could not be matched by other potential

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145 From the point of view of the Olson’s logic of collective action (Olson, 1965), regulation is not about enhancing efficiency, but about redistributing incomes from some groups of society (diffuse interests like environmental groups and consumers) to others (concentrated interests like peak industrial producers). As Majone (1996, p.32) points out, pluralist theses do not escape this logic, since they are based on the same reasoning of competitive pressure that would make the most competitive firms, namely monopolistic industries, favoured by regulation. Yet, Majone (ibid, pp.32-33) finds in the work of Becker (1983) an analytical argument that explains better the balancing effect of regulation. Becker argues that, in seeking a favourable regulation, “winners” must not only exert pressure on the agency, but also overcome the pressure that “losers” exert to avoid escalating losses. The greater the loss of losers, the more pressure they would exert, thus augmenting the winners’ “deadweight loss”, i.e. the difference between the winners’ gains and the losers’ losses from regulation-induced change in output.
competitors, who would be forced to exit the market. The argument broke its precedent liberal interpretation of economic efficiency. This interpretation would have looked at how the new products would favour the consumer. Instead, the Commission opted for looking at the effects of the new enterprise’s pricing strategy in terms of its effects on rival competitors.

There were two discernible sides in the debate on bundling, related to the reliance of two different theoretical economic models. The Commission, appealed for the advice of Choi, an economist adviser to Rolls-Royce, the main competitor of GE. Jay Choi offered a theoretical model concluding that the processes of discounting prices by means of mixed bundling would lead rivals to leave the market. Called for advice at the proceedings, the economist Barry Nalebuff, inventor of the model of “pure bundling”¹⁴⁶, assessed Choi’s model and concluded that “the model is not applicable to aerospace markets, characterised, as they are by extensive product differentiation, strong buyers and individually negotiated purchases” (ibid, p.47). In addition, Nalebuff argued that, had it been an attractive commercial strategy, there would have been no reason for competitors not to offer bundles themselves. This exchange of economic arguments based on two theoretical models shows the analytical tractability of the issue at hand. Decisions could be backed up on the advice of professionals who used the same theoretical set, techniques of analysis and data. There was a common standard of scientific evaluation, which would have served to objectively justify or reject their claims.

Taking into account the arguments presented, the revision of Nalebuff seemed to justify, on purely theoretical grounds, the position of GE. Yet, the high analytical tractability of the issue could not overcome the existence of a high level of conflict so as to induce compromises. On the one hand, given the strong position of GE as a producer and supplier to the US Air Force, it was not likely that it would accept important divestures. In this respect, 

¹⁴⁶ “Pure bundling” is defined as the selling of products as part of discounted packages, and not individually.
the Commission claimed that, were the merger to go ahead, the impact of GECAS, the world’s largest aircraft purchaser, might extend to the market of avionics, thus enhancing the dominance of Honeywell. However, GE did not accept a compromise that would have signified the loss of control of GECAS (ibid, p.50). On the other hand, the legal authority of the Commission as independent regulator left little room for accommodation. The Commission stuck with its argument about the “dominant position” and did not accept conclusions coming from the economic models:

The various economic analyses have been subject to theoretical controversy, in particular as far as the economic model of ‘mixed bundling’, prepared by one of the third parties, is concerned. However the Commission does not consider the reliance on one or the other models necessary for the conclusion that the package deals that the merged entity will be in a position to offer will foreclose competitors from the engines and avionics/non-avionics markets (Commission’s GE-Honeywell decision, para. 352, quoted in Morgan and McGuire, 2004, p.47, emphasis added).

In this declaration, the Commission obliquely recognised the validity of economic arguments, but not so as to lead to a revision of its conception of what constituted a dominant position. Further inconsistency of the Commission’s economic assessment was shown in its use of a second argument, the financial strength of GE, in order to justify its thesis of a prospective dominant position. According to Morgan and McGuire, the Commission’s reference to the financial strength of GE was not accompanied by evidence demonstrating that rivals in GE’s markets were having difficulty in raising finance or were investing less heavily in developing the next generation of engines (ibid, p.49). The Commission’s argument on financial strength was then based on speculations about the future, not on existing evidence. This suggests that
the approach of the Commission was basically normative, founded on an EU law interpretation of the impact of dominant positions in the EU market.

In my view, the exchanges of the analytical debate evidence a profound conflict between the parties’ core beliefs regarding the appraisal of regulatory efficiency. The Commission concentrated purely on anti-competitive effects and its appraisal was basically legalistic. By contrast, GE’s arguments, suggesting the pro-competitive reaction of rivals, either by means of imitating commercial strategies or by raising finance, pointed to an appraisal of efficiency that focused on encouraging innovation, and which was defended by the US Department of Justice (ibid, p.51). As a result of such a level of conflict, the analytical debate did not lead to cooperation in the short-term.

Despite the blocking, the controversies of the case of GE/ Honeywell suggested that the regulatory strategy of the Commission might change in future cases. In terms of integration developments, it cannot be clearly assessed if the prohibition of the merger improved the performance of EU merger policy. Instead, in this concrete case, the controversies showed “ills” of regulatory performance. Firstly, the case was a failure in international co-ordination among regulatory agencies, namely between the EU’s Competition DG and the US Department of Justice. This is a recognised impediment for fulfilling independent regulatory functions. As Damro argues, “regulators prefer promoting international convergence and co-operation as a means to avoid trade-related and other political interventions in their regulatory decisions” (Damro, 2006, p.868). Secondly, as noted, the Commission showed clear inconsistencies in its economic analysis and a lack of instruments within its own organisation to evaluate sources of advice. In this view, GE/Honeywell appeared as a correction-inducing case, suggesting that the legalistic approach to regulation might change towards a more focused economic approach to regulation. In this line, it is indicative that Mario Monti, the Director-General of the Competition DG for 2000-
4, stated that “to develop an economic interpretation of EU competition rules was … one of my main objectives” (Monti, 2003, quoted in Wilks, 2005b, p.123).

Beyond GE/Honeywell. The 2003 Modernisation on Competition policy

The series of inconsistencies of the Commission and the accumulation of controversies following mergers decisions such as that of GE/Honeywell, pointed to a direction of change that would come with the Modernisation Regulation of 2003 (see McGowan, 2005; Wilks 2005b). The Commission’s large number of cases and its reliance on an open forum of advice and consultation proved to have dispersive effects for the making of decisions. In this context, in 1999, the Commission issued a White Paper to modernise the rules implementing Articles 81 and 82 of the Treaty, which became a new Council Regulation in 2003. The new Modernisation Regulation 1/2003 eliminates the system of notifications and decentralises the decision-making process, by allowing National Regulatory Agencies (NRAs) to apply Community law, including merger prohibitions, fines and exceptions. Yet NRAs cannot contradict and overrule the Commission decisions. As Wilks (2005b) points out, the regulation signifies a reinforcement of the Commission as an agency. As a consequence, the level of supranational decisiveness is kept high. The Modernisation Regulation establishes vertical Coordination. It secures the coordination of regulation by integrating the NRAs into a trans-national network, with the effect that their independence as regulatory agencies is reinforced by a supranational linkage (ibid, p.437). The reform then entails a correction from the proceeding performance in two senses: it reduces the workload of the Commission and it “professionalizes” the regulatory forum by giving to the NRAs motivations to defend policy commitments in terms of their own professional standards. Yet, it is not clear whether the reform will also reduce the excessive judification of the EU regulatory system. As Damro
(2006) suggests, a major economic focus on economic arguments may come instead from a parallel process of international regulatory coordination.

6.4 The nature of the outcome of coordination: performance of the common policy

In regulatory cooperation, member states assess consensual solutions in terms of the improvement of the performance of a common policy. The strategic objectives of member states when looking to coordinate their policies by means of the services of a regulatory agency are to enhance the performance of policies that require general economic management and legal expertise at the regional level. The nature of the outcomes derived from the use of regulatory mechanisms is likely to reflect centralised policy coordination, or more precisely, the centralised control of decisions by the Commission. Centralisation favours the elaboration and interpretation of general principles and saves member states the transaction costs of negotiating and detailing rules for areas in which they lack the adequate “trans-national” information. By means of a centrally-coordinated control of information, supranational regulatory decisions are deemed to increase the competitiveness and economic growth of the European economic area, and therefore, achieve collective welfare-maximisation.

The analysis here permits two major implications to be drawn about how centralised coordination is qualified in the integration context. Firstly, because the choice of supranational regulation involves the abdication of important sovereignty rights by the member states, the scope of EU areas for which policy coordination through centralised control of decisions meets the strategic objectives of member states is limited. The member states’ reliance on regulation at the supranational level primarily concerns setting standards of conduct in the economic activity, so as to increase the competitiveness of European firms.
This implication contrasts with the conception of supranational/institutional coordination as “total harmonisation”, which points first to preferences for opening the market, and secondly, to preferences for protection against market competition (Scharpf, 1999). I find neither theoretical reasons, nor empirical evidence from the secondary literature reviewed, to support an association between the most supranational form of integration and the preferences for market protection, however desirable market protection at the supranational level might be. Instead, regulation in the EU is explicitly linked to a preference to enhance competitiveness. In this respect, we have seen that the most centralised regulated area of the EU is competition policy, and that here, the expansion of positive integration is based on statutory regulation aimed at eliminating anti-competitive practices and at setting minimal standards, with a view to promoting allocative efficiency.

Preferences for the protection of member states’ economies, on the contrary, have involved a deliberate limitation of the regulatory powers of the Commission, by means of establishing a control mechanism based on comitology procedures. In reality, it can be attested that aspects of policies needing protectionist measures are associated with the use of comitology procedures and other soft legal mechanisms that give ample discretion to national authorities in the execution of EU legislation (see Franchino, 2001). While the reticence of member states to extend the powers of the Commission in politically sensitive areas is one of the reasons for this, the prevalence of national practices of regulation can also be supported by reasons of allocative efficiency. Specialised knowledge about local conditions of workplaces or local cultural predispositions is needed for the tasks of implementing measures of protection, and member states have greater resources and administrative capacities than the Commission for obtaining this kind of knowledge. Since the specification of comitology procedures and soft law instruments derives from the legislative process, bargaining and coalition formation will be more appropriate to explain the terms policy coordination in issues
related to protection from market-competition than the Commission’s executive decision-making. These considerations mean that, in terms of impact on integration developments, coordination through regulation will be more uniform than coordination through bargaining or coalition-building, but it will be limited to the control of economic activities at the regional level. This involves a predominant use of hard legal instruments of coordination. The use of these instruments has been shown in the case of merger policy: the Commission has important discretionary powers for executing measures that regulate merger contracts. Rules for this economic activity are precise, normally specified in technical and detailed white papers or regulations. Finally, member states and firms operating in member states and in the EU economic space are unambiguously bound to apply these rules, often at the cost of short-terms economic loses.

The second implication that we can draw is that the use of supranational regulation in economic policies for which member states hold generalised interests does not live up to its potential of assuring optimal levels of collective welfare-maximisation – a potential that is analytically assumed to derive from the capacity of the hierarchical direction of the organisation (Weber, 1947; Scharpf, 1997). Instead, supranational regulation is a process of incremental correction and experimentation. Regulatory/organisational theories of decision-making focus on the activities that the Commission carries out when executing statutory regulation. The operation of cooperative mechanisms takes place in the processes of investigation of economic activities performed within this supranational agency. In these investigations, in order to assure efficient levels of performance, the agency is to contrast and weigh its own programmes of regulation with the information provided by actors operating in the regional market. With a view to capturing how the use of expert information is integrated in these practices, I have conceptualised the process of cooperative regulation as analytical debates involving the Commission and the parties subject to regulation. In view of the
evidence presented regarding the regulation of merger control, we can conclude that statutory regulation requires the resolution of controversial analytical conflicts so as to reach efficient solutions. In a long-term perspective, the expert-based conflict resolution that characterises the regulatory investigation has led the Commission to make incremental corrections that aim at rationalising its use of expertise. In particular, the evolution of competition policy has recently evolved towards a major focus on economic arguments and administrative decentralisation, involving a redirection of resources to national regulatory agencies. The hallmark of policy coordination is still centralisation, since the Commission guides and controls the general strategy of regulatory management. However, now the Commission concentrates on serious infringement cases and delegates workload to national regulatory agencies. These changes have been generated by an incremental process of conflict-resolution aimed at coping with organisational inefficiencies and at improving the performance of the EU common policy.
7 The Judicial Model of Cooperation

7.1 Introduction

The judicial model of decision-making deals with the cooperative processes by which the European Court of Justice (henceforth, the ECJ or “the Court”) and the national courts of the member states settle disputes among the member states, Community institutions and private parties regarding the application and correct interpretation of Community law, including Treaty-based norms and statutory legislation. “Community law” constitutes the most extensive field of research on European integration. For the study of cooperation, the focus here will be on judicial politics, that is, on the way in which the European Court of Justice takes and justifies its decisions and on the policy consequences of these decisions. The model of judicial politics will be used when discussing the following three main questions: what are the incentives of the member states to resolve their disputes through judicial adjudication? How is the law applied through the resolution of disputes in the courts? How is the law interpreted so as to prompt policy coordination?

The basic argument that I posit is that judicial conflict resolution is used as a response to coordination problems of enforcement regarding very concrete collective action problems that emerge when the member states apply EU law. Due to their detailed nature, these problems are either difficult to contemplate \textit{ex ante} or treat in the more general context of legislative politics. As a consequence, member states have incentives to rely on judicial adjudication. For the analysis of integration – that is, the relationship between the member states and the EU – the relevant enforcement problems are those that are manifest in the acts of judicial review involving preliminary references to the ECJ by means of Article 234 (ex 177) TEC. In these cases, a private party claims, before a national court, that a member state
has incurred a violation of EU law, and the ECJ has to give an interpretive ruling to a national court, for it to make a decision on the case. The reliance on the ECJ as an arbiter for the interpretation and application of the law is the key assumption of the theoretical perspective on judicial politics discussed here.

Following a “Legal Reasoning Analysis” approach (Bengoetxea, 1993; Bengoetxea, MacCormick and Moral Soriano, 2001; Mattli and Slaughter 1998; Weiler and Lockhart 1995), I conceive the process of conflict resolution as the decision-making of the ECJ. The explanation about the evolution of integration will derive from how the ECJ makes decisions based on the merits of concrete cases, that is, on legal precedent, the quality of the arguments and, especially, on the content of the Treaty articles relevant for the facts of the case. The basic conflict-resolution mechanism is assessed by how the ECJ gives legal reasons so as to justify a decision about the compatibility of member state measures with EU law in such a way as to enhance the objectives of the EU. My effort here will consist of constructing a model of the structure of reasoning of the ECJ, so as to identify the unfolding strategic process of that leads to coordination solutions. As a consequence of the incompleteness or

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147 An alternative approach to analyse the decisions of the ECJ is Principal-Agent modelling (Garret, Kelemen and Schulz, 1998; Kilroy, 1999; Pollack, 2003). Principal-Agent models focus on the exogenous political constraints (the political preferences of the member states) imposed on the ECJ, not on the legal justification of decisions. The perspective of inquiry is then different from that of Legal Reasoning Analysis. Following the distinction of Bengoetxea et al (2001) between discovery and justification, the analysis of political constraints would refer to the “process of discovery”. This process includes “aspects that influence the judicial decision but that are not strictly part of a rational reconstruction of the decision in terms of justification” (ibid, p.49). The factors included in the process of discovery do not make their way into the written judgement. On the other hand, Legal Reasoning Analysis refers to the “process of justification”, which “draws attention to how the Court takes account of reasons – legal norms, values, principles, policies – to justify its decisions” (ibid, p.44). The basic materials of Legal Reasoning Analysis are the published judgement of the Court and the published opinion of the Advocate General (the functions of the Advocate General will be described below). Moreover, the two approaches also differ substantially in their empirical strategy and methodology. Studies on political constraints require a statistically significant number of cases. In order to draw empirical conclusions about the influence of member states’ preferences on the behaviour of the ECJ, recent literature in the field has focused on estimating the probabilities of the ECJ being sensitive to political constraints (Carrubba, Gabel and Hankla, 2008; Kilroy, 1999). In contrast, Legal Reasoning Analysis is necessarily qualitative. It focuses on a small number of representative cases. In order to account for how the ECJ makes and justifies decisions, Legal Reasoning Analysis requires an exercise of exegesis that looks at the wording of the ECJ and draws implications concerning the connections between, on the one hand, the facts of the case, the principles and context of law and, on the other hand, the reasoning of the ECJ in the light of these facts, principles and context (the method of Legal Reasoning Analysis will be presented in detail in Section 7.3).
vagueness of the Treaties and the gaps of secondary legislation, concrete interpretations of the ECJ have resulted in policy coordination, giving a direction to the project of European integration. In order to better assess coordination developments, I have chosen to examine legal disputes involving policy areas that introduce “new objectives” that were not included in the central economic objectives specified in the Treaties. In particular, my empirical assessment of the reasoning of the ECJ will focus on the objectives of human rights protection. I assume that the basic economic objectives of the internal market are now accomplished. Policy coordination then will consist of the expansion of EU law to the new objectives. Such expansion requires the ECJ to strike a balance between the traditional economic interests and the new objectives. Coordination developments will be evaluated by looking at how far human rights objectives are recognised in judicial decisions. The empirical analysis of human rights cases will adopt the methodology of Legal Reasoning Analysis introduced by Bengoetxea, MacCormick and Moral Soriano (2001). This methodology examines the construction of the legal discourse of the ECJ (i.e., the presentation of the premises for the legal interpretation of the case) and the criteria advanced to give a reasoned justification regarding the compatibility between national measures and EU law (namely, the criteria of ‘the rule of reason”, “proportionality” and “non-discrimination”, to be defined in Section 7.3).

The scheme presented here will allow us to classify outcomes of coordination regarding a new policy area as centralised or decentralised. According to the 234 preliminary procedure, I model conflict resolution as a concrete dispute occurring between an individual, allegedly representing the EU’s interests, and a member state, which defends the validity of its own measures to apply Community law. The ECJ weighs the different values in play. The final interpretive decision of the Court leads to an outcome that may reinforce the integral
application of EU law called for by an individual party, or, on the contrary, may confirm the position of the member state. In the first case, we will have a “pro-Community decision”; in the second case, a “pro-member state decision”. Pro-Community decisions lead to centralised outcomes when the new objective is clearly recognised in the decision of the dispute. By contrast, when the policy objective has a minor role in this decision, this implies that the ECJ values the regulatory autonomy of the member state in the policy area. Therefore, the outcome will be “decentralised”. Pro-member state decisions are always decentralised. I argue that the ECJ has adopted a diversity approach in the expansion of the human rights objectives, reflected in a general pattern of decentralised policy coordination. This pattern can be assessed in two forms of outcome that we will find. In the first form, the ECJ has asserted a centrally determined standard of human rights protection only at a minimal level. In the second form, the national courts are granted wide discretion to decide on the compatibility of member state measures with EU law.

The conclusions of the analysis in the area of human rights do not permit us to generalise the pattern of coordination to other new policy areas, such as environmental protection or gender equality. However, human rights protection is an area in which

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148 I borrow this nomenclature from Kilroy (1999).
149 It should also be pointed out that both the fact that (save the Charter of Human Rights) there is not an institutionalized EU policy for human rights and that our focus is on preliminary references, limits the scope of our analysis of judicial politics. It does not permit us to treat relevant processes of judicial conflict-resolution that we find in other new areas, such as environmental policy, and in other types of actions in which the ECJ exercises jurisdiction, namely direct actions. In particular, the area of human rights will not be amenable to the examination of inter-institutional disputes over the nature and scope of procedural competences that we find in the work of Jupille (2004). As Jupille has shown, EU institutions are “competence maximizers” and the different legislative procedures of the EU have important implications for the exercise of competencies of institutions. For this reason, institutions harbor incentives to fight over the choice of the procedures that are to govern the decision-making of a given policy area. These “procedural politics” are more likely to arise when an issue presents “jurisdictional ambiguity”, that is, when there are several provisions in the Treaty that could potentially apply to the regulation of the issue. In the face of these ambiguities, the EP, the Commission, the Council and individual member states may engage (and have engaged) in disputes over the choice of the legal basis that is to govern policy areas and may bring their quarrels before the ECJ. Thus, Jupille demonstrates that the area environmental policy has been subject to several procedural disputes that have conditioned its increase of relevance in the EU policy-making, in addition to Treaty changes involving the extension of the co-decision procedure for this area. However, although human rights protection is a fundamental principle of EU law, the EU, as noted, lacks a specific policy for human rights. Moreover, we do not find inter-institutional disputes over
coordination has occurred almost entirely through case law. For this reason, it is a pertinent case study for modelling the specificity of judicial conflict resolution, as contrasted with the three other forms of cooperative process – bargaining, coalition building and regulatory management.

7.2 The EU system of enforcement

Following the general scheme to answer the research question of this thesis, in the first part of this chapter I will proceed by first specifying the coordination problem of enforcement. I will first present the incentives of member states to rely on judicial conflict resolution to resolve coordination problems of enforcement, and will sketch a model that shows how these incentives work for all states, thus defining the EU system of enforcement into a “universal jurisdictional equilibrium” (Johns, 2008). The EU system of enforcement is unique in that it imposes a high level of legal obligation on all the member states. For this reason, it is necessary to support the basic model on the incentives for member states by looking at how this system has been constructed. In a second section, I will turn to the exposition of this construction, by examining the judge-made doctrines of direct effect, supremacy and pre-emption. In a third part, I will examine Weiler’s thesis on the dynamics between law and politics that enabled the constitution of the system of enforcement (Weiler, 1999a). The review of Weiler’s arguments will give us an original and consistent support for the proposition that member states have incentives to rely on the EU high obligation jurisdictional system, even if such incentives were not explicit in their initial delegation of enforcement.

legal bases for human rights in preliminary proceeding (see Jupille, 2004, pp.100-103). As a consequence, it is difficult to draw interpretations about procedural politics from the area of human rights. Yet, human rights in the EU can be considered an extreme case of jurisdictional ambiguity. As we will see, litigants claiming human rights protection at the EU level often attempt to link human rights to several provisions of the Treaty. In fact, multiple policies are affected by human rights aspects. Therefore, a large number of Treaty articles could serve as legal bases for the protection of human rights. This suggests that the area has a potential to, indirectly, be subject to an analysis of procedural politics. As a consequence, in future research, Jupille’s approach could be fruitfully adapted to the study human rights issues.
powers to the ECJ. From the analysis of Weiler’s thesis, I will derive an argument about why judicial policy coordination occurs in particularised collective action problems. The final section will analyse the question of the expansion of the domain of enforcement of the EU.

7.2.1 The coordination problem of enforcement

7.2.1.1 Enforcement as adjudication and interpretation

There is a general consensus in the literature on the assumption that international courts, as dispute-resolution organisations, provide a function of enforcement. A minimal definition of enforcement is “the imposition of costs/punishments on states that fail to carry out the court’s rulings” (Gilligan, Johns and Rosendorff, 2008, p.5). In this view, the functions of enforcement have been characterised as “securing agreements” or “locking in” bargains (Johns, 2008; Moravcsik, 1998).

Some clarifications to this definition and characterisation of “enforcement” are needed. Firstly, it is necessary to distinguish enforcement as an adjudicatory function from enforcement as a policing function. In the EU, the adjudicatory function is performed by the ECJ and the national courts. It refers to settling the lawful rights of an actor against another, based on the merits of the case. “Policing” refers to ensuring that actors comply with the law. In the EU, this function is carried out by the Commission. Both functions involve costs to the actor who does not comply. As we will see, in the EU adjudication imposes costs in the form of political opprobrium, that is, reputational costs that are translated into the legislative arena and/or domestic opposition. Costs in the form of financial sanctions link policing and adjudication and are contemplated under Article 228 (ex 171), which allows for the

150 In addition, international courts are also said to be forums that provide information to actors which may be necessary to resolve disputes either in the courts or in post-litigation negotiations (see especially, Keohane, 1986).
Commission to propose financial penalties for a member state’s failure to comply with a judgement. However, the imposition of fines is at the Court’s discretion. In the EU, financial sanctions have an effect similar to that of reputational costs and have been used by the Commission as an effective threatening device, pushing member states to comply without actually ending up in a formal ECJ’s ruling (Tallberg, 1999, pp.178-84).

A second, and crucial, clarification regarding the meaning of enforcement is that, as noted, the adjudicatory function acquires a coordination dimension when the decision on the merits of the cases submitted before the courts is not limited to the application of law, but involves an *interpretation* leading to policy elaboration. The Treaty of the EU specifies the interpretive nature of the functions of the ECJ in Article 220 (ex 164):

> The Court of Justice shall ensure that the interpretation and application of this treaty is observed.

This interpretative duty is especially important since the Treaty is vague in most of its provisions. Judicial policy elaboration thus comes as an extension of this duty, that is, as filling in details that the coded legislation does not provide.

### 7.2.1.2 The decentralised system of enforcement of the EU – Article 234

The Treaties provide specific mechanisms of enforcement by means of a system of judicial review. In various articles (Articles 226-239 TEC), they establish the types of actions of Community institutions and member states in which the ECJ has jurisdiction to enforce the law. This jurisdiction covers Treaty provisions included in economic policies (the first pillar under the Maastricht terminology) and certain provisions of the Justice and Home Affairs (the third pillar), regarding immigration and granting of visas. The second pillar, Common Foreign and Security Policy, is excluded from the review of the ECJ.
The ECJ may review actions of infringement of Community law by Community institutions or by member states at two levels: the Community level and the member state level. At the Community level, either the Commission, under Article 226 (ex 169) TEC or a member government, under Article 227 (ex 170) TEC have *locus standi* for bringing complaints to the ECJ when a member state fails to comply with community law. Disputes between the member states are rare, since states prefer to leave the task of enforcement to the Commission. Disputes in which the Commission can initiate proceedings against a member state are basically carried out at an administrative level. When a dispute ends up in a ruling by the ECJ, this judgement is strongly supported by the previous administrative phase. Yet, the cases in which the proceedings end up in a ruling by the Court are minimal. Thus, Snyder reports that from 1983 to 1990 less that 4 per cent of the complaints filed by the Commission under Article 169 ended up in judgements (Snyder, 1993, p.27).

For the representation of judicial decision-making, I will concentrate on enforcement conflicts that arise in the judicial review at the member state level. As argued below, this level provides us with a nexus to examine the integration question. Review at the member state level is covered under Article 234 (ex 177), and consists of preliminary rulings of the ECJ, upon request of a national court, about the interpretation of Community law in cases where a member state measure has been challenged by a private party as being in violation of Community law. The use of the 234 preliminary procedure has established the characteristic “decentralised system of enforcement” of the European Union. The strength of this system rests on the cooperation between the ECJ and the national courts of the member states. In this respect, the organic relationship between the ECJ and the national courts set up by means of Article 234 has ensured that the implementation of the law by the member states goes beyond a duty of loyalty (Shaw, 1993 p.208). As Kilroy points out, preliminary procedures are only a first step that may leave many problems of compliance unresolved (Kilroy, 1999, p.351).
However, compliance is facilitated for two reasons. Firstly, at the level of the ECJ/national courts relationship, judicial cooperation has minimised a dogmatic understanding of the goal of uniform implementation of Community law. Secondly, at a horizontal level, the national courts have established a system of reciprocity and trans-national ‘judicial cross-fertilization’ (Weiler, 1994, p.521). They have accepted to assimilate the Community norms, and they refer in their decisions to those taken by their counterparts in other countries (Shapiro, 2005). The enforcement mechanism in the EU is then crucially dependent on the effective implementation of the member states.

As noted, judicial review in the EU also operates at the Community level. However, the basic traits of integration, as entailing a trade-off between the interests of the EU and its member states, are to be found in issues raised through Article 234. This importance of the preliminary references for the integration question rests on the fact that references deal with the compatibility of member state legislations with Community law. Moreover, individual litigants have increasingly used the procedure since the 1970s (from 50 cases in 1974, to more than 150 in 1984, to more than 240 in 1994, see Fligstein and Stone Sweet 2001, p.42). As a consequence, we can derive conclusions about the nature of policy coordination from the examination of the processes of legal conflict resolution in preliminary references, and their subsequent outcomes. Coordination may represent an extension of Community competencies, or, on the contrary, it may involve a granting of autonomy to member states in the application of Community law. In this sense, the structure of preliminary references offers us a setting in which to examine the intergovernmental/supranational problem.

7.2.1.3 The enforcement coordination problem

From the perspective of the study of conflict resolution and cooperation, I will model the coordination problem of enforcement according to the following question: which
incentives do member states have in relying on the ECJ to resolve their disputes? To answer this question we need first to look at the type of situations that trigger the “securing agreements process”. These situations are manifest when there is a conflict about how to apply and interpret those agreements. In this view, I conceptualise the coordination problem of enforcement as involving particularised and detailed collective action problems arising in the context of the application and interpretation of Treaty and secondary legislation. These problems present challenges or questions regarding EU law that had not been treated in the constitutional or legislative arena (Stone Sweet and Brunell, 2005, p.160). Concretely, these untreated issues are likely to appear when a private party claims that a member state’s policy measures are in violation of Community law.

As just noted, issues of enforcement are particular collective action problems arising within a member state and which regard the application of contracts reached in the constitutional or legislative process. States have a generalised interest in securing that each state performs adequately the agreements reached. Yet, in principle, they could bring the issues of concrete problems to the legislative area. However, I posit that member states have incentives in relying on judicial dispute-resolution because the costs of bringing particularised problems for cooperative resolution to the legislative arena are higher than the costs of relying on court adjudications. A problem of enforcement is typically related to the local context in which national legislation operates, and often will only affect one member state. Due to this concreteness, it is either difficult to contemplate ex ante or to resolve in the legislative arena.

The characterisation of the problem of enforcement have been an issue of debate between, on the one hand, scholars that find a demand for enforcement coming from transnational society (Alter, 1998; Stone Sweet and Brunell, 2005; Stone Sweet and Caporaso, 1998) and, on the other hand, authors that take an intergovernmental perspective and place this demand on the member states (Garrett, Kelemen and Schulz, 1998; Kilroy, 1999). In my view, we should distinguish between the initial incentives of member states in setting up a system of enforcement and the subsequent unfolding of the dispute-resolution processes within this system. Upon this distinction, the question of these incentives is distinct and prior to the question of a demand of enforcement, once this system is established. Private actors and EU institutions act as agents of enforcement, but the delegation of functions of enforcement to judicial institutions comes from strategic incentives of the member states.
Under these conditions, discussing these enforcement issues in this arena will be extremely costly. As a consequence states value a unique system of arbitration that is to be applied in each member state, and which is founded upon the jurisdictional decisiveness of a supranational judicial institution, namely the ECJ.

To represent this scheme of incentives for reliance on the judiciary in particular cases, we need to combine two propositions. First, member states accept dispute resolution facing their own courts. We have here a scenario that pits a member state adopting a given policy measure against an individual claiming that this measure violates Community law. The individual would indirectly act as an agent of the EU. Upon a request for a preliminary ruling of the national court, the ECJ interprets the compatibility of the national measure with the Community law, and the national court applies a decision following this interpretation. The problem of enforcement is represented in Figure 14. A dispute in a particular case confronts a member state and an individual plaintiff, filing in a court of this member state and invoking the application of Community law so as to invalidate a certain national legislative measure as unlawful. The ECJ may give an interpretation indicating that the national court should either strike down the national measure, point \(d\) in the figure, or confirm its validity, point \(m\). The status quo, SQ, represents the situation when the case has been raised before the ECJ but the decision has not been adopted yet. In this situation both the individual and the member state are uncertain about what would be the outcome of the judicial proceeding. If the ECJ makes an interpretation that sets the decision of the national court at point \(d\), it would make a pro-EU interpretative ruling on the merits of the case and, because of its jurisdictional

\[\text{\textsuperscript{152}}\] Naturally, cases may involve several legal issues, and the ECJ may give a balanced judgement in which the final resolution does not correspond to the initial claims that the plaintiff and the defendant presented before the national court. However, in the end of the day, the national court is to make a decision by which the measure under scrutiny will be maintained with required modifications or, on the contrary, will be struck down. For instance, as we will see in section 7.3, in the case \textit{Elliniki Radiophonía Tileorasi v. Dimotoki Etairia Pliroforissis} (see Section 7.3), the ECJ merely required for the national court to examine whether there was an infringement of a Community principle of human rights protection. Ultimately, the measure was not struck down and the choice of the means for protection of human rights was left to the discretion of the national court. In the scheme presented here this decision will correspond to an outcome at point \(m\).
authority, the ECJ can make this decision unilaterally. The system of enforcement would impose costs on the member state in case of non-compliance at point \( c \), making the situation of the member state worse than in the SQ. As compared with point \( c \), it would be in the self-interest of the member state to comply with the ruling. Note, however, that the ECJ could make a pro-member state ruling at point \( m \), interpreting that the member state measures are compatible with Community law. In this case, the state would not need to change its legislation in order to comply with Community law. Therefore, no costs of enforcement will be involved here.\(^{153}\).

Figure 14 Enforcement problem of coordination in one member state

The costs of enforcement come basically from the lack of support from other member states in a post-litigation context, that is, in the legislative process. This implies that, for the enforcement system to work, the costs of enforcement for the member state would need to be greater than the costs of engaging in a direct confrontation in a negotiation. Thus, suppose that the member state has strength to negotiate, or attach salience to, an issue in the legislative

\(^{153}\) The member state will be better off in \( m \) than in the SQ because in the SQ it was uncertain about the outcome of the decision. In the SQ situation, the member state can neither lawfully implement its legislative measure, nor invalidate it.
arena. Then, we can interpret that the costs of enforcement would be placed around the SQ, thus eliminating its incentives to comply with the decision of the Court at $d$. In fact, this situation would explain the lack of judicial enforcement in the CFSP. Member states attach salience to security issues and/or they value their strength to negotiate these issues. As a consequence, they prefer (i.e., find it less costly) to engage in direct negotiations rather than to rely on the arbitration of the Court.

The second proposition is that the system of decentralising enforcement must be reciprocal. Incentives to maintain the system of compliance are explained by the development of “reciprocal endogenous enforcement”. States have a general interest in the effective application of Community law. States expect that, if they do not comply or they do not punish a non-compliant state, they will neither receive the benefits derived from other compliant states or the benefits derived from the punishment of non-compliant states. Member states consider what Leslie Johns calls a “universal jurisdictional equilibrium” as optimal, that is a system of enforcement which is optimal from the perspective of all actors (Johns, 2008, pp.21-22). The Universal jurisdictional equilibrium exists in high obligation systems, such as the EU: “a system in which the costs of enforcement are high, and for every state, the punishment it receives from non-compliance is higher than its strength in [direct negotiations]” (ibid, p.19). “Reciprocity” is represented in Figure 15, which merely reproduces the structure above, now combining two member states facing their own courts. The reciprocity of the system of enforcement means that each member state is subject to the same judicial scrutiny of their actions, so that all states are bound by the system of enforcement. Thus, for the system to work, a member state, say MS1 in the Figure, facing a negative ruling and hence enduring costs of enforcement at $c_1$, can be certain that other states, MS2, may find themselves in the same position when facing their own courts, meeting costs
at \( c_2 \). Likewise, MS1 must accept that other states may win a case (i.e., obtain a pro-member state ruling) in the same manner.

![Diagram](image)

**Figure 15 Enforcement problem of coordination combining two member states**

The development of a regime of reciprocity of enforcement assures that member states will be willing to punish other states, even if they do not have a stake in the particular case in which those other states are facing their own courts. In the legislative arena, member governments may extend their lack of support to any issue, to punish a non-compliant state. Therefore, a member state must ponder its negotiation strength on average, rather than in relation to a specific issue. By delegating discretionary powers of enforcement to the ECJ, member governments “lock in” precedent agreements and save the costs of negotiating any particularised issue that may arise in national contexts.

According to these considerations, the scheme of costs of interdependence of a coordination problem of enforcement can be summarised as follows: generally, sovereignty costs involved in the performance of legislative or constitutional agreements are relatively not valued because all states have a great interest in securing the political investments that they have made in these agreements. Due to this interest in securing their contracts, states place a
high value on a supranational jurisdictional institution’s capacity to act, namely the ECJ. This capacity is to be displayed within each member state, in concrete cases of the application of EU law. The system of enforcement that this high level of jurisdictional decisiveness entails is sustained by the fact that states are willing to impose high costs of non-compliance on other states, thus constituting a jurisdictional universal equilibrium.

7.2.1.4 Arbitration of the ECJ

Reciprocity establishes the position of the ECJ as arbiter in the decentralised system of enforcement. The ECJ is the guardian of uniformity in the application of community law across member states. For this reason, it should maintain coherence in the preliminary rulings that it gives to each national court in each particular case. As we will see, the ECJ rulings are bound to the factual situations of the particular cases. This implies that interpretations are made on a case-by-case basis. As a consequence, in my view, we cannot expect a “general line” in rulings based on precedents, but this does not need to translate into incoherence. In order to evaluate each particular case, the ECJ must consistently follow the same criteria of reasoned interpretation about the compatibility of member state measures with Community law.¹⁵⁴

Why are there incentives to rely on the ECJ as an arbiter? The scheme above has presented a notion of the efficiency of the judiciary in resolving disputes in particular cases. While this notion is crucial to understand incentives for delegation, we should also examine why the member states consider the ECJ to be the authoritative arbiter. The basic reasons for reliance on the Court as an arbiter are the legitimacy of the objectivism of judicial reasoning, the formalism of the discourse and its neutrality (Weiler, 1994; Mattli and Slaughter, 1998). Judicial conflict-resolution entails a specific form of discourse requiring justification in terms

¹⁵⁴ These criteria will be analysed in section 7.3.
of applicable rules and pertinent facts. Legal discourse and justification requirements make the ECJ an objective arbiter. The Court is bound to the “the language of the reasoned interpretation, logical deduction, systemic and temporal coherence” (Mattli and Slaughter, 1998, p.197). Member states submitting their actions to judicial review have the opportunity to test their allegations and defences under accepted standards and procedures. The Court is then constrained by this legal objectivism. As Mattli and Slaughter argue: “Reasoning and results that do not meet [the requirements of the legal discourse] … may be challenged as ‘unfounded law’ or as indicative that a court is acting ultra vires – in excess of its mandate” (ibid, p.197).

The notion of reciprocity can explain the occurrence of a system of compliance, which generates the universal jurisdiction equilibrium. Yet, it cannot explain the level of obligation in this jurisdiction. We need a supporting argument to account for this phenomenon. We now turn the exposition to how the high obligation system of the EU was constructed and to the argument of Weiler’s thesis on the logic behind this construction.

7.2.2 The construction of the system of enforcement: the constitutionalisation process

The issue that we address in this section is the process by which the system of enforcement of the EU was created. In this process, the EU legal order established itself as a superior system of law, penetrating the national legal orders. The Treaty of the EU gives little indication about the nature of the relationship between EU law and national law. The ECJ, however, in a series of early hallmark cases, established key doctrines that were to regulate the vertical parameters of the Community legal order. Through these doctrines, the ECJ, in
cooperation with the national courts, transformed the texts of the Treaty into a high obligation system of law that differs from other international orders. In *Costa*, the ECJ stated:

> By contrast with ordinary international treaties, the EEC treaty has created its own legal system, which, on the entry into force of the Treaty, became an integral part of the legal systems of the member states and which the courts are bound to apply (*Costa*, Recital 3).

The doctrinal development, or “constitutionalisation” process, has the effect of giving to this and other statements their operating force, making the member states effectively responsive to their own courts in their obedience to Community law. This “nationalisation” of Community obligations (Weiler, 1999a, p. 24) will rule out the basic notion guiding international law: the recourse to exclusive state responsibility. In this manner, the EU legal order appears as a self-contained enforcement regime. What is more, I will argue that that this high obligation system also signifies a unique prevalence of the “universal jurisdictional equilibrium”. As noted, the maintenance of such equilibrium necessitates the acceptance of all member states of the enforcement system. The three key judge-made doctrines that establish the vertical parameters of EU enforcement are *direct effect*, *supremacy* and *pre-emption*.

### 7.2.2.1 Direct effect

*Direct effect* means that a community norm – if it is definitively accepted by the legislative authorities of the Community and the member states, and with no need of elaborating further criteria in order for it to be implemented – becomes self-executing, thereby

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156 Weiler (1994, 1999a) and Shaw (1993) include Human Rights Protection as a constitutionalising doctrine. I will consider the jurisprudence on human rights in the study of the strategy for conflict resolution (see section 8.3, of this chapter). As we will see, the boundaries of the human rights principle at the Community level are still fluid. Therefore, I have not included this principle as a part of the doctrinal development.
creating enforceable obligations, not only between member states but also between member states and individuals.

As Shaw points out, “direct effect” refers to the application of techniques of enforcement of laws that already have a constitutional quality (Shaw, 1993, pp.255-56). The doctrine generates, for the courts, the duty of making the laws justiciable, and for the governmental authorities of the member states the responsibility of assuring that the law operates for the benefit of the individual. The key for interpreting direct effect is that no further precisions and conditions are required to establish the enforceability of an EU law. Thus, a treaty provision has direct effect when the Treaty specifies a complete legal obligation. The ECJ introduced the doctrine in *Van Gend en Loos*:

Independently of the legislation of Member States, Community law not only imposes obligations on individuals but it is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty but also by reason of the obligation that the Treaty imposes in a clearly defined way upon individuals as well as upon the Member State and upon the institution of the Community. …

According to the spirit, the general scheme and the wording of the EEC Treaty, Article 12 [now Article 25 TEC] must be interpreted as producing direct effect and creating individual rights which national courts must protect (Case 26/62 *Algemene Transport en Expeditie Onderneming Van Gend en Loos v. Netherlands Administratie der Belastingen* [1963] ECR 1, Recital 3 and 5)\(^\text{157}\)

\(^{157}\) *Van Gend en Loos* concerned a Dutch chemical importer claiming that the Dutch customs authority had imposed an illegal duty on the chemicals (unreaformaldehyde) he imported from Germany. The Dutch government, by virtue of an agreement signed by the Benelux countries (the Brussels Protocol of 1958), increased the EC ad valorem import duty from 3 to 8 per cent. The plaintiff claimed that such an increase was in violation of Article 25 of the EC Treaty (ex 12), which provides that member states must refrain from
In regard to statutory legislation, direct effect was first conceived for *regulations*, which are directly applicable. *Directives*, however, stipulate a “result to be achieved” (see Article 251 (ex 189) TEC), but reserve the choice of the means of implementation to the member states. These means may entail further precision not specified in the provisions of the directive. Yet, the ECJ made clear that the member states had an obligation to correctly implement directives. The ECJ thus put the emphasis of the obligation upon the “result to be achieved”. As a consequence, individuals have the possibility to invoke the direct effects of a directive when there is incorrect implementation. Thus, in *Van Duyn*, The ECJ stated:

> Where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law (Case 43/74 *Van Duyn v. Home Office* [1974] ECR 1337, Recital 2)\(^{158}\).

A second aspect of the direct effect of directives is that it refers to an obligation of a member state to individuals. In regulations, the obligation applies also to individuals *inter se*. Yet, for both types of statutory acts, direct effect has its most important function for legal

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\(^{158}\) *Van Duyn* concerned a Dutch national who was expelled from the UK on the grounds of her prospective employment in the Church of Scientology, an organisation which was considered socially harmful by UK officials, but which was not unlawful in the UK. The ECJ held that the applicant had the right to invoke the Directive 64/221 in order to claim procedural rights that limited the UK’s discretion to exclude other Member States’ nationals on the ground of public policy. The ECJ’s final (and controversial) ruling was that the UK decision was justified. Yet, such a justification was only granted upon judicial review of the ECJ, and therefore, in the light of Community law.
integration in the link it creates between the member state and their own individuals. As Weiler points out:

In practice … Member States violating their Community obligations could not shift the locus of their dispute to the interstate or Community plane. They would be faced with legal actions before their own courts and their own individuals … Effectively, individuals in real cases and controversies (usually against state public authorities) became the principal “guardians” of the legal integrity of Community law within Europe (Weiler, 1994, p.513).

Direct effect is reinforced by the “interpretive doctrine” of indirect effect, by which national judges must interpret a directive in conformity with Community law, regardless of whether it has direct effect. Crucially, indirect effect is a harmonising device applied to directives. It implies that disputes between governmental authorities and individuals are to be resolved according to the general conception of EU law. The doctrine was introduced in Von Colson\(^{159}\). Yet, it was in Marleasing\(^{160}\) when the ECJ gave the doctrine its wide-ranging meaning. The ECJ resolved that when a directive had not been transposed, or had been transposed incorrectly into national law, the national courts had to interpret the national law, “as far as possible”, as if it were in conformity with the purpose of the directive in order to achieve the result pursued by the latter (Marleasing at p. 4159, quoted in Shaw, 1993, p.274).

Since Marleasing, the interpretive obligation of the indirect effect has depended much on the factual context for which a national law is required. Indirect effect offers the advantage of giving the national courts an interpretive recourse to balance their existing national legislation with Community law. In some cases, the existing national legislation may


cover the purpose of a directive that is not precise enough so as to have direct effect. Yet, in other cases, EU law provisions and national provisions are not easy to conciliate, and the constructions under indirect effect may become tense\textsuperscript{161}. Nonetheless, we can conclude, as Shaw points out, that the doctrine is consistent “with the evolution of a wider array of mechanisms concerned with increasing the effectiveness of EC law within the domestic legal system, through a focus on sanctions for breach of EC law rather than on the precise nature of the provision which is alleged to have been breached” (ibid, p.276).

7.2.2.2 Supremacy

The doctrine of supremacy is the basic constitutional principle of the ECJ. It provides that, in the sphere of Community law, any Community norm, be it an article of the Treaty or a minuscule administrative regulation enacted by the Commission, supersedes conflicting national law whether enacted before or after the Community norm. The ECJ stated the point forcefully in \textit{Internationale}:

\begin{quote}
The law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character of Community law and without the legal basis of the Community itself being called into question (Case 11/70 \textit{Internationale Handelsgeellschaft} [1970] ECR 1125, Recital 1).
\end{quote}

As Weiler notes, supremacy gives direct effect its full significance, by eliminating the principle that \textit{lex posteriori derogat lex anteriori}. Typically, this principle governs the conflict of laws in “quasi-monist” federations like the United States, where the enactment of

\textsuperscript{161} For a view on the limitations of indirect effect see Tridimas, 1994.
new laws is a way by which a national legislature can resolve inconsistencies of Treaty
norms with particular situations. By contrast:

In the Community, because of the supremacy doctrine, the EC norm, which by virtue
of the doctrine of direct effect must be regarded as part of the law of the land, will
prevail even in these circumstances. The combination of the two doctrines means that
Community norms that produce direct effects are not merely the law of the land but
“the higher law” of the land (Weiler, 1994, p.514).

In this view, we should add that the supremacy doctrine resolves the apparent contradiction
suggested by Cappelletti with regard to judicial review in the European Community.
Cappelletti states that, in the EU legal order, “every national court is … a Community judge
as well”. As a consequence, there is a high potential for divergence, since judges are not
bound to follow other judges in their reviews (Cappelletti and Cohen, 1979, p.365). It is true
that a national court is entitled to apply Community law in its country. Yet, the use of Article
234’s preliminary procedure in cases of a conflict of laws confers the right of interpretation to
the ECJ. By virtue of the doctrine of supremacy, interpretation has a uniformising effect in the
application of law: each time a national court asks for interpretation to the ECJ, this
interpretation becomes “the law of the land” for all effects of the application of the
Community law in domestic settings.

The determination of what is the sphere of application of Community law in the
member states brings in the most controversial aspect of supremacy. The ECJ attributes itself
Kompetenz-Kompetenz – i.e., it will be the body which has the final decision about which
norms come within the sphere of the Community law (Weiler, 1999a p.21, n. 26). Weiler
justifies the “Kompetenz-Kompetenz” of the ECJ on the grounds of Public International Law:
international institutions need legal mechanisms to settle the disputes between the composite
organ and its units in order to avoid auto-interpretation of the agreements (Weiler, 1999a, Chap. 9). Yet, this implicit jurisdictional right of the ECJ aroused the “rebellion” of the German and Italian constitutional courts to the supremacy doctrine (see Schermers, 1990). In particular, the German and Italian courts rejected the ECJ’s superior jurisdiction on human rights on the grounds that a Community-wide standard provided insufficient protection. As we will see, the decisions of the ECJ on this issue are to be based partly on the constitutional traditions of member states. This may have assuaged the early rejection of national courts to the supremacy doctrine. However, the problem of “Kompetenz-Kompetenz” reappeared more substantially in the so-called “German Maastricht decision” of the Brunner judgement, when the German Constitutional Court asserted that the competencies of the Community must be authorised by the sovereign member states in a precise and limited way, such that the actions of the EU are predictable (for a critic of this decision, see Weiler, 1997).

These challenges highlight that “supremacy” may be less forceful in practice than the ECJ’s early statements of the doctrine seem to imply. It is not only that national courts may challenge the jurisdiction of the ECJ at any time, on the grounds of preserving diversity. More importantly, the ECJ itself has integrated this notion of diversity in its jurisprudence. As I will argue below, the evolution of the case law makes it difficult to maintain the claim that the Court has a pro-federalist (read monist) policy.

7.2.2.3 Pre-emption

The doctrine of pre-emption states that member states are pre-empted from taking any action at all in situations where a policy area falls within the Community competences. Even in the event where there is not a specific Community measure, the area is potentially occupied (Weiler, 1982 p.48). Moreover, if a reform in the policy area is called for, the member states
are pushed to act jointly. A clear ECJ assertion of the doctrine appears in Plantl, in reference to the CAP:

Once rules on the common organisation of the market [in wine] may be regarded as forming a complete system, the Member States no longer have competence in that field unless Community law expressly provides otherwise (Case 16/83 Plantl [1984] ECR 1299, at p. 1324, quoted in Shaw, 1993, p.271).

“Pre-emption” complements in a fundamental way the principle of supremacy, since, in practice, Community law is put into effect by the national institutions themselves. The ECJ has no power to invalidate national legislation. In this respect, Weiler asserts that, since “there are no clear criteria as to the conditions under which legal/policy space will become thus occupied”, the ECJ first adopted a cautious approach in the application of the doctrine, giving the member states the power to assume commitments in the regulation of fields where the Community had not yet developed a comprehensive set of policies (Weiler, 1982, p.48). This cautious approach, however, is “transitory in nature” (Weiler, 1981, p.278). In the fields that have become exhaustively regulated by the EU institutions, when a new legal situation arises, national courts are constrained to set national remedies aside and apply the Community law directly.

7.2.3 Weiler’s thesis on the construction of the system of enforcement: the dynamics between law and politics in the EU

The vertical system of enforcement set up by the doctrinal development signifies a consummate settlement of the universal jurisdictional equilibrium, defined by the fact that all states agree to the arbitration of the Court, and that they agree to implement the Court’s rulings in their own domestic setting. The verticality of the system thus means that the
recourse to counter-measures in future negotiations is completely abandoned. As a consequence, the “lock in” of constitutional and legislative commitments is also complete\textsuperscript{162}.

In terms of integration, the most important aspect of enforcement is its relation to policy coordination. Because of the significance of case law in reconstructing Treaty and statutory norms, the acceptance of the enforcement system binds the member states, not only to judicial control, but also to judicial policy coordination. This form of binding leads us to the following question: why do all of the member governments of the EU, which have different capacities to defend their interests, have incentives to adhere to a system of arbitration that has so patent consequences for policy coordination?

In order to answer this question, I will review Weiler’s thesis on the dynamics between law and politics that explain why this process could take place. In my view, Weiler provides an original explanation of the generation of the universal jurisdictional equilibrium, which we cannot obtain with other models. In particular, Weiler’s thesis assists us in resolving the seeming paradox that the member states will have incentives to accept the considerable jurisdictional power of the supranational judiciary, in spite of not having intentionally delegated this power by means of a Treaty agreement. Weiler argues that the member governments accepted the doctrinal development of the ECJ, because, simultaneously, they developed intergovernmental mechanisms in the legislative process of the EU by which each of them could control the decisions on statutory laws that were to be enforced.

\textsuperscript{162} By contrast, enforcement in public international law is horizontal. The state’s domestic conduct and institutions are declared to be beyond the reach of other states. Direct effect is not completely unknown in international law. It exists, for instance, in the International Court of Justice. Yet, it is rarely used. Likewise, it can be said that the supremacy of International law over national laws stands as the legitimising principle of any international agreement. But the principle has the quality of an uncompromising sense of duty (see Weiler, 1999a, p.25). Essentially, in international legal orders, enforcement is actuated through the recourse to counter-measures among sovereign states. This entails that the rulings of an international court have an acknowledged purpose of defining the bargaining positions of states in future negotiations. In this view, the process of “lock in” agreements is not definite. Instead, post-litigation negotiations are crucial in the context of international adjudication. What is more, in litigations, international courts have often encouraged the parties to continue negotiations (see Johns, 2008).
enforced. Weiler’s point about consensual decision-making gives robustness to the argument posited before that reciprocity is the basic mechanism giving incentives for adhering to the universal jurisdictional equilibrium.

Weiler’s central thesis is that the normative centralisation of the doctrinal development was accompanied by the member states’ progressive control of the decision-making process, creating a “foundational equilibrium”, which sustained the system of enforcement. In The Transformation of Europe (Weiler, 1999a), Weiler analyses the construction of this equilibrium by applying Hirschman’s categories of “Exit” and “Voice” to the EU circumstance:

Exit is the mechanism of organizational abandonment in the face of dissatisfactory performance. Voice is the mechanism of intra-organisational correction and recuperation … [A] stronger “outlet” for Voice reduces the pressure for Exit option and can lead to more sophisticated processes of self-correction. By contrast, the closure of Exit leads to demands for enhanced Voice (ibid, p.17).

In Weiler’s characterisation of the two mechanisms in the Community context, the doctrinal development, along with the system of judicial review, is defined as a “closure of Selective Exit”:

The “closure of Selective Exit” signifies the process curtailing the ability of Member States to practice a selective application of the aquis communautaire, the erection

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163 Hirschman (1977), Exit, Voice, and Loyalty – Responses to Decline in Firms, Organizations and States, Harvard University Press: Cambridge: MA. Hirschman conceives his categories to analyse the reactions to malperformance in the market place. But he suggests that they can also be applied to explain behaviour in any organisational setting.
of restraints on the ability to violate or disregard their binding obligations under the Treaty
and the laws adopted by Community institutions (ibid, p.18).

Such a legal closure of Exit was only possible because of a corresponding enhancement of political Voice, that is, by the member states’ control of the process of decision-making. The key of the explanation of Weiler, and its originality with regard to other (dissatisfactory) explanations of the governments’ acceptance of judicial enforcement, rests on the reading of decision-making control, as it occurs in the legislative process, instead of in Treaty agreements.

On the one hand, member states assume an institutional control of decision-making through the generalised use of the rule of unanimity in the legislative process. Thus, “enhancement of Voice” means that each government is in a position to assure that their interests will be represented in any new legislative decision. A less-than-unanimity rule would not give Voice to each state to control the decision-making process. Thus, the appeal to the unanimity rule accounts for the basic requirement of the “universal jurisdictional equilibrium”, namely, that all states will have incentives to accept the jurisdiction of the Court. It dissipates preferences for a “partial jurisdictional equilibrium”, in which some states accept jurisdiction while others do not (see Johns, 2008, p.18-21).

On the other hand, the focus on the legislative process and the fact that decisional control is exercised for any statutory piece of legislation, offers, in my view, a solution to the seeming paradox that the member states will have incentives to support a supranational judiciary with high discretionary powers for enforcement, in spite of not having intentionally delegated that discretion by means of their treaty agreements. This paradox is highlighted in the academic debate between Garrett (1992) and Alter (1998). Garrett (1992), applying a Principal-Agent model to study the decisions of the ECJ, assumes that the EU system of decentralised enforcement of the EU is in consonance with the preferences of the member
states. However, a review of the jurisprudence (Alter, 1998) and of the reactions of member states to the ECJ rulings (Stein, 1981) demonstrates that member governments, when signing the EC Treaty, did not intend that Article 234 be used for reviewing member states’ policy measures, but only for Community measures. In this view, Alter and others (Stone Sweet and Caporaso, 1998, Stone Sweet and Brunell, 2002) have claimed that the acceptance of enforcement was an adaptive reaction and, at least implicitly, reluctant. The member governments adapted to the doctrinal development in order to avoid the high costs of non-compliance to their own courts. In my view, Alter and others are correct in arguing that Treaty-delegation cannot explain alone the breadth of the EU enforcement system. Yet, I do not think that the argument of “adaptive reaction” is tenable. After all, member governments, having the recourse to Treaty amendment, could have limited the powers of the ECJ to review national legislation in constitutional revisions. For this reason, I consider that the decentralised system of enforcement corresponds to the interests of the member states. In my view, Weiler’s focus on a legislative control that occurred during the judge-made doctrinal development explains why member states held incentives to accept the decentralised system of enforcement.

Weiler posits that the enhancement of Voice was the reason for the acquiescence of member states to the normative centralisation, achieved through the doctrinal development. According to Weiler, the member states’ political response is conditioned by the fact that they are bound by Community norms. In this sense, Weiler argues that there is a primacy of the normative or constitutional level over the political level:

The impact of constitutionalism is inevitable and profound. It is the operating system conditioning the process of governance itself and within which all the Community programs – economic, social and political – function and malfunction. These
Community programs have, of course, specific content, but they are “written in,” and “written for” a constitutional setting (Weiler, 1997, p.98).

Weiler argues that the normative centralisation pushed member states towards a consensual form of decision-making. Yet, at some point, the member states’ interests “take the lead” in maintaining the equilibrium between the legal and political levels. It is precisely the consensus that member governments reach in the legislative process that makes the system of enforcement effective and stable.

Member States, severally and jointly, balanced the material and political costs and benefits of the Community … The constitutional infrastructure “locked” the Member States into a communal (read “Community”) decision-making forum with a fairly rigorous and binding legal discipline. The ability to “go alone” was always somewhat curtailed and, in some crucial areas, foreclosed. The political infrastructure, with its individual veto power and intergovernmental discourse, gave each Member State a decisive position of influence over the normative outcome (Weiler, 1999a, p.37).

7.2.4 The evolution of the approach to policy coordination of the ECJ

From the explanation of Weiler, I wish to derive two propositions regarding the policy coordination function of judicial conflict resolution. The first proposition states the following: *once the key doctrines of the EU legal order are settled, the maturity of the legislative process will condition the form of policy coordination, which is distinctive of the EU judiciary, namely, coordination in concrete cases.*

The consensual character of legislative decision-making would entail that member governments deal with most matters in the Council of Ministers, pondering the interests of each state. As a result of this, judicial decision-making would be mostly restricted to concrete
problems, filling the gaps left by the legislative process, instead of asserting far-reaching coordination decisions. From this perspective, Weiler’s thesis gives robustness to the thesis here stating that member states have incentives to refer to judicial politics in order to deal with very particularised problems of coordination. Member governments can always legislatively overrule a decision taken by the ECJ. Yet, in concrete cases, the states will consider that the costs of enforcement are less pronounced than the costs of bringing the issue back to the negotiation table.

Following the formulation of the dynamics of Exit and Voice, I would like to derive a second proposition about policy coordination in judicial politics: when consensual decision-making in the Council becomes less prominent, the incentives to keep the universal jurisdictional equilibrium will be maintained, because the ECJ will assert less forcefully its centralising or pro-Community rulings, and will instead adopt a diversity approach to coordination.

For analytical purposes, I will distinguish four phases in which this shift of judicial decision-making towards a diversity approach to coordination can be assessed: the period of the 1970s when the “foundational equilibrium” prevailed, the period of the eve of the signature of the SEA, the period in which the SEA instituted the rule of QMV and the ECJ gave its Cassis de Dijon ruling, and the period of the 1990s defined by the ECJ ruling on “Sunday Trading”.

In the first period, the 1970s, we witness a case-law application of the normative centralisation of policy coordination involving the construction of the internal market. According to the dynamics of the “foundational equilibrium”, the Council’s consensual decision-making permitted the ECJ to interpret disputes involving the regulation of EU

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These four phases are consistent with Weiler’s chronological classification of “generations of cases” of free movement of goods (1999b). However, my interest is to show a pattern of evolution in the behavior of the ECJ towards a diversity approach of coordination. As it will become clear, the conclusions drawn here in this regard differ from Weiler’s.
economic interests in a pro-Communitarian and centralised way. The hallmark case of this centralising pattern is *Dassonville*. This case concerned the application of a Treaty provision that specifies the prohibition of “quantitative restrictions on imports and all measures having equivalent effect” (Article 28 (ex 30) TEC). The concrete collective action problem arose when Mr. Dassonville, a Belgian importer, claimed to be wrongly prosecuted by the Belgian authorities on the grounds that he had not produced a certificate of origin for a Scotch whisky he had imported from France. Dassonville argued that such a requirement by the Belgian authorities was an infringement on the free movements of goods, since the measure demanding the identification of the product had equivalent effects to quantitative restrictions to trade. In the preliminary ruling of this case, the ECJ ruled in favour of the plaintiff, stating the so-called *Dassonville* formula:

> All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually and potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions (*Dassonville*, Recital 5).

This formula asserted a significant expansion of the range in which centrally determined Community norms were to be applied to economic regulation. The Court’s interpretation of the meaning of “equivalent effects” signified that the rule that was to govern the conflicts of free movement of goods passed from the notion of “pecuniary impositions” to the much larger notion of “obstacles to trade” (Weiler, 1999b, p.359).

In the second period, around the mid 1980s, the “foundational equilibrium” started to shatter. The Community became challenged with the need to realise the Common Market

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objectives. However, it was unable to do so because of the combined effect of the “politics of
the consensus” in the Council and the rigidity created by the vertical constitutionalisation, that
is, by the very structure of closure of Selective Exit and Enhanced Voice. As Weiler puts it:

Not only it was difficult to achieve consensus on one Community norm to replace the
variety of Member State norms, but also there was the growing fear that that once such
a norm was adopted it would lock all Member States into a discipline from which they
could not exit without again reaching unanimity (Weiler, 1999a, pp.67-68).

The third period is defined by the introduction, in the SEA, of QMV for legislative
decisions concerning the completion of the internal market (Article 100a SEA, now Article 95
TEC). The changing of the decision rule was meant as a solution to the crisis of the politics of
consensus. Yet, it also meant that the decisional control of each member state, their Voice,
was to be diminished. As a consequence, we could expect that the possibilities for continuing
the jurisprudence of normative centralisation were to be curtailed. In other words, the closure
of Selective Exit was less compelling. Weiler, however, does not agree with this last judicial
derivation. In his view, since the SEA:

Member States are … in a situation of facing binding norms, adopted wholly or
partially against their will, with direct effect in their national legal orders (ibid, p.73).

In reality, Weiler is right in concluding that the introduction of Majority Voting in the Council
does not mean that the constitutionalisation doctrines were to be re-defined. In principle, the
statutory legislation that now, under QMV, becomes Community law, also compels the ECJ
to review measures of member states so as to make sure that the law is observed, regardless of
whether a minority of member states may not benefit from such a review. However, we can
expect the ECJ to confront situations of enforcement in which specific (read domestic) demands of member states in particular cases are also more compelling. I consider that the ECJ, in its jurisprudence, “read” the changes regarding the politics of consensus and adopted an approach towards the recognition of diversity in concrete judicial disputes. Therefore, while there is not a revision of the doctrines of supremacy, direct effect and pre-emption, we find the introduction of new principles of judicial review that will balance Community measures and member state measures in a new light.

The hallmark principle of this new development is the so-called “the rule of reason”. It was stated by the ECJ at *Cassis de Dijon* in 1979. It then precedes the signature of the SEA (1987) by almost a decade, but it forms part of the same mood of change in the politics of consensus. The principle asserts that national regulations can be consistent with the Treaties provided that they met certain “mandatory requirements”. The ECJ posited the principle in the following way:

In the absence of common rules, … [o]bstacles to free movement within the Community resulting from disparities between national laws relating to the products in question [in this case alcoholic products] must be accepted insofar as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer (Case 128/78 *Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein* (Cassis de Dijon) [1979] 649).

The “rule of reason” will become fundamental for justifying how member states’ interests are to be integrated within the EU legal order. The reference of the “absence of common rules” will be linked to the justification that mandatory requirements, if they are proportional to the
economic interests of the EU and are non-discriminatory, will serve the “the general interest” of the Community\textsuperscript{166}. As Weiler points out, the doctrine of mandatory requirements (i.e. the rule of reason) of \textit{Cassis de Dijon} was a response to a problem generated by the application of the expansive \textit{Dassonville} formula. The problem was that public sensibilities may change, and, accordingly, member states may wish to introduce for legitimate reasons measures for protecting social interests, such as those of consumers, not recognised in Community legislation (Weiler, 1999b, p.364). In this sense, national measures may be considered as necessary corrections to the discipline of the articles of the Treaty.

An important point of the “rule of reason” is that the list of possible requirements justifying national exceptions was left open by the ECJ, and further jurisprudence confirmed the extension of this list, notably to include environmental protection and human rights protection. In this light, the diversity approach of the ECJ, started in \textit{Cassis de Dijon}, shows that the ECJ was taking into account the increase in the variation of member states’ positions, evidenced in the crisis of the politics of consensus, and institutionalised by the substitution of the rule of veto by the rule of voting in the Council. We can present this evolution by appealing to Weiler’s dynamics of Exit and Voice. The ECJ can be said to react according to these dynamics: a decline of Voice leads to a decrease of the legal discipline previously instituted by the closure of Exit.

The fourth period in the evolution of the trend towards the ECJ’s recognition of diversity is the jurisprudence in the 1990s. Now, this recognition is even more marked than in \textit{Cassis de Dijon}. In the hallmark case \textit{Keck}, ECJ ruled that the national measures prohibiting trading on Sunday, “so long as they affected in the same manner the marketing of domestic products and those from other member states”, were not even to be considered a restriction to

\textsuperscript{166} The next section will deal in detail with how the ECJ uses the “rule of reason”, proportionality and non-discrimination as the basic pillars of its method of conflict resolution pursuing cooperative solutions, i.e. integration objectives.

Weiler recognises this progressive shift in the ECJ’s jurisprudence towards a more tolerant approach to the regulatory diversity of the member states. Yet, as in 1993, he interprets this shift in the ECJ’s jurisprudence as a sign of the consolidation of the commitment to the Common Market. He says,

Twenty years after Dassonville things had truly changed. In large measure the commitment to a single market was internalised by national administrations, and the reflexive habits of intra-Community protectionism had not disappeared perhaps, but they were certainly not presumptive. This was, after all post-Maastricht, and the Union committed to the EMU and all that … Unlike twenty years earlier, the harmonisation programme had, by comparison, become hugely successful and the need for judicial activism as a means of driving the common market agenda had considerably lessened. Conditions existed for a more relaxed, more mature, doctrinal framework (ibid, p.371).

Instead, I argue that whether the Common Market is consolidated or not, the new approach of the ECJ comes directly from its reasoned evaluation of concrete cases, when defining the application of Community law. This application now involves specifying what is to be reserved to the exclusive jurisdiction of national courts, and, more importantly, how the member states are to apply domestically tailored measures so as to enhance the effectiveness of EU objectives.

An alternative thesis pointing to the shift towards the recognition of diversity merits some discussion. This thesis has been proposed by authors applying Principal-Agent models. Focusing on the threat of “legislative overrule” that the ECJ is assumed to anticipate, they
have advanced valuable explanatory factors of the ECJ’s pro-member states decision-making. Thus, Garrett, Kelemen and Schulz (1998) signal three basic factors that would constrain the ECJ from making a pro-member state ruling: a lack of clarity of the case-law precedent, important domestic costs of a ruling to a litigant member government and a large number of member governments that would be affected by the ruling. The signalling of these factors is noteworthy. However, it seems to me that they are not related to the basic hypothesis of these models that the ECJ is constrained by legislative overrule. Arguably, only the last factor referring to an opposition by a majority of governments gives a clear indication of a possible coordinated reaction of member states in the Council that would overrule a decision of the ECJ.

In this respect, a second Principal-Agent study by Kilroy (1999) focusing on the threat of non-compliance as a constraint on ECJ decisions, gives a more plausible interpretation of how this constraint led the Court to adopt a diversity approach, consisting of pro-member state rulings. As differing from Garrett et al., Kilroy focuses on the “majority factor” as representing a threat of non-compliance by a litigant member state. In fact, the central claim of Kilroy is that non-compliance is a more relevant constraint than legislative overrule. She argues that if we cannot find a significant number of cases in which a state finds support of a qualified majority of other states, then the hypothesis on the threat of legislative overrule cannot be confirmed. By contrast, the support of a “blocking minority” of two or more states is sufficient to interpret a threat of non-compliance. Kilroy systematises the insight of the “majority argument” by taking as a proxy of the opposition of member states to pro-Community rulings the “objections” that states submit in a given case. She proves that the finding of more than one state making a submission supporting the litigant member state is correlated to a probability that the ECJ rules in favour of the litigant state, that is, that it makes a pro-member state decision. In particular, from a database of 293 cases decided in
1994, Kilroy concludes that 160 rulings (55 per cent) constituted pro-Community decisions, 107 (36 per cent) pro-member state decisions, and in 27 cases the ECJ took an intermediate position (Kilroy, 1999, p.406). When a blocking minority of two states makes submissions, the probability of a pro-member state decisions increases from 23 per cent to 56 per cent (ibid, p.410)\textsuperscript{167}. However, a single submission does not have significant effect.

I consider that Kilroy provides a consistent argument positing that the diversity approach of the ECJ can be influenced by political constraints (the threat of non-compliance) imposed by preferences of member states. Yet, Kilroy’s research design presents the problem that there is not a discriminating criterion that indicates whether the ECJ considers the objections of member states to be a political threat of non-compliance or, in contrast, whether these objections can be interpreted as manifestations of a legal assessment by the ECJ (and for that matter, by the objecting member states) of the merits of the case (Pollack, 2003, p.199).

This discriminating criterion has been provided in a recent study by Carrubba, Gabel and Hankla (2008), which also takes submissions of objections as an indicator of the political influence of member states’ preferences over the ECJ. We should first note that, in contrast with Garrett et al. and Kilroy, these authors do not make the motivational assumption that the ECJ necessarily has a preference for pro-Community measures. In my view, this is an important step, since this motivational assumption is the main critique that can be addressed to Principal-Agent models\textsuperscript{168}. On the other hand, Carrubba et al., using an original database,

\textsuperscript{167} A simple majority increases the likelihood of a pro-member state decision to 73 per cent.

\textsuperscript{168} Principal-Agent models start from the assumption that the ECJ has a preference for Communitarian policies and it is constrained by the preferences of the member states. The final decision of the ECJ is a result of the degree of change of its ideal preference due to the influence of the member states’ preferences. The pro-Community preference assumption is a problematic one, and in my view, not tenable. Studying the preferences of the Court entails enormous methodological difficulties. For one, the deliberations of the Judges are secret and the decisions are issued as a single collective opinion. The assumption on ECJ’s preferences has been supported by focusing on cases that have generated controversy between the Court and the member states (Garrett, Kelemen and Schulz 1998, 151). However, this research design does not resolve the question about the ECJ’s preferences. What about those other cases that have not raised such a controversy? Should we infer a different preference of the ECJ? As noted, Carrubba et al. do not make the pro-Community preference assumption, typical of Principal-Agents model. The approach on reasoned justification that I will introduce in section 7.3 is also
partially disconfirm the claim of Kilroy on legislative overrule. The authors find that the threat of legislative overrule influences the ECJ towards pro-member state decisions. In fact, this orientation towards pro-member state rulings helps them to make a distinction between “legislative overrule” and “threat of non-compliance”. They convincingly argue that when there is a threat of non-compliance by a litigant state, nonlitigant states will oppose its position with a view to influence the ECJ to rule against this litigant state (ibid, p.439)\textsuperscript{169}. Thus, political threats of non-compliance will influence the Court towards adopting pro-Community decisions, while threats of legislative overrule will point towards a pro-member state orientation\textsuperscript{170}. Carrubba et al. find confirmation both for the threat of legislative overrule and for the threat of non-compliance. That is, the probability that the ECJ rules for a litigant government increases as the likelihood rises that a coalition of member states could form to override a ruling against this government, and the probability that the ECJ rules against a litigant government increases the more opposition this government (a potential non-compliant) has from other governments (ibid, pp.442 ff).

Turning to the issue of the discriminating criteria between “political constraints” and “merits of the case”, Carrubba et al. find a first criterion in the identification of governments as litigants. They argue that the fact that the observations of member states have a major incidence when a government is a litigant (as they do), is indicative that they are manifestations of political constraints. This is because if the observations of member states neutral about preferences. What matters is to see how legally reasoned decisions in concrete cases are connected with integration developments. In reality, it is by taking into account the connection between the legal reasoning and the integration project that we can understand that decisions of the ECJ may favour even a single member state.

\textsuperscript{169} This argument is consistent with the one posited here that member states are willing to punish non-compliant states because they place a value on the universal compliance with their legal obligations.

\textsuperscript{170} Note that, although their approach for analyzing non-compliance differs from Kilroy’s, it does not need to oppose it. Kilroy simply does not consider objections that are pro-Communitarian. Her measurement of non-compliance is limited to the pro-member state observations that states submit. In other words, Kilroy considers the willingness of a litigant member state not to comply with a ruling, and the support that it receives, while Carrubba et al. consider the willingness of non-litigant member states to avoid the eventuality that a litigant state does not comply with EU law.
were to be assimilated as information to decide on the merits of the case, it would make no
difference if a government were a litigant or not, as in both cases the observations should be
equally informative (ibid, p.448). A second, arguably stronger, criterion is provided by the
introduction of a control variable that represents “merits of the case”, namely, the position of
the Advocate General (AG) in the cases. The functions of the AG will be specified later on.
Suffice to note now that this position offers the ECJ the basic evaluative information for
reaching a conclusion in a case, so that if the ECJ follows it, it will be making a decision
based on the merits of the case. Carrubba et al. find that the ECJ does significantly follow the
opinion of the AG (ibid, pp.446 and 449). The relevant point for their claims, however, is that
the observations of member states still are significant when this new variable is included, so
that they have an independent effect on the outcome and are not absorbed within the opinion
of the AG (ibid, p.448). As a consequence, it can be confirmed that political constraints have
an effect in ECJ decisions.

Yet, as just noted, the study of Carrubba et al. also confirms the significance of the
merits of the case as determining the decision of the ECJ, and substantively so. In other
words, both political constraints and the reasoned evaluation of the case by the Court have an
influence in the final decisions. The present study will focus on the reasoned evaluation of the
ECJ, without it denying that exogenous (political) factors also may have an influence on the
decisions of the ECJ. I will show in the case of human rights jurisprudence, the careful
examination of the judicial reasoning of the ECJ accounts for this evaluation of the merits of
the case. As noted, I do not consider that it is justified to assume that the ECJ has a pro-
Community preference. The ECJ has a declared objective to enhance the efficacy in the
application of Community law. If this efficacy depends on the major capacity of member state

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171 According to the predictions by Carrubba et al., the probability that the ECJ rules for the plaintiff is of 20 per
cent if the AG position is for the defendant and is of 80 per cent if the AG position is for the plaintiff. Thus,
taking the AG’s position as an indicator of the evaluation of the merits of the case, this evaluation shifts the
likelihood of an ECJ’s pro-plaintiff ruling by 60 percentage points (Carrubba, Gabel and Hankla, 2008: 449).
measures to deal with a particularised context in a given case, so the ECJ may rule in favour of such measures. Most national measures may fit more efficaciously into the factual conditions of a local situation in which the Community law is applied rather than the Treaty articles or the Community regulations and directives. In this manner, they may generally facilitate the implementation of laws connected to Community objectives.

As we will see in the next section, when national derogations to Treaty articles and mandatory requirements are called for and jurisdictionally granted, it is always in connection with Community law, and it is for the ECJ to decide whether jurisdiction is granted. In my view, when the ECJ sanctions national measures, or even rejects jurisdiction in a given issue raised by a national court, say in an issue of human rights protection, it is acknowledging that the preservation of cross-national differentiation avoids disruptions in implementation and gives coherence to, and even enhances, the project of integration. There may be a departure from uniformity. However, after all, national measures have to pass the tests of proportionality and non-discrimination. They are not detached from Community law. On the contrary, their justification is an expression of their compatibility with Community law, and hence with the integration project.

7.2.5 Mutation – the expansion of the domain of Community law

This section addresses a second relevant question about the enforcement system: what is the domain of enforcement of Community law? More precisely, the issue I wish to analyse is how the ECJ interprets the language of centralisation and diversity typical of a non-unitary system of governance. In the previous section, we touched on this issue in reference to the changes in jurisprudence after the breach in the “politics of consensus” around the signature of the SEA. Now, the perspective of analysis will be constitutional.

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172 For the definition of these concepts, refer to the next section.
I order to address this issue, I will examine Weiler’s thesis on “mutation”. Weiler maintains that the jurisprudence of the ECJ entailed a mutation of the principle of enumerated powers – that is, the principle governing the division of competencies between the Community and its member states. Weiler claims that this mutation resulted in the erosion of practically any limits to the material extension of Community competencies. I will offer a critical view of this thesis. However, in this qualification, I will keep the basic parameters of Weiler’s interpretation, namely, that mutation consists of a “flexible reading” by the ECJ of the scope of Community law. Ultimately, the analysis on mutation will give us a perspective from which to assess the decentralised or decentralised direction of policy coordination that derives from the conflict-resolution process in the area of human rights.

When we look at the question of enforcement in a non-unitary system of governance like the EU, the question arises as to how far the Court, by means of case law, will extend policy-elaboration in order to enhance the objectives of the Union. Weiler addresses this issue by examining the phenomenon that he calls “mutation”:

I characterise the period of the 1970s to the early 1980s as a second and fundamental phase in the transformation of Europe. In this period the Community order mutated almost as significantly as it did in the foundational period [of the doctrinal development]. In the 1970s and early 1980s, the principle of enumerated powers as a constraint on Community material jurisdiction (absent Treaty revision) was substantially eroded and in practice virtually disappeared. Constitutionally, no core of sovereign state powers was left beyond the reach of the Community … [T]he guarantees of jurisdictional demarcation between the Community and Member States eroded to the point to collapse (Weiler, 1999a, pp.42-43).
The phenomenon of mutation is presented as a truly integration movement. The Community needed to expand its jurisdictional competencies to new policy areas – to *new policy objectives*, in order to realise the integration project. To analyse this notion of expansion of objectives, a comparative reference on Federalism becomes fundamental. Two models of expansion can be signalled under the federalist principle of division of powers. The first is the United States’ model of *incorporation*. “Incorporation” denotes the process by which the Federal Bill of Rights, which originally applied uniquely to the actions of the Federal government, was extended to the actions of the individual states, through the application of the Fourteenth Amendment of the US constitution. In practice, then, the US Supreme Court has the jurisdictional power to expand the competencies of the central government against constitutional divisions whenever it proves necessary to enhance the objectives of the Union. To the extent that the division becomes an obstacle for the achievement of these objectives, it can be sacrificed (see Weiler, 1986). The second model will be called here the *European model*. Under this model, the ECJ would expand the Community competencies by reviewing member state actions only insofar as these actions relate to the area of competence of the Community, which is defined by the objectives stated in the Treaties (see Binder, 1995, p.4; Weiler, 1999a, pp.42-43).

The ECJ states its view on enumerated powers in the following passage of *Van Gend en Loos*:

> The European Economic Community constitutes a new legal order of international law for the benefit of which states have limited their sovereign rights, *albeit within limited*

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173 The Fourteenth Amendment, enacted during the Civil War, proscribes the individual states from abridging privileges or immunities of citizens of the Union. It forbids a denial of the equal protection granted by federal laws guaranteed to any person within a State (see Weiler, 1986, p.1137).

174 As Weiler recalls, “by 1925, the United States Supreme Court had ‘incorporated’ the substantive rights and limitations enumerated in the Federal Bill of Rights and applicable on their face to the Federal government alone, into the fourteenth amendment which is applicable to the individual states” (Weiler, 1986, p.1137).
fields, and the subjects of which comprise not only Member States but also their nationals (Van Gend en Loos, Recital 3, emphasis added).

Upon this and other constitutional statements, legal scholars have identified that the ECJ has the policy objective of constituting a federal polity that reads as a monist federation (see, for instance, Hartley, 1998, p.79). Such a policy would, ex hypothesi, define the ECJ’s jurisdictional expansion as approaching “incorporation”. Arguably, the first developments enforcing the Common Market, and in particular the landmark precedent set at Dassonville, may have indicated the federalist-monist trend. Yet, it is manifest that the ECJ refers to the authority of Community law as explicitly applying to an area of “limited fields”. Can we dismiss this reference? In my view, we cannot. The ECJ keeps the notion of enumeration when it undertakes an expansionist judicial review of member state actions. Weiler’s concept of “mutation” recognises that the expansion of Community objectives is an expansion of the “limited fields” of the Community – that is, it is Treaty-based, and, therefore corresponds to the European model. Thus, he says,

[When] mutation does occur it is always justified by some reference to the Treaty and its “implicit” principles (Weiler, 1999a, p.45, n.83).

However, he asserts that the ECJ’s creative reading of the Treaty provisions signified a nearly complete erosion of those limits. He continues:

I do not make a normative or interpretative argument for some construction of the legal basis in the Treaty. The strict ‘legal' evaluation is of little interest in my view. My point is that the relevant interpretative communities, by choosing to opt for wide and flexible reading of the Treaty, have transformed strict enumeration into a new
flexible notion, practically emptied of material content in the Community (ibid, p.45, n.83).

An original feature of the phenomenon of mutation is that it does not have the assertiveness of the precedent doctrinal development. The basis of mutation is precisely the ECJ’s “wide and flexible reading” of EU legislation. According to Weiler, the constitutional revolution meant that it became practically impossible to find an area of activity which could not be brought within the “objectives of the Treaty” (ibid, p.53).

In Weiler’s analysis, there are two categories of mutation that are of interest here. The first is extension. Mutation occurs here in areas of autonomous Community jurisdiction. The Court does not enter the jurisdiction of member states, but constructs a Community standard for the review of Community acts by referring to policy areas where the Treaty gives few indications about how to proceed. In this view, extension can be seen as the addition of a “new” objective at the Community level. Weiler gives the example of the inclusion of Human Rights Protection as a principle on the grounds of which Community measures could be reviewed. Extension entails a radical move at the Community level. However, since it does not encroach on member state measures, it has, in itself, a limited impact on integration. For this reason, according to Weiler, the member states did not perceive extension developments as affecting jurisdictional demarcations (ibid, p.46). As we will see below, this perception misread the potential consequences that adding new objectives at the Community level might have for the judicial review of member state measures.

The second relevant category is absorption. The Community legislation impinges on areas of the member states’ jurisdiction outside the Community’s explicit competencies. The basic mechanism of absorption is not to replace a national policy with a new Community policy. Rather, absorption entails that, when there is a conflict of competencies, the Community competencies must prevail. Therefore, if there are policy aspects of a national
measure that impede the Community measure, the national measure will be absorbed and subsumed by the Community measure (ibid, p.49). For instance, the case *Casagrande*\(^\text{175}\) concerned the interpretation of Article 12 of the Regulation 1612, which regulated the admission of students from another member state, but not the provision of grants in aid (see Weiler, 1999a pp.47ff). The issue at stake was that, even if the admission of students could be brought within the Treaty provisions on free movement of workers (Articles 39 and 40 (ex 48 and 49) TEC), the provision of grants was a matter of education policy, on which the Community had no jurisdiction – in *Casagrande*, the Bavarian law was to apply. Yet, the ECJ resolved the conflict by concluding that the regulation in question would have to include the provision of grants. The relevant conclusion is that, by means of a judicial ruling, an aspect of the policy of education is absorbed by the Community provision of free movement of workers, even if the EU does not promulgate a fully-fledged educational policy. The crux of absorption is that the Community measure trumps the national measure. Since the national educational policy was conflicting with this measure, it then must give way.

From the combination of these two forms of mutation, Weiler advances his basic thesis on the erosion of enumerated powers: the expansion of Community competencies may come close to the extreme form of US *incorporation*. We already mentioned the limitations of *extension*, consisting of it not reaching the revision of member state measures. However, it is hard to conceive that, once an objective has been posited for Community acts, it will not develop towards the member state level. According to Weiler, this is what happens with the Human Rights area when we combine extension and absorption. “Extension” sets a standard of protection of human rights for the Community. “Absorption” applies it to acts of the member states. The result is a jurisdictional expansion approaching incorporation:

Looking at the issue not through the prism of human-rights discourse, but as a problem of jurisdictional allocation, suggests that incorporation may not, after all, be so inconceivable. In the field of human rights, incorporation invokes no more than a combination of extension and absorption. The frequency and regularity by which these two forms of Community mutation are exercised suggest that incorporation is a distinct possibility (ibid, p.50).

We should note, however, the cautiousness by which Weiler makes this conclusion on incorporation, referring to it as a “distinct possibility”, not as a consolidated form of expansion. This is why I refer to an “approximation” of the US model of expansion. And in fact, this interpretation is perfectly coherent with the method by which the Community competencies are expanded, that is, by a flexible reading of the ECJ. However, I consider that the thesis of Weiler can be criticised on a fundamental aspect. He does not clearly specify that mutation occurs in relation to issues associated with the Common Market. Therefore, the expansion of objectives of the Community always posits a link with economic interests. As we will see, when the recognition of the objective of human rights protection as a matter of Community law enters in conflict with economic interests of the Common Market, the ECJ would not assert the objective as a Community objective. In my view, the link between economic interests and other new objectives indicates that when expansion of competencies occurs, it is a Treaty-based expansion, typical of the European model.

A last point on the expansion of community objectives merits discussion. Expansion of Community objectives can originate from the explicit recognition of national diversity. This line of expansion is represented by the derogations of free-movement provisions (Article 30 (ex 36) TEC)\(^\text{176}\) and by the doctrine of mandatory requirements set at *Cassis de Dijon*. The

\(^{176}\) Article 30 TEC: “The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the
ECJ confirms here the conception of the “limited fields” of the EU, and considers new objectives that are introduced in national measures, not in Community measures. Yet, in which sense can this consent to the application of national measures be considered an act of EU policy coordination? In which sense can “new objectives” that have been asserted in terms of derogations be regarded as objectives of the Community or “in the general interest” of the Community?

We can present two scenarios that answer these questions. Firstly, we have the resolution of the judicial cases in which national measures are called for and justified as derogations to Treaty provisions or as mandatory requirements. The typical sequence of these cases goes as follows. A national measure conflicts with the application of Common Market measures. The national authorities call for a new objective, such as consumer interest or cultural protection, as capable of justifying the national measure. The ECJ recognises the objective as deemed to be in the “general interest” of Community and rules in favour of the national measure. The jurisdictional power of the ECJ for recognising the new objective leads us to an important corollary: the scope of derogations and mandatory requirements, and their conditions for their employment are “creatures” of Community law (Weiler, 1996, p.76). Under this light, new objectives presented in national measures have validity in so far as they are connected with the Community law. Because of this connection, their application in a national context can be considered to be “in the general interest” of the Community, and therefore as measures favouring EU policy coordination. As I have argued before, their specific coordination function rests on their facilitating the implementation of Community law.
The second scenario in which the granting of mandatory requirements and derogations are mechanisms for policy coordination refers to the “spill-over” of the granting of mandatory requirements and derogations to the legislative arena. This point has been argued by Weiler (1999b). We should first recall that member states have the right, under Article 94 (ex 100) TEC, to enact, unanimously, new harmonisation laws whenever the Treaty does not provide the legal basis to attain internal market objectives. The scope of action of Article 94 was enlarged with the entry into force of 100a of the SEA (now Article 95 TEC). In fact, Article 95 became pre-eminent for the general harmonisation of laws. In the interest of realising the internal market it allows the adoption of new measures by QMV.

Articles 94 and 95 are legislative recourses, involving the Commission, the Council and the Parliament. Yet, what is important to see now is how the use of these “expansive” recourses originates in the context of concrete judicial cases in which national measures are called for and justified. Weiler presents this connection between case law and legislative action as follows:

When a measure on its face violates the Dassonville formula [i.e., the prohibition to introduce obstacles to intra-Community trade], the Member State is required to justify it by reference to European law criteria – ex Article 36 or as mandatory requirements ex Cassis de Dijon often before the European Court of Justice. If the measure cannot be justified it is inapplicable or must be modified appropriately. Critically, when it is justified and can, thus, be upheld, Article 100 or 100a comes into play … [T]he Community legislative competence ex Articles 100 or 100a is triggered each time is a

177 Article 95 TEC: “The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market”.

finding of *prima facie* transgression by a state measure of the *Dassonville* formula, even when, necessarily, the state measure in question is justified (Weiler, 1999b, p.362).

The consequences for policy coordination are now evident. Once a new objective is validated in a member state, it is possible for the Community institutions to bring it, as a matter of *common* policy, into the legislative decision-making process.

I argue that these two forms of expansion of Community objectives entail the recognition of cross-national diversity. As the argument of Weiler implies, when an issue enters the legislative arena, coordination becomes clearly more forceful. Yet, there is an important point that the text of Weiler does not stress: the passage of an objective from concrete judicial cases into the legislative process does not necessarily mean that it is going to be confirmed in common legislation to the same (large) extent to which it has been stated in a case law, which only concerns one member state. It should be noted that, once an area has been harmonised on the basis of Articles 94 and 95, a member state is no longer able to introduce more stringent regulation in this field, except for derogation or mandatory requirement. Therefore, it is likely that the new objectives confirmed in legislation will keep a minimal regulatory level. As I commented in the critique of Sharpf’s thesis, directives that state a minimal level of regulation have the effect of allowing wide-ranging forms of implementation, adapted to the domestic contexts. As a consequence, the introduction of new objectives for, say, environmental protection, will restore regulatory protection by allowing regulatory diversity. Thus, in practice, policy coordination through the granting of national exceptional measures, whether they reach the legislative level afterwards or not, imposes a diversity-oriented view of policy coordination, balancing a common level of consensus with the particular interests of the member states.
The diversity-approach of the ECJ can be confirmed especially after the *Keck* decision. Yet, it cannot be said to predominate against a pro-Communitarian approach. Instead, we seem to witness what Weiler calls “a somewhat bifurcated jurisprudence” (Weiler, 1999a, p.51). A majority of cases are resolved as pro-communitarian decisions, but important exceptions, where the list of mandatory requirements has been enlarged, point to pro-member states decisions.

In the next part of this chapter, we will examine the conflict resolution of the ECJ in new policy areas not strictly related to the Common Market, particularly, in the area of human rights protection. By stating that “incorporation” is a distinct possibility, Weiler gives us a yardstick to evaluate the direction of policy coordination in this area. In this respect, I will consider that the outcomes of policy coordination derived from the ECJ rulings may approach one of these two poles:

A) The case-law evolution that approximates the *incorporation model*. Policy coordination may entail setting up new Community objectives in a centralised way and which are to be directly applied to review member states measures. If confirmed by the member states in the legislative process, the new objectives asserted in case law may give rise to new EU policies, enacted in regulations and directives.

B) The notion of enumerated powers follows the *European model*. As differing from the incorporation model, here the introduction of new objectives needs to be rooted in existing Treaty provisions. New objectives, then, are not set up by the Court by means of a centralised Community standard which can subsequently be directly applied to review member state actions. Instead, they are integrated into those policy objectives established by the Treaty in a decentralised way, i.e., adapting to the different contexts of member states.
Typically, this entails a compromise between the economic interests of the Common Market and the member states’ own regulations in the field of human rights.

7.3 Judicial mechanism. Conflict resolution of the Court of Justice. The case of human rights protection

The first part of this chapter on judicial politics has examined the coordination problem of enforcement and the establishment of the system of enforcement of the EU. I have also advanced the thesis that judicial politics as a distinct process of conflict resolution in the EU involves coordination problems that arise in particular disputes in the application of EU law within the member states.

The interest now is to analyse the strategic conflict-resolution process by which these disputes are settled so as to lead to an outcome of trans-national coordination or integration. I consider this process to be the decision-making of the European Court of Justice. A caveat regarding the meaning of “strategy” here is needed. I consider “strategy” as the ECJ’s use of a method aimed at achieving a certain goal, namely the enhancing of the integration project set by the Treaties through the uniform application of EC law in the member states. I will then not use the term “strategy” to denote an interaction between actors with opposing interests. Rather, in the judicial model, we find the ECJ in the position of an arbiter of a conflict of interests, and, as legal arbiter, the decisions that it takes are jurisdictional. Following the approach on Legal Reasoning Analysis, conflict resolution regards the reasoned justification of ECJ in deciding on disputes between actors in concrete preliminary references raised before it (see especially Bengoetxea, 1993; Bengoetxea, MacCormick and Moral Soriano 2001; Weiler and Lockhart, 1995). In this sense, the strategy of the ECJ consists of how it structures and justifies its decision by taking into account legal reasons. Thus, the basic
resources” of the judicial form of conflict resolution are justifying reasons in the context of Community law.\textsuperscript{178}

In order to examine the question of policy coordination in case law, I will focus on dispute-resolution processes involving objectives of a “new” policy area, that is, an area which was not directly contemplated in the primary EU goal of completing the internal market. Instances of new areas are environmental protection, gender equality or human rights. Here, I limit the analysis to human rights protection. Coordination developments are best appraised in outcomes that signify an expansion of the integration project to new policy fields beyond the economic regulation of the internal market. I then will evaluate the occurrence of policy coordination in terms of this expansion, that is, as the recognition of the goal of human rights protection in the decisions of ECJ.

In the remains of this section, I will proceed by sketching the structure of judicial conflict resolution and the general parameters of the strategic reasoning of the ECJ, comprising the supporting structure by which the ECJ balances conflict of reasons in concrete cases in order to justify its decision. In the second part, I will analyse the judicial conflict resolution in the area of human rights protection by focusing on the three questions about justification, extension and coordination outcomes.

### 7.3.1 The structure of judicial conflict resolution

We examine judicial conflict resolution occurring through the review of member state measures, under Article 234 preliminary reference. Judicial conflict resolution has a policy dimension. The basic question of policy is whether judicial decisions generate an expansion of

\textsuperscript{178} I will draw on the work of relevant legal scholars who have given fruitful normative interpretations about the decisions of the ECJ. My interest, however, will not be normative. I wish to show the justifying reasons that the ECJ gives, and from there, derive a conclusion about the consequences for policy coordination. But I am not concerned about whether the ECJ “could have done otherwise”. I will attempt to demonstrate that the ECJ justifies its decision in law, mainly by sticking to the objectives formulated in the Treaties.
Community law to new policy objectives. Under the procedural framework of the preliminary reference, this policy dimension is structured within a *constitutional dimension*, regarding the division of competencies between the Community and the member states. In this structure, the integral application of Community law is pitted against the public interest represented in a member state measure. Reasons of public interest may justify limits in the application of Community law. We may find either that new objectives are part of a pro-Communitarian claim made by a private party, or, by contrast, that they constitute the public interest called for in a member state measure. Figure 16 shows the structure of conflict resolution, indicating where the new objective would be located.

**Constitutional Dimension**

<table>
<thead>
<tr>
<th>Policy Dimension</th>
<th>EU economic interests + new objective</th>
<th>Vs</th>
<th>Public interest of national measure</th>
</tr>
</thead>
<tbody>
<tr>
<td>EU economic interests</td>
<td>Vs</td>
<td>Public interest of national measure: new objective</td>
<td></td>
</tr>
</tbody>
</table>

**Figure 16 Structure of conflict resolution in judicial review of member states’ actions**

When carrying out judicial review of member state actions, the ECJ has to give an interpretation on the compatibility of national measures with Community law. In doing so, it has to take into account policy aspects of the inclusion of a new objective and their bearing on the constitutional division of competencies of the EU. When new objectives are claimed to be part of Community law (upper-left quadrant, in Figure 16), it may appear that conflict resolution occurs uniquely at the EU level. This is not so. The ECJ cannot dispel the public interest of the member state in this resolution. On the contrary, the consideration of this interest is necessary to regulate how much the new objectives will impinge on national law
and, therefore, the extent to which they will be weighted against traditional EU economic interests. On the other hand, if new objectives, as a public interest measure, are to justify a national derogation from Community law (lower-right quadrant), the ECJ must evaluate this justification in the light of Community law. As signalled before, the ECJ must look at how much the “public interest” of a member state is to limit the application of the EU economic interests so as to rule that the member state’s derogation serves the general interest of the Community. A third type of outcome occurs when the final decision does not recognise new objectives (upper-right quadrant and lower-left quadrant). Here, we will conclude that there is not policy-elaboration and that the status quo remains.

We will return to this structure when we examine the case study of EU judicial review on human rights. The utility of this introductory framework is to represent how the expansion of EU law to new objectives can come about either as a result of a reassertion of Community measures, or in the form of derogation from them.

7.3.2 The strategy of the ECJ: Judicial reasoning

The decision-making of the ECJ is analysed here by a focus on “justification”. The approach on justification attempts to reconstruct the legal reasoning of the ECJ. The basic question about strategy is how the ECJ takes into account a variety of reasons in order to justify its decisions. Methodologically, the reconstruction of reasoned justification is based on the published decisions of the ECJ. Thus, it does not take into account sociological and psychological factors that may have influenced the decision of the judges, such as the resources or the motivations, but which do not make their way into a written judgement. In
my view, the justification approach has the advantage of avoiding the difficult analysis of
the “motives” of the ECJ\textsuperscript{179}. As Bengoetxea, MacCormick and Moral Soriano argue:

The written judgement is expected to give sufficient acceptable reasons to support the
decision. Hence, the test of acceptability (and rationality) of judicial decisions has to
be made … from the context of justification which refers to the process whereby a
decision can be tested or justified. Here the focus is on the steps and requirements that
have to be met in order to consider that the decision is justified in law (Bengoetxea,

The main actors in the judicial proceeding of the preliminary reference are the Court
and the Advocate General (AG). The AG is not a partisan representative of the plaintiff, but
he or she has the duty of stating the plaintiff’s case and of raising an opinion with a neutral
view of EU law (Article 166 TEC). The published account of a ruling includes both the
opinion of the AG and the decision of the ECJ. Some authors have pointed out that the
reasoning of the Court reflects an interaction with the AG. Therefore, the understanding of the
final decision requires taking into account this “dialogue” between the two actors (Binder
1995; Haltern, 2004). I consider that such a view is correct. The opinion of the AG sets a
basic reference for the final decision. Indeed, the ECJ usually follows the line of reasoning of
the AG, even if it may take a different position for the resolution of the case. However, we
should take seriously the fact that the institutional power of the ECJ is jurisdictional. What
ultimately counts is the decision of the Court. It is from the Court’s reasoning, shown in this
decision, that we should ask how the ruling is justified in law. It is from this justification that

\textsuperscript{179} The dangers of a motivational approach for an analysis of judicial reasoning have been highlighted in the
debates about the “activism” of the ECJ (see Weiler and Lockhart, 1995).
we will find an explanation of the actual outcomes of the judicial process and a basis to interpret them as actual integration developments.

It is necessary to clarify from the outset that the characteristics of judicial reasons differ from those of moral reasons (see Bengoetxea, 1993). Judicial reasons are reasons of law, to be justified by sources including codified legal texts and the overall policy context in which these texts “make sense”. In the EU, the main legal code is the EC Treaty, setting specific policy objectives. Reasons justifying those objectives may not be “fair” from the point of view of normative theory. For instance, the ECJ’s reasons regarding the application of Community law tend to give an undue weight to economic values and may thrust aside certain universal human rights’ values such as the preservation of the dignity of the person (see the Konstantinidis decision, infra). Yet, this weighting can be justified in terms of EC Treaty. Normative questions of legitimacy (what the ECJ ought to do) are beyond the scope of the model of cooperation, as treated here. Instead, the interest is to look at what the ECJ does, that is, at its decision-making in the face of cases that present a conflict of values. The ECJ justifies its decisions on the grounds of the effectiveness in the application of law and on the grounds of the coherence regarding the compatibility of member states laws with Community laws. The justificatory claim of the ECJ is jurisdictional, not deliberative, and in my view, it should be examined in this light.

7.3.2.1 The process of justification

Internal justification: deduction and interpretation

What does the process of justification consist of? The process of legal justification has a logical basis. The basic structure of a reasoned decision has the form of a deductive syllogism: a major premise stating the universality of a legal norm; a minor premise
establishing the facts of the case and a conclusion subsuming the facts into the major premise.

The deductive logic in the process of justification will suffice in so-called “clear cases”, when the facts of the case are unproblematic and the formulation of legal premises that apply to them is straightforward. In other words, interpretation is not needed. However, the majority of cases in the EU are “hard cases” (see Bengoetxea, MacCormick and Moral Soriano, 2001, pp.48-49). These cases present a conflict of values. The coded texts do not present unambiguous sources to formulate the premises of the case. The construction of a deductive syllogism requires interpretation.

The need of interpretation, however, should not be confused with the prevalence in the EU of a “doctrine of precedent” or stare decides, characteristic of a “common law system”, such as the legal system in the UK. On the contrary, the EU is a “civil law system”: the ECJ is bound by the coded legislation. For a premise to be represented as legally right or legally wrong in the perspective of Community law, it must have some root somewhere in the Treaties. Given the usual recourse to precedents of the ECJ, legal scholars have questioned whether the doctrine of stare decides may, after all, characterise the legal system of the EU (see Arnull, 1993). Yet, a basic difference should be stated in this regard: the ECJ may call for a precedent as a source of interpretation in a given case. As Arnull comments, “previous decisions are normally only cited by the Court in support of its argument” and the Court has in most cases “overruled a previous decision that is no longer considered correct” (ibid, p.253). Therefore, contrary to what occurs in a common law system, the Court is not bound to follow precedents in subsequent cases. In fact, it is bound to follow the Treaty, and its appeal to previous jurisprudence is to be justified by means of a reasoned connection to the Treaty.

The fact that the ECJ has to give an interpretation of the Treaty provisions derives from the open-textured nature of the Treaty and from its incompleteness as a means to apply
the law in any particular case. For some cases, the provisions of the Treaty or the secondary legislation may lead to different legal solutions. In others, the proper meaning of the provision is simply not clear. When a new objective, such as human rights protection, is introduced into a case, it is precisely a clarification of the meaning of EU legislation that is demanded.

The interpretation of the Court has to satisfy justification “in law”, or internal justification. The Court has to interpret the EU coded texts and the merits of the case by looking at various legal sources: precedent jurisprudence, the common principles of the legal systems of the member states, other international treaties and general principles of law. Once an interpretation is given, it has to be integrated into a legal syllogism. In particular, the interpretation serves to formulate the major premise in such a manner that it makes a universal statement that can refer to any particular facts materially similar to the particular facts of the case. The ECJ should adopt a formulation of the major premise in such a way that it could, in principle, operate in all member states, and not only in the member state of reference (Bengoetxea, MacCormick and Moral Soriano, 2001, p.59).

**External justification: conflict of reasons and coherence**

In hard cases – that is, cases presenting a conflict of reasons – internal justification is necessary but will not suffice. The ECJ has to go beyond the justification “in law” and give reasons for the authoritativeness and adequacy of a chosen interpretation instead of another. This is external justification. Following Dworkin (1977), Bengoetxea et al. argue that external justification of hard cases depends on the notion of “coherence”, that is, the notion of what is “making sense as a whole” (ibid, p.60). In the EU context, this “whole” is the integration project. The ECJ has to justify its decisions in terms of their consequences and effectiveness with regard to the very aims of the EU law enterprise.
There are two ways by which coherence may be achieved. The first is by applying a universal-rule approach. A universal rule establishes a systematic priority among colliding reasons that appear in hard cases. In terms of the coherence of judicial reasoning, the universal rule focuses on unity. Its application would enhance the predictability of judicial decisions. However, the idea of the universal rule goes against the pluralist matrix of values of the integration project – diversity into unity. As a matter of enforcement, it disregards an important feature of judicial review in a translational system, namely that the interpretation of law in particular cases is highly dependent on the factual context of the case. This dependence prevents the application of a unitary value for any case. Especially since Cassis de Dijon, it is evident that the ECJ is sensitive to the fact that the regulatory system of each member state imposes different challenges on the application of Community law. In reality, this is not only a question of differentiating among member states. Questions of enforcement in a single member state always involve conflict of reasons about the value that a Treaty provision should have. The plaintiff and the defendant will both claim that certain provision of the Treaty have a value that governs the case in their favour and against the other party, in accordance with the facts of the case.

Given the prevalence of a pluralism of values and importance of the particularity of factual context in the judicial conflict resolution of the EU, the universal-rule approach of coherence will not do. Instead, a second approach, the particular-case approach, proves to be more adequate to achieve coherence. Bengoetxea et al. define this approach in the following manner:

instead of looking for universal rules, an alternative way of resolving conflict of reasons would be by apprising the weight or importance of colliding reasons in particular cases … In this way, conflict of reasons are resolved by striking a balance between all values, principles and norms involved in the particular case … The
practical question ‘what to do?’ moves from ‘what to do according to the rules?’ to towards ‘what to do according to the rules in a particular case?’ (ibid, p.64).

In the hard cases that we will be analysing, the ECJ confronts a “conflict of reasons” regarding two different objectives in the context of a particular case. The ECJ has to balance reasons supporting fundamental rights of the Community law, namely, the EU rights of free movement of the four factors of production, against reasons supporting the new goal introduced in the dispute, such as the goal of human rights protection.

Bengoetxea et al. base this differentiation between rights and goals on the work of Dworkin (1977). It can be argued that this differentiation may not be adequate, since free trade is a goal as much as is human rights or environmental protection. However, it has the advantage of giving us a clear sense of what it means to introduce a new objective in the application of Community law, and of how this introduction is to be balanced within the existing corpus of Community law. I hope to demonstrate that the dichotomy rights/goals prove to be explanatory for conflict resolution involving human rights protection.

At a conceptual level, I also consider that the transposition of Dworkin’s theory into the analysis of EU conflict resolution is justified. I now will argue this point. Dworkin first states that judges need to justify resolutions in hard cases by addressing both arguments of “policy” and “principle”. He defines these arguments as follows:

Arguments of policy justify a political decision by showing that the decision advances some collective goal of the Community as a whole … Arguments of principle justify a political decision by showing that the decision respects or secures some individual or group right (Dworkin, 1977, p.82).
When we look at this difference in the EU circumstance, the Treaties would establish the “principles” of EU law, securing individual or group rights. This does not mean that the Treaties do not refer to policies. Actually, the Treaties essentially contain provisions for applying policy measures. However, following the codification of the Treaties, these policies are to be enforced through the observance of a series of rights that the individuals and member states have in the area of the application of Community law. Particularly, the policies for realising the internal market are to be enforced through the application of fundamental rights of free movement that any individual or group has in the EU. It is in this sense that the concepts of Dworkin are useful to conceptualise the “hard cases” of the EU. Dworkin continues:

Arguments of policy are arguments intended to establish a collective goal (ibid, p.90).

In this respect, whenever the Court balances the appropriate weight of the new goal, it seeks coherence on the basis of policy considerations. It takes into account the policy advantages of an objective that has not been included in the bundle of rights contemplated in the Treaties, but which serves to further the integration project.

**Balancing criteria to resolve conflict of reasons**

Following the particular-case approach, the ECJ has to make plausible connections among conflicting reasons so as to reach a solution that is justified in law and is coherent with the integration project. In order to make these connections, the ECJ follows the strategy of applying three “balancing criteria”: the rule of reason, proportionality and non-discrimination.
The rule of reason

As indicated above, the *rule of reason* was introduced in *Cassis de Dijon* as a method to reach decisions in the general interest of the Community “in the absence of common rules” that could regulate the application of free trade provisions (see quote at p.265 here). The rule of reason provides the basic framework by which the ECJ balance rights and goals. It organises the reasoning of the Court in two steps:

1. It establishes that applying the economic interests of the Community in an absolute way can lead to irrational results. The importance or weight of other non-economic interests has to be taken into consideration in particular cases.
2. It determines what can be weighed against the economic interests of the Community, namely, those goals that may be desirable in the general interest of the Community.

In evaluating the coherence of a decision, we need to take into consideration that the two steps are, in fact, interlinked. Some commentators have criticised the Court for making arbitrary judgements regarding what is to be considered a goal in the “general interest” of the Community. For instance, in the Case 240/83, *Association de défense de brûleurs d’huiles usages*, [1985] ECR 531), the final decision of the Court limited the movement and disposal of waste oil for environmental purposes. Bengoetxea et al. consider that the ECJ failed to justify why environmental protection is an essential objective of the Community (ibid, p.69)\(^{180}\). This objection then refers to the second step of the rule of reason. In my view, however, the objection loses force if we look at the first step, which considers the context of a

\(^{180}\) Another famous the critique is that Coppell and O’Neill (1992), who accuse the Court of “not taking human rights seriously” it its jurisprudence, and adopting instead an excessively cautious view on the subject. Weiler and Lockhart provide a throughout response to this critique, arguing that Coppell and O’Neill fail to offer an adequate legal reasoning analysis and that they attribute, without visible demonstration, a motivation to the ECJ. Reading Weiler’s and Lockhart’ response, it is also clear that Coppell and O’Neill do not take into account how the ECJ applies the rule of reason.
particular case. If the coherence of decision is based on the effective functioning of the integration project, the Court may well have focused on a “means-effectiveness” policy argument\textsuperscript{181}. In this view, it would have interpreted that disregarding the predominant values in a given region to the respect of the environment could disrupt the implementation of an EU economic policy on waste disposal. The pragmatic reason of favouring effectiveness in implementation would have lead to the justification that environmental protection is a goal of general interest.

A second point that I would like to posit is that the rule of reason operates both to resolve conflict of reasons that appear when new goals define the “public interest” of a member state, and when new goals are part of an individual claim for the integral application of EU law in a member state (see Figure 16, above). As we have seen, the rule of reason was defined in \textit{Cassis de Dijon} for the first time. It stated that “mandatory requirements” that safeguarded the public interest justified derogation from member state measures from free movement provisions. In such cases, the new goal would be claimed by the member state as constituting the reason for derogating. The ECJ must decide whether the new goal, as a matter of policy, enhances the general interest of the Community.

Yet, we have seen that the rule of reason is essentially a criterion to balance two objectives. For this reason, I consider that it also applies when the ECJ deals with a claim that integrates two objectives as potentially defining a Community rule, always in the review of member state measures. In fact, at least in the area of human rights, the vast majority of cases involve a claim of an individual seeking to invalidate a national measure on the grounds that it violates the application of both free movement objectives and human rights objectives. More

\textsuperscript{181} MacCormick defines three levels of policy arguments: 1) means-effectiveness: “will \(x\) in this context actually achieve \(y\)?”; 2) means-desirability: “it is desirable to use \(x\) as a means to do \(y\)?” 3) goal-desirability: “it is desirable to procure \(y\) by any means?” (MacCormick, 1978, pp.262-27, quoted in Bengoetxea, MacCormick and Moral Soriano, 2001, p.70 at n. 38). It seems that “goal-desirability” can be attained just with the second step of the rule of reason. However, the other two levels of policy argument would need to consider the two steps.
precisely, typically the claim is that the principle of human rights is to be taken into account for the proper application of the Treaty provisions of free movement. The ECJ acknowledges these complementarities. However, the introduction of the goal of human rights posits a conflict of reasons: which level of protection of human rights would be sufficient to further promote the freedom of movement within the internal market? Does a member state measure that clears the provision of free movement also have to clear a certain standard of human rights protection? If yes, which Community standard of protection would be appropriate so as not to upset the public interest of the member state? As these questions make clear, the rule of reason may be applied for the review of member state measures when the conflict of objectives appears on the side of the individual claiming the correct application of Community law.\footnote{I do not go as far as to also include the rule of reason for the review of Community measures. It seems that the ECJ uses the rule of reason as a criterion to be applied when the “public interest” of a member state is at stake. The rule of reason is, after all, a criterion that establishes “degrees” of importance in the face of pluralist values in a particular case, not a criterion to establish a uniform and general standard for all cases.}

Proportionality

The ECJ applies the criterion of proportionality to test the compatibility of member state measures and Community provisions. A member state measure is proportional if it is the less restrictive option among all possible means that would limit the integral application of Community provisions.

The criterion of proportionality complements the rule of reason in a fundamental way. It defines the degree to which derogations from Community provisions can be justified. It does not suffice for a member state to declare that the national rules have an aim of public interest. The member state measure has to pass the test of proportionality in order to be considered as a measure justified in the general interest of the Community. Thus, the scope of
the derogation becomes a matter of Community law, and is to be justified only in the light of Community law.

With reference to new goals, proportionality establishes how the public interest of a member state may set the degree to which the new goal is weighted against the traditional economic rights encompassed by Community law. When the new goal represents the public interest of a member state, the situation is simple enough. If there is a choice between various measures in order to attain the same goal, the member state should choose the measure which restricts Community provisions the least. For instance, a measure allowing a demonstration that temporarily blocks traffic on a motorway may infringe the free movement of goods, but since it does not block the traffic permanently, it can be deemed proportional (see Schmidberger case, infra). On the other hand, in the cases in which the new goal forms part of Community provisions, we will find that the ECJ is inclined not to impose a specific EU standard, but to apply something similar to the principle of “subsidiarity”\textsuperscript{183}. If the member state can pursue its public interest and also apply its own devices to implement the new goal, the ECJ will not interfere with the national measure. In view of the jurisprudence on human rights, it can be argued that if the public interest of the member state proves to be proportional with regard to the economic interests of the Community, it will not consider the new goal in terms of a Community standard. The ECJ will only ask to include the new goal as a part of the national measure, and according to a national standard.

**Non-discrimination**

*Non-discrimination* constitutes a further test applied by the ECJ to consider member state derogations as justified. A national measure is non-discriminatory if it makes no distinction between domestic and imported products or between nationals and non-nationals.

\textsuperscript{183} For definition of The EU principle of *subsidiarity* see Chapter 2.
In principle, non-discrimination is an all-or-nothing criterion. Yet, since the SEA, for issues regarding the functioning of the internal market, the member states can adopt stricter measures than those laid down by a Community provision, if they are not a means of arbitrary discrimination (Article 95(4) TEC). As Bengoetxea et al. argue, with the additional condition of arbitrariness, non-discrimination became a matter of degree, and part of the test of proportionality.\footnote{For instance, in the Case 290, Commission of the European Communities v. Kingdom of Belgium [1992] I-443, the Belgian authorities imposed a differential treatment on imported waste in the region of Wallonia. The ECJ considered that the measure discriminated between imported and domestically-generated waste. However, since the measure was deemed proportional to the aim of preventing a dangerous waste overload in the Wallonian region, the ECJ ruled that it was a non-arbitrary form of discrimination, and hence justified (Bengoetxea, MacCormick and Moral Soriano, 2001, pp.74-76).}

7.3.3 Human rights protection vs. rights of free movement – a Paradigmatic case of coordination through judicial conflict resolution

This section analyses the ECJ’s conflict-resolution method in the policy area of human rights. The jurisprudence in the area of human rights is an interesting case study for various reasons. Firstly, the issue of protection of human rights at a trans-national level arises in a period when the basic economic objectives of the internal market have been accomplished. This makes the issue a paradigmatic example of extension of EU objectives. What is more, because of the links that human rights issues have with identity values and citizenship, the jurisprudence on human rights has begged the question of whether the judicial decisions can drive the EU to more than an economic union (Alston and Weiler, 1999; Von Bogdandy, 2000). Secondly, in terms of conflict resolution, this jurisprudence constitutes an apposite “hard case”, in which the ECJ has to resolve a conflict of reasons between the economic rights of free movement and the goal of human rights protection. Thirdly, the area is one in which policy coordination has occurred almost entirely through judicial conflict resolution, rarely
involving Treaty or secondary legislation\textsuperscript{185}. It then gives us an index to examine the breadth that coordination may have in particular judicial cases, as a response to problems of enforcement. Additionally, the analysis of human rights gives us interesting responses about the direction of coordination that decisions of the ECJ may generate, that is, whether there is a predominant centralising direction or a diversity-oriented direction. In analysing judicial conflict resolution, I will be concerned with two questions:

1. How does the ECJ justify its decision resolving a conflict of values between Common Market rights and a new goal in a concrete case? I will follow the Bengoetxea et al. conceptualisation of this conflict, as a conflict between rights and goals. In the cases that we will be analysing, the ECJ confronts a “conflict of reasons” between the EU economic rights of free movement and the new policy goal of human rights protection, in the context of a particular case. The final balance that the ECJ reaches defines the judicial decision as the cooperative solution of the dispute. The ECJ has to justify this decision as one that enhances the effectiveness of the integration project.

2. Does judicial decision-making lead to centralised or decentralised outcomes of policy coordination? Taking the references of an incorporation model and a European model, I will ask whether the expansion to the objectives of the EU comes from an interpretation of the objective of human rights protection as an independent integration goal (incorporation model), or, on the contrary, whether expansion is strictly Treaty-based and, therefore, attached to the

\textsuperscript{185} The member governments dealt with the issue of human rights in intergovernmental negotiations for introducing the Chart of Human Rights, which was included as a binding document in the Treaty Establishing the Constitution of Europe (2004). The chart provides a de minimis standard of human rights protection at the Community level. In the TEC, it remains a non-binding document.
existing economic interests of the Common Market (European model). An incorporation type of expansion will always lead to centralised outcomes. The ECJ defines Community standards for new objectives and imposes them on the review of member state measures. By contrast, in a European type of expansion, the ECJ takes a decentralised or diversity approach to coordination. Even if the decision including human rights protection is resolved as a pro-Community decision, the fact that the ECJ follows the Treaty will mean that the new objective, at the Community level, is seen as a complement to economic interests. In fact, if the objective of human rights protection were to carry more weight in the decision, we would conclude that the ECJ was approaching incorporation. Decentralised outcomes, therefore, are manifest when the ECJ applies only a minimal EU-wide standard of protection for human rights to the review of member state actions and when it grants a wide degree of discretion to the member states to apply Community law involving issues human rights protection.

I will proceed first by defining the specific value matrix of the field of human rights, taking into account the origins of the attention to the issue of human rights protection in the EU, and the construction of a judge-made standard of protection for judicial review at the Community level. Secondly, the core of this section will consist of the analysis of how the human rights principle extends to the review of member state actions. Here, it is necessary to consider in the first place the cases in which a member state acts as an agent implementing Community law. In this type of review, the member state acts as an executive branch of the Community, and therefore, national measures can simply be equated to Community measures. I will refer to the case of Wachauf. The case is not particularly interesting for examining the
integration problem – i.e., the relationship between the member states and the Community and its consequences for policy coordination. However, it illustrates well the reasoning of the ECJ on the question of human rights and serves as a baseline for examining further jurisprudence. The second type of review analysed here is that in which member state measures applying a member state policy are adopted in derogation from Community law. This line of cases is where the integration issue is relevant. Therefore, it will constitute our basic focus. I will analyse human rights jurisprudence by addressing the questions posited at the beginning of this chapter: how the ECJ justify decisions, what the model of expansion is (the incorporation model or European model) and what the nature of outcomes decision-making is (centralised or decentralised).

7.3.3.1 The matrix of values of Human rights in the EU: the Community standard

The principle of human rights, in the liberal-rights paradigm, is an expression of a vision of humanity that vests its deepest value in the individual. In the organisation of societies, this individual focus is counterbalanced with the interests of the collective. In this view, the protection of human rights signifies a compromise between the interests of the individual and the various interests of the collective, represented by the governmental authority. Along these lines, Weiler defines the basic matrix of values of human rights as a balance:

Critically, when a society strikes … [a] balance between these competing interests and characterise that balance as a fundamental right or liberty, it is the balance which is fundamental: the fundamental right of the individual to be protected against government power, set against the fundamental rights of the public through government to act in accordance with the general interest… this balance is an expression, then, of core values, of basic societal choices (Weiler, 1996, p.4).
This notion of a balanced societal choice becomes clear when we examine a determinate right in a particular society. Consider, for instance, freedom of expression in a European country, say Germany. In principle, the banning of a xenophobe discourse would constitute a violation of human rights. Yet, since such a discourse would be harmful for the collectivity, the government would prohibit it. Given the cultural and historical context of Germany, we will conclude, in a final evaluation, that the prohibition of a racist discourse will not constitute a violation of freedom of expression. In other words, the human right of freedom of expression will be expressed in terms of “the core value” of the German society.

Weiler asserts that human rights became part of the agenda of the Community judiciary as a need to establish a balance to the unchecked governmental power of the EU institutions, a power that was affirmed by the developments of European law:

How can one assert direct effect and supremacy of European Law – vesting huge constitutional power in the political organs of the Community – without postulating embedded legal and judicial guaranties on the exercise of such power? After all, the effect of direct effect and supremacy would be to efface the possibility of national legislative or judicial control of Community law ... Protecting human rights became a joint legal and political imperative (Weiler, 1996, pp.5-6).

In this view, setting the new objective of human rights required first the definition of a substantive standard of protection to review measures at the Community level, that is, a protection of the individual against the EU government. Yet, in the European system, a non-unitary actors system, individual human rights protection was to be integrated into what Weiler calls “fundamental boundaries”:
I use the term fundamental boundaries as a metaphor for the principle of enumerated powers or limited competences which are designed to guarantee that in certain areas communities (rather than individuals) should be free to make their own choices without interference from above (Weiler, 1996, p.2).

“Communities” here are understood both as communities of value and as different aggregations of power, which the member states are^{186}. The communities of values are so because they express a basic “social choice” involving a balance between compromising the right of individuals and limiting the right of the government.

Thus, setting an EU standard for the protection of human rights demanded taking into account two layers of governance, the EU and its member states. On the one hand, when human rights are protected at the EU level, this means that an individual would be exercising his or her trans-national economic rights with due protection of human rights, a core of rights which are said to be European and may not be transgressed in any of the communities (read member states). On the other hand, the measures enacted by the Community institutions may contravene individual rights that were protected by the member states’ jurisdictions. The social choice of a particular member state could set higher standards of protection than those which are considered at the EU level.

At issue, therefore, is defining the core values which have to include cross-national differentiation as well as cross-national assimilation: to find “‘a thicker nexus’ to Community law” (Weiler and Lockhart, 1995, p.66). Essentially, the “thicker nexus” implies a “societal choice” on the part of the ECJ. How is this choice to be made? A first approximation would

^{186} The concept of communities as used in this article by Weiler has a clear resonance with the communitarian philosophy. For instance, when describing fundamental boundaries as “the guarantee against existential aloneness” (Weiler, 1996, p.2), Weiler defines the concept in similar terms to those of Charles Taylor’s concept of “recognition” (Taylor, 1992). Nonetheless, Weiler always refers to the “Member States”, which is also an institutional concept. This concept should not be confused with the concept of “Community”, which refers to the European Community (EC), the economic pillar of the EU.
be to select from high and low standards existing among the member states. Yet, the high-low standards approach proves inadequate for the issue of human rights. The application of the supremacy doctrine entails that, once an EU standard is set, member states will be denied the right to apply their own remedies in cases involving Community measures. As a consequence, adopting a minimum standard would leave some member states with insufficient protection\textsuperscript{187}. Yet, the option for a high standard confronts parallel difficulties. Adopting the high standard of a particular member state would mean that the constitutional order of this state would determine the values to be considered fundamental for the Community as a whole, and would restrict the public authorities both of the Community and of the other member states to act in general interest. The essence of the inadequacy of the nomenclature of “high” and “low” standards is that the member states of the EU have different societal values. What the right of the unborn child means in the Irish society is not the same as it means, for instance, in France.

How did the ECJ resolve the conundrum? The ECJ explicitly edged away from the vocabulary of standards and asserted that the societal choice was to be made in the light of Community law. This means to construe a notion of human rights protection which appeals to a Community core value. The basic formula for the Community societal choice was established in \textit{Nold}.

Fundamental rights form an integral part of the general principles of law, the observance of which [the Court] ensures. For that purpose the Court draws inspiration from the Constitutional traditions Common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on

\textsuperscript{187} In fact, this insufficient protection was the reason for which the German Constitutional Court rejected the jurisdiction of the ECJ on human rights in Case 11/70, \textit{Internationale Hadelsgesellschaft}, [1970] ECR 411 (see Shaw, 1993, p.189)
which the Member States have collaborated or of which they are signatory … 

[significantly,] The European Convention of Human Rights (ECHR). (Case 4/73


How should we infer a “Community standard” from this formula? In my view, the ECJ construes the standard by applying a “flexible approach to consensus analysis” (Sweeney, 2007, p.48). This is manifest in the sources that the ECJ chooses in the absence of a Treaty-based reference. Firstly, it applies a sort of “majority activism” (Maduro, 1990, p.11) by appealing to the principles asserted in national legal systems, and secondly, it refers to a minimal standard of protection, to be found in the ECHR.

Yet, the critical point for the definition of the Community standard rests on the fact that the ECJ “draws inspiration” from these sources. It does not follow them in any categorical way. In this manner, the ECJ justifies the standard in terms of external justification, seeking *coherence* in terms of the integration project. As Weiler argues, appealing to these references as sources of inspiration implies rejecting them as a constitutional test that sets the standards for the Community for any conceivable situation. The Community may not violate the ECHR, but this source may not provide the precise answer to concrete questions submitted by national courts to the ECJ in preliminary rulings, questions concerning the interpretation of Community regulations, which may involve a conflict of values about the protection of human rights. The ECHR may be a starting point, but the Community may go beyond it (Weiler, 1996, p.11). Similarly, the ECJ does not take the traditions of the member states as definite, and understandably so. If the measure had been invalid according to the constitution of a single member state, the ECJ could not have set the standard, and it would have been compelled to return to the maximalist-standard trap. Instead, the constitutional practices of the member states are used as a “source for culling ideas” (ibid, p.12). The ECJ translates these practices, seeking its own social choice.
What is derived from this translation is a non-aggregative view of the Community standard for human rights protection. On the one hand, because of the attention given to the pluralist context of the EU, the societal choice of the ECJ is based on a flexible approach to consensus. The ECJ asserts a “constitutional ethos” for the EU “which must give expression to, or at least take into account, a multiplicity of traditions” (ibid, p.14). On the other hand, the validation of this choice as one stating the specificity of the Community is jurisdictional:

[The ECJ] rejects, in my view, any attempt at some mathematical-average approach to this issue. In its dialogue with its national counterparts, its claim is jurisdictional: Only the European Court of Justice is in a position to make the determination on the compatibility of a Community measure with fundamental rights. ... To the best of their ability [national] judges will give expression to the constitutional ethos of the constitutional text and of the polity (ibid, pp.13-14).

Weiler’s original argument about the role of “culling ideas” in the reasoning of the ECJ gives us a valuable insight into how coherence is achieved as the external justification of what is to be in the “general interest” of the Community. However, in my view, his interpretation is too expansive. We will see that the ECJ does not “go beyond” the ECHR in most cases and does not gives a forceful assertion of the principle human rights in the EU legal order.

7.3.3.2 Expansion of human rights review to member state measures

If the jurisprudence on Community measures sets a standard for human rights protection, the review of member state actions will involve expansion of the human rights goal to the member state national orders. Binder argues that the definition of the Community standard by the ECJ is equivalent to establishing a “Bill of Rights”, and that the expansion of review to member state actions signifies a process of an application of this standard (Binder,
However, we will see that the Community standard expressed in the “constitutional ethos” is not as firm as to permit the ECJ its application to the review of member state actions. Thus, I argue that the way in which the ECJ expands its jurisdiction is not based on the Community standard. Actually, it is much more limited. In particular, the ECJ will adopt two lines of action. Firstly, it will be reluctant to go beyond the minimal standard set by the ECHR. Secondly, in stating the sphere of competence of EU law, it will privilege the assertion of economic interests, thus relegating the Community protection of human rights to a complementary or supportive role, and not as an independent principle of EU law. As we will see, this will entail granting autonomy to national courts to decide on human rights issues.

Nevertheless, the review of member state actions is the critical juncture for the enforcement of the new goal of human rights in the EU. It is also critical to define the way in which member states integrate their interests into the EU by means of judicial politics, that is, for examining the direction of policy coordination as centralised or decentralised. The evaluation of the direction of coordination comes from the assessment of the extension of the new goal to the review of member state measures: is it an incorporated/centralised extension or is it a Treaty-based/ decentralised extension?

The ECJ confronts two types of review in which it has to ensure the protection of human rights within the scope of Community law: member state actions implementing Community law and member state actions adopted in derogation from Community law.

**Review of implementation of Community law: Wachauf**

In the case in which a member state is implementing a Community law by means of a national measure, the state acts as an agent of the Community law. The ECJ jurisdiction covers not only the source of the Community norms, but also its *mise-en-ouvre* (Weiler,
As a consequence, it should review actions where the member state is responsible for this *mise-en-ouvre*. In fact, in this type of review, the dichotomy Community/member state does not apply, because the member state is an executive branch of the Community in the same way that the Commission is when this institution is responsible for the enforcement of Community measures.

The Case 5/88 *Hubert Wachauf, v. Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609, represents a typical instance of the “implementation type of review”. The issue at stake in *Wachauf* was how to interpret an EU regulation in terms of the protection of the human rights of the individual. Concretely, the Council Regulation 875/84 provided detailed rules governing the transfer of milk benefiting from milk quotas as between a lessor and a lessee. The issue was whether the lessee, upon leaving the land, was entitled to compensation for the quotas produced during the lease thanks to his or her work. The question of the referring German court was, whether the Regulation 875/84 mandated compensation, and if not, whether to deprive the worker of compensation was a violation of Community law.

In its reasoning, the ECJ construes its major premise by stating “the rule of reason” to give a justified interpretation of the Community measure:

> The fundamental [human] rights recognized by the Court are not absolute, however, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of a common organization of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights (*Wachauf*, Recital 18).
It should be noted also that the ECJ refers to the comparative method of looking at the constitutional traditions common to the member states (Wachauf, Recital 17). As a consequence, the goal of human rights is defined by a Community standard, and it is this standard that is to be applied to member state actions. The ECJ continues by specifying further the proportionality criterion, stating that, when implementing Community rules, member state authorities must, “as far as possible”, apply those rules in accordance with the requirements of human rights protection (Wachauf, Recital 19). The ECJ then subsumes the facts (minor premise) by stating that a Community rule having the effects of depriving compensation would violate the protection of human rights. With regard to the regulation in question, the ECJ considers it was silent concerning the issue of compensation, but that its correct interpretation did not preclude the possibility for a departing lessee to obtain such compensation, as a matter of human rights protection. Thus, the advice of the ECJ was to estimate whether there were infringements of human rights in order to decide whether or not to implement the regulation. The ECJ did not invalidate the regulation on the grounds of the “silence”, simply because the same regulation would have been implemented in other member states accompanied by due protection of human rights (see Weiler and Lockhart, 1995, p.591).

The structure of Wachauf is of the type where the conflict between economic rights and the goal of human rights protection appears in the interpretation of the Community Regulation. In fact, the German law would have allowed for compensation as a matter of “public interest”, and the referring questions to the ECJ were directed to ascertain whether such compensation was compatible with Community law. However, the reasoning of the ECJ does not look at this “public interest” in order to interpret the Regulation. Instead, the issue is posited in terms of whether the Regulation, and not the member state legislation in the matter, is to include human rights protection. The conflict is resolved entirely at the level of the Community. This resolution consists of a justified interpretation of the inclusion of the
Community standard of human rights protection in the Regulation. From this interpretation, it follows that the member states should implement the Regulation in this light. What we have here is a conflict typical of the primary matrix of values of human rights: the individual rights against the governmental authority. And it seems that in the cases of an “implementation type”, the ECJ opts for a clear extension of the Community standard of protection of human rights. This is so because these cases do not pit a member state against the EU. Instead, the member state acts as an executive branch of the Community, and therefore, as a matter of governmental authority, there is not a differentiation between the two bodies.

**Review of member state measures adopted in derogation from Community law**

In the agency type of review, we can see the structure of a conflict resolution involving the basic matrix of values of human rights – that is, individual rights against governmental action. Yet, for the analysis of coordination, this type of review is relatively uninteresting. It does not entail a substantive conflict between the member states and the Community. The coordination question appears instead in the second type of review of member state actions, those in which member states seek derogation from the infringement of the Community provisions of free movement for the four factors of production. The ECJ has here to balance the Community interests against the public interest of a member state.

This jurisprudence will be analysed with reference to the structure of conflict resolution in the judicial review of member state actions presented in the introduction of this section. This structure integrates the *policy dimension* of rights and goals within a *constitutional dimension* positing a division between EU interests and the public interest of a member state. Figure 17 reproduces the representation of the structure of judicial conflict resolution, involving now the new goal of human rights.
According to this structure, I will review two relevant lines of jurisprudence:

1) Human rights goals are part of the EU objectives, and are compounded by the rights of free movement of goods, persons, services and capital. An individual claims that a member state measure violates the EU principle of human rights. The conflict then pits human rights goals at the Community level against the public interest of a member state. Policy coordination in the area of human rights occurs if the ECJ rules in favour of the individual, that is, it favours a pro-Community decision. Here, I will review the case of *ETR*\(^{188}\), where the ECJ first extended human rights review to member state measures seeking derogation from Community provisions; *Grogan*\(^{189}\), which lays the foundations for applying the doctrine of “margin of appreciation” in the EU, giving discretion to the national courts to rule on human rights issues;

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Konstantinidis\textsuperscript{190}, which clearly raises the issue of the potential application of an incorporation model of expansion.

2) Human rights goals constitute a value of public interest adduced by a member state seeking derogation from the provisions of free movement. The conflict pits the economic interests of the EU, as claimed by an individual, against the goal of human rights, as claimed by a member state to constitute the grounds of justification of the national rule. Coordination in the area of human rights occurs if the ECJ rules that the national measures are justified in the general interest of the Community, that is, if the ECJ takes a pro-member state decision. I will review here the Schmidberger case\textsuperscript{191}, which is the first case in which the conflict has appeared in this form. The case is also an apposite example of how the ECJ adopts a pluralist view of “public interest”, that is, it considers that “public interests have different weights (and content) from place to place and from time to time …[and] that these differences should be respected” (Sweeney, 2007, p.38).

\textit{ETR}

Up until 1975 the ECJ was reluctant to extend the review of human rights to member state measures. This reluctance was perhaps most evident in the hallmark case of Cinéthèque\textsuperscript{192}, where the ECJ accepted the justification of the French government for

\textsuperscript{191} Case C-112/00, Eugene Schmidberger Internationale Transport Planzüge v. Reblublik Österrrecih, [2003] ECR, 000.
\textsuperscript{192} Case 60-1/84 Cinéthèque v. Fédération Nationale des cinémas français, [1985] ECR 2605. The case concerned the prohibition by the French authorities of selling videocassette movies for a period of one year following their release in theatres. The French authorities adduced that the measure was a justified infringement of Article 28 TEC of free movement of goods, because its aim was to encourage the production of French
derogating from the infringement of free movement of goods by reasons of public interest, but declined to review human rights protection as a Community goal. The ECJ adduced that human rights fell within the jurisdiction of national legislation. As a “negative case”, Cinéthèque sets the background against which to evaluate subsequent jurisprudence in which the member states were applying national measures for national policies, as opposed to measures implementing EU policies. How far did the extension of human rights goals in the review of member state actions proceed?

The first case in which the Court carried out this extension was ETR. In this case, the ECJ accepted the derogation from the infringement of the rights of free movement of services insofar as the member state respected the principle of human rights protection. Thus, human rights protection was considered as an additional requirement that a member state should apply in order to observe a national measure in a way compatible with Community law. In this respect, the goal of human rights was balanced against the rights of free movement, and the balance involved the policy argument of considering human rights as an essential goal of the Community, hence prompting policy coordination in the new field. The ECJ departed from the Cinéthèque ruling. Yet, how assertive was this recognition? Let us examine the reasoning of the Court.

The facts of the case concerned a television broadcaster, Dimotoki Etairia Pliroforissis (supported by the Mayor of Tessaloniki), who claimed to be wrongly prosecuted by the Greek authorities, which had banned his television station on the grounds that it violated Greek law. Greek law conceded the exclusive right of broadcasting radio and television programmes to Elliniki Radiophonia Tileorasi (ETR). The plaintiff in the case thus claimed that such a monopoly was against the EU provisions of free movement of goods and services, the competition rules of the EU and Article 10 of the ECHR protecting freedom of expression.

movies. The ECJ ruled in favour of the derogation, and considered the measure be proportional to the aim of public interest pursued.
Regarding the issue of human rights, the referring Greek court asked whether the granting of a monopoly infringed Article 10 of the ECHR, and whether this article imposed obligations on the member state, independently of the Treaty provisions on free movement.

The reasoning of the ECJ reiterated the “rule of reason” stating that the freedom to provide services (Articles 49 and 50 (ex 59 and 60) TEC) was not an absolute right. The member states could justify the obstruction of this right on the basis of the combined provisions of Article 46 and 55 (ex 56 and 66) TEC. Articles 46 and 55 authorise exceptions to freedom to provide services, if these exceptions are a “non-arbitrary discrimination”. That is, the articles allow for “special treatment to foreign nationals on grounds of public policy, public security or public health”. The possible exclusion of foreign competition proscribes, in principle, the setting up of a national monopoly. By appealing to Articles 46 and 55, however, a national monopoly can be justified on public interest grounds. Yet, the ECJ ruled that:

The national rules in question can fall under the exceptions provided for by the combined provisions of Articles 56 and 66 only if they are compatible with the fundamental rights the observance of which is ensured by the Court. It follows that in such a case it is for the national court, and if necessary, the Court of Justice to appraise the application of those provisions having regard to all the rules of Community law, including freedom of expression, as embodied in Article 10 of the European Convention on Human Rights, as a general principle of law the observance of which is ensured by the Court (Case C-260/89 Elliniki Radiophonia Tileorasi v. Dimotoki Etairia Pliroforissis, [1991] ECR I-2925, Recitals 43 and 44)

The subsuming of the facts was, then, clear: the granting of a monopoly in broadcasting to ETR as a public interest measure required, for the national court, to examine
whether there was an infringement of a Community principle of human rights protections – note, however, that, in *ETR*, the ECJ equates this principle to that of the ECHR.

In its structure, *ETR* is not that different from *Cinéthèque*. The member state is in a position to justify a national measure in the public interest. The difference, however, is that, now, the ECJ does not decline jurisdiction on human rights issues. In fact, it demands for the member state to respect the human right of freedom of expression. It can be argued that in the balance between rights (of free movement) and goals, human rights protection stands as an independent principle for review. After all, but for the human rights issue, the member state measure would have just cleared the infringement of free movement of services. However, it seems to me that the heart of the case remains the economic interests of the EU. It is from the issue of freedom of services that the ECJ considers granting the derogation, and the policy goal of human rights is explicitly linked to the possibility of derogation from rights of freedom of services. That is, human rights protection adds an additional requirement for the derogation to be justified in the light of Community law. The ECJ does not really apply the original Community standard of human rights protection, as it does in *Wachauf*. It rather asks the Greek court – and in reference to its referring question – to respect the minimal standard of the ECHR. Ultimately, the measure was not struck down and the choice of the means for the protection of human rights was left to the discretion of the Greek court. Unlike *Wachauf*, this case concerns a national measure that applies a national policy. Therefore, as Weiler argues, if the member state is to provide human rights protection through its own devices, the ECJ had no reason to invalidate the measure (Weiler, 1999a, p.123).

*Grogan*

*Grogan* represents a case in which the ECJ sets the balance between rights and goals by interpreting the human rights goal (again, freedom of expression), as strictly linked to the
rights of free provision of services. Moreover, its interpretation of freedom to provide services is also strict, restricted to the economic (productive) activity of providing services. In a first reading, the resolution of Grogan means a limitation of the role of human rights as a specific Community objective. However, this understanding may be hasty. If we consider the case from the perspective of a diversity-approach to the Community objectives or policy coordination, there will not be such a limitation.

In reality, Grogan presents a complex structure of the conflict of reasons that compels us to nuance the evaluation on human rights policy coordination: the ECJ is not only challenged to decide on a balance between EU free movement of services and freedom of expression, but also between the human right of freedom of expression, represented as a part of the Community law, and the human right of the protection of the unborn child, represented as the public interest of Ireland. It is in reference to the right of the unborn child that Grogan has raised scholarly interest (Coppell and O’Neill, 1992; Weiler and Lockhart, 1995; Binder, 1995). Grogan frontally brings up the issue of having to deal with the incompatibility of values in a multicultural soil – in other words, the question of the extent to which “fundamental boundaries” can be transgressed by the trans-national polity. As we will see, the ECJ indirectly grants discretion to the national courts for applying human rights protection in conformity with EU law. Thus, if a first aspect of the ruling is the economic interpretation of human rights at the Community level, a second aspect is the indirect introduction, in EU law, of the doctrine of the “margin of appreciation”, by which the particular circumstances of a member state may justify giving its courts a large degree of discretion in the evaluation of the compatibility of EU law with human rights protection.

The facts of the case concerned a group of students who had disseminated information about abortion services provided by British clinics on Irish territory. The Society for the Protection of Unborn Children Ireland Ltd (SPUC) applied for an injunction against the
students on the grounds that Article 40.3.3 of the Irish Constitution prohibits individuals from assisting women in obtaining an abortion. Previous jurisprudence of the Irish Supreme Court had interpreted such assistance as including provision of information. The group of students claimed that the prohibition was in violation of the EU free movement of services (Article 49 and 50 (ex 59 and 60) TEC, and of the right of freedom of expression.

The Court hearing the case, the Irish High Court, considered the merits of the injunction and submitted a preliminary reference to the ECJ. It enquired whether the organised activity or process of carrying out an abortion came within the definition of “services” of Article 50 TEC. It also asked whether Ireland was violating the Community law by prohibiting student associations from distribution information about abortion clinics. This second question, thus involved the consideration that the Irish Constitution may be violating the right of freedom of expression.

In its reasoning, the ECJ did not reach the stage to which a justification of derogation was required and instead ruled that the Irish authorities were not infringing the Community provisions on freedom to provide services. Its major premise posits a clear economic interpretation of the activity of disseminating information. It can be stated as follows: an activity of dissemination of information, to be considered within the definition of provision of services, must present an economic link between the provider of the service and the provider of information regarding this service. Subsuming the facts, the ECJ ruled that:

The link between the activity of the students associations of which Mr Grogan and the other defendants are officers and medical terminations of pregnancies carried out in clinics in another Member State is too tenuous for the prohibition on the distribution of information to be capable of being regarded as a restriction within the meaning of Article 59 of the Treaty (Grogan, Recital 24).
As a consequence, the prohibition of the Irish authorities did not constitute a violation of Community law. On the issue of human rights, it followed that, since the activity under scrutiny did not fall within the sphere of Community law, the ECJ did not have jurisdiction to determine the compatibility of the member state measure with Community law (Grogan, Recital 31).

Since the stage of derogation was not reached, the Grogan judgement may, in principle, preclude an analysis based on the rule of reason as a supporting structure of the reasoning of the ECJ. Yet, because of the avoidance in referring to the human rights issue as a Community goal, the ECJ opens the way to considering protection of human rights on the basis of a diversity approach, close to the principle of “subsidiarity”. The question which arises in Grogan is whether the issue of extension of the Community standard of human rights is addressed at all. I believe that it is. Firstly, we should indicate that the conflict between the right of freedom of expression and right of the unborn child was posited by the opinion of the AG (Weiler and Lockhart, 1995, p.603). As a consequence, we should infer that the final decision of the ECJ took into account this opinion. Secondly, we should note that the ECJ did not use the Keck formula, by which it would exclude the medical procedures to terminate pregnancy from the rules governing freedom to provide services. If it were so, it would legitimise prohibition of abortion practices in other member states, perhaps against the freedom of expression or the rights of the mother. Instead, the basic implication of judging that the Irish government did not violate the Community law was to defer the decision on the right of the unborn child to the national courts.

In my view, this “deference” is not open-ended. Instead, it is granted in the light of Community law, and it derives from an implicit application of the rule of reason. Let us examine this application. The ECJ first delimits the sphere in which decisions on the compatibility of human rights issues with Community law is Treaty-based. The main concern
the ECJ here consists of making an assessment of freedom of expression as linked to the economic activity to provide services. Some authors have considered this linkage as an *astuce* of the ECJ, so as to avoid the evaluation of a conflict between the two human rights of the case, freedom of expression and abortion (see Binder, 1995, p.18). In my view, however, the ECJ makes a Treaty-based interpretation, *given the facts of the case*. The ECJ interprets the provision of services in terms of an economic interest, which is the main EU objective set in the Treaties. It then subordinates human rights to economic interests. It is this subordination that might have been objectionable. However, in my view, it is based on how the facts were presented in the case. After all, the students could have claimed that their action was governed by the ECHR, without any reference to the provision of services. Nevertheless, since the reference to provision of services is explicit, the ECJ is compelled to interpret freedom of expression as linked in one way or another to the Treaty norms. In other cases, such as *ETR*, freedom of expression constitutes an addition to freedom of movement and the reference to the ECHR is made. Here, by contrast, human rights are to appear in the definition of freedom to provide services, and the ECJ opts for an interpretation of the meaning of the whole provision as an economic and productive activity. Could the ECJ interpret “services” in terms of the voluntary (read non-remunerated) activity of distributing information? This is possible. However, the ECJ should not give a general definition of “services”. It should give a definition in terms of the objectives of the EU. The meaning given to these objectives has to have some root in the Treaties. The ECJ considers, in my view, correctly, that the Treaties give sufficient indication to define the provision of services as an economic objective of the EU.

Yet, does this interpretation relegate the importance of human rights as a goal in the general interest of the Community? On the contrary, the decision of the ECJ to restrict its interpretation to the economic aspects of the case has a crucial implication: it opens the way
for member states and their courts to evaluate the compatibility of Community law and human rights issues in the light of how it affects their public interest. It is here that the “rule of reason” and the test of “proportionality” come into play.

The ECJ has the specific task of securing the functioning of the internal market. As a consequence, any exemption to the Community law is to be granted in a degree that avoids disruption of the internal market objectives, that is, in terms of the balance between rights and goals. The rule of reason and the proportionality criterion are to establish this balance as justified. In my view, the decision of the ECJ of not including the issue of prohibition of abortion in the evaluation of a possible infringement of EU law allows the ECJ to justify the rights of free movement as fundamental in the balance, preserving the rationale of the internal market. Once this rationale is preserved, we can assess whether the public interest of the member state can contribute to the operability of the integration project. In particular, we can consider an implicit application of the proportionality test for the goal of human rights in Ireland. In this case, we can conclude that there is no doubt about the proportional character of the policy measure protecting the right of the unborn child. Given the constitutional sanction of the right of the unborn child in Ireland, would it not be disrupting for the integration project to reject the policy measure as a matter of public interest in this country? Note, however, that the ECJ’ ruling did not state that the right of the unborn child was more important, at the Community level, than the right of the freedom of expression or the right of the life of the mother. Instead, it only grants deference to decide on the matter to the Irish courts. The ECJ is then adopting again a flexible approach to consensus analysis in order to evaluate how human rights issues should be examined in the light of Community law. As Sweeney points out:
[W]here the public interest motivated by the Member State is of exceptional importance and is raised with sufficient precision, this may outweigh that their position is at odds with the more general European Consensus (Sweeney, p.48).

It is true, however, that if the ECJ declines jurisdiction on the issue, the proportionality test is not required. To reiterate, my point is not that this test is applied, but that it is implicit in the decision to defer jurisdiction. To support this argument, we may speculate about what would have happened if the dissemination of information had come directly from the British clinics. In my view, the ECJ would have been compelled to justify the Irish measure as a matter of derogation. It is reasonable to conclude that the ECJ would have justified the measure as explicitly proportional. Yet, in the way the case was presented, the ECJ did not need to decide on the matter of the right of the unborn child.

We should recall that a measure is proportional if it is the less restrictive means to achieve a proposed aim. In the case at hand, the decision of the ECJ to leave the issue of human rights to the Irish courts implies that, given the characteristics of the local context, there would be little option for less restrictive means. In other words, the ECJ is indirectly applying the doctrine of “margin of appreciation”. The doctrine asserts that, in certain issues, the particularism of a state is justified against a universal rule. As Sweeney points out, the doctrine was introduced by the ECHR in recognition that the restrictions imposed on states by the Convention rights were subject to necessary limitations, derived from the existence of prevalent local values (Sweeney, 2007, p.29-31). In the 1976 *Handyside* case, the ECHR formulated the doctrine as follows:

> It is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place … by
reason of their direct and continuous contact with vital forces of their countries, State authorities are in principle in a better position than the international judges to give an opinion on the exact content of these requirements as well as on the “necessity” or a “restriction” or a “penalty” intended to meet them … Consequently, Article 10 para. 2 leaves to the Contracting States a margin of appreciation (Handyside v. UK Series A No. 24 (1979-89) EHRR 737 para. 48, quoted in (Sweeney, 2007, p.30).

Weiler and Lockhart comment that the opinion of the AG in Grogan “laid the foundations [in the area of human rights] for an EU version of the doctrine of the margin of appreciation” (Weiler and Lockhart, 1995, p.603). Yet, is it not precisely the application of this doctrine that the ruling of the ECJ indirectly did by avoiding jurisdiction on human rights? The ECJ ruling obliquely justifies a national policy intended to protect a particular human right within a particular member state without requiring this level of protection for this particular right to be imposed to all other member states. That is, avoiding a decision on the issue of human rights is equivalent here to applying the doctrine of the margin of appreciation. In this light, the ruling of the ECJ represents a solution for harmonising human rights in the multicultural context of Europe. In terms of policy coordination, it is a decentralising solution, based on the diversity approach.

Konstantinidis

The Konstantinidis case is one in which the ECJ invalidated a German measure for violating Community law. The case is of interest for examining the human rights issue, because the proceedings presented the reasonable option for a centrally defined extension of the human rights Community standard to the review of member state actions. As Binder (1995) suggests, the opinion of the AG Jacobs in Konstantinidis offers a view of expansion of Community objectives that would signify the adoption in the EU of the incorporation model
of expansion, defined in the fourteenth amendment of the US Constitution. The ruling of the ECJ, however, evidences that the ECJ adopts a Treaty-based or European model of expansion. In addition, I will argue that the ECJ does not consider that human rights are an independent principle of review. Instead, Konstantinidis shows the prevalence of economic interests in the EU. This position is contrary to the normative view of at least one commentator that human rights protection stands as a principle hierarchically superior to economic rights (Avbelj, 2004, pp.64-66).

Konstantinidis presents a conflict between the right of freedom of establishment compounded (according to the opinion of AG Jacobs) with the human right of “psychological comfort” on the one hand, and the public interest of the member state on the other. The case concerned a Greek national living in Germany, Kristos Konstantinidis, who claimed to have been wronged by a measure of the German authorities requiring the transliteration of his name. The German authorities, adopting the system of the International Organisation of Standardization changed the name of the Greek national into “Hrestos Konstantinides”. Konstantinidis claimed that the new spelling deprived his name of its religious and ethnic significance and that provoked confusion among his clients – he was a self-employed masseur and hydrotherapist. The German court asked whether the plaintiff could contest the national measure on the grounds of infringing his EU right of freedom of establishment (Article 43 (ex 52) TEC), the right to provide services (Article 49 and 50 (ex 59 and 60) TEC) and the principle of non-discrimination on the basis of nationality.

As Binder argues, the interest of the case for the issue of human rights is to be found in the opinion of AG Jacobs, who went well beyond the questions asked by the German court and claimed that the national measure was unacceptable on the sole grounds that it signified an infringement of the human rights of a migrant worker (see Binder, 1995, pp.24-31). In reality, AG Jacobs construed an extensive notion of “European” human rights. He said:
In my opinion, a Community national who goes to another Member State as a worker or self-employed person under Articles 48, 52 or 59 of the Treaty is entitled not just to pursue his trade or profession and to enjoy the same living and working conditions as nationals of the host State; he is in addition entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values, in particular those laid down in the European Convention on Human Rights. In other words, he is entitled to say "civis europaeus sum" and to invoke that status in order to oppose any violation of his fundamental rights (Konstantinidis, Opinion of Advocate General, Recital 46).

The reasoning of the ECJ took a different direction. The ECJ established its major premise upon the economic functions of freedom of establishment and of non-discrimination on the grounds of nationality (Konstantinidis, Recital 12). A national measure will be neither proportional nor non-discriminatory if it creates a risk of economic loss to the European migrant working in a host country. Subsuming the facts, the ECJ held that:

It is contrary to [the provision of freedom of establishment] for a Greek national to be obliged, under the applicable national legislation, to use, in the pursuit of his occupation, a spelling of his name whereby its pronunciation is modified and the resulting distortion exposes him to the risk that potential clients may confuse him with other persons (Konstantinidis, Recital 17).

The German measure was then found in violation of Community law, and not justifiable on grounds of public interest. Yet, we can see that the ECJ focus on the economic aspects of the infringement, and, contrary to AG Jacobs, does not make any reference to the injuries to the dignity of Konstantinidis, or other “humanity” aspects.
What conclusion for the issue of human rights can be derived from the Court’s reasoning? The ECJ does not really have a “human rights position” in the case. The basic implied feature of the issue of human rights is that the ECJ has a conception of the European citizen as an economic agent. We have seen that AG Jacobs proposed to introduce the conception of European citizen as “civis europeus”, that is, as an individual who, living and working in a member state other than his or her own, should be entitled to the same rights that he enjoyed in his or her country of origin in all aspects regarding his or her humanity. The Court’s “elaborate silence” (Haltern, 2004, p.189) on the issue of human rights, does not express, in my view, a negation of these rights to Konstantinidis. Rather, it emphasises a conception of the EU in which economic interests prevail. The ECJ finds a way to “defend” Konstantinidis’ claim on the basis of his economic interests. The validity of these interests as grounds for invalidating the German measures can be justified by means of the provision of freedom of establishment of the Treaties. Instead of appealing to the professional life of the plaintiff, the ECJ could have followed the AG and concentrated its reasoning on human rights. It chose not to do so.

Why does the ECJ take an economic view in an issue where the human rights were clearly at stake? To address this question, it is worth looking at Haltern’s normative criticism to the Court. He argues:

If humanity is essentialist, human rights protect at least an essential core. The more human rights the better, and the more encompassing their scope the better too … The

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In his extensive analysis of the opinion of the AG Jacobs, Binder convincingly argues that the AG meant to restrict the entitlement of the human rights protection to “migrant workers”, and did not go as far as to include “any individual” who, in her or his own country, is a potential recipient of services from other member state. We can see that adopting such a broad Community standard would create sever problems for the lawful application of the doctrine of the margin of appreciation. Take, for instance, the situation of Grogan. An Irish person would have the EU right to receive information about abortion, and could challenge the prohibition of the Irish Constitution accordingly (see Binder, 1995, p.27).
In my view, however, adopting such an “encompassing” view to human rights would disregard the multicultural context of Europe. Judging from other cases, it appears that the ECJ is indeed reluctant to establish an EU-wide conception of human rights precisely because there is a lack of consensus among the member states about how to interpret the scope of certain human rights. Moreover, it seems to me that it cannot be deduced from the Konstantinidis ruling that the ECJ has a notion of citizenship as a “consumer identity”. We can, instead, confirm that the Treaties do present this notion in the provisions of EU Citizenship introduced in Maastricht (Articles 17-22 TEC). In the particular case of Konstantinidis, the economic notion of the citizen sufficed to protect the individual against the discriminatory effects of the national measure. Given that the ECJ has its primary source of justification in the Treaties, it is only coherent that it looked first for economic arguments in order to justify a decision. However, once the question of freedom of establishment was settled, the ECJ could have asserted, as in ETR, that a member state should consider human rights principles in its observance of EU law. There are two reasons that may indicate why it did not make such an assertion. The first reason is that, contrary to what happened in ETR, here the national measure was invalidated as contrary to EU law, and therefore, there was no need to posit further arguments about how to enforce the decision. The second reason is that, given that human rights is the focus of the AG’s opinion, a reference to human rights by the ECJ would have forced a justification of the decision by referring also to the extreme position of the AG. As Binder points out, implementing the proposal of AG Jacobs would have entailed a far-reaching expansion of the Community human rights standard to review member state actions, approximating the US incorporation model (Binder, 1995, p.28). The ECJ does...
not make a reference to such expansion and sticks to the European or Treaty-based model. In doing so, it avoids introducing an artificial “consensual” position for all the member states.

In fact, looking at the concrete case of *Konstantinidis*, the centralising notion of “civis europaeus” may appear as reasonable. But this case does not define the human rights issue for any conceivable situation that may appear in the future. The imposition of a centrally-determined human rights standard may increase harmonisation and stimulate the integration project. Yet, as Binder points out:

> The possibility cannot be dismissed that, where disagreement about the proper level of protection for fundamental rights exist – such as with the abortion issue – attempting to resolve or even engaging in debate about such disagreements may in fact prove more divisive than unifying (ibid, p.35).

We have seen that the ECJ construes a Community standard of human rights for reviewing Community measures by means of the flexible consensus analysis consisting of looking at the ideas common to the constitutions of the member states at the ECHR. The ECJ may directly impose this trans-national standard on the review of member state measures, whenever it finds that national legislations provide insufficient protection. However, in the context of the “judicial cross-fertilisation” of the EU, it is more likely that developments for remedying such insufficiencies come in an indirect way. As Frowein comments:

> Since the Community law is directly applicable in the domestic sphere it is rather unlikely that national courts will fall behind established Community standards when applying domestic fundamental rights even in matters which have nothing to do with Community law (Frowein, quoted in Binder, 1995, p.42).
In conclusion, Konstantinidis reinforces the thesis that the ECJ keeps the basic aim of protecting the internal market. Human rights goals either complement this protection at the minimal and non-disruptive level of the ECHR, or they provide a limited counterbalance to the internal market objective. Beyond the level of the ECHR, the ECJ is inclined to adopt a flexible consensus analysis. This analysis asserts a diversity approach to coordination that takes into consideration the particular situation of a member state, on a case-by-case basis. Konstantinidis also confirms that the ECJ avoids positing the principle of human rights as an independent ground for review of member state measures. Instead, the bulk of the jurisprudence in which human rights are part of a pro-Community claim shows that expansion occurs in situations where there are compatibilities with the EU provisions of free movement of the four factors of production.

EU rights of free movement v. human rights protection as a Member State’ public interest: Schmidberger

The last type of cases to be analysed corresponds to the line of jurisprudence in which a member state invokes human rights protection in order to justify derogation from the infringement of EU rights of free movement. As noted, this situation was implicit in Grogan. In contrast, in the Schmidberger case, human rights goals are explicitly presented in a member state policy, implemented in the public interest. Thus, the structure of the conflict pits the economic interests of the EU against the public interest of a member state. The ECJ, then, is to decide whether human rights protection in a member state provides sufficient grounds for derogation from EU law. In the assessment of these grounds, we are confronted with the issue of how a national measure exempted from EU law may contribute to the general interest of the EU. This means that the ECJ has to assess the protection of human rights enclosed in a measure of a particular member state from the perspective of its compatibility with EU law.
As noted, in these situations, a national measure can be justified if it constitutes a “mandatory requirement” and if it is proportional to the aim pursued.

I maintain that the case presents a clear assertion of the diversity approach to coordination. We found that when human rights are set against the policies of member states, the ECJ was inclined to compound the new objective of human rights with the economic interests of the EU. By contrast, now we can ascertain that when human rights are called for by a member state, the approach of the ECJ is much more deferential towards the national court, giving considerable importance to the fact that the state authorities can provide a better assessment of the local situation.

In the Schmidberger case, the conflict was between the EU free movement of goods and a national policy supporting freedom of assembly and expression. Schmidberger, an international transport undertaking, put forward a complaint against the Republic of Austria for breaching the EU provision of free movement of goods (Article 28 TEC). The Austrian authorities permitted an environmental group to hold a demonstration on a section of Brenner Motorway, the effect of which was to completely close the motorway to traffic for almost 30 hours. Schmidberger claimed that the blocking of the route caused considerable economic loses for his business and that the national measure was in violation of his EU rights of free movement of goods. The Austrian authorities maintained that the authorised demonstration was an expression of freedom of assembly and expression, and that the national measure was justified on the grounds of public interest, and therefore, subject to derogation from infringement of EU law.

The referring court asked whether the rights of freedom of expression and assembly exercised by the demonstrators should prevail over the Community provisions of free movement of goods, by reason of the importance of the aims pursued by the demonstrators, namely, publicising the need for environmental protection. As Avbelj points out, AG Jacobs
correctly reformulated the question by focusing, not on the content of the demonstration, but on the right of the Austrian government to authorise a measure aimed at protecting human rights (Avbelj, 2004, p.36).

The ECJ followed AG Jacobs in its reasoning. It first asserted the doctrine established in *Cassis de Dijon*, stating that a national measure aimed at derogating from Article 28 could be justified as a mandatory requirement relating to the public interest. Yet, significantly, its major premise focused on human rights, instead of on free movement of goods. Applying the “rule of reason”, the ECJ held that the rights of freedom of expression and assembly were not absolute:

> [T]he exercise of those rights may be restricted, provided that the restrictions in fact correspond to objectives of general interest and do not, taking account of the aim of the restrictions, constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed (Schmidberger Recital 80).

From this formulation, we can see that the basic justificatory issue was how much human rights protection a member state can allow so as to remain in compliance with the economic provisions of EU law. Subsuming the facts, the ECJ applied the proportionality test, concluding that the level of human rights protection adopted by the Austrian authorities was justified:

> The imposition of stricter conditions concerning both the site – for example by the side of the Brenner motorway – and the duration – limited to a few hours only – of the demonstration in question could have been perceived as an excessive restriction, depriving the action of a substantial part of its scope (Recital 90).
This focus on the national measure of the member state in order to construe the justified reasoning is revealing. When the member state is the party that calls for the application of human rights, the ECJ gives much more attention to the goal of human rights. Still, the proportionality test is applied to regulate the degree of interference of this goal with EU economic objectives. However, the Schmidberger ruling shows that the ECJ opts for giving a wide degree of discretion to the national authorities to decide how to apply this test:

> The national authorities were reasonably entitled, having regard to the wide discretion which must be accorded to them in the matter, to consider that the legitimate aim of that demonstration could not be achieved in the present case by measures less restrictive of intra-Community trade (Recital 93).

This paragraph confirms the thesis that Avbelj derives from the examination of Schmidberger, namely that in issues of human rights, the EC applies a highly deferential review as standard, instead of imposing the Community Standard of human rights (ibid, p.73). In my view, this deference is a confirmation of the diversity approach to coordination that the ECJ applies regarding the new goal of human rights.

In the total number of cases examined, it can be seen that the ECJ’ reasoning and its decisions follow an approach of coordination for the new goal of human rights that is decentralised, requesting the application of a minimal standard of protection or favouring the national courts evaluation of the issue. The ECJ avoids the imposition of a uniform EU standard of protection. Moreover, in the particular case of human rights, the outcomes are very dependent on the factual context of the cases. We noted that the granting of derogations in cases involving exclusively the internal market objectives, such as Cassis de Dijon, could trigger a legislative action in which the member states confirmed the line of action taken by the Court in a common decision. I also pointed out that the legislative decision was likely to
remain at minimal levels of harmonisation. This legislative follow-up of judicial conflict resolution is not only limited to traditional economic objectives. In the “new area” of environmental protection, the member states have also confirmed the jurisprudence of the ECJ (Bengoetxea, MacCormick and Moral Soriano, 2001, p.84). In human rights issues, the member states have adopted the Charter of Fundamental Rights, providing a common formula, which in fact asserts a minimal level of protection. However, it is not possible to conclude that the Charter confirms a trend of case law. Nor can we confirm that any specific case of a granted derogation has triggered legislative action in the area of human rights. The outcomes of particular cases remain the basic index of coordination. This compels us to examine policy coordination on a case-by-case basis, since the factual context of the case determines the outcome to a high degree.

7.4 Nature of the outcome of coordination: effectiveness in the application of EU law

Developments of policy coordination in judicial resolutions occur when the ECJ carries out its interpretive functions. This is because interpretation entails generating new rules where none existed prior to a given judicial dispute, as well as a reconstruction of legislative rules. This rule-making activity occurs in the context of very particularised collective action problems that arise when a member state is to apply EU law. In the resolution of concrete collective action problems, the ECJ justifies its decisions according to a “particular-case approach”, which takes into account the factual context of the case. That is, the resolution of a dispute involves an adaptation of the rules to the particular case in hand. This dependence on the factual context of the cases defines the basic characteristic of outcomes of policy coordination in judicial politics. Policy coordination is particularised, often affecting only the situation of one member state. Certainly, EU law has to be uniformly
applied. In a given case, the ECJ must make a decision that would be applied in any member state facing a similar situation. This requirement of universability is manifest in the formulation of the major premise of a case. However, as we can see in human rights jurisprudence, the major premise refers often to general principles of EU law, such as non-discrimination. The final interpretation derives from the subsuming of the facts into these general principles, and it is here where we find the particularised character of policy coordination. Case law may have a far-reaching impact when it is confirmed by the member states in the legislative or constitutional process. For instance, the SEA confirmed the principle of mutual recognition as stated in *Cassis the Dijon*. The ECJ had then a firm Treaty-based source to subsequently interpret the application of mutual recognition in concrete cases. However, in these following cases, the principle is still to be applied in the light of the circumstances of the case. Policy elaboration resulting from judicial decisions will be more uniform, but it will still have the mark of a particularised result.

Given the function of enforcement of judicial decision-making, particularised outcomes of coordination are assessed in terms of the effectiveness in the application of EU law. The relevant question, then, is whether we can ascertain a particular direction from a series of particularised outcomes that indicates the centralised or decentralised form in which the effectiveness in the application of law is reached. The notion of “effectiveness” here refers to the correct implementation of laws (see Snyder, 1993). When interpreting the application of law, the ECJ attempts to ensure that Community law becomes effectively implemented in all member states, so as to enhance the integration project. I have posited that the crucial juncture of integration arises is the review of member state actions, when the ECJ has to interpret on the compatibility of Community law with national legislations. The ECJ has to give interpretations on compatibility that facilitate implementation. Interpretations that impose the application of centralising measures, specifying clear and precise provisions for all member
states, constitute *hard law* instruments. They will favour harmonisation if the national legislations are equipped to implement those measures. Decentralised measures assert that EU law is to be uniformly applied, but maintain the autonomy of the national authorities in determining the precise mechanisms by which it is to be done. They are *soft law* instruments. They may lead to less harmonisation. However, when the national authorities can apply Community law by means of their own provisions, decentralised solutions provide effective implementation. Thus, I consider both types of outcomes as integration outcomes that may enhance the effectiveness in the application of law, according to differences in the factual circumstances in which a concrete collective action problem arises.

In the analysis presented here, integration outcomes, that is, outcomes of policy coordination, are assessed according to the notion of the *expansion of Community competencies in a policy area*, and in particular, in the area of human rights protection. When the ECJ expands the competencies of EU law by imposing a Community standard of human rights protection, the outcomes will be centralised. When the regulatory autonomy of the national authorities is taken into account, outcomes will be decentralised. I consider that a pro-Community decision in a given issue is centralising if the ECJ recognises this issue as prevalent for the application of EU law, specifying clear and precise Community provisions that are to regulate the issue. By contrast, a pro-Community decision will be decentralised if the issue is recognised according to a minimal level of Community obligation, leaving a wide discretion to national authorities for the specification of further provisions and mechanisms for applying Community law. Pro-member state decisions are always decentralised. They do not recognise the issue as a Community provision. Instead, the issue is a matter of public interest for the member state. Typically, pro-member state decisions uphold a national measure applying a national policy as a justified derogation of the infringement of Treaty provisions. Thus, they leave to the national courts the decision of setting the level of
obligation on an issue and to specify provisions for the lawful implementation of the issue. As long as these provisions are proportional and non-discriminatory, they are justified in the light of Community law, because they are expected to enhance the general interest of the Community.

My approach to evaluate outcomes has focused on the “new” policy objective of human rights protection. As noted, the focus on human rights imposes certain restrictions on the generalisation of our conclusions regarding policy coordination. However, since the recognition of this objective as a Community objective requires resolving a conflict with economic rights of the EU, we can also derive some implications regarding the direction of policy coordination regarding traditional economic interests, that is, those interests that the Treaty associates with the implementation of the internal market. The cases on human rights protection analysed here show that the ECJ approaches traditional economic interests in a centralising way. In my view, this prevalence of traditional EU economic interest is related to the consensual tendencies that existed in the Council around the 1970s at the time when the internal market was asserted as the main objective of the EU. The importance of this objective remains. As a consequence, the ECJ has a strong basis to interpret the application of law in concrete cases according to what has been decided in Treaty and secondary legislation. As result of the correspondence between the ECJ’s interpretations and the Council’s decision-making, we can expect that centralised outcomes will be followed by effective implementation.

Following this logic, when the dynamics of consensus are less forceful, a diversity approach of coordination would be more likely. We find the first manifestations of a diversity approach following the Cassis the Dijon decision. The decisions in these cases involve taking into account the cultural specificity of the member states. The diversity approach assesses the effectiveness in the application of law according to a flexible approach to consensus analysis.
A flexible approach to consensus may entail asserting the diversity of cultures of member states, whether this is in pro-Community or pro-member state decisions. The relevance of cultural diversity is asserted in the Treaties. Thus, Article 151 (4) TEC states:

The community shall take cultural aspects into account in its actions under other provisions of this Treaty, in particular in order to respect and promote the diversity of cultures.

From the perspective of the impact of judicial politics on policy coordination, what is important is to ascertain when this approach is applied in concrete situations and why. In my view, the adoption of the flexible consensus analysis is related to the recognition that national legislations may respond more effectively to the factual conditions of a local situation in which the Community law is to be applied, and therefore, may facilitate the implementation of laws connected to Community objectives. In the area of human rights protection, we find an extreme application of the flexible approach to consensus, signifying a predominance of decentralised policy coordination or *soft law* in both pro-community and pro-member state decisions\(^{194}\). This is evidenced in two patterns of judicial solutions. Firstly, when the application of a Community standard of human rights protection was at stake, the ECJ gave prevalence to economic interests over the goal of human rights, either by rejecting jurisdiction (*Cinémathèque*), or by adopting the minimal standard of trans-national human rights protection of the ECRH (*ETR*). Therefore, the width of expansion of a Community standard of human rights protection is limited, and the national courts are given considerable latitude to decide on the matter. Secondly, in cases where human rights are part of the national policy,

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\(^{194}\) It should be clarified that in other “new” policy objectives that are more directly related to economic interests, namely, environmental objectives, policy coordination derived from case law has shown a less decentralized pattern than that of human rights protection. In addition, Treaty changes have confirmed those objectives and have introduced institutional changes in order to facilitate the enactment of new EU legislation related to those objectives (see Jupille, 2004).
this latitude is even wider. Thus, in *Schmidberger*, the ECJ did not set any clear limits to the deference granted to the national courts in applying the test proportionality. I argued that the same result was implicit in *Grogan*. Moreover, the introduction of the doctrine of margin of appreciation in *Grogan* signifies an even more open-ended application of the tests of proportionality and non-discrimination.

It should be noted, however, that such deference to national courts in regard with human rights issues goes with a confirmation of the centralising trend of coordination of economic interests. Human rights protection is more forcefully recognised when there is not serious interference with the functioning of the internal market. *Grogan* provides an illustration of this pattern of recognition. In this case, asserting the freedom of expression as independent grounds for reviewing the application of Community law might have been problematic. The ECJ, however, integrated the human right into the definition of services, with the result of giving an economic interpretation of the right. As I have argued, the ECJ thus assured that the economic interests of the internal market were preserved. Once this was ascertained, it granted deference to the national court to decide on the right of the unborn child, an issue that does not present the same interference with transnational economic interests.

Ultimately, we can confirm that outcomes of judicial politics are very particularised and dependent on the factual context of the case. When cases involve traditional EU economic interests, particularised resolutions fill minor gaps of Treaty and secondary legislation. Even if outcomes are centralised and harmonising, the interpretative function of the ECJ has relatively minor importance. By contrast, when disputes involve new policy objectives, the judicial solutions require more interpretation. The case of human rights shows that, regarding new objectives cases, the interpretations of the ECJ have resulted in a decentralised trend of policy coordination.
8 Conclusion

The primary aim of this dissertation project has been to provide a theoretical understanding of how consensual decisions in the EU are generated and what the terms of this consensus are. I have approached the exploration of cooperation and its variation by referring explicitly to the integration question, positing a trade-off between national and European interests. This thesis has argued that variations in consensual decisions are generated by the objectives of member states to maximise their utility from different situations of costly interdependence or coordination problems that arise in the integration context. In each coordination problem, member states balance the minimisation sovereignty costs against enhancing the capacity of the regional group to act and, subsequently, they choose the strategic course of action more functionally adapted to providing rewarding cooperative solutions. On the basis of this general argument, a conceptual framework has permitted to theoretically analyse the mechanisms that lead to different consensual solutions by looking at four models of the cooperative process in the EU that take into account the conditions under which cooperation takes place and the strategic trajectories by which actors respond to these conditions.

This quadripartite vision of the representation of cooperative processes addresses crucial differences in the cooperative mechanisms of EU decision-making, regarding the relevance of procedural rules, the nature of the issues to be resolved, the way in which preferences are configured and, more determinately, the strategic operations that actors use so as to reach a final agreement. What the conclusions on the variation of cooperation in the EU can be drawn from the analysis of the models?
The analysis portrays operationalisations of consensus of the EU that range from decentralised forms of policy coordination, reflecting the use of soft legal instruments that accommodate national divergences, to centralised coordination schemes, requiring hard legal instruments by which supranational institutions control the rules for the allocation of benefits to different actors.

The most decentralised scheme of policy coordination takes the form of generalised compromises that fractionalise the common policy by means of soft law instruments. Decentralised arrangements are explained by models of the cooperative process in which the logic of bargaining, based on the informal character of negotiations, is predominant. I have posited that the use of informal bargaining strategies derive from distributional incentives consisting of preserving or enhancing sovereignty claims or “national interests”. In this view, the interaction of member governments is directed at minimising sovereignty costs of interdependence. Bargaining mechanisms give each individual government the opportunity to invest in efforts and resources so as to obtain the most they can from the collective agreement. In the interaction, then, governments confront the problem of determining a criterion upon which all of them recognise they have reached an equilibrium point, so that profitable opportunities to better their interests no longer exist. Theories of representing the informal bargaining process have been able to determine this criterion upon the assumption that political power constitutes the basic resource valued in an interdependent interaction.

Yet, qualifications on the configuration of a final consensual equilibrium arise when we consider that two basic forms of power are important: bargaining power or *de facto* veto power, based on capabilities and relative dependence on the agreement, and institutional veto power, determined by the use of unanimous procedures. In the general scheme of the strategic exchange of concessions, cooperative theories of bargaining posit that the difference in governments’ utility functions determines the concession-mechanism by which actors form
their expectations of the capacity of other actors to influence the outcome. Models such as Bueno de Mesquita’s challenge model reveal that, in the exchange of concessions among states, capabilities, as measured by the voting weight of governments, are critical in establishing this difference of utilities. Translated into a pattern of asymmetrical interdependence, *de facto* or bargaining power is likely to shape the outcome in the direction preferred by the most powerful governments in the Council.

Bargaining power then partially dispels the analytical tenet, seen in Scharpf’s work, that the use of the unanimity rule, institutionalising the veto power to each government, signifies that the most recalcitrant government will determine the direction of policy coordination towards solutions close to the *status quo*. It is indeed counter-intuitive to think that a weak but inflexible government, say, Luxemburg, could achieve a more favourable distributive arrangement in a collective outcome than powerful states such as France or Germany. And yet, when member states have to take decisions unanimously, institutional veto power exists and it is by no means irrelevant. Why, if not, do governments feel compelled not to reach an agreement until each and every government is on board? The analysis here suggests that the significance of institutional veto power is likely to be proven in the use of tactical devices. Those governments that are adamant regarding the protection of their national interest will be willing to use manipulative tactics in order to press for specific compensation. Unlike models specifying concession mechanisms, approaches on tactics cannot yield up a determinate solution from the cooperative behaviour of actors. The determination of the specific weight of commitments, threats and promises in a negotiated solution is much dependent on empirical induction. However, the relevance of tactics is undeniable precisely because a pattern of bargaining power is difficult to generalise in the face of the existence of institutional veto power, and because governments make calculations about expected reciprocations that they may encounter in future negotiations. In view of this
difficulty, the identification of possible tactical devices provides insights into how credible threats to veto can be overcome, so as to nail down a settlement. Thus, in the final analysis, both forms of power will shape decentralised outcomes. The inclusion of all interests will reflect compromises of an all-inclusive nature that provide stability because they consolidate prevailing distributive claims over an issue and avoid revisionist temptations. The recognition of the capabilities of states is critical for this stability, so that powerful states are likely to determine the general direction of policy coordination in these compromises. However, the use of compensatory tools will account for the reality that achieving stability has often required fractionalising the issue into several dimensions, so as to satisfactorily integrate all individual interests.

A less decentralised scheme of policy coordination can be identified in outcomes of the regular legislative process, and in particular, in decisions adopted by QMV under the co-decision procedure. Consensual decisions reflect here the preferences of a majority of member states and signify a policy change with respect to the status quo – as when a greater level of environmental protection is promoted over pre-existing minimal standards. Given the number of states making up the Council, and the need to make decisions by a qualified majority of 3/4 of the votes, policy changes need not be far-reaching, requiring the consideration of preferences of many member states. Yet, consensual decisions will require fewer intricacies than generalised compromises. On the other hand, the majority of states whose preferences are close to the common policy selected will minimise costs of adaptation incurred in implementing this policy. The conditions for the emergence of this form of consensual solutions are the existence of choice alternatives that cannot be easily complemented, and the identification of a certain degree of homogeneity of policy preferences for at least a sub-group of member states, which will favour one or another alternative. Coalitional cooperation is based on the application of a voting rule and on the participation of supranational institutions.
in the decisional process. Because these procedural constraints permit the exclusion of choice alternatives, they constitute a cooperative mechanism by which actors can prompt redefinition of collective policies in a redistributive direction. Once actors constitutionally decide that a majoritarian coalition will make the whole assembly of states act, the strategy of the individual government will be directed at joining a coalition whose policy preferences are closer to its own, and which can aggregate the sufficient number of votes to be decisive. The advantage that a government will derive from joining the decisive coalition analytically differentiates the coalitional logic from the logic of pure bargaining. Because pushing for sovereign claims entails a risk of being excluded, a government will have incentives to adapt its preferences to those of the coalition.

Coalitional cooperation is mediated by three factors: the voting weight of governments, their distribution of preferences and the agenda-setting power of institutions. On this basis, I have portrayed the cooperative process under the co-decision procedure as a sequence of two phases: a first phase of coalition formation, in which states form a winning or majoritarian coalition in the Council of Ministers, and a second phase in which the EP intervenes in the decisional process. I have proposed that the formation of the Council’s winning coalition is determined by the voting power of actors and the proximity of their preferences. When envisaging possible coalitions, states strategically re-weight their constitutional voting power by taking into account their closeness in a policy space. Voting power analyses are often thought to disregard strategy (Garrett and Tsebelis, 1999; Heisenberg 2008). The analysis on re-weighting of power refutes this belief. It shows that modifications of axiomatisations posited by constitutional voting power indexes permit us to draw strategic derivations from these indexes. The perspective of re-weighting then is a suitable tool to explain the dynamics of implicit voting within the Council. In essence, the coalitional mechanism modifies the power of the actors on the basis of the closeness of their
preferences. This implies a key difference with respect to the informal bargaining mechanism: a winning coalition needs to aggregate enough voting power to pass a decision, but powerful actors who stand far away from a prospective winning coalition can be excluded. In particular, actors with extreme positions are likely to be excluded from the winning coalition. Such exclusion will not be conceivable following the logic of informal bargaining, where those powerful actors will, moreover, obtain a favourable arrangement in a bargained compromise.

Theories dealing with the effects of majority voting demonstrate that assuming homogeneity of preferences increase the accuracy of deductions of the results in voting sessions. The analysis here provides a confirmation of this tenet for EU decision-making. Conditions of heterogeneity of preferences will add considerable pressure to the coalitional method as an effective mechanism for reaching cooperative solutions. Under a majority rule as inclusive as the QMV and with 27 actors, exclusions become extremely selective. In this sense, the dynamics of coalition building and those of the informal interactions of bargaining will approximate. Yet, the logic of coalition building remains predominant even under heterogeneity. We have seen that the enlargement of the EU to 27 members has had the effect of increasing heterogeneity in the distribution of preferences of European countries, and yet, a powerful actor like Poland could still be excluded from the final winning coalition. Then, in which sense does heterogeneity mediate the outcome of the legislative process? Heterogeneity changes consensual outcomes in two crucial ways. Firstly, the process of coalition formation may entail significant modifications of the initial preferences of governments, so that the final selected policy may show a set of preferences that considerably differs from the initial preferred outcome of any government of the Council. As a consequence, consensus within the majority is likely to be more diffuse, and the costs of adaptation experienced by states when implementing the selected policy will be greater. Secondly, the agenda-setting influence of
the EP will be more significant. The position of the Council’s winning coalition sets the range of feasible alternative agreements and always constrains the capacity of the EP to influence a decision. Under homogeneity conditions, the influence of the EP will be minimal. The EP will be mainly favoured when, and because, the majority happens to be close to the position in the policy space that it prefers. In contrast, heterogeneity increases the decisiveness of the EP. The greater the distance between the initial positions of the states in the policy space, the more preferences the Council’s winning coalition will need to include. The basic result of this greater inclusiveness is that the range of feasible alternatives will be extended, thus reducing the constraints of the EP for bargaining a policy option with the Council. As a consequence, the policy change that the coalition will finally impose in a consensual decision is likely to be inclined in the direction that the EP supports.

A third set of consensual decisions is characterised by a greater degree of uniformity and centralisation of policy coordination, reflected in the control of economic activities by the supranational organisation. In regulatory cooperation, the Commission will have a high degree of decisiveness and will be able to impose hard legal instruments for the regulation of the European market, elaborating and executing precise and uniformly binding norms. The condition for the generation of centralised coordination is the generalised need of expert and coordinated economic management among exporter groups operating in the European economic space. By delegating large discretionary powers to the Commission, in its capacity as an expert agency, member states save transaction costs of gathering and coordinating the information required for the regulation of economic activities.

The conceptual analysis conducted here shows that incentives for centralised coordination are mostly directed at increasing the economic competitiveness at the European level. This leads to a key implication: centralised decision-making is mostly limited to the liberalisation of the internal market, and especially to competition policy, where managerial
skills at a regional level are required. In this view, arguments such as Scharpf’s, suggesting that integration developments are to be achieved through the application of centralised coordination in areas where specialised knowledge of local conditions is important, such as social policy, seem at odds with the application of a rationale of allocative efficiency. On the other hand, theories of organisational decision-making focusing on statutory regulation appear to be the best suited to account for how allocative efficiency can be achieved at a regional level. I do not find any reasonable argument indicating that models based on total harmonisation can become part of the strategy of the Commission for increasing the economic performance of the EU. On the contrary, its strategy of management is mostly based on the control of market inefficiencies.

A second implication of regulatory cooperation is that the expert management of the Commission depends greatly on its environment and is subject to continual corrections. This implication is noteworthy because theories of delegation and discretion applied to the EU, such as Majone’s, have not looked at the strategic operations that the Commission carries out in performing its executive functions, and have assumed that coordination through an expert agency is itself associated with efficient performance. By appealing to incremental and network theories of organisational decision-making, we have gained insight into the strategic components of expert-based regulation, reaching the conclusion that the assumption of the efficiency of expert agency management is problematic. In its investigation proceedings, the Commission engages in analytical debates with advisory bodies defending the view of firms subject to regulation. These analytical debates may involve an unexpected high level of conflict, revolving around which model of regulation is able to supply more adequate means for the purpose of increasing competitiveness. Analytical conflicts may indicate that the legalist programme of the EU may lead to sub-optimal regulation, prompting important corrective measures of this programme. Empirical evidence supports this corrective pattern. In
particular, later developments in competition policy have shown corrections directed at giving major focus to economic aspects of regulation and at improving worldwide coordination between regulatory agencies. Likewise, the Commission has configured a more rationalised use of its organisational resources by delegating tasks of gathering information to national regulatory agencies and refocusing its role to coordinative functions.

Finally, the last set of coordination solutions is characterised by its particularised nature and relates to the resolution of enforcement problems of coordination. In configuring the model of enforcement, the aim here has been to focus on the integration dimension of judicial politics, as derived from the interpretive decisions of the ECJ. In this sense, an added value has been provided with respect to other theoretical perspectives that envision jurisdictional enforcement as a last part of a policy cycle and conceive the constitution of a jurisdictional system as an institutional cooperative solution in itself. Instead, I have argued that judicial politics represent a response to specific problems of costly interdependence and that, as such, can be compared to other mechanisms of cooperation. Costs of enforcement have been conceptualised here as concrete collective action problems that arise when states are to perform contracts reached at the constitutional or legislative level. Member states wish to secure general and effective enforcement, but find it extremely costly to discuss localised enforcement problems in the legislative arena. Under these conditions, states have incentives to rely on the services of a decisive supranational system of jurisdictional arbitration that is to be applied in each member state.

In this system, the ECJ is to decide about the compatibility between national laws and EU law, with a view to strengthen the effectiveness of the integration project. The integration question is then posited in terms of how issues regarding this compatibility are resolved. The ECJ is to uniformly apply coherent criteria of judicial reasoning and justification so as to balance conflicts of values between, on the one hand, the economic interests of the EU
established in the legislation and, on the other, new objectives, such as human rights protection, which are raised in particular cases as justified policy objectives within the EU project.

The direction of policy coordination issuing from the resolution of these particular cases is of a bifurcated nature. From the analysis of the jurisprudence on human rights, I have found that the ECJ, when considering the expansion of EU law to new policy objectives, sticks to a Treaty-based model of expansion. In this perspective, centralised outcomes prevail in economic issues where the Court has a solid legal basis for interpretation and does not recognise new objectives. In contrast, in the case of human rights, we have seen that the recognition of new objectives has a decentralised imprint. The ECJ acknowledges a general lack of consensus among states regarding those objectives. For this reason, it either assimilates them into economic interests of the EU – thus giving them a complementary and minimal value – or it grants ample discretion to national courts to decide on the compatibility of these objectives with EU law, in relation to domestic imperatives. In either case, the Court adopts a diversity-approach for the recognition of new objectives. As a consequence, policy coordination regarding these objectives has a decentralised nature. As I cautioned, we cannot generalise the results from the area of human rights to all new policy objectives, which may present a less decentralised pattern of coordination. Yet, the study of the case of human rights has permitted to assess why the ECJ is inclined to adopt a diversity approach to coordination, and, more generally, why its diversity approach is functional in the context of the integration project. I have maintained that the diversity-approach of the ECJ is coherent with the central objective of enhancing the effectiveness in the application of EU law. A pro-diversity decision is always taken in reference to measures concerning EU law, not national law. In this view, the ECJ judges that, in the face of cross-national differentiation, allowing national
legislations to apply their own measures for implementing EU legal measures avoids disruptions and gives coherence to, or even reinforces, the project of integration.

The central thrust of this dissertation has been twofold. On the one hand, it has provided a categorisation of the relevant mechanisms of cooperation of the EU by means of an analytical formulation that functionally relates incentives for actors to cooperate, the strategies that they use and the different consensual decisions that they reach. On the other hand, it has offered a conceptual investigation permitting the development of theoretical tenets so as to explain key but elusive phenomena of EU cooperation such as the integration of sovereign interests, the implicit voting in the Council, the regulatory process of conflict resolution or the pro-diversity reasoning of the ECJ.

In a polity configured by an amalgam of national and supranational interests, the fact that cooperation is frequent and successful is a puzzling phenomenon. Paradoxically, detailed descriptions of interactions often increase our impression of the complexity of the phenomenon. The decision-making processes by which actors with conflicting interests end up adopting consensual decisions are something like a black box. My theoretical contribution has been an attempt at opening this black box by investigating the underlying mechanisms of how consensus is generated and which form it takes. Yet, the decision-making process of the EU is a complex subject of study that will continue to challenge theoretical thinking. In this view, the analytical formulation on the variation of cooperation presented here does not intend to be finite, and lends itself to revision and extension. Future lines of research based on this analytical formulation may come from the application of the different mechanisms to concrete decisional events. I have conceived these mechanisms in forms presenting the more plausible analytical connections between coordination problems and strategies. However, concrete cooperative processes may reveal more mixed costs of interdependence – as when states encounter simultaneously or sequentially information and selection problems. As a
consequence, it is worth exploring the operation of various mechanisms in the same process, and their relative weight in accounting for decisional outcomes. Another avenue open is to introduce other factors in the analysis that may modify a given mechanism or create a new one altogether. Thus, relaxing the assumption of complete information in the legislative process is likely to affect both calculations of re-weighting of voting power and perceptions of the capabilities of states, giving more weight to variables such as domestic constraints. Likewise, considerations of political power in the management of expert information, which have not been treated here, may have a considerable incidence in the level of conflict of this management.

This study has shown that there is much to be gained in the understanding of the mechanisms of cooperation in the EU by means of a meta-theoretical framework that makes pertinent categorisations about conditions of cooperation and related conceptions of strategy. The underlying thesis has been that member states resort to different cooperative mechanisms in order to better integrate their interests into the regional organisation, in accordance with their different objectives and capabilities. According to this thesis, the prevalence of consensual outcomes over deadlocks patent in EU decision-making is derived from a flexible view of integration by which member states are able to diversify their objectives within the framework of regional organisation. The mechanisms of cooperation represented in the models of bargaining, coalition building, regulatory management and judicial politics are not exhaustive. I consider, however, that they capture the most relevant ways in which cooperation works in the EU.
9 References

Treaties

Treaty establishing the European Community (consolidated text)
   *Official Journal of the European Communities C 325 of 24 December 2002*

Treaty on European Union (Consolidated version 1997)
   *Official Journal of the European Communities C 340 of 10 November 1997*

Treaty of Nice. Amending the Treaty on European Union, the Treaties Establishing the European Communities and certain related acts, *Official Journal of the European Communities*, C80, 10.03.2001
10 Bibliography


Hosli, M.O. and Van Deemen, A. (2002) “Effects of Enlargement on Efficiency and Coalition Formation in the Council of the European Union.” In Hosli, M.O., Van Deemen A. and


OECD Environmental Data Compendium 2009. (Available at http://www.oecd.org/document/49/0,3343,en_2649_34283_39011377_1_1_1_1_1_00.html)


