Jnl Publ. Pol., **21**, 2, 107–131
Printed in the United Kingdom

Unintended Consequences: Institutional Autonomy and Executive Discretion in the European Union*

DIONYSSIS G. DIMITRAKOPOULOS, *Politics, Oxford University*

ABSTRACT

Institutions are more than mere agents of their creators. They produce unintended consequences by means of their autonomous action. In the context of the European Union (EU), supranational institutions, such as the European Court of Justice (ECJ) and the European Commission produce such consequences, even in areas where no direct or overt transfer of powers has taken place, while performing the roles assigned to them by their creators. Using a case study regarding the protection of the free movement of workers, this article demonstrates that supranational institutions circumscribe the use of executive discretion by national governements by blurring the line between 'safe' and other issues, that is, the line that distinguishes between the 'two faces of power'.

Institutional structures, like the EU, are not mere neutral agents used by their creators in the quest for more effective policy-making. Once created, institutions take on a life of their own (March and Olsen 1989; Krasner 1984) – in part because of the limited capabilities and time horizons of their creators – and produce unintended consequences. However, existing analyses of the role of supranational institutions focus primarily on the agenda setting and the formulation stages (see, for instance, Pollack 1997; Schmidt 2000). Little attention has been paid to the implementation stage where Treaty provisions are put into effect. This article looks at this stage and indentifies the ways in which supranational institutions affect the outcomes of the EU policy process.

* A previous version of this paper was presented at the workshop on the New European Commission organised in the Department of Politics and International Relations, University of Oxford, 4–5 May 2001. The author is grateful to workshop participants, Argyris Passas and an anonymous referee for challenging and stimulating comments. Naturally, the usual disclaimer applies. Financial support provided by the European Commission through a Marie Curie Post-Doctoral Fellowship is gratefully acknowledged.

Recent literature on the role of institutions in the policy process have highlighted the idea that institutional contexts shape not only the strategies, but also the goals pursued by participants (Thelen and Steinmo 1992, 8; March and Olsen 1989). The argument presented here is linked to this line of reasoning. It is argued that, in the context of the EU, supranational institutions circumscribe the use of executive discretion by national governments, i.e. their freedom to choose between alternative *procedures* and *potential outcomes*. Indeed, their use of discretion is coloured by the autonomous role of supranational institutions. These institutions, in performing the roles assigned to them by the Treaty, produce unintended consequences by blurring the line between 'safe' and other issues, that is, the boundary between what Bachrach and Baratz (1962; 1963) have termed 'the two faces of power'. The autonomous role of the European Court of Justice and the European Commission is construed here as a product of the bounded rationality of the drafters of the Treaty of Rome, who were unable to foresee the consequences of this role in individual cases. Although this autonomy corresponds broadly to functional and normative principles – and thus can be construed as, indeed *is*, a product of design – in individual cases it produces consequences that the member states are unable to avoid.

To be sure, existing literature has already highlighted the 'political power' of the ECJ (Alter 1996; 1998) as well as the capacity of the European Commission (Pollack 1997; Schmidt 2000) to produce unintended consequences by acting autonomously. However, these analyses essentially rely on the assumption that the views of supranational institutions and national governments necessarily diverge from each other. The approach used in this article is informed by sociological and historical institutionalism and differs from existing analyses in five fundamental ways.

First, existing analyses rely implicitly or explicitly on the idea that supranational institutions *intentionally* go against the wishes of national governments. On the contrary, the approach utilised here is couched on the idea that the activity of supranational institutions is the result of historically defined conceptions of *appropriate action*. Secondly, the divergence of views between supranational institutions and national governments is not taken for granted. Rather, one key source, namely socio-economic actors, is identified. They act on the basis of their own interests but in a manner that relies on key choices made by the member states at the time when the Treaty of Rome was drafted. One such choice is the relative autonomy of supranational institutions which reflects both normative and functional principles. Thirdly, the approach used in this article is explicitly based on the concepts of bounded ration-

ality and incrementalism stemming from decision and organisation theory (Simon 1976; 1997; March and Simon 1958; Lindblom 1959; Braybrooke and Lindblom 1963). The use of these concepts in the analysis allows the explicit discussion of the factors that shape the *pace* and the *direction* of institutional activity and its evolution over time. This leads to a more accurate analysis of the dynamics of the EU policy process and the factors that shape it. Fourthly, the dominant view regarding the role of the Commission relies on the principal-agent approach. This sees information asymmetries as the only limitation on the part of the 'principal' (i.e. the member states). What happens when such asymmetries do not exist? Finally, the principal-agent approach also takes for granted the *consequential* nature of institutional activity: institutions are thought to be determined utility maximisers that seek to increase their powers, budget or personnel. Clearly, this perspective automatically breaks down once one considers a case where institutions still manage to produce unintended consequences despite the lack of any budget-, personnel- or power-related stake.

This is demonstrated by means of a case study regarding the free movement of workers and, in particular, the scope of the exemption of 'employment in the public service' introduced by art. 48 para. 4 of the Treaty of Rome. The free movement of workers is one of the four fundamental freedoms[1] upon which the single European market is based. The 'founding fathers' excluded from its scope 'employment in the public service' (art. 48 para. 4 of the Treaty of Rome). However, the implementation of this provision has demonstrated the limits imposed by supranational institutions on the member states thus producing unintended consequences. Although the member states initially sought to exclude *en bloc* 'employment in the public service' from the free movement of workers, the ECJ and the European Commission imposed a much more limited definition of this term. Indeed, not only have they made an issue out of what the member states had initially construed as a 'non-issue', i.e. the scope of the exemption, but they have also managed to impose their views in substantive terms as well. They did so by performing *autonomously* the role assigned to them by the drafters of the Treaty in a manner not foreseen by the latter.

The case is interesting for a number of reasons. Existing analyses of the impact of supranational institutions on policy outcomes rely on competition-related cases, such as state aid and the liberalisation of air transport services and electricity markets (Smith 1998; Schmidt 2000). However, the powers of the Commission in this policy area are wide-ranging and, most importantly, they are not shared by the EU and the member states since they belong exclusively to the former. What is the

impact of the role of supranational institutions in policy areas where they possess a rather modest 'toolkit'? Unlike the area of competition policy, where the Commission has the right to make secondary legislation on its own, to authorise or ban mergers and the provision of state aid (Smith 1998), its toolkit in the free movement of workers is limited. Indeed, the Commission can only (a) propose new legislation and (b) refer member states to the ECJ when it considers that they have failed to comply with EU law. While the former power can by no means guarantee the final adoption of a proposed piece of legislation, the latter entails two hurdles. First, given the Commision's limited resources, the detection of problematical cases is not easy. Second, even when such a case is detected, there can be no guarantee that the ECJ will uphold the opinion of the Commission.

The following section outlines the approach of the article, highlighting bounded rationality and institutional autonomy as the sources of unintended consequences in the EU policy process. The emphasis then shifts to the case study. In the final section, conclusions are drawn with regard to the impact of supranational institutions on the EU policy process.

Bounded Rationality and the Two Faces of Institutional Autonomy

The concept of bounded rationality stems from the work of Herbert Simon (1997; 1976) and has influenced organisation theory, decision theory (March and Simon 1958; March and Olsen 1979) as well as political science (Lindblom 1959; Braybrooke and Lindblom 1963). It constitutes the basis for Simon's criticism of decision models that are derived from economics and underpinned by conceptions of utility maximisation. Simon argues that, in addition to the properties of a decision situation, one must also examine the characteristics of the decision makers. First, decisions, including those that shape institutions, are frequently based on incomplete information. Second, even in the presence of complete information, decision makers have a limited 'computational capacity' to process it and to foresee the consequences of alternative options. Third, decision makers are mutlidimensional, that is, they typically have more than one identities to fulfil. Fourth, decision making takes place in an opaque environment that is underpinned by attention-seeking processes and actors. Hence, rationality is essentially *bounded*. As a result, decison makers, rather expectedly, resort to 'satisficing', i.e. they tend to adopt solutions that are 'good enough', primarily because 'they have not the wits to *maximize*' (Simon 1997, 118, original emphasis) and decisions are the product of concep-

tions of 'appropriate deliberation' (Simon 1976, 131; March and Olsen 1989, 51) rather than utility maximisation.

It is therefore reasonable to expect that institutions will not always act in a manner that complies with the initial wishes of their creators. In other words, in light of the inability of their creators to foresee all contingencies, institutions can be expected to generate unintended consequences. These consquences are expressions of institutional autonomy. However, institutional autonomy is also linked to two intertwined imperatives, one *functional* and one *normative*. On the one hand, the creators of institutions need to ensure that institutions enjoy a degree of freedom from short-sighted competing interests so as to promote long-term solutions. They therefore seek to insulate institutions from such interests. On the other hand, institutional autonomy also reflects normative principles – such as justice and equality, which are valued by society – and is meant to promote them functionally.[2]

Institutions approach decision situations by means of their standard operating procedures and repertoires in their quest for role fulfilment. Not infrequently, they do so even in the face of adversity. In addition to the externally induced element of their autonomy outlined above, the capacity of institutions to produce unintended consequences is also rooted in internal elements. Institutions generate and nourish conceptions of appropriate behaviour (March and Olsen 1989) that affect the environment in which they operate; and their autonomous activity constrains the action of participants in the policy process. In both respects, their impact is largely influenced, in Hauriou's terms (cited in Waschkuhn 1987, 72), by both a 'functional' and a broader 'guiding idea', instilled in them at the moment of their creation. These ideas permeate institutional activity thereafter.

In the EU – which is an open system where there are numerous sources of stimuli for institutional role fulfilment – this activity is an expression of the dual role of supranational institutions. The quest for the fulfilment of their role is, simultaneously, the mechanism that gives concrete meaning to the commonly agreed provisions *and* the vehicle for the production of the unintended consequences. This mirrors the dual role of the member states: they are both *promoters* of integration and *subjects* to its consequences. Member states now operate within the wider institutional system of the EU. Although they may well remain the most powerful actors therein, their power must be exercised in a certain manner and within certain limits if the common endeavour is to remain meaningful. This presupposes the continuing existence of the endeavour and the institutional structure that supports it (cf. Crozier and Friedberg 1977, 104; Sandholtz 1996, 408). In other words, although the member states in performing their integrative role

initially shape the functional idea that permeates the institutions of the EU, they simultaneously subject themselves to the dynamics of the unintended consequences produced by the autonomous action of these institutions.

The nature of these consequences is historically defined in the sense that they are products of critical junctures that generate a significant branching effect whereby subsequent developments are shaped by past choices (Krasner 1984). One such juncture was the adoption of the Treaty of Rome. Unlike the Treaty of Paris that established the European Coal and Steel Community, which is an example of a *treaty-law*, the founding fathers gave to the Treaty of Rome the shape of a *framework treaty*. The crucial difference between the two types of treaties is essentially that a framework treaty, unlike a treaty-law, defines broader objectives (covering a number of policy areas) and principles that guide the operation of the institutional mechanisms by means of which these objectives are to be achieved (Louis 1990). This relative lack of specificity is conducive to *discretionary action* – an expression of institutional autonomy – on the part of the supranational institutions that give meaning to these principles and objectives. Moreover, the nature of the commitments undertaken by the member states, predominantly in the form of the four freedoms and regulative policies which seek to establish a 'level playing field', is also conducive to a minimum of functional autonomy of the supranational institutions of the EU. The latter is a *conditio sine qua non* for the effective operation of the former, not least as a means to resolve the familiar problem of free-riding which could undermine the credibility of the whole integrative endeavour.

The concept of institutional autonomy is linked not only to the *content* but also to the *timing* of institutional activity. The allocation of attention to issues (and, thus, the timing of autonomous institutional action) is problematical rather than given (March and Olsen 1979). In the context of the EU, the ECJ is in a paradoxical position in this respect. On the one hand, unlike the Commission, it has no power of initiative; indeed, its involvement in the EU policy process depends on other actors. On the other had, there is a multitude of such actors, including other EU institutions, national governments, national courts and, crucially, individuals and firms. Although this multitude of actors is frequently ignored in accounts of the EU policy process, it is a key reason why the ECJ occupies a unique position in this 'implementation structure' (Hjern and Porter 1981). In particular, the role of individual citizens in this structure is crucial. The transfer of power from the national to the European level is inextricably linked to the empowerment of individuals (as well as groups and firms) who are the main beneficiaries of the constraints placed by EU regulative policies

on the national authorities. Indeed, legal action taken by individuals frequently provides the primary impetus for the involvement of the ECJ in the EU policy process. This, in turn, allows the ECJ – and the Commission – to perform the role attributed to them by the Treaty and to produce consequences that their creators did not foresee.

Given its wide-ranging – and widely used (Louis 1990) – powers of interpretation of EU law and the binding effect of its judgements, the ECJ is, arguably, particularly well placed to shape the terms of the inter-institutional debate that underpins the EU policy process – not least because its rulings can be over-turned only at the level of IGCs which require unanimity. Crucially, since the 1950s the ECJ has made extensive use of the so-called 'teleological method' of interpretation of European law. This method relies on the Court's *own* – that is, autonomously defined[3] – conception of the objectives of the Treaty as a guideline for the interpretation of ambiguous legal provisions (Louis 1990, 49) and has become part of the ECJ's 'standard operating procedures'. Crucially, it mirrors the fact that the Treaty of Rome is a framework treaty that has defined broad objectives whose achievement was left to the discretion of the Council of Ministers, the European Commission, the European Parliament and the ECJ.

Thus, given the legally binding effect of its judgements, the involvement of the ECJ in the EU policy process can constitute a critical juncture which can open a path that either increases the cost of a subsequent move in a different direction or precludes such a move altogether. Nevertheless, its role cannot be considered in isolation from the role of the Commission. The latter constitutes a *source* of cases that reach the ECJ while it also monitors their subsequent implementation and frequently uses such cases as a stimulus for the (re-)formulation of policy. Such junctures that open particular paths and shape subsequent developments need not be marked only by 'big' events (Pierson 2000, 263), especially in the EU where the implementation of regulative policies – the dominant type of EU public policy – relies to a significant degree on their target groups, including individuals.

Implementation,[4] which entails at least a minimum of interpretive activity, thus becomes the testing ground for past choices. The politics of policy implementation, however, is primarily *defensive* in the sense that actors are particularly solicitous over what they may lose (Bardach 1977, 42). As short time-horizons underpin political life (Pierson 2000, 261–2), the defensive nature of implementation politics is more conspicuous when a policy entails a significant degree of change. Moreover, the defensive politics of implementation also entails a battle focusing on the *terms* of the interactions between players with regard to the precise delimitation of the scope of policy that inevitably occurs in this stage of the policy process (Bardach 1977, 42).

Crucially, after the creation of an institutional structure, its creators (that is, the member states in the case of the EU) no longer have the power to define these terms unilaterally. Rather, these terms are shaped and given specific meaning by supranational institutions as well. From the moment supranational institutions and national governments share the power to define the terms of a policy debate, they also share the capacity to define the *outcome* of that debate. The autonomous action of supranational institutions, arguably, *conditions* the exercise of the executive discretion of national governments, even in areas where no transfer of powers has taken place. Supranational institutions do so by circumscribing the capacity of national governments to resort to what Bachratz and Baratz (1962, 948) term 'non-decision making', that is 'the practice of limiting the scope of actual decision-making to "safe" issues'. Supranational institutions generate this result by responding to calls for role fulfilment that stem from the context within which the Treaty is meant to be implemented without necessarily expanding their remit intentionally. Rather, the meaning that their action gives to specific provisions effectively dilutes the distinction between 'safe' and other issues as defined by the member states when the Treaty of Rome was drafted.

The dialogue between supranational institutions and the national governments proceeds *incrementally*. The logic of incrementalism is a product of bounded rationality and has four cardinal characteristics (Lindblom 1959; Braybrooke and Lindblom 1963). First, actors focus on moving away from known 'ills' instead of attempting to achieve a stable and clearly defined goal. Second, decision making is not concerned with comprehensive solutions to problems, but, rather, focuses on the small increments by which the potential result of a decision differs from the status quo. Third, this debate proceeds sequentially: decisions follow one upon the other in the quest for a solution to a problem until one that is good enough is found. Fourth, objectives are adapted to means.

The case study that follows illustrates the repercussions of the autonomous role of supranational institutions on the executive discretion of national governments. It shows that, although the views of national governments have remained stable in terms of their substance, the *procedural* dimension of their discretion was affected considerably. The case study essentially covers a thirty-year period (ca. 1970–2000) and examines the manner in which the ECJ and the European Commission have managed to restrict the exemption to the free movement of workers introduced by art. 48 para. 4 of the Treaty of Rome. The scope of this exemption was defined as a result of the intensive autonomous activity of the ECJ and the Commission despite the fierce opposition of

national governments. Neither the ECJ nor the Commission has ever disputed the argument, put forward by national governments, that they had no power to harmonise national administrative structures. However, they have used their standard operating procedures in order to fulfil their roles of interpreter (the ECJ) and guardian (the Commission) of the Treaty, in response to calls for the precise definition of the scope of art. 48 para. 4 that have emanated from interested parties. In doing so, supranational institutions have demonstrated that national governments are no longer capable of defining 'safe issues' in a unilateral manner. Rather, national governments' strategy – at least its procedural dimension – is shaped largely by the autonomous activity of supranational institutions.

Access of EU Nationals to Employment in the Public Service of Other Member States

From the Treaty of Rome to the Single European Act: Opening the Path of Reform

The Treaty of Rome that established the European Economic Community is, as already mentioned, a framework treaty. Indeed, on the one hand, it sets out broad objectives and, on the other, it relies on a set of institutions and specific procedures for their achievement. One of the key objectives enshrined in the Treaty is the progressive establishment of an area where labour, capital, goods and services can move freely. These four fundamental freedoms constitute the basis of economic integration in Europe and rely on the principle of non-discrimination on grounds of nationality (art. 6 of the Treaty). In other words, labour, capital, goods and services from one member state should have access to other member states *without* having to overcome *additional* barriers: they should be treated equally to domestic workers, goods, services and capital. These broad objectives were to be achieved incrementally, that is, by the end of a twelve-year transitional period, through specific legislation adopted by means of the appropriate procedures specified in the Treaty.

However, the founding fathers recognised that some areas of activity had to be excluded from the scope of the four freedoms. Crucially, one such area was 'employment in the public service' that was excluded from the scope of the free movement of workers.[5] Nevertheless, the precise meaning and scope of this provision was not defined by the drafters of the Treaty because they wanted to ensure that the scope of the exemption would remain as broad as possible. Indeed, the national

negotiators rejected the proposal put forward by the German Bundestag, which sought explicitly to exclude publicly-owned (commercial and industrial) companies from the scope of this exemption. On the contrary, the national negotiators had agreed that the terms 'administration publique/öffentliche Verwaltung' that were used in the first drafts of the Treaty referred to these companies as well (Secrétariat de la CIG pour le Marché Commun et l'EURATOM 1956, 2–3). Further, secondary legislation adopted by the Council after the transitional period prescribed by the Treaty did not deal with this issue at all (Council of Ministers 1968a, 1968b).

Institutions shape political outcomes by performing autonomously the roles that are assigned to them, even in the face of adversity. This article highlights the idea that institutions produce unintended consequences, i.e. ones that their creators had never (and, arguably, could never have) foreseen, by operating on the basis of a logic of *appropriate* action. This logic relies on two cardinal elements. First, institutions generate, nourish and maintain standard operating procedures and repertoires that serve as instruments for the handling of novel situations. Second, the actual use of these procedures and repertoires in concrete situations is based on the normative and the functional aspects of operational autonomy ascribed to institutional actors at the moment of this creation. This logic of appropriate action is used in specific cases that unfold over time. It leads to unintended consequences because the drafters of the Treaty could not – and did not – foresee the *precise combination* of a given decision situation and the use of the autonomously defined standard operating procedures and repertoires developed by institutional actors.

In the context of the EU, supranational institutions approach novel decision situations by means of their own standard operating procedures and repertoires that embody each institution's guiding idea. The ECJ and the European Commission became involved in the definition of the term 'employment in the public service' in a manner that curtailed the margin of manoeuvre of the member states, although neither the Treaty nor secondary legislation had transferred powers, for that purpose, to the European level. The ECJ and the Commission did so in performing the roles that their creators had assigned to them.

The ECJ first dealt with the issue of 'employment in the public service' in a case that concerned the discriminatory treatment against an Italian employee of the Deutsche Bundespost (ECJ 1973). This case constitutes a critical juncture that has significantly affected subsequent developments. Indeed, it has enabled the ECJ to become an active part of the implementation structure in a manner that has shaped the *terms* of the debate with the national governments and, more importantly,

the *outcome* of this debate. It has initiated an incremental process of policy implementation that, inevitably, entailed the definition of the key concept of 'employment in the public service' which was neither foreseen by the member states nor compatible with their preferences. Crucially, the ECJ did so in performing the role of authoritative interpreter of Community law attributed to it by the Treaty.

The German Federal Labour Court in 1973 asked the ECJ to interpret the term 'employment in the public service' and, essentially, to decide whether workers of the Deutsche Bundespost whose contracts were governed by private law could be exempted from the principle of non-discrimination on grounds of nationality in line with art. 48 para. 4 of the Treaty (ECJ 1973). When the case reached the ECJ, the German government sought to maximise the number of posts that were not covered by the principle of non-discrimination on grounds of nationality. It argued that since the objective of art. 48 para. 4 of the Treaty was *not* the harmonisation of national administrative structures, the definition must be based on *national* conceptions of 'public service'. It therefore concluded that, since the German Constitution stipulated that the Deutsche Bundespost was part of the federal administration, its employees were covered by the clause of art. 48 para. 4 and, thus, exempted from the free movement of workers and the principle of non-discrimination. This argument was based on the so-called *institutional* conception of 'employment in the public service'. This relies on the idea that the *nature* of the institution, unit, body, etc. that engages a worker determines whether or not he falls in the domain of the free movement (and therefore cannot be discriminated against on grounds on nationality).

In a clear illustration of 'satisficing', the ECJ *refrained* from providing a comprehensive answer to the complex problem of defining the term 'employment in the public service'. Rather, it focused on the small *increment* that was put to it by the German court and has sought simply to move away from a known 'ill'[6]. It supported the views of its Advocate General and the Commission, and ruled simply that the legal nature of the relationship between a worker and a company was irrelevant to determining whether this was a case covered by the exemption of art. 48 para. 4. Going against the views of the German government in this case was but the first step in the direction of a specific definition of the exemption introduced by art 48 para. 4. The ECJ, supported by the action of the Commission, based this definition on the *rejection* of the institutional criterion mentioned above, despite fierce opposition from the member states. Subsequent to these developments, the member states were obliged to resort to what can be termed 'the politics of non-decisions'.

Unlike the ECJ's reaction to the aforementioned case, when another case was referred to it, this time by the Commission in 1979 (ECJ 1979), it provided a specific answer to the question of what constitutes 'employment in the public service'. The key difference between the two cases was the manner in which the question was put to the ECJ. Unlike the question put to the ECJ by the German Federal Labour Court, which was essentially a matter of *interpretation*, the Commission presented its action as an attempt to ensure that a member state – in this case Belgium – *fulfilled obligations* that derived from the Treaty. Arguably, this allowed the ECJ to seek a specific solution to this issue. Moreover, the fact that the British, French and German governments submitted observations in support of Belgium further raised the stakes.

The case brought by the Commission against Belgium concerned a number of posts – unskilled workers, trainee locomotive drivers, loaders, hospital nurses, electricians, plumbers, architects, etc. – advertised and filled by local government bodies in Brussels and the Belgian National Railway Company between 1973 and 1977. Belgian nationality was a formal condition for recruitment. When the case reached the ECJ, the Commission argued that this requirement was incompatible with the principle of non-discrimination on grounds of nationality and the freedom of movement of workers enunciated by the Treaty. Moreover, it reiterated the view that, despite the ambiguity of the Treaty, the member states must not be allowed to define the content of the term 'employment in the public service' *individually* – that is, by reference to national conceptions – because this would undermine the implementation of a fundamental objective of the, then, Community.

On the contrary, the Belgian government (and the British, French and German governments along with it) argued that the ambiguous nature of art. 48 para. 4 reflected the unwillingness of the founding member states to limit their autonomy in deciding whom they recruit in the remit of the public sector. Further, they reiterated the view that the remit of the provision should be based on the *institutional criterion* alone because any alternative solution would be 'unworkable'. Finally, they issued a carefully worded, but unambiguous, invitation to the Commission to bring forward a legislative proposal. The ECJ rejected most of these arguments.

It ruled that the adoption of the institutional criterion for the determination of the meaning of the term 'employment in the public service' would undermine the implementation of the principle of non-discrimination on grounds of nationality and the free movement of workers. Crucially, the ECJ ruled that it was the uniform implementation of this principle throughout the Community that ought to guide

the action of the Community in this field (Everling 1990, 227). Hence, a *functional approach* must be adopted so as to determine whether a *particular post* should be excluded from the scope of the free movement of workers. In other words, the ECJ ruled that what matters was *not* the legal nature of the body that offers a job *but the nature of the post itself*. In order to establish this, it opted for an incremental, case-by-case approach that relied on the cumulative use of two criteria:

(a) participation in the exercise of powers conferred by public law, and
(b) duties designed to safeguard the general interests of the state or of other public authorities (ECJ 1979, 3900).

Consequently, it ruled that since the posts that fulfilled both criteria presumed on the part of their occupants a special relationship of allegiance to the state as well as reciprocity of rights and obligations that form the foundation of the bond of nationality, they could be legitimately excluded from the freedom of movement of workers and the principle of non-discrimination on grounds of nationality.

This judgement was significant for a number of reasons. First, it built on the path opened by the previous judgement of the ECJ in that it confirmed the incremental approach initially adopted by the ECJ in the previous case. Although the ECJ gave a specific answer to the issue of what constitutes 'employment in the public service' in the sense of the Treaty, it ruled that a *case-by-case approach* had to be adopted in order to determine whether a *particular post* ought to be excluded from the scope of the free movement of workers.

Second, the action of the ECJ and the Commission in this case was an illustration of their capacity to produce consequences that their creators could not have foreseen. Indeed, the judgement of the ECJ was based on the idea of the primacy of the free movement of workers and the principle of non-discrimination on grounds of nationality, that is two broad fundamental aspects of the Treaty. This line of reasoning, which was also promoted by the Commission, led to the idea that a Community-wide definition of the concept of 'employment in the public service' had to be adopted so as not to endanger the implementation of two fundamental mechanisms of economic integration (i.e. non-discrimination on grounds of nationality and the free movement of workers). Thus, it managed to formulate and impose a minimalist approach (Baclet-Hainque 1990) that considerably limited the number of posts excluded from the free movement of workers. This approach went *against* the view of the member states that argued in favour of individual *national* approaches in an attempt to *maximise* the scope of the exemption in question. More importantly, three *founding* states also promoted a national approach, thus demonstrating that, so far as they

were concerned, the issue had been resolved in Rome when the Treaty was signed. The action of the two supranational institutions established that this was not the case, thus constraining the role of the member states.

Third, in addition to constraining the role of the member states, the activity of supranational institutions was beginning to exert pressure of a different nature: it was starting to affect the posture of the member states. Although initially they were against the involvement of the, then, EC in the definition of the scope of the free movement of workers, they were beginning to show clear signs of a different attitude in inviting the Commission to submit a legislative proposal aiming to regulate this area. In other words, the institutional context was beginning to condition the posture of the member states. More importantly, the supranational institutions generated these changes in performing the roles assigned to them by the Treaty. In that sense, this case demonstrates the path opened by the choices made when the Treaty was drafted. The autonomous action of supranational institutions, which could initially be depicted as a mere guarantee aiming to protect the credibility of commitments, was gradually beginning to affect the preferences of the member states at least in terms of the *procedures* that they favoured. Indeed, the member states acted in line with Simon's assertion (1976) that human rationality is procedural rather than substantive. Hence, the member states tried (but failed) to avert a condemning decision of the ECJ by favouring an alternative procedure, that is, the adoption of legislation.

The confirmation of the views of the ECJ in two similar cases involving France (ECJ 1984) and Germany (ECJ 1985a) – the reinvigoration of the idea of the Single Market as well as the adoption of the Single European Act in the mid-1980s have provided the impetus for a significant change in the debate between supranational institutions and the member states. This time, it was the European Commission that tried to build on the jurisprudence of the ECJ by preparing a legislative proposal.

The Single European Act: A Window of Opportunity and the Politics of Non-Decisions

As an increasing number of problematical cases were being reported to the Commission, it recognised that the jurisprudence of the ECJ was difficult to implement. Thus, neither the inclusion in the Commission 1985 White Paper on the establishment of the Single Market of the problem of member state nationals' access to employment in the public service of other member states (Commission of the European Commu-

nities 1985, 24) nor the decision by the Commission to draft a legislative proposal (Commission of the European Communities, n.d.) came as a surprise. On the contrary, they were *appropriate* responses that reflected the modest toolkit that was available to the Commission in this area. In the meantime, the member states had been placed in an even more difficult position since the ECJ had recognised that the provision of art. 48 of the Treaty was directly applicable (Druesne 1981, 712–13). This had allowed interested individuals to take national authorities to national courts in an attempt to benefit from the broad principle of non-discrimination and the free movement of workers.

However, the situation at 'street level' remained imperfect, at least from the Commission's point of view. This is so for two reasons. On the one hand, the idea that only nationals of a member state should be allowed to have access to employment in its public service was so ingrained (Claisse and Meininger 1994) that it was unlikely to change rapidly. On the other hand, policing the implementation of the principles outlined by the ECJ in diverse and highly complex national administrative systems was extremely difficult, not least because of the Commission's limited resources. The Commission was aware of the differences between the historically defined national administrative systems. Further, it had explicitly recognised that it was not up to the, then, Community to *harmonise* the national administrative structures and this view was also shared by the ECJ (1973; 1979; 1984).

In that sense, the decision of the Commission to prepare a legislative proposal mirrored a *procedural* imperative. Indeed, the Commission was aware of the negative reactions that the relative liberalisation of access to employment in the public service could bring about, especially in a period when other bastions of 'nationhood', such as public procurement and public utilities, were also under increasing attack in the context of the emerging single market. It therefore did not seek to further limit the posts reserved to nationals of each member state, but, rather, sought to facilitate the micro-implementation of the jurisprudence of the ECJ in the member states. The adoption of legislation at the European level was likely to increase awareness at the national level with regard to the obligation of national authorities to treat nationals of member states equally in terms of access to posts not covered by art. 48 para. 4. Secondly, it was likely to shift the focus of monitoring micro-implementation to the national level (in particular to national courts). Directives are necessarily followed by the adoption of *national* legislation which deals with the state-specific practical aspects of micro-implementation. Crucially, this facilitates implementation because it obliges recruiting authorities in the member states to comply with *national legislation*[7] instead of the somewhat obscure (and frequently 'unintelligible') jurisprudence of the ECJ.

Hence, this decision of the Commission was an example of incremental action because it sought to avoid perceived ills by adapting ends to means through marginal modifications to the existing framework. At the same time, it was a politically shrewd move. Indeed, unlike the jurisprudence of the ECJ, which national governments typically portray as an *externally imposed obligation*, European legislation cannot be easily used as a vehicle for 'blame avoidance' since national governments play a crucial role in its adoption. Thus, its adoption would have enhanced further the legitimacy of the activity of supranational institutions in this case. Nevertheless, this did not happen, because member states engaged in what can be termed 'the politics of non-decision making'.

The draft Commission proposal was essentially based on the jurisprudence of the ECJ and the two crucial criteria analysed above. In that sense, the Commission did not use its autonomy in order to innovate. On the contrary, the draft proposal was essentially an attempt to codify the two categories of posts to which the jurisprudence of the ECJ had referred. In particular, it recognised explicitly the idea that, when the two criteria are fulfilled, the authorities of one member state have the right to restrict the access of nationals of other member states. Consequently, the Commission sought to identify the area where the member states remained free to impose restrictions to the free movement of workers in a manner that would then allow it to concentrate on the other categories of posts (i.e. those where the free movement *did* apply).

Thus it has refrained from the temptation to 'harmonise'[8] national administrative systems by promoting the uniform implementation of the principle of non-discrimination and the meaning that the ECJ has given to the concept of 'employment in the public service'. To be sure, this was, to a very large extent, the result of the differences that characterise these systems and the inherent complexity of such an endeavour. These differences were both a key reason why national governments were dismayed by the jurisprudence of the ECJ and also a crucial factor that led them to undermine – and eventually to defeat – the Commission proposals even prior to its official submission to the Council.

As noted earlier, both the jurisprudence of the ECJ and the approach favoured by the Commission were based on the functional – as opposed to the institutional – criterion. In other words, what matters decisively is not the nature of the *body* an employee is working for (or, more accurately, aims to work for) but the characteristics of the *functions* that underpin a specific post. Nevertheless, the use of the functional criterion is extremely problematical in the vast majority of the member states, where the public service relies on the *career system* whereby the principle of seniority ensures that officials are considered for top jobs –

usually those that are excluded from the scope of the free movement of workers – when they accumulate the experience and qualifications required. This logic, in turn, relies on an extremely cumbersome and tedious process whereby each member state must determine which posts fulfil both criteria in each and every part of the public service (Ziller 1988, 282). This is precisely what the vast majority of the member states had to face as a result of the jurisprudence of the ECJ and the action of the Commission (Druesne 1981; Everling 1990). On the contrary, only the Netherlands, the UK and (to a lesser extent) Denmark can apply the functional criterion without significant problems because their recruitment policies are largely job-specific and, thus, necessarily entail a definition of the tasks that the incumbent will perform.

Hence, in utilizing the autonomy attributed to them by the Treaty, both the ECJ and the Commission have promoted a policy approach that has constrained the role of the member states. They did so by putting the necessities of the uniform implementation of the free movement of workers above the technicalities invoked by the national governments with regard to the feasibility of the new approach, thus producing important unintended consequences by means of a series of small, seemingly marginal, but significant events. Thus, supranational institutions have, by shaping the terms of the policy debate, opened and followed a path that the member states most probably never meant to follow. They did so in their attempt to give meaning to a Treaty provision that was never meant to operate as a vehicle for the transfer of power from the national to the European level, an issue which frequently is at the heart of the policy debates at the level of the EU. When the member states realised that the draft proposal of the Commission (a) essentially reflected the jurisprudence of the ECJ and (b) was meant to facilitate its implementation, they effectively resorted to a solution that was considered to be 'good enough' and dissuaded the Commission from submitting it. Nevertheless, they had – arguably – already lost the capacity to limit the scope of decision making to a 'safe' issue.

Despite this temporary setback, the Commission was not dissuaded from taking further action in its attempt to facilitate micro-implementation. Instead, it has opted for an alternative policy instrument.

Post-1988 Developments: Protecting the Path of Reform

In light of the negative reaction of the member states to its draft legislative proposal, the Commission chose to move things forward by means of a Communication. Although Communications have no binding

effect, they are used regularly by the Commission as a means to (a) express its understanding of a particular issue and (b) communicate its views to interested parties (including other institutions of the EU, target groups, etc.).

The Communication of 1988 further builds on the jurisprudence of the ECJ and essentially reflects the views of the Commission with regard to the implementation of the free movement of workers in the field of employment in the public service. Hence, it constitutes a small additional step along the long path opened by the complementary action of the two supranational institutions. The incremental step that it takes along this path is the definition of two categories of areas (Commission of the European Communities 1988). First, the Commission has explicitly taken the view that free movement of workers and the principle of non-discrimination on grounds of nationality do *not* apply to specific functions exercised by the armed forces, police and other forces responsible for public order, the judiciary, tax authorities, the diplomatic corps, central banks, ministries, as well as regional government and local authorities. These functions fulfil the criteria enunciated by the ECJ and thus justify the restrictions that national authorities may impose on the access of nationals of other member states. Second, the Commission has identified four priority sectors where such restrictions are not justified. They concern the administration of commercial services (in particular public transport, the distribution of gas and electricity, maritime and air transport, postal, telecommunications, radio and television services); operational public health care services; tuition in public education establishments; and research for non-military purposes in public education establishments.

These are the areas where the ECJ had already issued a number of judgements (see *supra*). However, the new element added by the Commission is its explicit decision *not* to put forward legislative proposals but to take *systematic* action in these sectors by means of its powers of 'guardian of the Treaty' so as to facilitate the micro-implementation of the jurisprudence of the ECJ. Thus, the Communication can be construed as a statement of the Commission's determination to refer member states to the ECJ if they fail to comply. The Commission has consistently pursued this line and has successfully used its powers of 'guardian of the Treaty' in a number of cases (see, for instance, ECJ 1988; 1993; 1994; European Commission 1999).

Conclusion: Supranational institutions and the EU Policy Process

The key theme of this article is the capacity of supranational institutions to produce unintended consequences by means of their autonom-

ous action. Institutions, it has been argued, are more than mere agents of their creators. In the context of the EU, they are opportunity structures that give meaning to legal provisions. This meaning is the product of the institutions' quest for role fulfilment. However, the manner in which institutions fulfil the roles attributed to them by their creators produces significant unintended consequences. This is so because institutions have the capacity to develop their own standard operating procedures and to use them even in the face of adversity. The use of the teleological method of interpretation of EU law by the ECJ is a clear example of this phenomenon: the ECJ uses the Treaty as a *system* of rules and principles so as to construct autonomously the precise meaning of *individual* ambiguous Treaty provisions. The Commission has contributed significantly to the use of this method. In the case examined here, it has highlighted the deficiencies of individual national approaches to the concept of 'employment in the public service' and their repercussions upon the free movement of workers, i.e. a fundamental freedom enshrined in the Treaty of Rome. Crucially, the quest for role fulfilment by both institutions is frequently initiated by individuals trying to promote the interests conferred upon them by EU law by using the legal means established by the Treaty. In that sense, this case demonstrates empirically the role of individuals as sources of impetus for the autonomous activity of supranational institutions.

Supranational institutions have managed to blur the line between 'safe' and other issues. Indeed, so far as the member states were concerned, the term 'employment in the public service' referred to a whole array of domestically defined employment relations and posts which, in their view, ought to be exempt from the free movement of workers. In that sense, the definition of the scope of their provision was a 'non-issue'. The Commission and the ECJ have managed to reduce significantly the scope of this exemption by means of a stepwise process, without raising the issue of competence that frequently underpins the inter-institutional debate at the level of the EU. Moreover, they have refrained from attempting to *harmonise* national administrative structures. In effect, they have imposed on the national governments not only the *terms* of the inter-institutional debate but also specific *outcomes* that the latter had never foreseen. They did so by undermining the capacity of the national governments to define autonomously – that is, on the basis of their individual conceptions – the scope of the term 'employment in the public serviced'. Consequently, this case demonstrates that the use of executive discretion by the national governments – that is, their capacity to choose amongst alternative procedural and substantive options – is conditioned by the activity of supranational institutions.

More importantly, contrary to the dominant principal-agent approaches which ascribe to EU institutions the '*purposefulness*' to go against the wishes of the member states, this article demonstrates that these institutions have the capacity to produce unintended consequences *as a matter of course* by developing their own conceptions of appropriate action. In other words, it has been shown that neither the ECJ nor the Commission was seeking to promote a secret agenda, entailing the increase of their powers, budget or personnel. Rather, they were simply fulfilling the roles attributed to them by the Treaty. They achieved this by acting in a timid and incremental manner. Thus, bold claims about 'judicial activism' or a 'runaway Eurocracy' are not supported by this case study. Indeed, timidity was illustrated on a number of occasions.

First, in the first two cases (a critical juncture) brought to its attention, the ECJ (1973; 1979) has deliberately sought to avoid a head-on assault on the views expressed by national governments. Initially it has identified the factors that must *not* determine the scope of art. 48 para. 4, i.e. the legal status of employer–employee relations. Then, it has proceeded to identify in more *positive terms* what must be taken into account whilst also underlining the need for a case-by-case approach. Second, the Commission has hesitated characteristically to respond to the member states' call to bring forward a legislative proposal in the early 1980s, i.e. immediately after the ECJ had defined the two key criteria that ought to guide the implementation of art. 48 para. 4 of the Treaty. Third, the Commission has also decided to focus, that is to *limit*, its action on a small number of priority areas after the publication of its Communication in 1988 because it was aware of the difficulties associated with 'policing' the micro-implementation of the jurisprudence of the ECJ. Thus, it adjusted the *ends* (the completeness of this task) to the (limited) available *means* by limiting its action to a relatively small number of areas. The incremental action of the two institutions has proceeded (over a period of almost thirty years) along the lines of a *path* that diverged considerably from the one preferred by the member states.

Essentially, this article has sought to identify the (normative and functional) sources of institutional autonomy and to link them to specific political outcomes. The argument relies on the relaxation of the assumption that 'agents' (i.e. supranational institutions) are utility maximisers whose action is based on a consequential logic. The logic of appropriate action that underpins institutional activity corresponds to conceptions of bounded rationality and incremental action that permeate sociological institutionalism. Treaty provisions are not set in stone. Rather, their precise meaning is determined in the course of an

implementation process that unfolds over time. This process undermines the capacity of national governments to distinguish clearly between 'safe' (set in stone) and other issues. It is affected by the activity of supranational institutions that corresponds to their autonomously defined conceptions of appropriate action.

The implications of the preceding analysis are fourfold. First, it highlights the need to pay more attention to the manner in which institutional action unfolds over *long periods* of time, because history, in particular the sequence of events, matters.[9] Second, it is important to move beyond the analysis of the formal balance of power between supranational institutions on the one hand and the member states on the other. Third, the implementation stage of the EU policy process – macro-implementation in particular – ought to attract more attention, for it is there that the true meaning of legal provisions takes shape. Finally, one must move beyond the analysis of inter-institutional relations in areas where powers have been transferred to the level of the EU. Indeed, the analysis of these relations in areas where such transfer of power has *not* taken place can be equally revealing of the impact of supranational institutions on political outcomes.

In broader terms, this article demonstrates the need to move beyond the 'grand theories'. Indeed, the study of the politics of the day-to-day policy process where individuals act as sources of impetus for the autonomous action of supranational institutions leads to a more accurate view of the dynamics of the interactions between the key players. The member states remain the key actors in intergovernmental conferences, but their capacity to shape political outcomes *in between* such conferences is undermined by the autonomous activity of supranational institutions. The latter are capable of producing unintended consequences that the member states are unable to foresee and, thus, control. By the same token, this article also highlights the wisdom of Jean Monnet's *step-wise* method of integration. The latter proceeds on the basis of broad objectives whose achievement has been left to the discretion of a dynamic set of institutions. They were, no doubt, designed to perform specific functions. But the *way* in which they do so (i.e. the other side of the coin), could – and has – not been foreseen. Therefore, new theoretical analyses must seek to integrate these two levels of analysis while also taking into account the *dual role* of supranational institutions – as the mechanism that gives concrete meaning to the common policies and the vehicle for the production of the unintended consequences – as well as the member states – as creators of this process and subjects to unintended consequences.

The analysis of the sources of unintended consequences in the EU

policy process raises two important, but still unexplored, issues. First, what is the impact of these consequences on supranational institutions[10]? Both the European Commission and the ECJ already face significant functional pressures stemming from the expansion of the number of member states and, more importantly, the areas in which the EU is active. While the Commission finds it increasingly difficult to monitor micro-implementation-primarily due to its limited resources – the ECJ has to process a very large number of cases. Does this pressure affect the behaviour of these institutions? If so, how? Secondly, what is the impact of these unintended consequences on 'history-making decisions' that occur in the context of IGCs? To what extent and how are these decisions shaped by the activity that takes place between IGCs? These are challenging questions that require detailed research.

Finally, a brief word of caution is necessary. The capacity of supranational institutions to produce unintended consequences is one of the factors that render European integration such a fascinating field of research. Arguably, this incremental method of integration has served Europe very well since the 1950s. Part of its appeal relies on the unintended but welcome (though, clearly the two do not always coincide) consequences that it has produced. However, as integration moves closer to the political sphere, national and European political leaders must seek to enhance the sense of democratic accountability that should permeate the powerful institutions that have brought it (and us) thus far. This would minimise unwelcome institutional activism while providing an additional impetus for institution-led creativity.

NOTES

1. The other three freedoms concern the movement of services, capital and goods.
2. In the context of the EU, both the European Commission and the ECJ embody this dual logic (Sandholtz 1996, 408–11) since the appointment of their members and the performance of their duties are protected by a number of 'constitutional' guarantees. The unintended consequences produced by autonomous institutional activity can take a variety of forms, some welcomed by the designers of institutions, others not. Nevertheless, the two cannot be separated from each other, not least because of the human limitations that led to them in the first place.
3. The teleological method of interpretation is not a 'product' of the ECJ. Rather, it is a classical method that is widely recognised in legal doctrine and is used for the interpretation of international law.
4. Following Berman (1978), who distinguished between *micro-implementation*, that is, the activity of local organisations responding to federal action, and *macro-implementation*, that is, federal action aiming to steer micro-implementation, this article focuses on the latter. Hence, it differs from a classical implementation study.
5. This mirrored provisions of a similar nature which demonstrated some reluctance on the part of the member states to go too far down the road of liberalisation (Druesne 1981).

6. Thus, it has distinguished clearly between this case and cases in which it took a bolder approach such as those that led to the establishment of the principles of supremacy and direct effect of EU (then EC) law (Louis 1990).
7. At the same time, cases of non-transposition become much easier to detect.
8. Harmonisation would entail the compulsory re-definition of the national administrative structures. These were left intact. What has changed is the definition of the scope of art. 48 para. 4 of the Treaty and the manner in which it applies to *unaltered*-historically defined-national systems.
9. In 2000 the British Home Office was considering seriously the possibility to amend British legislation so as to allow EU nationals to become police officers in Britain (BBC 2000). Moreover, in June 2001, the British Royal Air Force too was contemplating recruiting German pilots to fly British fighter jets (*The Sunday Times*, June 10, 2001). These two occupations were hitherto protected by art. 48 para. 4 of the Treaty – but the UK government was willing to open these areas to EU nationals in an attempt to address the problem of a serious shortage of police officers and fighter pilots. This clearly shows the dynamics of member state preferences.
10. The author is grateful to an anonymous referee for raising this issue.

REFERENCES

Alter, K. (1996) The European Court's political power, *West European Politics*, 19, 3, 458–87.

Alter, K. (1998) Who are the 'Masters of the Treaty'? European governments and the European Court of Justice, *International Organization*, 52, 1, 121–47.

Bachrach, P. and M. Baratz (1962) The two faces of power, *American Political Science Review*, 56, 4, 947–52.

Bachrach, P. and M. Baratz (1963) Decisions and nondecisions: An analytical framework, *American Political Science Review*, 57, 3, 632–42.

Baclet-Hainque, R. (1990) L'Europe des emplois dans l'administration publique, *Actualité Juridique – Droit Administratif*, 4, 224–32.

Bardach, E. (1997) *The Implementation Game: What Happens after a Bill Becomes a Law*. Cambridge, MA: MIT Press.

BBC (2000) Foreign recruits for police considered. http://news.bbc.co.uk/hi/english/us/newsid__889000/889332.stm (21 August).

Berman, P. (1978) The study of macro- and micro-implementation, *Public Policy*, 26, 2, 157–84

Braybrooke, D. and C. Lindblom (1963) *A Strategy of Decision: Policy Evaluation as a Social Process*. New York: Free Press.

Claisse, A. and M.-C. Meininger (1994) *Fonctions Publiques en Europe*. Paris: Montchrestien.

Cohen, M., J. March and J. Olsen (1972) A garbage can model of organizational choice, *Administrative Science Quarterly*, 17, 1, 1–25.

Cohen, M., J. March and J. Olsen (1979) People, problems, solutions, and the ambiguity of relevance. In J. March and J. Olsen (eds.), *Ambiguity and Choice in Organizations*. 2nd ed. Oslo: Scandinavian University Press.

Commission of the European Communities (1985) *The Completion of the Internal Market White Paper of the Commission*. COM (85) 310 final. Brussels, 14 June.

Commission of the European Communities (1988) Free movement of workers and employment in the public service of the member states – Communication of the Commission with regard to the implementation of article 48 paragraph 4 EEC Treaty, *OJEC*, C 72, 18 March.

Commission of the European Communities (n.d.) Draft Directive on the conditions for access to employment in the public service not covered by art. 48 para. 4 EEC Treaty. In V. Skouris, K. Vassilaki-Bougiouka, S. Ioannidi-Andrioti, G. Moutsiou-Evangelinou, and N. Sakelariadou (eds.), *The Access of European Citizens to Employment in the Public Sector*. Athens: Ant. N. Sakkoulas (in Greek).

Council of Ministers (1968a) Directive 68/360 of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, *OJEC*, L 257, 19 October.

Council of Ministers (1968b) Regulation 1612/68 of 15 October 1968 on freedom of movement of workers within the Community, *OJEC*, L 257, 19 October.

Crozier, M. and E. Friedberg (1977) *L'Acteur et le Système.* Paris: Seuil.
Druesne, G. (1981) Puissance publique et libertés: les limites à la liberté de circulation des personnes dans la Communauté économique européenne. In *Service Public et Libertés: Mélanges Offerts au Professeur Robert-Édouard Charlier.* Paris: Émile-Paul.
ECJ (1973) Case 152/73, Sotgiu/Deutsche Bundespost. Judgement of 12 February 1974. *European Court Reports*, 1974, 153–74.
ECJ (1979) Case 149/79, Commission/Belgium. Judgement of 17 December 1980. *European Court Reports*, 1980, 3881–919 and 1982, 1845–50.
ECJ (1984) Case 307/84, Commission/France. Judgement of 3 June 1986. *European Court Reports*, 1986, 1725–40.
ECJ (1985a) Case 66/85, Lawrie-Blum/Land Baden-Württemberg. Judgement of 3 July 1986. *European Court Reports*, 1986, 2121–48.
ECJ (1985b) Case 225/85, Commission/Italy. Judgement of 16 June 1987. *European Court Reports*, 1987, 2625–41.
ECJ (1988) Case 33/88, Allué and others/Università degli studi di Venezia. Judgement of 30 May 1989. *European Court Reports*, 1989, 1591–613.
ECJ (1993) Case C-473/93, Commission/Luxembourg. Judgement of 2 July 1996. *European Court Reports*, 1996, I. 3207–63.
ECJ (1994) Case C-290/94, Commission/Greece. Judgement of 2 July 1996. *European Court Reports*, 1996, I, 3285.
European Commission (1999) Commission takes further steps against Luxembourg for failing to comply with ECJ ruling in the social field and Spain for discrimination in access to employment in the public service.
http.//www.europa.eu.int/comm/dg05/fundamri/movement/news/infring__en/htm (26 April).
Everling, U. (1990) Zur Rechtsprechung des Europäischen Gerichtshofs über die Beschäftigung von EG-Ausländern in der öffentlichen Verwaltung, *Deutsches Verwaltungsblatt*, 105, 5, 225–31.
Hjern, B. and D. Porter. (1981) Implementation structures: A new unit of administrative analysis, *Organization Studies*, 2, 3, 211–27.
Honorat, E. (1997) Les incidences de la libre circulation des personnes sur l'accès aux fonctions publiques nationales, *Administration Publique*, 21, 1, 3–14
Krasner, S. (1984) Approaches to the state. Alternative conceptions and historical dynamics, *Comparative Politics*, 16, 2, 223–46.
Lindblom, C. (1959) The science of 'muddling through', *Public Administration Review*, 19, 2, 79–88.
Louis, J.-V. (1990) *L'Ordre Juridique Communautaire*. 5th ed. Luxembourg: O.P.O.C.E.
March, J. and J. Olsen (1979) *Ambiguity and Choice in Organizations.* 2nd ed. Oslo: Scandinavian University Press.
March, J. and J. Olsen (1989) *Rediscovering Institutions. The Organizational Basis of Politics*. New York: Free Press.
March J. and H. Simon (1958) *Organizations.* New York: Wiley & Sons.
Pierson, P. (2000) Increasing returns, path dependence, and the study of politics, *American Political Science Review*, 94, 2, 251–67.
Pollack, M. (1997) Delegation, agency and agenda setting in the European Community, *International Organization*, 51, 1, 99–134.
Sandholtz, W. (1996) Membership matters: Limits of the functional approach to European institutions, *Journal of Common Market Studies*, 34, 3, 403–29.
Schmidt, S. (2000) Only an agenda setter? The European Commission's power over the Council of Ministers, *European Union Politics*, 1, 1, 37–61.
Secrétariat de la CIG pour le Marché Commun et l'EURATOM (1956) Note sur les dispositions du Traité rélatives à la libre circulation des travailleurs que le President du Group du Marché Commun propose comme base de discussion lors de la deuxième lecture. Doc. MAE 680 f/56 vr. Bruxelles, 3 décembre.
Simon, H. (1976) From substantive to procedural rationality. In S. Latsis (ed.), *Method and Appraisal in Economics.* Cambridge: Cambridge University Press.
Simon, H. (1997) *Administrative Behavior: A Study of Decision-Making Processes in Administrative Organizations.* 4th ed. New York: Free Press.
Smith, M. (1998) Autonomy by the rules: The European Commission and the development of state aid policy, *Journal of Common Market Studies*, 36, 1, 55–78.
Thelen, K. and S. Steinmo (1992) Historical institutionalism in comparative politics. In S. Steinmo, K. Thelen and F. Longstreth (eds.) *Structuring Politics: Historical Institutionalism in Comparative Analysis.* Cambridge: Cambridge University Press.

Waschkuhn, A. (1987) Allgemeine Institutionentheorie als Rahmen für die Theorie politischer Institutionen. In G. Göhler (ed.) *Grundfragen der Theorie politischer Institutionen: Forschungsstand – Probleme – Perspektiven.* Opladen: Westdeutscher Verlag.
Ziller, J. (1988) *Égalité et mérite: l'accès à la fonction publique dans les États de la Communauté Européenne.* Bruxelles: Bruylant.

DIONYSSIS G. DIMITRAKOPOULOS
Department of Politics & International Relations
University of Oxford, George Street
Oxford OX1 2RL, UK
Fax: +44-1865-278712
Email: dionyssis.dimitrakopoulos@social-studies.oxford.ac.uk