Beyond transposition: A comparative inquiry into the implementation of European public policy

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Doctor of Philosophy

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by

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For my parents and my brother
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<tbody>
<tr>
<td>Art.</td>
<td>Article</td>
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<tr>
<td>BT</td>
<td>British Telecommunications</td>
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<tr>
<td>CAP</td>
<td>Common Agricultural Policy</td>
</tr>
<tr>
<td>CBI</td>
<td>Confederation of British Industry</td>
</tr>
<tr>
<td>CCM</td>
<td>Commission Centrale des Marchés (Central Committee for Procurement)</td>
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<tr>
<td>CCT</td>
<td>Compulsory Competitive Tendering</td>
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<tr>
<td>CCTA</td>
<td>Central Computer and Telecommunications Agency</td>
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<tr>
<td>CFSP</td>
<td>Common Foreign and Security Policy</td>
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<tr>
<td>COI</td>
<td>Central Office of Information</td>
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<td>Col.</td>
<td>Column</td>
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<tr>
<td>COREPER</td>
<td>Comité des Représentants Permanents (Committee of Permanent Representatives)</td>
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<tr>
<td>CS</td>
<td>Crown Suppliers</td>
</tr>
<tr>
<td>CUP</td>
<td>Central Unit on Purchasing</td>
</tr>
<tr>
<td>DAJ</td>
<td>Direction des Affaires Juridiques (Directorate for Legal Affairs)</td>
</tr>
<tr>
<td>DG</td>
<td>Directorate General</td>
</tr>
<tr>
<td>DREE</td>
<td>Direction des Relations Economiques Extérieures (Directorate for External Economic Relations)</td>
</tr>
<tr>
<td>DTI</td>
<td>Department of Trade and Industry</td>
</tr>
<tr>
<td>EC</td>
<td>European Community</td>
</tr>
<tr>
<td>ECD</td>
<td>European Community Department</td>
</tr>
<tr>
<td>ECJ</td>
<td>Court of Justice of the European Communities</td>
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<tr>
<td>ECO/FIN</td>
<td>Economie et Finances (Economy and Finance)</td>
</tr>
<tr>
<td>ECSC</td>
<td>European Coal and Steel Community</td>
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<td>ECU</td>
<td>European Currency Unit</td>
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<td>EID</td>
<td>European Integration Department</td>
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<td>Acronym</td>
<td>Description</td>
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<tr>
<td>EMU</td>
<td>Economic and Monetary Union</td>
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<tr>
<td>ENYEK</td>
<td>Special EC Legal Service</td>
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<tr>
<td>EQ (O)</td>
<td>European Questions (Official) Committee</td>
</tr>
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<td>EQ (S)</td>
<td>European Questions (Steering) Committee</td>
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<td>EQO (L)</td>
<td>European Questions Official (Legal) Committee</td>
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<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>EURATOM</td>
<td>European Atomic Energy Community</td>
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<tr>
<td>FCO</td>
<td>Foreign and Commonwealth Office</td>
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<tr>
<td>GDP</td>
<td>Gross Domestic Product</td>
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<tr>
<td>GEM</td>
<td>Groupe d'Étude et de Mobilisation (Study and Mobilisation Group)</td>
</tr>
<tr>
<td>HMSO</td>
<td>Her Majesty's Stationery Office</td>
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<tr>
<td>IGC</td>
<td>Intergovernmental Conference</td>
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<tr>
<td>KYSYM</td>
<td>Governmental Council</td>
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<tr>
<td>MAFF</td>
<td>Ministry of Agriculture, Fisheries and Food</td>
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<tr>
<td>MEP</td>
<td>Member of the European Parliament</td>
</tr>
<tr>
<td>MP</td>
<td>Member of Parliament</td>
</tr>
<tr>
<td>NSK</td>
<td>State Legal Council</td>
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<tr>
<td>OEEC</td>
<td>Organisation for European Economic Co-operation</td>
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<tr>
<td>PASOK</td>
<td>Panhellenic Socialist Movement</td>
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<tr>
<td>PFI</td>
<td>Private Finance Initiative</td>
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<tr>
<td>PM</td>
<td>Prime Minister</td>
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<tr>
<td>PSA</td>
<td>Property Services Agency</td>
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<tr>
<td>QMV</td>
<td>Qualified Majority Voting</td>
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<tr>
<td>Rn.</td>
<td>Randnummer (Number of paragraph)</td>
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<tr>
<td>SEA</td>
<td>Single European Act</td>
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<tr>
<td>SGCI</td>
<td>Secrétariat Général du Comité Interministériel pour les questions de coopération économique européenne (Secretariat General of the</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Description</td>
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<tr>
<td>SGG</td>
<td>Secrétariat Général du Gouvernement (Secretariat General of the Government)</td>
</tr>
<tr>
<td>TED</td>
<td>Tenders Electronic Daily</td>
</tr>
<tr>
<td>TEU</td>
<td>Treaty on European Union</td>
</tr>
<tr>
<td>TMR</td>
<td>Training and Mobility for Researchers</td>
</tr>
<tr>
<td>UKRep</td>
<td>Permanent Representation of the UK to the EC/EU</td>
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Chapter 1

INTRODUCTION: SETTING THE SCENE

1.1. SOME PRELIMINARY QUESTIONS

In spring 1990 Greece had a new conservative government after eight years of socialist rule. One of the first major pre-electoral pledges of the conservative party (Nea Dimokratía) was the radical improvement of the country's poor record in the implementation of EC\(^1\) legislation. The idea was an expression of the political will to remedy what had become a national scandal. The fraudulent use of EC subsidies (Mendrinou 1994, 86) by the Greek state had made a major contribution to the national political turmoil that led to the downfall of the socialists in the election of spring 1990. The pledge of the conservative party had a wider symbolic significance because it was a previous conservative government that took Greece into the EC in January 1981.

Nevertheless, what the new government meant was a rather different story. The basic idea behind this new political attitude concerned the adoption of the legislative measures for the transposition of EC legislation into national law. In other words, the rapid and timely adoption of national legislation was the tool that was going to be used for the improvement of the country's implementation

\(^1\) This term is used throughout this dissertation in order to cover the activities of the European Economic Community until November 1993 and the first pillar of the Treaty on European Union thereafter.
profile. However, if the mere transposition of EC legislation into national law was the only or even the most important source of the problem, what has impeded a Greek government from doing something about this problem earlier?

All the post-accession single-party Greek governments had enjoyed the support of quite robust parliamentary majorities. Moreover, the Greek Parliament has no significant past as an arena of political dissent in the post-dictatorial era. This means that there was not much that could impede previous governments from achieving this objective. Furthermore, one could use PASOK's anti-EC stance as an explanation of the country's poor implementation profile only between 1981 and 1985 because the end of its first period in office marks a quite clear change in the direction of a much more positive, albeit quite critical, pro-EC stance. Moreover, Greece had problems implementing EC policy before and after 1990 and the electoral victory of the conservative (and traditionally pro-EC) party. Consequently, even if the decision of the conservative government to focus on the legislative dimension of the problem went in the right direction, it was not a sufficient step for the improvement of the Greek implementation profile. What can, then, national governments do in order to resolve this problem? Are there any tools that may be used in that respect?

Reducing the issue of implementation to one of producing laws which appear to give effect to EC legislation ignores the rich political reality which characterises the pluralistic societies that participate in the process of European integration. Consequently, even if the legislative
aspect is an important factor affecting national implementation profiles, it is not the only one, and possibly not the most important one. More importantly, it will be argued here that effective transposition must be construed as a wider process. Getting a legislative act through parliament is one thing. Preparing this act and above all, ensuring that it reflects the spirit of the European policy that it embodies, is another. Consequently, a dynamic rather than static view of the transposition process must be adopted. This means that on the one hand, we should examine the links between this stage of the process and what precedes it. Does the formulation of policy contain elements that may illuminate problems in the subsequent stages of the European policy process? Does formulation constitute an opportunity for the choice of methods and tools which may at least help us foresee some of the difficulties that may appear later, thus facilitating their timely resolution?

On the other hand, pluralistic European polities embody many factors that could mitigate any certainties that one could have about subsequent effective action after transposition. For example, shifting majorities, powerful pressure groups, recalcitrant administrations create enough room for speculation about post-transposition gaps between reality and intended objectives. That automatically raises, once more, the issue of the national governments' margin for action. What can they do in order to ameliorate their implementation profile? Are there any strategies and tools that could be used in order to steer post-transposition implementation?
Two broad strategies can be envisaged: Firstly, governments may seek to be more pro-active by taking account of implementation in previous stages of the European policy process. This would allow them to transpose more effectively and finally set up national strategic mechanisms and procedures that facilitate monitoring and problem-solving during and immediately after the transposition phase. Secondly, they may adopt specific measures such as the recruitment of more and better trained staff, which will seek to ensure better implementation at street-level.

Following the second strategy as a platform for the analysis of the implementation process would certainly provide rich insights about the relations between front-line implementers and the relevant target groups and other societal actors, but would be inadequate for the analysis of the national actions regarding a country's implementation profile. Discussing the implementation of the EC's environmental policy in Greece Giannakourou (1996, 7) identified the creation of an independent body for the delivery of the so-called 'eco-label' as a significant innovation. Who assessed the need for this body, who decided to create it and which tools have been used therein? Street-level implementation analysis is not likely to answer these questions.

This dissertation sets out to examine the first strategy in an attempt to draw wider lessons relating to the development of the integration process in Europe. Peters (1997, 200) captured the salience of this question by stating that
The capacity to implement policy is one central defining feature of any political system, and if in the future the EU is to be a functioning government then implementation becomes a crucial question.

We shall first seek to examine the methods used at the national level for implementation-orientated formulation of policy and effective transposition. We shall seek to identify the formulating and the transposing agencies and, more importantly, the factors that affect the linkages between the relevant actors and these two stages of the European policy process. Then we shall examine the tools used by national governments in order to monitor and refine post-transposition implementation of EC policy. In that sense we shall seek to go beyond transposition without reaching street-level implementation. What does this bit beyond transposition entail?

National governments can do a number of things here. They may set-up institutions and procedures that raise awareness about difficulties in implementation, thus making them an issue that must be considered in the previous stages of the European policy process. They may create mechanisms that will detect problems during implementation. They may diffuse information more rapidly, e.g. through focal points where implementers may turn to for guidance and clarifications. Moreover, recalcitrant behaviour may be rendered more costly for those individuals or institutions that may adopt it. Given that just like individuals, public organisations (ministries, agencies etc.) have different attitudes towards specific situations and problems, national
governments may seek the most sympathetic ones for the implementation of policy. In short, national governments possess a quite large tool-kit enabling them to act in this part of the European policy process.

This dissertation sets out to examine the nature of the tools that they use. A look at the literature on implementation found in the field of public policy analysis will outline what is involved in the process of implementation and will enable us to better define the level and the field of analysis of this dissertation. However, a word of caution is necessary here. The focus on the national governments may be misleading in the sense that it may give the impression that this dissertation follows the intergovernmentalist strand of integration theory. This strand places special emphasis on the role of national governments as the main driving force (Hoffmann 1963, 11; 1966, 909; Moravcsik 1991, 48-50) behind the integration process. Briefly, intergovernmentalists see the EC as an instrument in the hands of national governments (Moravcsik 1993, 507-9) which accept the limitation of the nation-state's sovereignty only to the extent that this facilitates the resolution of problems faced by the latter. The clearly inaccurate monolithic view of the nation-state has led intergovernmentalists to relax this assumption. They now see it as one actor in a more liberal context (Hoffmann 1982, 26; Moravcsik 1993, 481; 1995).

Nevertheless, the other two main strands of European integration theory, namely neo-functionalism (Haas 1964a, 47-8; 1968, 15; Lindberg 1966, 235; Lindberg and Scheingold 1970, 130; Schmitter 1971, 242) and federalism (Friedrich
1962, 514; Brugmans 1967, 1026; Spinelli 1983, 19-20; Pinder 1985, 51; Burgess 1989, 6; Sidjanski 1990, 659) agree (directly or indirectly) that national governments are important players in the integration process. What differs is the role that they attribute to the national governments. While the neo-functionalists came to accept the dramatic effects of action taken by national governments thus relaxing their initial assumptions about the integration being an automatic process (Haas 1968, xxiii), the federalists perceive the national governments as parts of a wider federal structure that encompasses not only supranational but also sub-national actors. Consequently, one can safely argue that for all these strands of thought on integration, governments matter. What we seek to analyse is how they matter in implementation in the light of the fact that the integration process has so far led to the

2 Following one of these strands of thought in the analysis of this process would not enhance our insights because none of them deals with implementation. If this is quite natural for intergovernmentalism and neo-functionalism in the light of the fact that they have been formulated mainly during the 1960s, that is too close to the beginning of the integration process thus being unable to draw lessons from the implementation of policy, this is less natural for federalism whose proponents seem to ignore effectiveness in favour of other principles like co-operation (between the various levels of government) and legitimacy. Thus, the pre-occupation of intergovernmentalism and neo-functionalism with the formulation process and the focus of federalism on structures and the division of power between them limits their utility in the initial stage of this dissertation.
modification but certainly not the substitution of national governments.

1.2. LESSONS FROM IMPLEMENTATION ANALYSIS

1.2.1. THE CONCEPT OF IMPLEMENTATION

The literature on the implementation of public policy offers four major insights relevant to our purposes. First, implementation is a complex process. Second, it is a dynamic process. Third, it has an object, namely a policy. Fourth, it involves a number of actors. The analysis of these aspects will be based on a generic question: What is implementation? Implementation can be defined as the complex and dynamic process through which a theory-based policy entailing means, ends and revision mechanisms is pursued by the relevant public authorities and private actors. In simple terms implementation means getting a job done (Jones 1984, 165), that is to execute, to manage, to administer (Mény and Thoenig 1989, 233). Let us take a closer look at the components of this process.

The complex nature of implementation derives from a variety of factors. Defining its limits is an extremely difficult endeavour because it is a part of the wider policy process which has a cyclical form. This means that it is difficult to define accurately the boundaries between the stages of the policy process, given that they are not self-contained (Hogwood and Gunn 1984, 10). For example, formulation can be based on the implementation of an existing policy which produces effects during the
formulation of a new policy. How can we distinguish between the two? However, the inability to draw clear distinctions between the various phases of the European policy process should not lead to a view of this process as a set of completely integrated actions. It should be viewed as the process in which various actors pursue their objectives by constantly defining, acting and assessing within a specific policy context.

Complexity is a typical characteristic of implementation even when one attempts to define it in terms of the actors who participate in it. The identity and the number of the participants and the nature of their input depend on a number of parameters, like the nature of the activity which is being pursued, formal and informal arrangements, the locus, etc. For example, implementers of health policy include doctors, the implementation of defence policy is in the hands of army officers etc. Clearly, it is difficult to define accurately on an a priori basis every national and European actor who participates in implementation, an element that further underlines the complexity of this stage. The preceding analysis leads us to the preliminary conclusion that the concept of implementation is dependent on the wider concept of the 'policy process' and the identity of the participants.

What is being implemented? Implementation can only be defined by reference to this question which determines an object, namely policies. Although many definitions exist (see Hogwood and Gunn 1984, 13-9 for a discussion of various usages of the term) policy is construed here as a set of means and ends bound together by a theory. Pressman and
Wildavsky (1984, xxiii) rightly state that policies imply theories. A theory, in turn, takes the form of a conditional phrase: If A happens, then B will be produced, over time T. In this sense, theories are the mechanisms which link ideas to reality by bringing together conditions, means and ends. The function of a theory within implementation analysis is of crucial importance because it is a pre-condition for the definition of the object of implementation. Policies combine the examination of an existing situation, a desired outcome and the ways to achieve it. The latter part is an element of cardinal importance because

any policy or program implies an economic, and probably also sociological, theory about the way the world looks. If this theory is fundamentally incorrect, the policy will probably fail no matter how well it is implemented

(Bardach 1977, 250).

If the theory is correct, then it combines the proper understanding of the existing situation, the desired outcome and the choice of the right methods and tools to achieve it. On the contrary, a mistaken theory might start with an appropriate understanding of the existing situation and a clear view of the desired outcome, but is bound to fail due to the choice of the wrong methods and tools. It is the direct link between the theory and the choice of the method

3Based on the problem of testing their correctness, Majone (1980, 152) draws the analogy between a policy and a scientific theory.
and tools necessary for the achievement of the desired outcome that underlines the importance of the theory incorporated in a given policy. This theory defines the paths that have to be followed in order to achieve the desired outcome. The 'if' of the theory either exists, or must be created, given that it is a condition for the achievement of the objective. In both cases it structures the next stage ('then') of the process. This analysis has to take into account i) the origin of this theory and ii) the availability of alternative theories.

The theory is the basis of the policy which is meant to address a specific problem, given that policies are instruments. Their effectiveness does not depend only on the incorporation of the appropriate theory but also on what Sabatier and Mazmanian\(^4\) called tractability of the problem construed as

> the specific aspects of a social problem that affect the ability of governmental institutions to achieve statutory objectives

(Sabatier and Mazmanian 1981, 6).

\(^4\)In the framework which they developed mainly for the analysis of the implementation of regulatory policy, they consider the tractability of a problem as an independent variable analysed in the i) difficulties in handling change, ii) diversity of proscribed behaviour, iii) percentage of the population within a political jurisdiction whose behaviour needs to be changed and iv) extent of the behavioural change required of target groups (Sabatier and Mazmanian 1981, 6-9).
Moreover, the definition of implementation as a process is based on the need to depict the inherent dynamism of the concept. The term 'pursuit' used in the working definition of implementation underlines the open-ended nature of the process which at the same time is an attempt to achieve pre-defined objectives. Furthermore, policies are not necessarily static aspects of implementation. Indeed, Majone and Wildavsky (1984, 176-7) rightly construe implementation as evolution because

[when we act to implement a policy, we change it.]

This argument results from the view of policies as attempts to change a given situation which is inherent in the theory upon which the policy is based. Consequently, the definition of this process has to take into account the mechanisms for policy revision/refinement/re-formulation, which provide the answer to the question 'how is policy implemented?' Moreover, this element concert with the aforementioned conceptual link between the various stages of the European policy process.

The analysis that follows is based on the distinction between two sets of factors, namely those relating to a) implementation as a process and b) the policy which is being discussed. This distinction results from the need to establish a set of factors that affect the implementation of policy based on the distinction between the institutional and wider political context on the one hand and the nature of the activity which is being undertaken, on the other.

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1.2.2. THE FOCUS ON INSTITUTIONS

The attempts to implement a policy take place in a historically specific context marked by the presence of a set of institutions that affect implementation and are also affected by it. Consequently, it is necessary to analyse the linkages between these institutions (national and European) not only in relation to the specific policy which is being implemented but also in an attempt to identify the impact of the wider institutional setting upon this process. This focus is explained by the fact that national governments use institutions in order to act. Consequently, the discussion of the attempts of national governments to improve their implementation profile must have an institutional focus.

These institutions do not operate in a vacuum. They interact with other societal actors (pressure and target groups) which could be the direct or indirect recipients of the policy's desired outcomes. This clearly produces the need to analyse the linkages between these actors and the institutions during the implementation process. However, two elements of caution must be introduced here. First, the institutional setting within which implementation takes place includes EC institutions. Second, we depart from a rather agnostic basis regarding the nature of the interactions between the EC and the national level. Hence, we simply accept the multi-level (Marks, Hooghe and Blank 1996) nature of the structure that we seek to examine. This view is governed by Pressman and Wildavsky's assertion (1984, xxiii) that implementation analysis focuses on the
interactions between actors who seek to forge links in the direction of the desired outcome. Where these actors are located is for this dissertation a matter of empirical analysis (infra, Chapters 2-5).

When does implementation start and when does it end? The context provides the answer to this question. The adoption of the European legislative measure which is going to be implemented is considered as the beginning of this stage of the European policy process. Three factors lead to this decision, two of them are normative while the other is methodological. i) The subject of this dissertation is the implementation of policy within a specific context, namely the EC. This context is characterised by the predominance of law. Indeed, this is a Community of law, where every action of the competent authorities has to be based on a specific legal provision. Furthermore, this aspect reflects the principle of the so-called Rechtsstaat (state of law) which is a part of the very foundations of

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5One should not underestimate the importance of 'soft law' (Wellens and Borchart 1989) which is used extensively in the EC as a means for the clarification, specification or even analysis of hard law provisions. Soft law is issued by the institutions of the EC and carries their authority.

6Discussing policy implementation in the federal system of the USA Sabatier and Mazmanian (1981, 6) argue that the process starts with the passage of the statute.

7This does not mean that the EC is construed as a state. On the contrary, the concept is used mutatis mutandis precisely because of this reason and also because of the influence that the member states are bound to exercise upon this newly emerging European polity.
the liberal democratic regimes that constitute the EC. Consequently, the same principle applies to both levels which are involved in the European policy process. ii) The second element is linked directly to the principle of Rechtsstaat. In democratic systems, not only should every action of the competent authorities be based on specific legal provisions, but once laws are passed, they must be implemented accordingly. iii) The adoption of the legislative measure can be considered as the provisional end of the negotiation/formulation process. It marks the end of the period that culminates in the adoption of an authoritative text which is meant to guide the subsequent action of the relevant authorities.

These factors (normative and methodological) also help define the end of the same process. Indeed, the adoption of a new legislative measure or the amendment of the Treaty provisions relating to a given policy area may mark the provisional end of the implementation process because they may alter the 'rules of the game'. This end is provisional because the new provisions have to be implemented, even if they are meant to terminate the policy in question. This fact clearly illustrates the cyclical form of the European policy process. Just like a cycle, the European policy process has no clear beginning or end.

Nevertheless excessive emphasis on the formal element risks leading to a partial analysis of implementation, one that may focus on the mere transposition of EC law into the national legal order, a type of goal displacement that would be detrimental to the analysis of the theory which has been incorporated into EC law. This risk underlines the
importance of Kovar's (1973, 209) conceptual distinction between formal and administrative implementation of EC policy which is an inherent part of the EC because of the extensive use of directives and the nature of the Treaty as a framework-treaty (Louis 1990, 74) which sets out objectives and methods for their achievement. Kovar defined formal implementation as the transposition of EC law into the national legal order and administrative implementation as the adoption of concrete individual measures.

Although this distinction is a useful organising principle for the discussion of implementation in the context of the EC, it does not resolve the problem of the definition of the level of our analysis in the 'administrative' stage. For that purpose we shall use Berman's important distinction (1978, 164) between macro-implementation and micro-implementation. Discussing the implementation of public policy in the federal system of the USA Berman defined macro-implementation as the execution of policy by the federal government with the aim to influence local delivery organisations to behave in desired ways and micro-implementation as what the local organisations do in response to the federal actions. This dissertation sets out to examine the action taken by national governments in the stage of macro-implementation from the moment of the adoption of a policy at the European level. In other words we shall seek to examine the role of implementing managers rather than that of street-level (Lipsky 1971) or so-called 'front-line' implementers (Sorg 1983).

Clearly, these are ideal types in the Weberian sense of the term. The discussion of macro-implementation cannot be
totally distinguished from the discussion of micro-
implementation. Some EC-related examples may further
illuminate the differences between the two. In the field of
regional policy macro-implementation involves making sure
that applications submitted conform to the specified
criteria for funding and that the approval of such
applications follows prescribed rules while micro-
implementation involves the actual use of these funds for
the project in question. In competition policy macro-
implementation would involve the authorisation of a merger
of two firms, while micro-implementation would involve its
actual supervision on the basis of the conditions set by the
macro-implementers.

Policies are formulated in order to be implemented. The question that then arises concerns the ways in which implementation is taken into account (if at all) during the formulation stage. The subsequent question is 'who implements policy in the European Community?' The answer to this question determines the number of the levels of government involved in this process. The impact of the increased number of the levels involved is linked to the inherent complexity of the implementation process. The larger number of the levels involved adds to the complexity of this process not only because a larger number of actors have to be co-ordinated, but also because a larger number of organisational motivations, interests and views have to be taken into account. Indeed, Pressman and Wildavsky have underlined the importance of the number of what they called
'decision points'. The importance of their contribution to the analysis of the implementation of public policy in the federal system of the USA is based, _inter alia_, on their assertion that the larger the number of decision points, the smaller the probability for effective implementation. The view of implementation as a process points to the fact that some policies survive because they adapt to their environment. The adaptability of a policy illustrates that vetoes are not permanent but conditional. Accommodations can be made, bargains entered into, resistances weakened. The price of ultimate agreement is delay or modification of the existing program.

(Pressman and Wildavsky 1984, 116).

Excessive emphasis on the number of these points would lead to the conclusion that if there is only one such point, the likelihood of effective implementation is greater. However, analysis should go beyond the purely quantitative element, in order to examine the quality of the input of each actor, their relative power and the possibilities and likelihood of trade-offs between them. Furthermore, one

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8They are defined as the points where an act of agreement has to be registered for the program to continue while 'clearance' is each instance in which a separate participant is required to give his consent (Pressman and Wildavsky 1984, xxiv).

9Bardach's study of a different policy area (mental health reform) points at the importance of the same element (1977, 52), although he also underlines the importance of the substantive issues that made the negotiations necessary in the first place.
must examine the possibility to make package deals that reduce the number of the decision points (Bowen 1982, 8).

However, this possibility raises the stakes for the participants without necessarily reducing the possibility of a break-down. Consequently, the analysis of the possibilities for package deals has to take into account their impact on the structure of the process and the linkages between the various actors.

We have so far defined the stage of the European policy process that we shall examine and the level of our analysis. However, we are still in need of a set of concepts that will guide the discussion of the tools used by the national governments. This discussion will be facilitated by the use of Hood's NATO scheme (1983, 1-15) which constitutes a useful conceptualisation of the tools of government. NATO stands for Nodality, Authority, Treasure and Organisation. Discussing the tools used by government at the point where it comes into contact with the world outside, Hood (1983, 4-6) defined nodality as the property of being in the middle of an information or social network; authority as the power officially to demand, forbid, guarantee, adjudicate; treasure as the possession of a stock of moneys or 'fungible chattels' and organisation as the possession of a stock of people with whatever skills they may have, land, buildings, materials and equipment somehow arranged.

Hood used this conceptual framework in order to discuss the ways in which government interacts ('detects' and 'effects') with society. Assuming that government acts as a totality, he acknowledged that it is difficult to draw the
frontier of government, so he proceeded on the basis of the view of the man in the street

who believes...that government is what 'they' do to 'us' (Hood 1983, 12).

This set of concepts will provide a useful basic organising principle for the discussion of the efforts of national governments to improve their implementation profile. This set of concepts is useful here because it reflects fundamental characteristics of the EC. Authority reflects the importance of law in the integration process (Joerger 1996; Charrier 1996; Weiler 1982), treasure illustrates the fundamental importance of economics as the basis of the integration process, organisation and nodality tend to reflect the lack of external implementing agencies and the subsequent need to rely on the national politico-administrative structures whose operation is based on the principle of institutional autonomy and also on target groups and the use of the legal principles of supremacy and direct effect of EC law (infra, Chapter 2).

The emphasis placed on the procedural element of implementation research does not mean that the 'substantive' element is neglected. On the contrary, the nature of the activity undertaken is a very significant analytical parameter.
1.2.3. THE POLICY

Each policy has its own logic because it corresponds to a specific problem. This logic is reflected upon the theory embodied in it thus producing the need to analyse the policy-specific analytical parameters. One reaches the same conclusion as a result of the capacity of each policy to structure (up to a certain extent) the behaviour of the actors who participate in its implementation. In other words, each policy is construed as an attempt to change given situations by structuring the linkages between the participating actors and their behaviour. What are the implications of this assumption?

The type of policy which is being implemented must be taken into account. Different types of policies are conducive to different theories, entail different stakes for the participants, concern different institutional settings and target groups. Following Lowi (1964, 1972) and his assertion that policies determine politics and William Wallace (1983, 412-3) we shall distinguish between i) regulatory policies characterised by the extension or the limitation of the margin for action of various actors or groups of actors; ii) distributive policies which allocate

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10 Majone and Wildavsky (1984, 174) state that some of the ways in which policies shape implementation include the definition of the arena where implementation takes place, the identity and the role of the principal actors, the range of tools for action and the resources.

11 The argument presented by Windhoff-Héritier (1980, 142) according to whom the 'clients' can be seen as hidden resources underlines the significance of this element.
resources to some segments of the society; iii) redistributive policies which allocate to some segments of the society resources taken from other segments and iv) constituent policies where the shape and the scope of the political system is at stake.

This typology is based on the likelihood and the actual use of coercion, construed by Lowi as the most significant political fact about government. This provides the context within which politics takes place. Coercion is embodied in the concept of law as a policy instrument (Rose 1986; Daintith 1988) which exemplifies our view of the EC as a Community of law. Nevertheless, these categories are ideal types in the Weberian sense. In reality one has to look for elements which combine various types within the framework of the same policy. Moreover, the time factor is important because it alerts us to the possibility of shifts of the focus of policies (European and national) from one type to another. This could result from a number of factors like political majorities, priorities, that affect the policy process as a whole. This is the result of the subjective/political nature of the policy process.

The content of the policy which is being implemented must also be analysed. The analysis of this parameter must take into account first and foremost the extent of change introduced by a new policy. Change can be analysed in terms of the specific provisions of the relevant legislative measures (both national and European) and in terms of the relations between and within the relevant actors and the resources needed for its implementation. The interpretation of policies as change helps identify sources of their
success or failure and also determines a part of the limits that a given study might have. The analysis of the content of the policy which is being implemented leads to better awareness of the generalisations that can be based on the study in question.

Policies are not self-executing. They are implemented by organisations. Consequently, the organisational dimension is of particular importance\textsuperscript{12}. The bottom-up approach to implementation research rightly stresses the importance of the so-called implementation structure (Hjern and Porter 1981) comprised of parts of many organisations which participate in this process. Hjern and Porter note (1981, 222) that the analysis of the programme's objectives suggests an administrative imperative which, in turn, points to a potential pool of organisations from which an implementation structure is formed. The similarity with the top-down approach is evident. Sabatier and Mazmanian (1981, 13) rightly specify this administrative imperative to be the assignment of the responsibility for the implementation to agencies and officials committed to statutory objectives. A set of questions emanates from this element.

In what way does the policy distribute the roles (Mayntz 1983a, 17) between the participants? Does the new policy entail significant changes in the relations between the organisational actors? In particular, does the new

\textsuperscript{12}Pressman and Wildavsky (1984, 87) underlined the negative importance of inherent administrative antagonisms upon their case study. Rein and Rabinovitz (1977, 14) state that a concern for institutional maintenance, protection and growth is the primary inspiration for 'bureaucratic rationality'.

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policy entail structural changes (e.g. the creation of new units)? Has it been formulated in a way that enables the relevant actors to exercise their own discretion? In short, how new is the policy in question? This question has to be answered not only in relation to the policies adopted by the EC but also those adopted by the member states.

Another set of questions concerns the number and the content of the decision points built in the policy. Are there any mechanisms for package deals? Does the policy represent a compromise between various actors that helped formulate it? Are there ways in which other participants might affect its implementation after the end of the formulation stage? In particular, one should look for 'fixers'. Bardach (1977, 274) defined fixing as a concept that incorporates two meanings: i) 'Repairing' and ii) 'adjusting' certain elements of the system of games, which constitute the implementation process. He underlined the political nature of 'fixing' by stating that

it is a job for a coalition of political partners with diverse but complementary resources. It is therefore no different from any other political task

(Bardach 1977, 278).

This is just one of the aspects that indicate the political nature of the implementation process. Indeed, it is a major wider objective of this dissertation to illustrate that the linkages of the previous stages of the European policy process and implementation are not linear (Hogwood and Gunn 1984, 20, 217; Jones 1984, 29) and
certainly not automatic. What matters then is the subjectivity that may be involved in the subsequent action of the institutions and the individuals involved. After all, implementation takes place within living societies. Changes in the latter are bound to influence the former. How this may happen is what this dissertation sets out to examine. Browne and Wildavsky (1984a, 244) rightly underline the systemic function of implementation by citing Lowi's *The End of Liberalism*, where emphasis is placed on the failure of government to use its formal power to implement policies that embody the public interest. They go on to stress that

> [w]ho is to be blamed has an effect on what is to be implemented. (Emphasis added)

Following the same vein, we shall seek to draw wider conclusions as to the impact of implementation upon the process of integration in Europe. Does the existing literature shed light on the questions that we seek to examine in this dissertation?

1.3. A REVIEW OF THE LITERATURE

The existing literature on the implementation of EC policy has a number of basic characteristics. First, there is a rather widespread terminological confusion in the sense that there is no clear definition of the term 'implementation' which is used interchangeably with the terms 'enforcement' and 'application' (Snyder 1993; Pappas
Although it has become common ground that formal implementation is only a part of the wider implementation process, not enough attention has been given to the differences between the two (Siedentopf and Hauschild 1988, 95). Secondly, existing studies of formal implementation construe it rather statically, in a manner that fails to underline the importance of what precedes and what follows it (Schwarze et al. 1990; Schwarze, Becker and Pollak 1991, 1993b). Thirdly, implementation analysis has focused on the street-level (Siedentopf and Ziller 1988a, 1988b) or has remained practically at the EC-level despite acknowledging the importance of the interactions between the European and the national level (Laffan 1983). Fourthly, the national dimension of implementation profiles has not been identified as an important research topic and has thus been left unexplored. Let us take a closer look at this literature in order to identify other characteristics that it presents.

Ciavarini Azzi (1985b, 7) noted that for almost 25 years after the establishment of the EC the focus of the scientific debate was on the creation rather than the 'application of Community law'. Indeed, the principal contribution of the first study (Ciavarini Azzi 1985d) is the fact that it opened the debate on this neglected topic. Although the study covers Belgium, Germany, France, Italy, the Netherlands, and the UK - thus constituting an interesting basis for a comparison - this fact does not correspond to a specific methodological consideration relating, for example, to their respective institutional arrangements.
Second, the significance of the use of various legislative measures (directive and regulation) covering a wide range of common activities (agriculture, environment, customs duties and external relations) for the analysis of the implementation process is undermined by the lack of a clear conceptual framework which would enable the establishment of a set of systematic conclusions relating to the importance of a) the nature of the legislative measures and b) the type of the activity (policy) in question. Third, the methodological weaknesses are further underlined by the brief analysis of country-specific case studies completely lacking a clear methodological objective.

So far as this study's findings are concerned, one must first note that despite the attempt to link the formulation and implementation stages, no direct link between the two stages is illustrated. On the other side of the coin, its most significant finding is the gradual absorption by some central co-ordinating bodies of a role in the implementation stage, especially in France and the UK (Ciavarini Azzi 1985a, 341). Second, despite the fact that the various national arrangements reserve for the national parliaments different roles in the implementation stage, there is no attempt to discuss the impact of the parliamentary input upon the quality of implementation. Third, although the importance of the link between the negotiation and the implementation stages is mentioned (Ciavarini Azzi 1985a, 354) its existence and its significance remain unexplained.

The second study on this topic published under the auspices of the European Institute of Public Administration (Siedentopf and Ziller 1988a, 1988b) covers ten member
states and constitutes the first attempt to draw general conclusions on the basis of a comparative approach. Their analysis proceeds on the basis of a set of important assumptions. First, the authors of this collective study acknowledged the lack of a clear-cut conceptual framework which would enable the establishment of a set of general conclusions. Second, based on previous work by Mayntz (1980b) they underlined the importance of the link between the formulation and implementation stages and focus on three fundamental factors affecting the outcome of the policy process, namely the characteristics of the programme, the implementing agencies and the target groups.

Third, they took into account the political, economic and legal importance of the legal instruments which were implemented. These instruments had various forms (directives and regulations) and they covered a wide variety of policy areas (state aids, food, statistics, tobacco, heaters, life insurance etc.) and policy types. Fourth, they underlined the importance of departmental attitudes and the role of pressure groups in the formulation and implementation of EC policy.

Despite its importance, this study presents a set of important deficiencies relating not only to the framework that it utilises but also the very nature and the salience of the implementation process in the EC. First of all, although it raised the issue of the linkage between the formulation and the implementation stages, it did not offer systematic conclusions as to the ways in which formulation may influence implementation. Second, its field of reference was limited to the period preceding the Single
European Act which had significant implications for the EC system in terms of the shift of executive power from the Council of Ministers to the Commission (infra, Chapter 2). Third, although one of the most important findings was the existence of different national political and administrative styles (pragmatic or legalistic) the consequences of this finding on the quality of implementation remained unexplored. For example, the fact that the Greek style has been characterised as legalistic (Siedentopf and Hauschild 1988, 103) that is one which is focused on the strict conformity of formal rules without any pragmatic interpretations, does not shed light on the ways in which this may affect this country's poor implementation profile.

The most recent study on this topic (Pappas 1995b) covers twelve member states, consequently it is the most comprehensive study on this topic. Furthermore, it constitutes a static description of the national structures which deal with EC policy. The first striking feature is the fact that despite the analysis of this process, there is no link to the quality of implementation. Furthermore, although much emphasis is placed on the nature of the national polities, there is no link to the implementation process. Secondly, the continuous use of various terms such as application, execution, enforcement and implementation (Pappas 1995a, 7-8; Belloubet-Frier 1995, 288, 290) without clear distinctions between them reinforces the ambiguity stemming from the lack of a proper conceptual framework.

The latter lacuna can be partly attributed to the fact that the general framework which constitutes the basis of this collective study is centered around a) a structural
perspective emphasising the description of the institutions of each country and b) a chronological perspective covering the various phases of the policy process. Then the contributors attempt to evaluate the procedures on the basis of the degree of formalisation and cohesion. The choice of these criteria is not explained. Moreover, the first criterion seems rather awkward in the light of the extensive use of informal procedures at the European level (infra, Chapter 2). Finally, the lack of a case study of implementation in every national context undermines the validity of the conclusions reached on the basis of the second criterion (cohesion of national and Community procedures).

In quantitative terms lawyers have devoted more efforts than political scientists in this field. The predominance of the legal literature is mainly due to a) the fact that the rule of law is one of the fundamental means used in the integration process and b) the emphasis of the Treaties on the legal control of implementation (infra, Chapter 2). This is also the spirit of the relevant annual reports published by the European Commission since 1985. The most significant collective study of formal implementation covering a large number of member states is the set of three volumes published under the auspices of the European University Institute between 1990 and 1993 (Schwarze et al. 1990; Schwarze, Becker and Pollak 1991, 1993b). The main characteristics of this study are threefold. First, it focuses mainly on the conflicts between the European and the national legislation and the difficulties that the member states faced in the process of adaptation of their
respective legal order. Second, it does not provide general conclusions about the sources of difficulties that the member states faced in this process. In other words, it deals with the 'how' rather than the 'why' of this process. The focus on the attitudes of national courts constitutes a rather illustrative example of this tendency. Finally, although this study covers a diverse range of policy areas such as food labeling and air transport, it does not link the nature of these activities to the quality of implementation.

Another characteristic of the legal literature is its focus either on a part of the legal dimension, e.g. legal control (Ryziger 1980) or a particular aspect of the legal machinery of a member state, e.g. the French Conseil d'État (Simon 1992) or even its emphasis on the national implementing legislative measures (Bates 1989; Buffet-Tchakaloff 1986; Christophe Tchakaloff 1993, 1994; Frangakis 1994). The same comment applies to otherwise useful studies by political scientists (Lequesne 1993).

In the light of this review we would add two more general comments as to the lessons that we can draw from it. First, the lessons for the wider integration process that one can draw from the analysis of implementation and its national dimension have been left unexplored despite the comparative nature of some existing studies. Secondly, Puchala's provocative idea regarding the politics of implementation has been largely ignored. Discussing 'episodes of noncompliance in the EEC system' he used the term 'postdecisional politics' in order to outline
[t]he transmission downward and outward of regional directives from Brussels to the national peripheries, and the problems, pitfalls, and impacts involved therein

(Puchala 1975, 497-8).

The subjectivity involved in the implementation (but also the wider political) process is the direction that we set out to explore in the light of Puchala's assertion.

1.4. RESEARCH STRATEGY

We have adopted a three-stage research strategy. Firstly, we have sought to identify the particular characteristics of the EC as an implementation structure (Chapter 2). This description is based on two distinctions, one between formal and informal arrangements (and their interactions) and one between institutional and operational characteristics. What kind of constraints or opportunities does the EC's system create for the member states in the implementation process? Has the system evolved and if so, in which direction? In the second stage the emphasis shifts, inevitably, to the national level (Chapters 3-5). We faced a significant methodological choice between the study of one or more member states.

The best way to analyse the implementation process in the EC is through the use of comparisons. The alternatives would include studies of a specific member state thus endangering the wider validity of the conclusions that can be reached. Indeed, the focus on a specific state would by
definition tend to limit the analysis to the characteristics of the state in question thus undermining the opportunity for wider conclusions. On the contrary, although the comparative method does not resolve the problem of the representative nature of a study, it enables the researcher to seek conclusions that apply to a number of states. Indeed, the main driving force behind the choice of the comparative method is the need to reach valid systemic generalisations, rather than idiosyncratic conclusions.

On a more positive note, the comparative method enables us to draw more incisive conclusions on the various categories of factors that affect the implementation process within a specific group of states (Cyr and deLeon 1975, 378). The fact that they share common important characteristics helps the researcher to orientate the study towards the possible systematic links between these characteristics and the outcome of the implementation process through the exclusion of idiosyncratic elements. The complexity of the implementation process underlines the importance of the systematic links between these characteristics and the result of the implementation process. Furthermore, the need for comparisons emanates from the output-side of the EC system. Indeed, the EC system is characterised by the extensive use of regulatory policies (Majone 1996a) which, in turn, are dominated by the principle of free competition. The very principle of competition (level playing field) leads to the need for the comparative analysis of the implementation process in the various member states because of the salience of the concept
of uniformity which is a fundamental element of this activity.

The process of internationalisation and harmonisation of previously national activities accentuates the need for the comparative analysis of the implementation process (Feick and Jann 1988). This stems from the fact that despite the commonality of the problems and the solutions that have been sought and adopted at the level of the EC, potential sources of variation in the implementation stage have not been eliminated. Even within the same category of states, sources of variation exist as a result of i) different traditions relating to mechanisms and policies, ii) motives for the participation in the integration process, iii) balance of power between the various actors etc. Feick and Jann (1988, 207) rightly underline the fact that irrespective of the theoretical/ideological preconceptions of the researcher as to the role of functional, class or group interests, it is only through empirical comparative studies that one can come to a conclusion relating to the characteristics of state activities in the field of public policy.

Following Burdeau's definition (cited in Ziller 1993, 83) of unitary states as the states where there is only one centre of political and governmental impetus, we shall focus on the analysis of the implementation process in the UK, France and Greece. The choice of a set of unitary states examined here is based on a number of factors. Irrespective of the theoretical perspective that one adopts in order to analyse the process of integration, there is evidence to suggest that this process has led to the creation of a
significant number of non-governmental actors (Mazey and Richardson 1993) which directly challenge the monopoly of the central governments in the representation of interests at the European level. Thus there seems to be a contradiction between this aspect of the integration process and the nature of unitary states to the extent that the latter seem to be unable to monopolise relations with the EC.

EC policy cannot be streamlined easily through the traditional functional lines that characterise the division of labour between the various parts of the national administrative machineries. For example, CAP (common agricultural policy) combines aspects of external trade, financial affairs, food safety and food production which are dealt with by different national ministries. This produces a particular problem for unitary states that seek to express their will through the central government. Furthermore, the fact that the EC agenda has expanded over the years means that the traditional mechanisms that represented the 'national interest' abroad, do not necessarily have this monopoly any more. In brief, the function of co-ordination has acquired a particular importance as a result of the participation of the nation state in the process of integration. In a more general sense, the very principle of integration, which is seen here as a product of the inability of the nation-state to resolve the problems of modern European societies, points at the importance of the analysis of the implementation process in unitary states. What is the response that these states have chosen in order to fulfil their obligations as external agencies of the EC?
The need to limit this dissertation to a manageable size without ignoring the need to choose a number of states that would facilitate valid general conclusions determined the number of the states. So far as the choice of these specific states is concerned, a number of factors can be invoked. First of all, these three states fit the definition of unitary state presented above. Although all three states have established some sort of second level of government, they remain unitary for a number of reasons. The British polity is characterised by the formal principle of 'sovereignty in parliament' which does not permit the creation of any other level of law-making institution (de Smith and Brazier 1994, 15; Ziller 1993, 88). Article 2 of the Constitution of the Fifth French Republic clearly stipulates that France is an indivisible republic (Guchet 1994a, 145). Although art. 101 § 1 of the Greek Constitution stipulates that the administration of the state is organised on the basis of the principle of decentralisation the provision of paragraph 3 of the same article stipulates that the self-administration of the peripheries is subject to the tutelage of the state.

Moreover, these states have joined the EC at different stages of its development and carry with them various national perceptions about the utility and the possible or even desirable outcome of the integration process. At the same time, if one uses the economic/political distinction between the highly developed industrial northern and the less developed southern member states, the UK and France are parts of the former while Greece is a part of the latter group. This enables the researcher to have a fairly wide
view of structures where implementation takes place, that transceeds the boundaries between the two categories. Last but not least, this group includes states with different policy traditions. Indeed, the British tradition of liberalism (further developed after 1979 but also within the context of the EC) co-exists with more protectionist practices typically found in France and Greece. In more general terms, despite the presence of common characteristics, there is sufficient evidence of divergence to enable the formulation of valid general conclusions.

Analysis of the national structures will be based on four fundamental elements: i) The development of the division of labour at the political and the administrative level, including the creation of new units. The ways in which EC policy is perceived by the member states largely determines the nature of their institutional development. The dichotomy between foreign and domestic policy constitutes the basis of the examination of this aspect of institutional development. Indeed, if the (clearly inaccurate) interpretation of EC negotiations as traditional international negotiations leads to the reinforcement of the ministries of foreign affairs, the expansion of the EC's agenda (Pollack 1994) and the increasing impact of the EC upon the conduct of government business on a daily basis underline the need for a much more flexible approach. What are the repercussions of this phenomenon on the handling of EC policy at the national level?

ii) The relations between the national Executives and Legislatures in formulation and formal implementation must be examined. The EC decision-making process is by
definition a legislative process. This has important implications for the relations between the national executive and legislative bodies. Unlike the former, the latter lack any formal powers to influence directly the development of this process. The expanding agenda of the EC underlines the extent of this phenomenon. Do national parliaments put pressure on the respective governments and if so, how and what is the result?

iii) The role of pressure groups. The extent of the EC's agenda and the constant attribution of powers to EC institutions have produced the need for national pressure groups to take on board the European dimension of their field of activity. How do they try to affect the national position?

iv) The division of labour in the stage of formal implementation (who implements formally and how) and the wider implementation profile\(^\text{13}\) of each member state.

The comparative findings (Chapter 6) underline a number of significant differences between the three countries.

\(^{13}\)Implementation profile is defined here as the broad picture of the implementation process in a given member state. This 'picture' is based on procedures under art. 169 of the Treaty (infra, Chapter 2) and in particular, the number of formal letters raising questions relating to the implementation process and the number of cases reaching the ECJ. Although this concept can constitute a useful organising principle for the analysis of implementation in a given country, it cannot be considered as hard evidence relating to the quality of the implementation process, because the evaluation of problems in implementation has a qualitative dimension that simply cannot be illustrated through quantitative data.
These differences then constitute the basis for the formulation of working hypotheses regarding implementation. The validity of these hypotheses can only be tested through a case study, namely public procurement (Chapters 7-8). Indeed, the use of this method will enable us to examine the relevance of the abstract analytical parameters and the validity of the hypotheses that have been formulated on the basis of this discussion. Nevertheless, the use of this method raises three fundamental methodological questions. i) What is the right time frame within which the implementation of any given policy must be analysed? ii) Can one draw general conclusions from the analysis of case studies? iii) Is the specific policy representative of its type? The answer to the first question can be found relatively easily through the relevant legislative measures. Secondly, one would ideally compare the implementation of a number of policies. However, the need to keep this dissertation to a manageable size has led to the choice of one policy.

Indeed, public procurement has been chosen for the case study as a result of a number of factors. First, it is a policy of great political and economic salience for every member state. Second, in terms of type, it constitutes a typical example of a regulatory policy, a policy type which is dominant in the EC. It distributes rights and obligations to a number of actors in a manner that embodies and promotes the principle of free competition, a fundamental element of the prevailing economic philosophy in Western Europe (and the EC in particular). Thirdly, it is a cornerstone on the single market project.
1.5. RESEARCH METHODOLOGY

This dissertation is based on written sources (including legislation and policy documents) and the extensive use of interviews (Appendix). The very nature of the topic led us to conduct 43 confidential élite interviews with British, French, Greek officials and civil servants of the European Commission, in London, Paris, Athens, Hull and Brussels. Semi-structured questionnaires have been used. Instead of seeking the official view of the institutions for which they work, we have sought to obtain the personal views of these officials in order to grasp the full richness of the implementation process. The direct implication of this was the need to avoid linking these individuals with specific pieces of information or opinions presented in this dissertation. Although in very few cases this was not necessary, we have discovered that for the majority of the interviewees, this was a pre-condition, that we have accepted in order to find out

what is going on in the kitchen

as a French official has put it.
Chapter 2

THE EUROPEAN COMMUNITY AS AN IMPLEMENTATION STRUCTURE:

THE FORMAL FRAMEWORK OF THE IMPLEMENTATION PROCESS

The objective here is to analyse the principal characteristics of the EC as an implementation structure in a manner that combines two basic approaches. We shall approach this issue from the point of view of the EC's institutional characteristics (Sections 2.1 and 2.2) before discussing its operational elements (Sections 2.3-2.7) in order to illustrate that this is a loosely coupled (Peters 1997, 188) implementation structure—primarily based on formal, but also informal arrangements—which provides to the member states considerable, albeit regulated, latitude. Although these arrangements refer to formal obligations\(^1\), they cannot guarantee successful implementation of EC policy. Weakness here refers to the operation of the EC as a framework rather than a single structure. In short, the argument here is that in the light of the analysis that follows, one should be rather positively surprised by what is actually achieved by the EC, at least because it does not possess its own implementing agencies.

\(^1\)This view confirms the understanding of the EC as a law-intensive organisation (Page and Dimitrakopoulos 1997).
2.1. THE LACK OF EXTERNAL IMPLEMENTING AGENCIES: THE FOUNDATION OF THE PRINCIPLE OF INDIRECT ADMINISTRATION

Page (1997, 22-3) rightly argues that the frequent comparison between the European Commission and local administrations (or even national ministerial departments) is misleading because unlike the latter, the former never had the army of service providers frequently associated with local government, as this has never been a part of the founding fathers' project. Indeed, the High Authority (the forerunner of the European Commission) had to be small and flexible, in order to facilitate the generation of solutions to common European problems, rather than resolve them directly.

Monnet (1976, 436) had in mind what Pisani (1956, 324) called administration de mission (task administration) a concept which he defined as a lean, dynamic and risk-orientated administration adapted to a time, problem and space, in other words the opposite of the traditional administration de gestion (management administration). The function of the European administration as the source of ideas and orientation\(^2\), rather than the implementer of the solutions and the subsequent need to associate the national administrations to the policy process, especially but not exclusively in the implementation stage, led some scholars (della Cananea 1993b, 1108; Pag n. d. 446) to depict the EC as a particular case of co-operative federalism, or

\(^2\)This function is reflected through the Commission's reinforced right of initiative which can be over-ruled only through a unanimous decision of the Council.
Vollzugsföderalismus (Lenaerts 1993, 28) that is implementation federalism.

Irrespective of the validity of this view (whose analysis is beyond the scope of this dissertation) one must underline not only the subsequent need for the EC as a new system of government to rely on national administrations for the implementation of the policies\(^3\) which were to be formulated collectively at the European level\(^4\) but also the European regulation of this role of the national administrations (infra, Section 2.3). The reliance on national administrations for this stage of the policy process exemplifies the principle of indirect administration (Louis 1990, 165) also known as principle of co-administration (Franchini 1993). It is precisely the lack of the EC's own external implementing agencies which gives a European dimension to the national administrations while it legitimises the formal framing of their operation.

This, though, was not the only way in which the member states acquired a role in the implementation process. The extensive use of intergovernmental committees which 'assist'\(^3\)

\(^3\)This structural characteristic mirrors the important role that national administrations play in the formulation stage thus establishing what has been accurately called 'bureaucratic interpenetration' or 'intermingling' (Scheinman 1966, 751; Wessels 1985, 17).

\(^4\)The discussion on European agencies (Kreher 1996; Wilks and McGowan 1995) is excluded from this chapter precisely because of their policy-specific nature (whenever they exist) and mainly because these agencies have, so far, remained peripheral rather than typical characteristics of the EC as an implementation structure.
the European Commission in some of its executive functions became known as 'comitology'. This is one of the most original and significant elements of the EC's politico-administrative structure which can be defined as the institutionalised capacity of national administrations to influence collectively the implementation process.

2.2. COMITOLGY

The analysis of comitology needs to take account of two basic considerations which constitute the two sources of its development, namely the tensions between the intergovernmental and the supranational institutions which share the formal executive power in the EC (Council of Ministers and European Commission respectively) and also the lack of external implementing agencies.

On the one hand, formal executive power had to be shared between the Council of Ministers and the Commission thereby leading scholars to underline the EC's quadripartite (Pescatore 1978) characterised by the existence of an institution (Council of Ministers) which accumulated both legislative and executive powers. This distribution of executive power was based on art. 155 fourth indent of the Treaty stipulating that

[i]n order to ensure the proper functioning and development of the common market, the Commission shall...exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter.
The terms used in this provision point to the direction of a principal-agent relation where the Commission (agent) exercised the Council's (principal) executive power if and when the latter chose to delegate it. The subordinate position of the Commission has been further underlined by the lack of external implementing agencies which ensured that it would still need a significant input from the member states in the implementation process even if the political context changed in favour of a more active role for the Commission. Indeed, the Council soon found it very difficult to cope with the initial workload of policy formulation and also the adoption of the implementing measures which were necessary if the policies were to produce any results.

This functional pressure produced by the operation of the EC obliged the Council to use extensively various committees and the Commission for the implementation of policy. Thus, the quest for efficacy rather than an attempt to re-distribute executive power was at the heart of this development. That meant that a new and very subtle sub-stage of the policy process had already emerged. The initial distinction between formulation and implementation had been supplemented by another stage (between the other two) where European implementing measures were adopted before the policy reached the national level. For example, once a decision had been taken for the regulation of the market for a specific product, e.g. cereals, a specialised committee would meet in order to define the practicalities of the regulation.
This development is significant for four reasons, two methodological and two political. First, it shows that implementation analysis in the European Community must start from the European level because this is where the implementation process begins, with the adoption of the European implementing measures. In other words, one must adopt a top-down approach for the analysis of the implementation process in the EC. Secondly, the establishment of comitology amounted to the creation of another set of decision points within the implementation structure, although its significance depended on the powers of these committees. Thirdly, the dynamics of the policy process had already led the EC's institutional structure to its limits, thus obliging it to find informal solutions. Finally, these solutions opened a window of opportunity for the member states which were the only actors capable of filling the functional gap. The solution took the form of the aforementioned set of intergovernmental committees\textsuperscript{5} grouped under the term 'comitology'. So what is the nature and the role of these committees in the implementation process?

This system has been developed in a pragmatic manner which reflected the political pre-occupations that produced it. This is illustrated by the quantitative importance of

\textsuperscript{5}Examples of these committees include the Technical Progress Committee for the Adaptation of Measuring Devices and Packaging Ranges, the Committee on Conservation, Characterisation, Collection and Utilisation of Genetic Resources in Agriculture and the Scientific Committee on Foodstuffs.
these committees and the lack of any clear-cut principle on the basis of which these committees were used. Even the very assessment of whether they were going to be used or not was made on an ad hoc basis (Blumann 1993, 193-4). The methodological implication is the inability to assess the exact impact of these committees on the implementation process. Nevertheless, it can be argued that they constituted an important channel through which the Council exerted influence on the Commission in the European sub-stage of the implementation process until 1987.

The legal basis for the use of these committees could be found in basic legislative instruments adopted by the Council (mainly regulations but also directives). Their use was first observed in CAP. Three types of committees had appeared, namely consultative, management and regulatory committees (della Cananea 1990, 668-70). Although membership did not vary in the sense that they were composed of representatives of the member states and chaired by a representative of the Commission, their powers vis-à-vis the Commission and consequently their impact on the implementation process depended on the type of the committee.

The SEA constituted a significant turning point in the development of comitology because it shifted executive power from the Council to the Commission (Bradley 1992, 713; della Cananea 1990, 684; Lenaerts 1993, 34; Meng 1988, 221) while

6This importance does not obscure the uncertainty as to the precise number of these committees (van der Knaap 1996, 96).

7This is by no means a coincidence, because it is the most integrated policy of the EC.
enabling the creation of a horizontal legal basis for comitology. The shift of executive power from the Council to the Commission, which became the main locus of executive power at the European level, was very subtle but extremely significant. The shift took place as a result of the introduction of a third indent to art. 145 of the Treaty. Initially this article, which constitutes the main legal basis for the participation of the Council of Ministers in the European policy process, did not contain a reference to implementation. The new provision obliged the Council to confer on the Commission, in the acts that the Council adopts, powers for the implementation of the rules which the Council lays down. The Council may impose certain requirements in respect of the exercise of these powers. The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself. The procedures referred to above must be consonant with principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the Opinion of the European Parliament. (Emphasis added)

Thus the exercise of executive power by the Commission became the rule (Harnier 1991, 4247; Breier 1994a, 1050). The Council retained the right to exercise directly this power itself, but only in specific (exceptional) cases. The symbolic integration of the new provision into art. 145 (which regulates the action of the Council) instead of art.
155 (which regulates the action of the Commission) is devoid of any significant impact upon the implementation process.

Nevertheless, this point should not be over-emphasised, for the first legal text adopted by the Council after the entry into force of the SEA was based on art. 145 and attempted to organise comitology in an orderly manner. Decision 87/373 of the Council did not go as far as putting into practice the Declaration attached to the SEA urging the Council to use extensively consultative committees in order to facilitate the adoption of the measures based on art. 100a (harmonisation of legislative, regulatory and administrative measures for the establishment of the single market) but it streamlined comitology procedures in a way which significantly reduced the ability of the member states to invent new forms (Ehlermann 1988, 239) and has formalised the aforementioned three types of committees and the use of five procedures. So, what is the content of this set of decision points?

On the one hand, consultative committees must be consulted by the Commission, but their opinion has no binding effect on the content of the implementing measures. On the other hand, management committees, used extensively in CAP (Bertram 1967; Schindler 1971) discuss and decide using qualified majority voting (QMV) on the implementing measures submitted by the Commission. In case of a negative opinion of the committee, the measures are notified to the Council which can rescind or vary the measure (using QMV). Finally, regulatory committees, used extensively in the harmonisation of national legislations, customs and veterinary controls, can block the measures proposed by the
Commission either by not deciding, or by adopting a negative opinion. In the second case the committee has two options: First, the Council can adopt (by QMV) a different view thus enabling the Commission to proceed accordingly. Secondly, the Commission can proceed only if the Council does not adopt a negative opinion or does not decide at all, within a specified period usually of three months. Yet, it remains unclear where each type of committee is used, because there are no hard rules regulating this aspect of comitology.

So far as the functions of these committees are concerned, a useful distinction has been drawn between i) rule-interpreting, ii) fund-approving and iii) rule-setting functions (Schaefer 1996, 16). The aforementioned tensions that explain the emergence of the comitology system do not spill over into the functions exercised by these committees. On the contrary, scholars have underlined the constant quest for consensual solutions (Neyer 1997, 30) and the fact that these committees constitute arenas of the search for efficacy rather than the promotion of national8 interests (Roethe 1994, 50).

After the adoption of the European implementing measures, the locus of the implementation process shifts to the national level. The action of the national politico-administrative machineries is regulated by art. 5 of the Treaty.

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8The findings of the European Parliament's special committee of enquiry (Europäisches Parlament. Untersuchungsausschuß für BSE 1997, 12-3) into the role of the BSE-subcommittee of the Scientific Veterinary Committee illustrate the limits of this view.
2.3. ARTICLE 5 OF THE TREATY AND THE REGULATION OF THE MEMBER STATES' OBLIGATION TO IMPLEMENT EC POLICY

Article 5 of the Treaty of Rome stipulates that the member states shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty.

Its position within the text of the Treaty and more specifically the fact that it is part of the principles which constitute the hard core of the EC, or as Constantinesco (1987, 98) has put it

*la structure profonde du consentement des auteurs de l'acte constitutif* (the inner structure of the agreement of the Treaty's authors)

constitutes both a strength and a weakness in its role as the general legal basis for the regulation of the implementation process. Precisely because it is a

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9Blanquet (1994) provides an excellent legal analysis of the wider implications of this article for the EC's legal order which does not concern this dissertation.
principle, it had to be abstract. Its abstract nature meant that it was only after the accumulation of considerable case law of the ECJ on this issue (Blanquet 1994) that its precise characteristics could be defined. This case law has mitigated the abstract nature of this provision and has turned it into a proper 'constitutional' principle of Community loyalty\textsuperscript{10} regulating the function of the EC as an implementation structure. Its wording has certainly contributed to the parallel that some scholars have drawn with the principle of \textit{pacta sunt servanda} (agreements must be kept) found in public international law, which embodies the obligation of the high contracting parts of an agreement to faithfully abide by its content. However, as Lenz (1994, 33) rightly argues, the provision of art. 5 goes farther. This becomes more evident when a different approach is used for the analysis of this provision.

One can draw a distinction between the positive and the negative obligations incorporated into this provision\textsuperscript{11} whose structure underlines its origin, namely the principle of federal loyalty found in federal states. Indeed, the so-called Bundestreue (federal loyalty) is a constitutional principle developed in the Federal Republic of Germany (Hesse 1984, 102). It is defined as the obligation to adopt a bundesfreundliches Verhalten, that is a federal-friendly behaviour. The development of this principle in the German federal context immediately after the unification in 1871 is

\textsuperscript{10}Scharpf (1994, 225) prefers the term 'comity' to 'loyalty'.

\textsuperscript{11}These obligations are not necessarily symmetrical. On the contrary, the discussion that follows will illustrate the predominance of the obligations of the member states \textit{vis-à-vis} the EC.
an illustration of its content. Indeed, Bismarck had underlined the fundamental role of the federal loyalty of the sovereigns as the foundation upon which the German Empire was based. In other words, the federal construction (of the German state) creates the need for its constituent parts to be conscious of the fact that they belong to a wider whole (Schwarz-Liebermann von Wahlendorf 1979, 783). Bundestreue echoes this idea. The fact that this concept has been devised and developed in federal states means that it should be treated cautiously in the analysis of the EC as an implementation structure, because the EC is not a state, although the normative intensity of this concept is a clear illustration that the EC goes far beyond the level of a mere international organisation. This is a broad idea based on a number of obligations incorporated into this concept.

The first and most obvious positive obligation of the member states is to take every necessary measure in order to implement the policies which are formulated at the European level. The action of the member states here primarily concerns formal implementation occasionally irrespective of the form of these rules (regulation, directive or decision). Directives by definition (art. 189 § 3 of the Treaty) entail the adoption of national implementing measures in order to achieve the objectives that they embody, while regulations frequently lead to the adoption of organisational (e.g. the creation of new agencies) or other measures (financial instruments etc.) although they are directly applicable\textsuperscript{12}.

\textsuperscript{12}Decisions may also require national implementing measures (Rideau 1994, 656).
In any case, the member states are under the obligation to use the most appropriate measures in order to achieve the common objectives, despite their freedom to make this choice on the basis of their own constitutional rules (infra, Section 2.4). This fact illustrates the normative significance attached to the concept of effet utile (Mouton 1993) that is the desired effect, which embodies the need to give to the European provisions their full effect and is frequently used by the ECJ (Louis 1990, 54) not only for the interpretation of EC law (infra, Sections 2.5 and 2.6) but also in defining the obligations of the member states under art. 5. In other words, the obligation to implement goes far beyond the mere formal implementation and covers the need to take every measure which is necessary including filling the gaps in EC policy (Blanquet 1994, 44). The ECJ has elaborated on this point (joined cases C-205 - 215/82) by underlining the obligation of the member states to act on the basis of their own procedural and substantive rules whenever the European provisions do not include common rules to this effect.

The second obligation entails the abolition of any domestic provision or practice that goes against the achievement of the effet utile. This obligation emanates from the wider need to facilitate the emergence of the policy's full effect by not encouraging breaches of EC law (Temple Lang 1987, 516). The third obligation comes closer to the core of the concept of implementation outlined in Chapter 1 and involves the choice of the implementing agencies (Bleckmann 1981, 654) and their co-ordination for the achievement of the effet utile (case C-240/78).
Following the same line of thought, the member states are under the obligation to assist the European Commission in its executive function by sending their officials to meetings (Blanquet 1994, 162) of the committees of the comitology framework.

The obligation to co-operate which is based on art. 5 is reinforced by article 213 of the Treaty which stipulates that the European Commission has the right to collect every piece of information and to make all the necessary controls in order to carry out the functions attributed to it. Despite the view that art. 213 concerns primarily the relations between the Commission and individuals or firms (Röttinger 1994, 1307) it is widely accepted (Bleckmann 1976, 487; Grunwald 1991, 5358; Zuleeg 1991, 139) that the combination of articles 5 and 213 creates a solid basis for the obligation of the member states to provide any information deemed necessary by the Commission for the performance of its tasks. This view also constitutes another illustration of the system of co-operation (von Bogdandy 1995, Rn. 11; Constantinesco 1987, 110) between the member states and the EC where the former act as 'the eyes and the hands' of the latter (Blanquet 1994, 145).

The most frequently used expression of the obligation to provide information is the clause, almost invariably incorporated into EC directives, stipulating that the member states must communicate to the Commission the texts of the national implementing measures that they have adopted. This is a *conditio sine qua non* for the successful fulfillment of the Commission's role as guardian of the Treaty (infra, Section 2.6). The importance attached to this function is
the ECJ's acknowledgment (case C-96/81) that failure to fulfil this obligation may of itself justify recourse to the procedure under art. 169 of the EEC Treaty. This positive obligation to facilitate the control of the implementation process is mirrored by a symmetrical obligation focusing on the national level. This obligation involves the creation of the mechanisms for control and the wider obligation de diligence, a concept which is frequently used by the ECJ. This entails the obligation to organise the controls (administrative or judicial) and the obligation of the relevant (implementing) authorities to actively utilise them in the pursuit of the effet utile (Blanquet 1994, 52).

The operation of the EC as an implementation structure has led to the extension of this obligation, albeit in an asymmetrical manner, to the European institutions (Rideau 1994, 662). This obligation is mainly focused on the European Commission because of its close non-hierarchical relations with the national administrations. This is the necessary product of the view of the EC as a system of co-operative government. Co-operation is meaningful only when there is a minimum of reciprocity, which does not necessarily entail symmetry.

The negative obligations are based on the second paragraph of art. 5 and entail the general duty of the member states to avoid any action which could undermine the achievement of the objectives enshrined into the Treaty. This involves mainly the obligation to avoid any measure which could lead to legal uncertainty (Blanquet 1994, 196) thus linking this duty to the positive obligation to abolish the national provisions and practices which are contrary to
the policies adopted at the European level. It also entails the obligation for the national authorities to avoid discriminations between domestic and European rules (Zuleeg 1991, 145).

The preceding analysis of the regulatory content of art. 5 cannot conceal the fact that, although their action is regulated, the national administrations maintain a certain freedom of action. This need for a balanced analysis, which is more accurate because it construes the national administrations as 'co-dependent organisations' (von Bogdandy 1995, Rn. 43) is based on the relevant case law of the ECJ which has established and developed the principle of institutional autonomy.

2.4. INSTITUTIONAL AUTONOMY AND ITS LIMITS

This principle is defined as the right of the member states to achieve the objectives emanating from their participation in the European policy process through their own constitutional rules, in the wide sense of the term. This is a principle devised and established by the ECJ since the beginning of the 1970s. The two most significant characteristics in its development are i) its direct link to the implementation process and ii) the frequent 'bridge' to art. 5 of the Treaty. The examination of these elements

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13Rideau (1972) has conceptualised this principle whose analysis will help illuminate some of the obligations deriving from the general provision of art. 5 and the precise identity of the national institutions that it covers.
will shed light to the precise content and the limits of this principle.

The whole concept is based on the fact that the EC does not interfere with the institutional structure of the member states. This concerns not only the relations between the executive and legislative bodies but the role of the judiciary, the number of the levels of government and the division of powers between them as well. This wide-ranging freedom has three fundamental implications. First, the ECJ has acknowledged (joined cases C-51 - 54/71) the fact that the member states are free to choose the institutions which will implement EC policies. Secondly, the member states are also free to choose the procedures through which the policies will be implemented. Thirdly, the same freedom applies to the choice of the form of the measures used in the implementation process.

Indeed, the ECJ has recognised as early as 1971 (case C-39/70) that

[where national authorities are responsible for implementing a Community regulation it must be recognised that in principle this implementation takes place with due respect for the forms and procedures of national law.]

The ECJ went farther (joined cases C-51 - 54/71) in order to establish that

\[14\] The normative intensity of this principle reflects the significance of the distinct historic national developments which produced these institutional structures (Häberle 1994; Tsatsos forthcoming).
the question of how the exercise of such powers may be entrusted by Member States to specific national bodies is solely a matter for the constitutional system of each State.

Moreover, it has also stated (case C-8/88) that

it is not for the Commission to rule on the division of competences by the institutional rules proper to each Member State, or on the obligations which may be imposed on federal and Länder authorities respectively.

The establishment of the principle of institutional autonomy by the ECJ has gone hand in hand with the creation of a set of limits whose objective is the unequivocal recognition of the concept of efficacy as the basic guideline that must underpin the action of the member states in the implementation process. The national politico-administrative structures which implement EC policy are the products of distinct national traditions. The fact that they share some fundamental characteristics (e.g. liberal democratic systems) does not necessarily eliminate the danger of significant variations in the outcomes of the implementation process. The need to limit these variations as much as possible is at the heart of the efforts of the ECJ to limit the potential negative effects of the member states' institutional autonomy in the implementation process. These efforts concern every aspect of this
principle and have been integrated in judgments which are inextricably linked to art. 5.

Going beyond the mere statement of the principle of institutional autonomy, the ECJ stated in its judgment in case C-8/88 that

it is for all the authorities of the Member States, whether it be central authorities of the State or the authorities of a federated State, or other territorial authorities, to ensure observance of the rules of Community law within the sphere of their competence.

This obligation also covers the national courts precisely because they are parts of the EC as an implementation structure (case C-14/83). The normative intensity of this judgment has been reinforced by the ECJ's judgment in case C-33/90. It has stated that

[t]he fact that a Member State has conferred on its regions the responsibility for giving effect to directives cannot have any bearing on the application of Article 169. The Court has consistently held that a Member State cannot plead conditions existing within its own legal system in order to justify its failure to comply with obligations and time-limits resulting from Community directives...[E]ach Member State...alone remains responsible towards the Community under Article 169 for compliance with obligations arising under Community law.
The choice of the form of the national implementing measures has also been regulated (Capotorti 1988, 241; Zuleeg 1991, 143). Indeed, the ECJ has ruled in case C-96/81 that

mere administrative practices, which by their nature may be altered at the whim of the administration, may not be considered as constituting the proper fulfillment of EC obligations. The absolute terms used in this judgment must not be taken to mean that the use of any administrative measures has been considered to be unlawful. The points that they cannot be the main or the only type of measures used in the implementation process because they can, by definition, be altered in a way that may not be compatible with the principle of legal certainty.

The limitation of the principle of institutional autonomy by the ECJ also includes the regulation of procedural aspects. In case C-240/78) the ECJ stated that

it is...incumbent on the said national institutions to ensure by appropriate means that the measures which they adopt are co-ordinated in such a way that they do not jeopardize the proper functioning of the organization of the market.

The ECJ reinforced this view by stating (joined cases C-205 - 215/82) that
The application of national law must not affect the scope and effectiveness of Community law.

Taking this view further, the ECJ underlined the intensity of the participation of the member states in the formulation stage of the European policy process and the opportunities that this creates for successful implementation. In a case involving financial arrangements the ECJ has stated (case C-30/72) that by reason of their participation in the deliberations of the Council, the Member States are informed of the extent of the expenditure which might be entailed in applying acts adopted by that institution and are therefore able in good time to make the appropriate provisions for satisfying the financial obligations incurred.

The regulation of the role of the member states as parts of the implementation structure also has two significant legal facets, namely the principles of supremacy and direct effect of EC law.

2.5. THE SUPREMACY AND THE DIRECT EFFECT OF EC LAW: TWO LEGAL PRINCIPLES IN THE QUEST FOR EFFICACY

The supremacy of EC law means that it prevails in cases of conflict with domestic legal rules or practices. It has first been established in the ECJ's judgment in the famous Costa/ENEL case (C-6/64). Departing from the view that the
Treaty of Rome has established a legal system which goes far beyond the ordinary international treaties, the ECJ went on to underline the fact that

the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves. The integration into the laws of each Member State of provisions which derive from the Community... make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity... The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty... [T]he law stemming from the Treaty... could not... be overridden by domestic legal provisions... without being deprived of its character as Community law... The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail. (Emphasis added)

The concept of efficacy which is at the heart of the implementation process was also the main driving force behind this judgment. The ECJ accepted that the reciprocal
nature of the obligations emanating from EC membership would be severely damaged if the member states could unilaterally adopt measures contravening these obligations. This legal reasoning places emphasis on the idea of uniform implementation across the Community which requires the limitation of the powers of the member states to adopt conflicting unilateral measures, thus reinforcing the negative dimension of the principle of Community loyalty based on art. 5 § 2 of the Treaty.

Subsequent developments in the case law of the ECJ have confirmed and reinforced the position adopted in the Costa/ENEL case. Indeed, the ECJ ruled in the equally famous Simmenthal judgment (case C-106/77) that

in accordance with the principle of the precedence of Community law, the relationship between the provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but...also preclude the valid adoption of new legislative measures to the extent to which they would be incompatible with Community provisions...[Action in the opposite direction] would amount to a corresponding denial of the effectiveness of the obligations undertaken...pursuant to the Treaty...It follows from the foregoing that every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter
confers on individuals and must accordingly set aside any provision of national court which may conflict with it, whether prior or subsequent to the Community rule.

This view places substantial emphasis on the role of the national courts as significant parts of the structure where implementation of EC policy takes place, by instructing them not to apply any contravening national rules irrespective of the time of their adoption. This means that although the member states maintain the right to legislate, the exercise of this right must take place within the boundaries created by their participation in this Community of law. Thus, the ECJ has enshrined to EC policy a legal attribute which is meant to facilitate implementation. This attribute produces its full effect in cases of conflict (between domestic and European policies) which reach the courts. This is where the concept of direct effect comes into play, in a manner that complements the supremacy of EC law in the quest for efficacy.

It means that some provisions of primary and secondary EC law can be invoked by individuals or companies in order to promote or protect rights enshrined into these provisions even when their implementation requires the adoption of legislative measures which are not in place when the case reaches the court. This concept has been established by the ECJ in its van Gend & Loos judgment (case C-26/62). It departed again from the view that the Treaty

is more than an agreement which merely creates mutual obligations between the contracting states...In addition
the task assigned to the Court of Justice...confirms that the states have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals...Independently of the legislation of Member States, Community law...not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.

Initially this principle concerned mainly Treaty provisions which had to be clear and unconditional. Indeed, in a set of judgments the ECJ has acknowledged the direct effect of a number of fundamental Treaty provisions (Rideau 1994, 683-4) including art. 7 (non-discrimination on the basis of nationality), art. 30 (prohibition of quantitative restrictions to intra-Community trade) art. 48 (free movement of labour) art. 52 (right of establishment) and art. 59 (freedom to provide services).

The establishment of the direct effect of provisions contained in directives was somewhat problematic. Directives by nature require transposition into national law (formal implementation) according to the relevant domestic procedures. This clearly establishes a discretionary power for the member states. In its van Duyn judgment (case C-41/74) the ECJ has accepted the direct effect of precise and unconditional provisions of directives\(^{15}\) which do not entail a margin for manoeuvre left at the discretion of the national authorities. The obligation to accept the direct

\(^{15}\)Nevertheless the ECJ accepted that this should be assessed on an ad hoc basis.
effect of directives (whenever the relevant conditions are fulfilled) covers not only courts but public authorities in general, including sub-national governmental bodies and other organisations which, irrespective of their legal form, provide services to the public on the basis of exclusive rights conferred upon them, such as privatised utilities.

More importantly, this principle has been reinforced significantly by the recognition by the ECJ (Barav 1993, 106; Rideau 1994, 688) of the fact that even when a member state has failed to transpose a directive into national law, the directive can produce direct effect if it fulfills the conditions of clarity and lack of conditions attached to EC legislation. This is the logical result of the need to avoid the use by the member states of the additional decision point (formal implementation) contained in the definition of the directive as a justification for incorrect implementation.

From the point of view of the analysis of implementation in the EC, this is an extremely important finding because it reinforces the validity of our choice to go beyond the mere formal implementation of EC policy. This methodological foundation of this dissertation is further reinforced by the ECJ's judgment in the Reyners case (C-2/74) where it acknowledged that even if at the end of the transition from national to European competence in a policy area, the European institutions have not adopted the necessary measures envisaged by the Treaty, these provisions can still be invoked in courts. It is clear that EC policies can produce results even when the relevant measures have not been adopted, simply by virtue of the participation
of states and individuals in the process of European integration, hence the focus on formal implementation.

Although the European Community does not have its own implementing agencies, it possesses two important institutional guarantors of efficacy in the implementation process. The European Commission and the ECJ are the EC's own institutionalised fixers.


The objective here is to analyse the development of the role of the European Commission as an active fixer whose action covers every aspect of the implementation process, unlike the ECJ whose role is mainly passive and dependent on the activities of (primarily) European but also national actors. The analysis of the European Commission's role in the implementation process reveals a multitude of functions. Indeed this is reflected through the provision of art. 155 first indent of the Treaty which constitutes the legal basis for the European Commission's role. It stipulates that

\[\text{in order to ensure the proper functioning and development of the common market, the Commission shall} \]
\[- \text{ ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied.}\]
This role of the Commission has three basic facets\textsuperscript{16}.

First, it is a direct implementer in competition policy primarily on the basis of art. 85-94 of the Treaty. This role includes a number of significant functions like the authorisation of mergers between companies and the authorisation and control of state aids. Although these functions are performed on the basis of Treaty provisions and other legal texts (especially regulations) shaped mainly by the member states, recent literature (Cini 1996, 23; Allen 1996, 167) has underlined the discretion exercised by the Commission, which is embodied in basic guidelines that it has developed, like the so-called \textit{de minimis} principle in mergers whereby the Commission determines whether a merger can be authorised on the basis of the minimal or significant impact that it will have on the structure of the market (e.g. through the formation of an oligopoly).

Secondly, the Commission also implements the budget of the EC under art. 205 of the Treaty. This function is guided by the relevant financial regulations and constitutes an important demonstration of the pressures that the Commission attracts. Indeed, Levy (1997, 210) underlined the fact that about 150 officials had the responsibility to authorise about 360,000 requests for spending in 1995. The Commission's margin of freedom here is shaped in a rather indirect manner, compared to competition policy, namely

\textsuperscript{16}These roles are ideal types in the Weberian sense since they are not easily distinguished from each other. Indeed, even a casual observation of the role of the Commission in its day-to-day practice will reveal the intensive interactions between them.
through the definition of criteria for the distribution of funds (Cini 1996, 24-5).

In both of these cases, one must underline the fact that the role of the Commission comes closer to what we have identified in Chapter 1 as macro-implementation. This is demonstrated by the fact that both in spending programmes and in competition policy the Commission relies on national administrations or even private actors for the actual operationalisation of many aspects of its decisions. For example, one could underline the obligation of companies to notify to the Commission their plans for a merger and the Commission's direct contacts with research institutes and researchers funded by the EC's Fourth Framework Programme on Research and Development. The latter aspect includes the selection of research projects and the authorisation of payments. On the other hand, the actual merger is the prerogative of the companies in question while in the second example (research grants) the conduct of research is the prerogative of the relevant researchers. These examples illustrate i) the significance of Berman's distinction and ii) the fact that the Commission's role in the implementation of policy is not that direct after all.

More important though is the third role of the European Commission as the guarantor of legality in the implementation process. This role is defined by art. 169 of the Treaty which covers the failure of the member states to fulfil Treaty obligations. The procedure of art. 169 has two parts (administrative and judicial) and is composed of three separate stages: First, the Commission informs through a formal letter the interested member state of the
reasons why it considers that an infringement may have happened during the implementation process and provides a 'reasonable deadline' for it to present its views. Secondly, if the said state disagrees or fails to respond the Commission has the right to refer the case to the ECJ after issuing a 'reasoned opinion' thus entering the third (judicial) stage of the process. On the contrary, if it considers that the response is valid and sufficient, the case is considered to be closed.

The analysis of the Commission's role under this provision presents a conceptual problem, namely the definition of the 'failure of a member state to fulfil a Treaty obligation.' One can distinguish between four types of failure: i) The total lack of national implementing measures; ii) the incorrect formal implementation; iii) the incorrect administrative implementation and iv) the non-implementation of judgments of the ECJ. They concern every part of the institutional structure of a member state (de Bellescize 1977, 187)\(^\text{17}\).

Despite a set of ground rules which regulate the action of the European Commission in this process\(^\text{18}\) this is an

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\(^{17}\)The ECJ has not yet ruled on a case relating to non-implementation by a national court (Craig and de Bürca 1995, 389). One should expect the ECJ to rule in favour of the inclusion of national courts in the scope of this obligation as it has done (supra, Section 2.3) in the definition of the scope of art. 5 of the Treaty (Galmot and Bonichot 1988, 20-1).

\(^{18}\)These rules include the use of 'reasonable' time limits and the need for the Commission to present the motives for its action (Candela Castillo and Mongin 1996, 56-8).
eminently political function. This is based on the sources of information which provide the incentive for the action of the Commission, the identity of the decision-making body and the possible outcomes. On the one hand, the Commission possesses both formal and informal sources of information. Formal sources are mainly found in the information clause integrated into EC legislation, primarily directives, which obliges member states to communicate to the Commission the texts of the essential measures adopted in order to implement EC policy. Commission officials can check not only whether the member states have adopted the relevant measures on time but also whether the nature and the content of these measures correspond to its interpretation of the effet utile\textsuperscript{19}. Individuals, private firms and national administrations\textsuperscript{20} are the sources from which the Commission informally obtains information relating to the implementation process. The confidential treatment of this information by the Commission explains the preference for this channel. The assessment of the scope for action under art. 169 is also political as it is the political échelon of the Commission, namely the college of the Commissioners,

\textsuperscript{19}One may also add the questions submitted by MEPs, which are more visible and equally formal. 

\textsuperscript{20}Member states do not use the (otherwise similar) procedure of art. 170 by taking another member state to the ECJ (Hartley 1994, 324). An assessment of the obvious political risks entailed in this action is the rationale behind this behaviour, especially in a context which is characterised by the extensive use of QMV and the subsequent need to create voting 'alliances' in the formulation stage (Wallace 1985).
which is responsible for the final decision\textsuperscript{21}. Figure 2.1 demonstrates the quantitative dimension of art. 169 procedures\textsuperscript{22} after 1978.

Figure 2.1: Number of letters and referrals of cases to the ECJ under art. 169 procedures, 1978-96

Source: Commission of the European Communities 1986b, 32; 1991a, 91; 1997a, 145.

Despite the fact that one could only have a very general idea of the EC's implementation profile - due to the crude

\textsuperscript{21} This underlines the value of the view which sees both an administrative and a political role in the Commission (Page 1997, Chapter 7; Ludlow 1991).

\textsuperscript{22} The general perception within national administrations that the European Commission normally wins in the cases that it brings to the ECJ is confirmed by the available data for the period between 1988 and 1994 (Commission of the European Communities 1993a, 207-9; Commission des Communautés européennes 1996, 123-5; Commission of the European Communities 1997a, 147-9) which show a 89.8% success rate for the European Commission.
and undifferentiated nature of the data which cannot present a detailed picture of the nature of problems that lead to the use of this procedure— a number of comments can be made.

Firstly, although there is an overall pattern that illustrates a clear increase in the number of procedures commenced by the European Commission, the same does not apply to the number of cases that reach the ECJ. That means that the Commission uses this procedure as a preventive rather than a punitive measure. Secondly, the differences between the number of cases opened by the Commission and those that reach the ECJ constitutes a clear illustration of the utility of this procedure given that a number of these cases are clarified and resolved during this process. Thirdly, the stable pattern of the cases that reach the ECJ should not obscure the fact that some of them are resolved just before or even during proceedings in the ECJ. The stability of the second pattern should not be overestimated as it may be an illustration of the limits of the Commission's resources, in terms of the amount of time they can spend on these procedures or the skill that they possess compared to their skill in formulating policy.

23 However, this is the only set of available data that could depict the EC's implementation profile.

24 The validity of this point is illustrated by the expansion of the EC's agenda (Pollack 1994). Although it has been argued (Peters 1997, 194-5) that the diversity of ideas and inputs involved in agenda-setting (Peters 1994) seems to make implementation more difficult this is a far too risky generalisation because it fails to take account of the nature of the problems involved in implementation.
(Peters 1997, 191; Ludlow 1991, 107). Fourthly, although one could attribute the dramatic increase in 1990 to the accession of Portugal and Spain more important is the fact that this pattern coincides with a pattern of increase in the overall legislative output (Page and Dimitrakopoulos 1997, Figure 1). In other words, it does not demonstrate a deterioration in the quality of implementation.

Although there is no room for the identification of the role of individual Commissioners as the main source of the political character of this function, it is clear that the limited administrative resources\textsuperscript{25} of the Commission make it necessary to focus on a number of specific 'important' cases. Deciding which case is important and which is not is a political issue. Moreover, the political nature of this action - also underlined by the particular interest shown by specific Commissioners like President Jenkins who pursued a more rigorous policy (Mendrinou 1996, 16) - has been acknowledged by senior Commission officials who implemented it (Ehlermann 1987, 207). There is a number of contextual and administrative problems that illustrate the potential and the limits rather than the actual utility of this procedure\textsuperscript{26} thus providing a clear illustration of the weakness of this implementation structure.

\textsuperscript{25}A small unit of the Secretariat General of the European Commission deals with these issues.

\textsuperscript{26}Even when the ECJ has found that a member state has not implemented properly a policy, the outcome was, at least until the entry into force of the Treaty on European Union, not necessarily a correction of its behaviour, as all the Commission could formally do, was to commence another procedure under art. 169.
Indeed, the length and the relative inefficiency of this procedure (Ehlermann 1987, 208) had a number of significant systemic repercussions on the role of the European Commission which has found alternative and much more flexible ways to deal with these problems. First, a number of informal procedures have been introduced in an attempt to reinforce its monitoring actions. These procedures include mainly the so-called réunions-paquets (package meetings) where Commission officials and national civil servants meet in the capital of the interested member state and discuss specific problematic cases (Thomas 1991, 890). The success (Dewost 1990b, 79) of these procedures is partly due to their informal nature and the prevalent spirit of co-operation as opposed to the necessarily adversarial nature of legal proceedings. Secondly, it has also reinforced the opinion of those who argue in favour of a 'decentralised control' (Ehlermann 1987, 217) by affected individuals through the use of the concept of direct effect (supra, Section 2.5).

Although a large number of problems are resolved in these informal meetings or even in the administrative stages of the procedure of art. 169, others reach the ECJ. This is the most obvious part of the ECJ's participation in the implementation process. The ECJ facilitates this process by issuing judgments relating to all aspects of implementation, formal or administrative, and has thereby been able to identify fundamental principles of this implementation structure (supra, Sections 2.3-2.5). However, the primarily passive role of the ECJ, is illustrated by the inability of the EC to implement judgments. Until 1993 and the entry
into force of the Treaty on European Union, the non-implementation of a judgment could only trigger another procedure under art. 169 (or art. 170), due to the initial weakness of the provision of art. 171. As it was not an effective deterrent, a number of member states had accumulated a significant backlog of judgments which they had not implemented.27 The new version of art. 171 which has received positive comments in the light of the previous intransigence of the member states (Tagaras 1993, 152) enshrined into the TEU enables the Commission to bring the case (after having opened a dialogue with the state in question) before the ECJ by specifying a lump sum or penalty payment which it considers appropriate. This may then be imposed on the member state in question.

Aside from this post hoc function, the ECJ also exerts its influence during the implementation process through the procedure of art. 177 which organises a dialogue with national courts (Craig and de Búrca 1995, 399; Vandersanden 1992, 3:280) aiming at the uniform interpretation of (primary and secondary) EC law through the so-called preliminary rulings.28 This is the mechanism that it has used in order to establish and develop the principles of supremacy and direct effect of EC law. The significance of this function of the ECJ is illustrated by the obligation of national courts of last instance to submit questions relating to the interpretation of EC law to the ECJ.

27 Until the end of 1992 the UK, France and Greece had not implemented 6, 8 and 8 judgments respectively (Commission of the European Communities 1993a, 410-8).

28 These rulings are binding for the national courts.
Part of the operation of the EC after the entry into force of the Treaty on European Union is subject to the principle of subsidiarity as it is defined in art. 3b of the Treaty. Does this affect the implementation process?

2.7. THE PRINCIPLE OF SUBSIDIARITY: AN IMPLEMENTATION PERSPECTIVE

The explicit formal definition of subsidiarity found in art. 3b of the Treaty reconciles (Jachtenfuchs 1992; Peterson 1994) two contradictory views, one pro-integrationist which construed this principle as a means of resolving the problem of division of powers between the EC and the member states and the opposite view which promoted the introduction of subsidiarity as a means of renationalising EC powers. These views reflect the basic idea behind subsidiarity which attempts to reconcile the need for the constituent parts of society to maintain their own distinct sphere of action without undermining the collective element that comes with social life, an idea that can be traced back to a number of sources (Millon-Delsol 1993; Burgess 1995, 15-9; Müller-Graff 1996, 76-7).

The definition incorporated in art. 3b is based on two distinctions: One between two levels of government (the European and the national) and another between two types of competence (exclusive and concurrent). The EC takes action only when and to the extent that the objectives of the proposed action cannot be sufficiently achieved by the

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29 The SEA implicitly introduced the principle of subsidiarity through art. 130r § 4 (covering environmental policy).
member states. If one follows this line of reasoning, one comes to the conclusion that this principle does not affect the operation of the EC as an implementation structure. Indeed, the importance of the second distinction is largely neutralised by the fact that the Treaty does not contain a list of exclusive or concurrent powers (von Bogdandy and Nettesheim 1995, Rn. 8). This, in turn, means that the nature of the EC's competence will remain part of the wider negotiations at the European level. This applies not only to the formulation stage, but implementation as well.

Even when one examines subsidiarity from the point of view of the distinction between the two levels of government (European and national) one is led to the same conclusion as to the ability of this principle to alter the operation of the EC as an implementation structure. It does not alter three fundamental characteristics of this structure, namely the lack of external implementing agencies, comitology and the principle of institutional autonomy of the member states, thus leaving unaffected the quantity and the quality of the decision points. On the contrary, these characteristics reflect both the 'active' and the 'passive' (Weinacht 1995) facet of subsidiarity.

First, the lack of external implementing agencies embodies the institutional dimension of subsidiarity because it automatically places emphasis on the role of the national politico-administrative machineries as parts of a wider whole, namely the EC. They are responsible for performing the functions that the EC cannot perform due to the lack of own implementing agencies, in line with the definition of subsidiarity found in art. 3b.
Secondly, comitology can also be seen as an expression of subsidiarity to the extent that it opens for the national administrations a window of opportunity to participate, from an early stage, in the implementation process which affects them. This also reveals the quest for efficacy although this was not the only objective behind this phenomenon (supra, Section 2.2).

Thirdly, the definition found in art. 3b rightly limits the implementation of subsidiarity to two levels of government, namely the European and the national level. A different approach which would underline the domestic repercussions of subsidiarity, e.g. by urging the member states to devolve power to sub-national levels (Millon-Delsol 1993, 97; Lequesne 1997, 486) would clearly contradict the principle of institutional autonomy which rightly protects\(^{30}\) the formal domestic distribution of power from any influences emanating from the operation of the EC, but only to the extent that the domestic structure does not create opportunities for ineffective implementation of EC policy\(^{31}\). By the same token, institutional autonomy expresses the spirit of subsidiarity to the extent that it reflects the need of the constituent parts of the EC to preserve elements of their identity without ignoring the quest for efficacy as part of the common action.

\(^{30}\)The validity of this view is illustrated by the provision of art. F § 1 of TEU which stipulates that the European Union respects the national identities of its member states.

\(^{31}\)This view of the dual dimension of institutional autonomy has been confirmed by the European Council through the adoption of Declaration No. 19 on the implementation of Community law attached to the TEU.
This analysis leads us to a number of important conclusions. First, the European Commission has developed into the EC's executive body. Its function covers a rather limited number of actions that we have identified as parts of macro-implementation. This basically means that the Commission relies heavily on the national politico-administrative structures for the implementation of policy (macro- and micro-implementation).

Secondly, the member states not only have a crucial role in implementation as the EC's implementing agencies, but they have also developed a system (comitology) which enables them to have a direct primary input in the choice of the European legislative (and other) implementing measures. The fundamental implication of this finding is the fact that if the member states do not i) implement formally EC policy and ii) implement administratively the policy that it embodies in an effective manner, this is certainly not due to the lack of participation in the previous stages and the information (about the policy's philosophy and objectives) that comes with it.

Thirdly, the operation of the national politico-administrative structures in the implementation stage is tightly regulated by the ECJ's case law and the European Commission's formal powers and informal mechanisms. The latter aspect is of crucial importance because it illustrates the adaptability of the European Commission to its environment and more importantly the partial shift away from confrontational procedures which do not necessarily promote a spirit of co-operation. Nevertheless, the member states have a considerable margin of freedom through the
operation of the principle of institutional autonomy, which has a structural and, more importantly, a procedural dimension.

Fourthly, the efficacy of the concepts of direct effect and supremacy of EC developed in the ECJ's case law largely depends on the willingness and the ability of the relevant societal actors to make use of these mechanisms in order to protect their interests that may be harmed during the implementation process. While the first dimension (ability) largely depends on objective criteria, that is the cost (in terms of time and money) involved, the second dimension (willingness) is largely a matter of subjective judgments involved in the daily operation of these actors. This is certainly not a criticism of these very useful concepts. It is rather a clear demonstration of the fact that although public institutions may create original and potentially powerful tools, their efficacy largely depends on the use that one may make of them.

Our focus will now shift to the national level. We shall attempt to outline i) the linkages between the formulation and formal implementation stages and ii) the national implementation profiles (Chapters 3-5). Then we shall develop working hypotheses based on our comparative findings (Chapter 6).
Chapter 3

THE UK

3.1. THE ARRANGEMENTS BEFORE 1974

3.1.1. INSTITUTIONAL DEVELOPMENT

The pre-1974 arrangements for the handling of EC policy at the political level were marked by the constant changes of the operational framework and the division of labour between the various ministers (Wallace and Wallace 1973, 253-4). Although the first Cabinet minister with special EC responsibility has been appointed as early as 1957 (Butler and Butler 1994, 476) the period until 1974 has been characterised by constant changes at the political level, in a way that illustrated the political salience of the principle of British accession through the involvement of prominent members of the successive governments such as Heath, Brown and Thompson but also through the clear attribution of responsibility to three different albeit fundamental parts of the central government, namely the Department of Economic Affairs, the Foreign Office and the Cabinet Office.

Their involvement reflected i) the predominance of economics in the integration process, ii) the position of the UK as a third country whose dealings with the EC were part of her foreign affairs and iii) the political salience of the issue which had to be dealt with at the highest political level. The pattern of change concerns the degree
of the involvement of these ministers but only until Prime Minister Heath's decision to transfer the responsibility for the co-ordination of EC policy to the Cabinet Office. This fundamental choice reflected his view of EC affairs as part of domestic rather than foreign policy.

At the administrative level, the gradual participation of 'technical' departments in the negotiations brought about a considerable pressure created by the need to service the relevant interdepartmental committees. The small secretariat in the Cabinet Office serving this purpose has gradually grown and became a distinct 'European Unit' (Wallace 1973, 91). After June 1967 it took the responsibility for the preparation of discussions on the British accession at the level of the Cabinet. The formal establishment of this structure took place in 1972 when John Davies took charge of European affairs (Mazey 1992, 6).

The FCO developed gradually its own EC-related machinery (The British Imperial Calendar and Civil Service List 1967, 1969, 1971). The pre-existing European Economic Organisations Department has been re-named European Integration Department in 1970 and was juxtaposed to the European Communities Information Unit. They were headed by grade 4 officials and were supervised by grade 1 officials unlike other FCO departments (such as the East European and Soviet Department) which were supervised by grade 2 officials. This underlined the importance attached to this policy area. In 1974 the EID has been divided into two separate departments, an 'Internal' dealing with the internal working and development of the EC, parliamentary and legal aspects of EC membership and an 'External' which
dealt with the EC's external relations with third countries and European Political Co-operation (United Kingdom. Civil Service Department 1974, cols. 343-4). The Permanent Representation of the UK to the EC (UKRep) was initially established in order to handle relations with the ECSC. The number of its staff grew gradually as a result of the intensification of the negotiations and in 1971 it had twenty-nine staff (including eighteen diplomats) and trainees from various departments served as third secretaries (Wallace 1973, 91). As far as the technical ministries are concerned, most of the main Whitehall departments like MAFF quickly established divisions responsible for the relations with the EC. This is explained by the extent of the competence and activity of the EC in the policy areas covered by those departments.

3.1.2. POLICY FORMULATION

The Ministerial Committee for Europe was the locus\(^1\) of policy formulation at the political level (Sasse 1975, 59). It was chaired by the Chancellor of the Duchy of Lancaster and membership varied according to the issues which were under discussion. The committee dealt with controversial and politically sensitive issues which had not been resolved

\(^1\)The convention of secrecy which governed the very existence and the work of the Cabinet committees does not permit a more detailed analysis of this process. However, the committees have always been regarded as an important feature of the British Cabinet. Some issues are resolved in the committees and never reach the Cabinet (Mackintosh 1962, 437-42; Hennessy 1985).
at the administrative level. It met whenever it was necessary and formulated the British negotiating position. The Chancellor of the Duchy of Lancaster performed three important functions. First, he was responsible for the development, the co-ordination and overall coherence of the UK's EC policy. Secondly, he informed the Cabinet on developments in this policy area thus ensuring *liaison* with the main decision-making body of the British central government and the Prime Minister. Thirdly, he exercised the function of representation by (occasionally) replacing the Foreign Secretary in sessions of the General Affairs Council thus mitigating the predominance of the Foreign Secretary in this field. Consequently, the Chancellor of the Duchy of Lancaster played, in practice, the role of a Minister for European affairs. John Davies who assumed this role was Heath's close associate and a noted pro-European (Stack 1983, 126).

At the administrative level, the function of collective co-ordination was taken-up by the Official Committee for Europe (Sasse 1975, 59). It was chaired by a senior Cabinet Office official and membership included under secretaries from the technical ministries and a representative of UKRep. The committee met on a weekly basis and examined issues appearing in the agenda of the various working groups, *COREPER* and the Council of Ministers.
So far as the political level is concerned, one should first note the appointment in March 1974 of a Minister of State at the FCO responsible for European affairs. It should, however, be attributed to functional pressures rather than the willingness to give a high profile to the 'external' dimension of this portfolio. Since then, this post has become a permanent feature of the British governmental system irrespective of the attitude of successive British governments toward the EC. Over the years, the structure of the political mechanism for the formulation of policy at the political level, took the form of a pyramid thus underlining its hierarchical character. The Cabinet remained the most senior political mechanism dealing with Britain's EC policy. A permanent 'EC slot' in its weekly meetings serves as the basis for a report by the Foreign Secretary on recent developments in this policy area.

Below the Cabinet there is a web of committees dealing with EC affairs. The most prominent is the Ministerial Committee on Defence and Overseas Policy (OPD) which keeps under review the Government's defence and overseas policy (Dod's Parliamentary Companion 1995, 822). It is chaired by the Prime Minister and the Foreign Secretary, the Chancellor of the Exchequer, the President of the Board of Trade, the Defence Secretary and the Attorney General are its members while others may be invited on an ad hoc basis.
During the period of the re-negotiation, the European Questions Committee had the responsibility for the political co-ordination of the British position vis-à-vis the EC (Sasse 1975, 68). This committee is now chaired by the Foreign Secretary and is known as OD (E). This structure remained unchanged until the beginning of the 1990s but more recently the bulk of EC issues were taken up and discussed by the Ministerial Sub-committee on European Questions, code-named OPD (E). It is chaired by the Foreign Secretary but membership is more extensive and includes Ministers with clear EC dimensions in their portfolios like the environment, transport and agriculture. Furthermore, the UK's Permanent Representative to the EC is also in attendance. The sub-committee deals with every issue relating to the UK's membership of the EU.

At the administrative level, the decision of the Labour government in 1974 to transfer the political responsibility for EC policy to the Foreign Secretary had no repercussions upon the Whitehall machinery. The European Unit of the Cabinet Office has been re-named European Secretariat. Despite the expansion of Community competence over the years and especially after the Single European Act, the number of staff of the European Secretariat remained rather stable (about ten). Stability can be attributed to the growing involvement of Whitehall departments in the process of policy formulation. The staff of the European Secretariat is seconded from various Whitehall departments for a period of two years thus ensuring that knowledge of European affairs is constantly diffused within Whitehall. The same stability has been observed in UKRep during the 1970s and
1980s. While the Ambassador who heads UKRep is always drawn from the ranks of the FCO, his deputy is a senior DTI or Treasury official and the remaining posts are filled on a roughly equal basis by staff seconded from the Whitehall departments most heavily involved in EC policy. Currently, it comprises about fifty staff divided into specialised sections.

Developments at the level of technical Whitehall departments were marked by three elements. First, in most cases aspects of EC policy were attributed to the functionally specialised divisions and units. However, the creation of horizontal co-ordinating units was intended to limit the negative effects of this functional diffusion. This is a trend observed in departments heavily involved in EC policy, such as the Treasury (European Co-ordination Division), the DTI (Branch 1 of the Europe, Industry and Technology Division) and MAFF (European Economic Community Directorate). Secondly, in the geographical departments (Northern Ireland, Wales, Scotland) three different patterns were applied. i) Responsibility for EC issues has been attributed to pre-existing internal units (Northern Ireland Office); ii) a 'European Division' has been created (Wales) or iii) EC-related work has been divided between the regional offices of Whitehall departments (Scotland). Thirdly, in departments covering policy areas with limited EC activity EC issues are dealt with by international affairs units (like the Department of Health).

A web of committees comprising senior officials from various departments has been created. The European Questions (Official) Committee deals with the many run of
the mill issues (Stack 1983, 129) mainly through line-clearing - that is ensuring that an individual department's view on an issue does not contain any points of tensions with other departmental views - and the provision of advice on procedure, tactics and strategy for forthcoming negotiations (Spence 1993, 59). It is chaired by an under secretary based in the European Secretariat and meets at assistant secretary level. Membership is determined directly by the agenda of the meeting thereby creating an extensive network of participants who also receive copies of the minutes. Due to the committee's workload, meetings take place formally two or three times a week but informal co-ordination meetings are also arranged - whenever necessary - either on the initiative of the European Secretariat or the lead department. In any case, a spirit of inclusion of any department that may have an interest in a given policy proposal is the widely prevailing characteristic of the administrative ethos in Whitehall in terms of the handling of EC policy. This is illustrated not only through the wide circulation of minutes of meetings, but also the wide participation in these meetings.

Politically, Heath's fundamental decision to consider EC policy as a part of domestic policy can be interpreted as an attempt to expose the British politico-administrative structures to the European influence thus i) promoting 'European thinking' and ii) avoiding the confinement of EC policy in a small part of the structures which deal with it. Two more factors explain this decision (Stack 1983, 130).

2Its work is complemented by the European Questions (Steering) Committee.
The objective was to i) reduce the political profile of this policy and ii) use the limited specialised staff in the most efficient way. The common element in the political and administrative structures is the creation of co-ordinating mechanisms which were necessary because of the diffusion of responsibilities to various actors. However, Wilson's decision to transfer the political responsibility for EC policy to the Foreign Secretary mitigated the effect of organisational diffusion thus creating a two-tier - and potentially contradictory system - where the diffused day-to-day work (dealt with as an extension of domestic responsibilities) of desk officers is streamlined into political structures which (from the organisational viewpoint) tend to reinforce its 'foreign' element.

3.2.2. POLICY FORMULATION

Policy documents emanating from the EC institutions are sent to Whitehall through UKRep and the FCO which is formally responsible for the handling of communications to and from Brussels. The limits of this formal arrangement are illustrated by the growing tendency of technical departments to establish direct links with Brussels (Spence 1993, 61). Those departments are required to signal to the European Secretariat the issues which are likely to cause interdepartmental tensions. This link of dependence underlines the importance of the European Secretariat as a mechanism that monitors developments in EC policies. Given that the specialised Whitehall departments are not expected to predict the wider impact of a policy proposal, the
European Secretariat needs to be informed constantly in order to start the process of co-ordination.

The European Secretariat is a powerful co-ordinating body which organises and services the interdepartmental meetings aiming at the resolution of problems that occur in the previous stages of the policy process. It performs three fundamental roles. First, it ensures that the UK has a view on each EC policy proposal. Secondly, it makes sure that the UK's EC policy is consistent with the broad policy objectives of the British government. Thirdly, it supervises the practical follow-up of decisions. The fact that its size has remained rather small despite the expansion of the EC's agenda has led to the need to prioritise more ruthlessly.

The FCO participates in the process of policy formulation before 'technical' Council meetings and more importantly, it provides advice on EC implications of domestic legislative proposals. Initially, the participation of the FCO in the formulation of the UK's EC policy was explained by its considerable experience in international negotiations. The validity of this argument has been limited by two factors. On the one hand, the decision has been taken to consider the European policy as an extension of domestic - rather than a part of foreign - policy. On the other hand, the participation of other Whitehall departments in the process of policy formulation grew as a result of the expansion of the EC agenda. This produced what one of the FCO's officials called
a dramatic rise in the expertise possessed by technical ministries.

Those developments unavoidably led to tensions between these departments and the FCO with the latter's 'supremacy' being challenged. A Treasury official identified a tension between her department and the FCO which, like all ministries of foreign affairs, likes being nice to foreigners.

The issues that gave rise to those tensions were the FCO's right to provide advice on EC implications of domestic legislative proposals and its concurrent role as co-ordinator of the UK's EC policy\(^3\). This made other Whitehall departments fear that the FCO would intervene in their sphere of competence thus enhancing the need of coordination. The question of the reinforcement of the FCO's status within Whitehall is directly linked to its posture towards the EC. Indeed, as the British membership broadened the FCO's role, its officials have been accused of transferring their allegiance to Brussels. According to Tony Benn

the Foreign Office in a deep way has transferred its allegiance from Britain to Brussels...If they think it will interfere with our partners in the Community they will veto it, if they can, in Whitehall. If it isn't

\(^{3}\text{This is more evident in the semesters when the UK holds the Presidency of the Council of Ministers.}\)
vetoed in Whitehall, they will be party to the process by which the Brussels Commission might veto it. And that is a fundamental change in allegiance.

(Quoted by Young and Sloman 1982, 80)

In cases where the Foreign Secretary also had a pro-European stance like Sir Geoffrey Howe, the FCO attracted even more criticism. Thus, according to Norman Tebbit

[t]he Ministry of Agriculture looks after farmers. The Foreign Office looks after foreigners.

(Quoted by Clarke 1992, 107)

These accusations have, quite naturally, been rejected by an FCO official who called it

a pro-British department.

As an external part of the FCO, UKRep has been depicted as the hidden arm of Whitehall in Brussels (Young and Sloman 1982, 73). Benn meant to illustrate the looseness of the relationship between London-based ministers and the civil servants who work in UKRep when he described it as 'a mandarin's paradise' (quoted by Young and Sloman 1982, 75). Three factors undermine the validity of this view. First, the ambassador who heads UKRep participates in the meetings of OPD (E) which is chaired by the Foreign Secretary and is the Cabinet's specialised committee on EC policy. The Permanent Representative returns to London on Fridays in order to participate (along with senior ECD officials) in
two-hour planning meetings organised by the European Secretariat (Clarke 1992, 103). Moreover, the senior MAFF official working there attends weekly meetings in London where instructions are sorted out in preparation of next week's work. Secondly, the nature of the instructions emanating from Whitehall's co-ordinating meetings constitutes another important constraint on the activities of UKRep. They have been characterised as being among the tightest and most strictly adhered to (Edwards 1992, 74).

Thirdly, the system of same day reporting ensures a regular flow of information from UKRep to Whitehall which in turn means, as a British official has put it, that you can react very quickly to developments. A summary note contains the basic information emanating from the previous day's meeting in which UKRep's competent desk officer has participated. Moreover, UKRep provides a basis for Whitehall negotiators in Brussels. They are briefed before the meetings and this gives UKRep the opportunity to play the role of the last minute's co-ordinator.

The growing involvement of technical departments in negotiations at the European level (as a result of the diffusion of responsibilities) enhances the need for co-ordinating mechanisms which can escape criticism for 'taking sides'. Indeed, the web of relations and mechanisms within
the Cabinet Office put a premium on achieving agreement (Steiner 1987, 6). The Cabinet Office provides (by the means of the European Secretariat) this neutral basis.

We act in good faith

as one of its officials has put it to us.

Furthermore, impartiality is an extremely important feature given two fundamental tensions: One between 'spending departments' and the Treasury and another, between the FCO and the technical departments. The profile of the European Secretariat as a neutral mechanism in the hard core of British government is enhanced by the fact that the responsibility for the Cabinet Office is part of the Prime Minister's prerogatives. Over the years, it has accumulated knowledge and experience on EC issues which is accessible to all Whitehall departments.

The activity of the European Secretariat is multidimensional and covers a wide range of actors. First, at Cabinet-level, the Head of the Secretariat briefs the Prime Minister before the meetings of the European Council and also attends Cabinet meetings. Secondly, the major task of the European Secretariat is interdepartmental co-ordination. For that purpose the Secretariat organises about two hundred interdepartmental meetings per year where three types of issues are discussed: i) Horizontal issues affecting a range of departments; ii) issues concerning constant departmental interests applying to a range of proposals and iii) issues having a potential spill-over into the interests of other departments (Bender 1991, 16).
Occasionally, such meetings are called on the initiative of the lead department. Thirdly, the European Secretariat acts as a think tank and collective memory for all Whitehall departments. It provides guidance and advice on important issues of the EC policy-making process such as comitology, competence issues and the use of the Luxembourg compromise. Fourthly, it monitors the process of parliamentary scrutiny and the implementation of EC legislation. Those functions are exercised in conjunction with the lead department.

The importance of the European Secretariat's role as a central part of the mechanism which formulates the British policy emerges at the administrative level. EQ (0) has the responsibility for daily co-ordination and advice on EC procedures and negotiating tactics (Mazey 1992, 15). The wide distribution of the minutes, which constitute the basis of the guidelines for the forthcoming negotiation, ensures the diffusion of information which is important, especially when it comes to advice on procedures and tactics, thus constituting a process of continuous diffusion of information.

At the interface between the political and the administrative levels is EQ (S) which performs a 'pivotal' role. It is the clearing house between the administration and the ministerial level and provides guidance on other issues. The importance of its position is underlined by the rank of its members. They are deputy secretaries or under secretaries and the committee is chaired by the Head of the European Secretariat. Its pivotal role is further illustrated by the fact that it is responsible for the preparation of the meetings of OPD (E).
These procedures are underpinned by Whitehall's well-documented (Jordan and Richardson 1982; Richardson 1993a) close links with interest groups. Indeed, the dominant British policy style in this field is characterised by extensive consultations with interest groups which provide information and a more or less clear understanding of what is acceptable to them and what is not. Within Whitehall, these procedures are thought to be one of the most significant strengths of the British system of policy formulation because they enable the administration to have a clear view as to the possible outcomes while also enlarging the legitimacy of the policy process.

The departments seek to mobilise the relevant groups in a way which is similar to the wide circulation of documents within Whitehall as a whole. Indeed, Whitehall departments have consultation lists (Richardson 1993a, 86) which include all the relevant interest groups. Furthermore, their representatives also contact UKRep which is seen to be acting as an unpaid agent for groups and appears to do an effective job

(Mazey and Richardson 1992, 105).

However, the access to the system of policy formulation in Whitehall is not equally open to everyone or everywhere. While lead departments and UKRep are quite accessible thus constituting a vital channel of influence, higher échelons of the system and especially the European Secretariat and the FCO are open
Only to the most senior business persons and the best of the lobbying firms

(Spence 1993, 68).

This phenomenon does not subtract from the valuable contribution of interest groups in the British formulation process whose accurate and detailed view in construed by British civil servants as a direct result of openness to these groups. At the same time, limiting access to the European Secretariat is the natural result of the need to abide by an increasingly tight time schedule that this small team of officials faces on a daily basis.

Although the majority of problems relating to the formulation of policy are resolved at the administrative level, the political dimension of the process is far from unimportant. OPD (E) meets five to eight times a year and deals with the political implications of EC issues although in-depth examination concerns only one or two issues. The agenda consists of issues like meetings of the Council of Ministers that require co-ordination at Cabinet level. The sub-committee reports 'as necessary' to OPD. Furthermore, the sub-committee's wide membership mitigates the validity of flexibility as an argument which seeks to explain the creation of Cabinet committees and sub-committees. However, it illustrates the interdepartmental nature of EC issues.

As the most senior Cabinet committee dealing with EC policy, OPD's work is limited to major issues affecting EC policy. Its limited membership enables it to proceed in a more detailed discussion of issues and decisions of strategic importance. Problems that have occurred and have
proved impossible to resolve at the lower levels are discussed and resolved in the Cabinet, although this requires the assent of the chairman of the committee.

3.3. WESTMINSTER AND THE FORMULATION OF THE UK'S EC POLICY

3.3.1. THE MACHINERY FOR SCRUTINY

It was only until after the British accession that the establishment of the parliamentary machinery for scrutiny took place. In May 1974 the House of Commons instituted the Select Committee on European Secondary Legislation. Initially the Committee examined draft proposals by the Commission of the European Community and other documents published for submission to the Council of Ministers or to the European Council, whether or not those documents originate from the Commission (House of Commons 1995b).

These terms of reference have been amended in 1990 (House of Commons 1990, col. 399) in order to extend the scope for scrutiny through the inclusion of wider categories of EC documents.

The extension of the Committee's remit was twofold. On the one hand, it has the opportunity to examine documents emanating from the European institutions even when they do

4This committee has been re-named Select Committee on European Legislation in March 1983 (Boulton 1989, 657).
not contain legislative proposals. On the other hand, it will examine any other document relating to the EC after it has been deposited by a minister given that it might influence the European process of negotiation at a later stage. The same extension led to the inclusion of the common positions adopted by the Council of Ministers in the co-operation and co-decision procedures.

The House of Lords instituted the Select Committee on European Communities in April 1974. The Committee is divided in five permanent specialised sub-committees although ad hoc sub-committees have been set up in order to discuss general issues (such as the progress to European Union)\(^5\). The Committee has been appointed to consider Community proposals, whether in draft or otherwise, to obtain all necessary information about them, and to make reports on those which, in the opinion of the Committee, raise important questions of policy or principle and on other questions to which the Committee consider that the special attention of the House should be drawn

\[(\text{House of Lords 1974b, col. 1229}).\]

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Clearly, the scope for scrutiny is very broad not only in terms of the sources of documents and their form but also the issues that they cover. Still, the criteria for the distinction of those questions have not been specified thus providing a wide freedom of action to the members of the Committee.

3.3.2. THE WORKING METHODS

The lead department has the general responsibility for the supply of documents to the Committees. According to the initial undertaking, the documents would be deposited in the Commons 48 hours after they have been received by the British government. They are followed by an explanatory memorandum prepared by the same department which either states the view of the government or provides information on a purely factual basis about the nature of the proposals (House of Commons 1974d, col. 1426). When the document is not available and the issue is likely to be discussed in the Council of Ministers the department prepares an un-numbered explanatory memorandum which serves as the basis for the Committee's work (Boulton 1989, 774).

The documents that have been deposited are considered by the Commons' Committee and sifted into one of the

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6This was the formal undertaking of the government (through the then Foreign Secretary Callaghan) in the first stage of the existence of the Committee (House of Commons 1974d, col. 1426).
following categories: Documents of political or legal importance justifying a debate; those of political or legal importance which do not warrant debate; those of no political or legal importance and those of political or legal importance for which the Committee has not decided whether a debate is justified or not. When the Committee has been set up it has been decided that it - as a whole - should be responsible for the sift. This decision was based on the mere fact that the members of the Committee were divided on the issue of British membership (Kolinsky 1975, 55).

The main element of the Committee's competence was the fact that it was going to distinguish the documents of legal or political importance without entering into a discussion of the merits of those documents. According to the government's initial undertaking no minister would finalise a decision in the Council of Ministers if the Commons' Committee decided to refer the issue to the House. In a statement to the House, the then Foreign Secretary Callaghan made it clear that

[the House ought to reach a conclusion on the issues before Ministers go to Council...it should be the normal and general rule](House of Commons 1974d, col. 1429).

Initially, the criteria were unclear and some proposals have been reported when one or more members of the Committee considered they were politically important (Bates 1975, 27).
Despite this clear undertaking the Government has tried to maintain some margin of manoeuvre by stating that in case of an urgent matter a minister could get in touch with the Committee in order to draw its attention on this issue thus illustrating its importance. Furthermore it has been admitted that it was possible to use a reserve but the exceptional character of this measure has also been underlined by Callaghan (House of Commons 1974d, col. 1428). Those undertakings of the government have been subsumed by a Resolution adopted by the House in 1980 according to which no Minister of the Crown should give agreement in the Council of Ministers to any proposal for European legislation which has been recommended by the Select Committee on European Legislation...for consideration by the House before the House has given it consideration unless (a) that Committee has indicated that agreement need not be withheld, or (b) the Minister concerned decides that for special reasons agreement should not be withheld; and in the latter case the Minister should, at the first opportunity thereafter, explain the reasons for his decision to the House

(House of Commons 1980, col. 843).

Moreover, ministers are expected to place a reserve in the negotiations in the Council of Ministers until scrutiny has been completed (House of Commons 1989, § 8). The aforementioned Resolution constitutes an attempt to limit the freedom of the British government without neglecting its need for some margin for manoeuvre in European negotiations.
This is reflected on point (b) which gives the possibility to ministers to proceed in the European negotiation process even when the Committee has not given its assent but only when 'special reasons' make it necessary for them to block a decision. This is also underlined by the terms it has used in order to define those reasons on the basis of criteria like the need to avoid a legal vacuum, the desirability of permitting a particular measure of benefit to the UK to come into force as soon as possible and the difficulty of putting a late reserve on a measure which will have little effect on the UK or which is likely to be of benefit to the UK.

The Committee may then recommend a debate for the important issues. The debate can take place on the Floor of the House. If the recommendation for a debate on the Floor is accepted by the government, this will be done by the means of a motion which can be negatived by at least twenty members who rose in demonstration of their objection (House of Commons 1995a). Yet, debates on the Floor were generally not very well attended and did not attract much public interest (Bates 1991, 122).

The functional need for another forum for debate led to the proposal for the creation of five subject-orientated Special Standing Committees (House of Commons 1989, § 65). Finally, the government accepted in 1991 (House of Commons 1991a, col. 292) the creation of two such Committees, European Standing Committee A (which deals with affairs relating to agriculture, fisheries and food, transport, environment and forestry commission) and B (other departments). The role of the Commons' Standing Committees on European Community Documents is to debate an issue in not
more than two and a half hours. At the end of their proceedings, the Standing Committees report the document to the House, together with their resolution. MPs who are not members of these Committees have the right to attend the meetings and participate in their work on an ad hoc basis but they do not have the right to vote. At the end of this process, a government motion is considered (and usually agreed) and then reported to the House by the chairman. The government may then choose to table its own motion which can be approved or rejected without debate (Norton 1995b, 97-8).

The Lords' Committee has adopted a more flexible working method. Initially, it met fortnightly and distributed to the sub-committees only the proposals that were considered to be important on political grounds (Ryan and Isaacson 1975, 211). However, the chairman's decision can be overridden by the Committee (Bates 1975, 29) thus making the sift a collective function. Currently, the documents are sifted by the chairman on the basis of the information contained in the explanatory memorandum prepared by the lead Whitehall department. When a document is not recommended for scrutiny, the Committee does not reserve its opinion thus leaving the government with a free playing field. However, only a part of the documents which are attributed to the sub-committees will be scrutinised.

The sub-committees have three options (Denza 1993a, 742). First, they can lift the reserve. Second, they can send a letter to the relevant minister expressing an opinion on the issue or a part of it (e.g. the legal basis) also indicating whether the reserve is lifted or not. Third, the sub-committees may proceed in an in-depth analysis of the
document. At the end of the process which involves public hearings, trips abroad etc., the preliminary report is adopted by the chairman of the sub-committee and is debated until consensus is reached. The relevant minister is obliged to be present and respond to the remarks of the Committee. After the debate, the reserve of the House is considered to be lifted.

In general, the only innovative measure in the House of Commons was the creation of permanent standing committees. The composition of the committees is based on the majority of the ruling party which means that both those who scrutinise and those whose action is being scrutinised belong to the same majority and political party thus reducing the potential for conflict, apart from cases of weak parliamentary majorities like the one which 'supported' the last Major government. Moreover, the two branches of the scrutiny mechanism are not co-ordinated and this does not help the efficiency of the scrutiny process. The same point can be made about the lack of formal co-ordination between those committees and the department-related select committees, although a certain degree of co-ordination is actually achieved via the clerks.

On the other hand, the government may use the opinion of the House in order to reinforce its negotiating position in the European process. This was clear right from its first steps when it was perceived as a

sounding board in the management of Community business

(Kolinsky 1975, 56).

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8I owe this point to Professor Norton.
Indeed, one can depict the institutional development of this mechanism as a fine balance between Westminster's calls for a greater say in the conduct of EC policy and the maintenance of the government's autonomy for action.

The remit of the Lords' Committee is broader thus enabling it to have a larger margin of manoeuvre in its action. Secondly, unlike the Commons, the initial sift in the Lords' Committee means that a very large number of EC documents is removed as unimportant thus facilitating the in-depth scrutiny of the remaining documents\(^9\). Thirdly, the Commons' Select Committee has been set up in order to discuss not the merit but the importance of EC documents. The two-tier system found in the House of Commons does not necessarily produce a coherent view, unlike the House of Lords which is entitled to discuss the merit of a document. For that purpose it uses the report of its relevant sub-committee thus maintaining an important degree of coherence. Fourthly, the scrutiny process in the House of Commons is specifically related to the aim of exerting pressure on the government while the Lords address a larger audience (Gregory 1983, 119) and their reports often receive wide media coverage and are highly regarded in the European institutions (George 1992, 92).

As the pace of the EC decision-making process is often unpredictable, both Houses play a reactive (although the Lords' Committee seeks to anticipate trends in EC policy) rather than a pro-active role in the formulation stage as they lack the power to impose their will on the government.

\(^9\)Initially, between 25 and 33\% of the documents have been chosen for scrutiny (Ryan and Isaacson 1975, 211; Brew 1979, 242).
Indeed, the philosophy that forms the basis of the scrutiny machinery in Westminster is basically a procedural obligation. Put simply, the British government is not bound by the result of the scrutiny procedure thus maintaining a large margin of manoeuvre. It is simply obliged to consult the two Houses when formulating its position on a particular issue and this illustrates the limits of the influence that Westminster can exert on the British government on EC issues. The same limits are illustrated in the stage of formal implementation.

3.4. THE FORMAL IMPLEMENTATION OF EC POLICY IN THE UK

3.4.1. THE LEGAL FRAMEWORK

Three factors explain the use of a very short and simple legal text (European Communities Act 1972) as the basis for the formal implementation of EC policy in the UK. First, the absence of a written constitution that would regulate the distribution of power between the various actors participating in this process is the dominant characteristic of the British legal framework. Second, the British accession took place fifteen years after the establishment of the EC. This meant that a part of the acquis communautaire (achievements of the EC) had already been formed, especially after 1968, the year when the transitional period leading to the customs union ended. Consequently, the new legal instrument should perform a double role. It should provide the basis for the implementation both of the acquis communautaire and the
future EC policies. Finally, the small size of the document and its laconic provisions served a clear political purpose, namely the avoidance of the perpetuation of the debate on the very principle of British membership.

Indeed, this political debate would have continued if the Heath government had decided to create a detailed set of legal provisions which would include legal instruments implementing EC policy on an ad hoc basis. The parliamentary debates preceding the adoption of the relevant acts would inevitably further illustrate the deep divisions within the two major parties. Furthermore, they would also endanger the already unstable process whereby the Conservative government prepared the British entry, by enabling MPs to vote against the government's wishes. The aforementioned factors led to the adoption of the European Communities Act in 1972.

Its laconic provisions constitute an attempt to integrate the pre-existing primary and secondary EC law into the British legal order. Indeed, section 2 § 1 stipulates that

[all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recorded and available in law, and be enforced, allowed and followed accordingly; and the expression 'enforceable Community right' and similar]
expressions shall be read as referring to one to which this subsection applies.

Clearly, this provision covers a wide variety of forms of EC law: i) The Treaties establishing the three Communities, ii) other treaties entered into by the Communities with or without any of the member states and iii) secondary EC legislation adopted on the basis of the Treaties. However, two more elements have to be underlined. First, the European Communities Act incorporated EC law without the need for further enactment. Practically, this arrangement served the political purpose mentioned earlier, namely the marginalisation of Westminster which constituted the main forum of expression of disagreement against the principle of British membership. Furthermore, this solution was compatible with the very nature of the legal provisions that it concerned. In other words, directly applicable EC legislation had to be incorporated into British law. Secondly, the aforementioned forms of EC law concern only previously existing legislation. Consequently, a solution had to be found in order to provide the basis for the formal implementation of future EC policies.

Section 2 § 2 of the European Communities Act 1972 provides this basis. This provision covers two types of legislation. First, it covers provisions adopted for the purpose of implementing any Community obligations of the United Kingdom, or enabling any such obligations to be implemented, or of enabling any rights
enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised.

Second, this provision also covers legislation adopted for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above.

Clearly, while in the first case the objective was the creation of a general legal basis that would enable the UK to implement formally future EC policies, in the second case the provision of section 2 § 2 concerns the means that are necessary in order to render EC law operational, especially the provisions of the acquis communautaire that need a legislative follow-up. Furthermore, schedule 2 specified the type of instrument that was going to be used in the process of formal implementation of EC policy. Indeed, statutory instruments were going to be the main means used in this process.

This choice can be explained by a set of factors that characterise subordinate legislation, which is defined as the set of rules and regulations made by executive bodies such as the Crown, ministers, some departments, public corporations and local authorities, in the British tradition of legislation (de Smith and Brazier 1994, 359-64). Despite the fact that the great bulk of subordinate legislation is made by virtue of parliamentary authority, this type of legislation is, ironically, characterised by the willingness
to limit the parliamentary input in this process. Indeed, the initiative emanates from the Executive and the consultations with interest groups are quite intensive. They provide better data, information and thinking although at times it makes officials less flexible as they can be boxed in a position as a British civil servant put it.

Thus efficiency is the factor that underpins the decision to use statutory instruments. Efficiency results from the time that is saved when Westminster is not heavily involved in this process. The typical characteristics of the legislative process leading to the adoption of primary legislation further explain the increasing use of delegated legislation (Greenwood and Wilson 1989, 274). More specifically, the Parliament has time to enact a very small number of major bills and the government has the instruments which are necessary in order to limit, but is unable to avoid, parliamentary debate. Nevertheless, caution is necessary here because the fact that this choice is characterised by the limitation of the parliamentary input, does not mean that Westminster is totally excluded from this process.

Statutory instruments adopted on the basis of the European Communities Act that contain i) an Order in Council or ii) regulations made by a minister or government department are subject to annulment in pursuance of a resolution of either House of Parliament, if they are made
without a draft having been approved by resolution of each House (European Communities Act 1972, Schedule 2 § 2). In other words, these statutory instruments are subject to the so-called affirmative resolution procedure (de Smith and Brazier 1994, 374). This procedure is characterised by the need for a parliamentary resolution approving the instrument. The importance of this provision is further underlined by the fact that this resolution has to be adopted by both Houses of Parliament.

Nevertheless, the importance of this provision should not be over-estimated because it is used only in a small number of cases. This is the result of the fact that many orders that practically implement EC law are made under other legislative instruments (Collins 1990, 121) which do not necessarily contain a similar procedural requirement. Indeed, successive British governments have used powers previously delegated by the Parliament for the formal implementation of EC policy (Butt Philip and Baron 1988, 650). The limited importance of this provision is further illustrated by the fact that it is used only for a number of statutory instruments, the remaining being subject to the negative resolution procedure. In this case, the instrument becomes effective automatically unless it is annulled by a resolution (Greenwood and Wilson 1989, 276) following a prayer moved by an MP within forty days from the instrument being laid (de Smith and Brazier 1994, 374).

Another limit placed on the action of the Parliament results from the use of 'non-legislative action' as a means to implement EC policy, despite the fact that successive British governments have used formal legislation in order to
achieve the same objective and ii) the condemnation of this practice by the ECJ's case law (supra, Chapter 2). Quasi-legislative devices such as administrative circulars and codes of practice are used for that purpose (Drewry 1995, 457). The recognition of the Parliament's limited role places firmly the emphasis on the Executive as the branch that dominates in the process of formal implementation of EC policy in the UK.

3.4.2. THE INSTITUTIONAL DIMENSION

The first question that arises concerns the identity of the mechanisms that deal with implementation. Generally, the British administrative apparatus is characterised by the absence of mechanisms that deal exclusively with the implementation of EC policy. On the contrary, the units which have the responsibility for formal implementation are, as a rule, the ones that formulate the national policy and then negotiate at the European level (Butt Philip 1985b, 97; Drewry 1995, 457).

This is the only way to do it as a British official put it. On the one hand, this is the result of a fundamental characteristic of the central British administration, namely its organisation on the basis of policy areas rather than parts of the policy process10.

10The exceptional nature of some bodies such as the Cabinet Office whose role is defined in terms of a function (co-ordination) cannot undermine the general validity of this point.
On the other hand, this also constitutes a conscious choice which reflects awareness of the fact that the units and the officials who have participated in the formulation and negotiation stages know what i) ministers, ii) interest groups, iii) the Commission want and more importantly, how the content of the final compromise has been defined and what its precise philosophy ('its spirit') is. That facilitates formal implementation of EC policy because as a British official has put it, in that way one knows

why it is as it is, what you can do with it and what you can't do with it.

However, this does not mean that mechanisms dealing only with a part of the wider implementation process are totally absent. The Litigation Department of the European Secretariat is an example of this type of mechanism. Despite the existence of departmental legal advisors, the Litigation Department deals with judicial proceedings involving the UK, and also the co-ordination of observations and references for preliminary rulings (Usher 1995, 102-3). The extremely technical nature of this part of the process explains the existence of this specialised unit. On the contrary, one can be led to the same conclusion if one takes into account the marginal role that lawyers play (Drewry 1995, 470) in departmental decision-making processes dominated by the traditionally generalist British civil servants. At the interministerial level, EQO (L) is a committee composed of officials physically based in the Treasury Solicitor's Department, who deal with legal aspects
of EC policy and the conduct of litigation in the ECJ (Drewry 1995, 470). Furthermore, a specialised unit (Single Market Compliance Unit) has been set up in the DTI in order to handle complaints by British firms regarding implementation of EC policy in other member states. Some of them are subsequently forwarded to the European Commission who examines them accordingly. Although the more advanced pursuit of these cases by each British firm involved is not thought to be a part of the wider business ethos, this function is important because it constitutes a source of information for the European Commission. This means that this specialised unit acts as a secondary detector in the implementation process that takes place in other member states. Clearly, firms which act at street-level have access to practices which may contravene the spirit and the letter of the relevant policy.

The important role of the European Secretariat in the formulation process is mirrored by its participation in formal implementation. At least one of its officials ensures the provision of guidance to individual departments as to the way in which policy should be implemented. It is a reactive function in the sense that the European Secretariat keeps an eye on the process and intervenes only in problematic cases. The ethos of wide consultation within Whitehall is at the heart of this process. In cases of interdepartmental tensions, the European Secretariat seeks a compromise. This means that occasionally issues have to ascend to the political level. The European Secretariat assesses the need for this form of action although the intensity of a particular department's pre-occupations is
another important factor. Moreover, the European Secretariat periodically asks departments to submit lists of the measures that have been formally implemented in order to establish what is still outstanding thereby increasing awareness on a pro-active basis. The tables based on this set of data is then circulated within Whitehall.

Although the cases of its intervention in day-to-day formal implementation are rather limited, it does intervene in cases of interdepartmental conflict relating to implementation styles. Indeed, the main source of conflict seems to be the strong tendency of some departments, like the DTI, to prefer codes of practice and administrative circulars as a reflection of their strong deregulatory culture. These pre-occupations need to be balanced by the traditional administrative willingness to have everything 'cut and dried' that is clear and effective, underpinned by legal certainty. The need to balance preference for 'gold-plating' (heavier interpretative function promoted by some sectoral departments during formal implementation) with the avoidance of over-implementation (imposition of an unnecessary regulatory burden through what a British official has identified as the addition of departmental pet projects to national implementing measures) is the European Secretariat's fundamental input to the implementation process.

Deregulation is one of the main issues where we will get called in because there is a difference of philosophy or approach in how a particular measure should be dealt with
The input provided by the Deregulation Unit of the Cabinet Office is currently a major aspect of that tension because it tends to promote copy-out as a method that minimises regulatory burden on industry. This practice actually means that in some cases EC law is implemented formally through its word-by-word incorporation into a British legal text. The first implication of this is the minimisation of each individual department's margin for interpretation during formal implementation. The second implication is the increasing emphasis placed on the target groups as the main interpreters of what a specific provision actually means. Emphasis is placed on the need to avoid the imposition of excessive regulatory burden and this is also a point stressed by the pressure groups in the consultations that take place during the process of formal implementation. These preoccupations are expressed and balanced within a context which is characterised by

the tradition to try and have legal certainty. Our legislative instruments tend to be totally precise because judges and courts will look at the face of the text before them and say this is what it means

as a British official has put it.

Assessing which formula should prevail is a part of the political functions performed by the European Secretariat in the implementation process. Prominent amongst these is the assessment of the likelihood of a legal challenge by the European Commission and its potential outcome. The same
applies to the constant attempts of the European Secretariat to orientate departmental thinking towards all stages of implementation, e.g. through the definition of a fall-back strategy which may be useful in case the negotiation does not go the British way. This is another part of the value added by the European Secretariat to the domestic process of policy formulation. This approach is occasionally influenced by the 'political spin' provided by ministers who in later stages of the process are advised that an interest group has taken a different view. This triggers again a process of interdepartmental consultation based in the European Secretariat.

The preceding analysis of the mechanisms used for the formal implementation of EC policy in the UK calls for a number of observations. First, one should underline the predominance of the Executive in this part of the policy process. Indeed, the provisions of the European Communities Act 1972 are formulated in a way that reflects the predominance of the Executive that also dominated the policy formulation process. Consequently, there is a relation of symmetrical imbalance between the executive and the legislative branches of government, within the wider framework of this policy, resulting from the dominance of the Executive in both parts of this process.

Secondly, the Executive disposes of a number of instruments in order to formally implement EC policy. These instruments include both primary and (mainly) secondary legislation although administrative methods are also used. Thirdly, the fact that the units that formally implement EC policy are those which also formulate the national position
and negotiate at the European level results from the wider division of labour within the British administrative system and the awareness of the positive effects of this dual role. Fourthly, the importance of the central co-ordinating mechanism, namely the European Secretariat at the Cabinet Office, seems to be confirmed in implementation as well. The European Secretariat provides the basis for the co-ordination in litigious cases and also in more general legal issues. The marginalisation of lawyers is confirmed indirectly, through the exceptional nature of the role that they perform in this part of the European policy process.

3.4.3. THE UK'S IMPLEMENTATION PROFILE

National and Commission civil servants share the view that, in general, EC policies are implemented quite effectively in the UK. Figure 3.1 depicts the broad lines of the UK's implementation profile although caution is necessary here because this set of data cannot provide an accurate picture of the nature of the problems that lead to the formal letters and the referrals to the ECJ.
Figure 3.1: Number of letters and referrals of cases to the ECJ under art. 169 procedures regarding the UK, 1978-96
Source: Commission of the European Communities 1986b, 32; 1991a, 91; 1997a, 145.

The first comment that one can make in the light of this set of data concerns the significant overall increase in the number of letters sent to the UK between 1978 and 1992. Although this pattern is certainly not constant, given the decreases of 1980, 1983, 1988 and 1991, it is clear that the drive towards the single market has led to an increase in the attention that the UK has attracted from the European Commission. However, this pattern has affected only marginally the number of referrals to the ECJ.

Indeed, the second pattern is one of a very limited number of cases that reach the ECJ. The almost constantly increasing gap between the two patterns illustrates the increasing pressure that the officials of the European Secretariat absorb on a daily basis. At a more general level, the widely held view both within national
administration and the European Commission that the UK has a very positive implementation profile is illustrated mainly during the first half of the 1980s (Commission of the European Communities 1985, 24-7) and slightly less so during i) the second half of the same decade which has been marked by problems in the field of the single market and industrial affairs, and the environment (Commission of the European Communities 1991a, 131-2) and ii) during the first half of the 1990s (Commission des Communautés européennes 1996, 114-6). Furthermore, judgments of the ECJ are implemented slowly but rather effectively in the UK (Commission of the European Communities 1993a, 418; Commission des Communautés européennes 1996, 411-2) whose government has been a major player (Armstrong and Bulmer 1996, 279) behind the reinforcement of art. 171.

Finally, the attitude of the British courts towards the concepts of supremacy and direct effect and the use of preliminary rulings under art. 177 of the Treaty has, in broad terms, been rather un-problematic. The question of supremacy of EC law has been marked by a distinction between two periods, before and after the beginning of the 1990s and the Factortame litigation (Craig 1995, 3-9). Before Factortame, the predominant view was that in cases of conflict between EC and UK law, the latter should be read in a way that would render it compatible with the former. After the Factortame litigation, supremacy of EC law has been considered as a natural and integral part of EC membership, precisely because it has been established by the ECJ (supra, Chapter 2) long before the British accession.
This idea had also been enshrined into the European Communities Act 1972.

So far as the concept of direct effect is concerned, the British courts have generally accepted and used it without compunction (Craig 1995, 10) although some provisions have presented problems in some courts like the High Court and the Court of Appeal, possibly as a result of a lower quality of advocacy before these courts (Barnard and Greaves 1994, 1064). Finally, a somewhat restrictive set of guidelines issued by Lord Denning in 1974 in relation to the use of preliminary rulings, has gradually but steadily been replaced by wide use of this mechanism in addition to a greater vigilance about the use of the acte clair doctrine (infra, Chapter 4) as a reason for not submitting preliminary questions to the ECJ (Craig 1995, 10-1). This has been illustrated by the rather extensive use of this mechanism by British courts thus accepting the 'supremacy of the ECJ' (Armstrong and Bulmer 1996, 282).

The preceding analysis illustrates the importance of the European Secretariat as a strong co-ordinating mechanism which brings together many actors with not necessarily similar views. Let us turn now to the case of France.
Chapter 4

FRANCE

4.1. THE PERIOD UNTIL 1980

4.1.1. INSTITUTIONAL DEVELOPMENT

The most significant domestic institutional repercussions of the participation of France in the Marshall plan and the integration process right from its beginning were threefold. First, a political post of a Minister for European affairs had been established since the beginning of the 1950s. It has been occupied by a number of already important or future prominent members of the French political élite, like Mollet, Pflimlin and Mitterrand. However, this has not been matched by the establishment of a corresponding administrative basis.

Second, the interministerial nature of the new policy area led to the creation in 1948 (Décret n° 48-1029) of the Interministerial Committee for European economic co-operation issues as a result of the need for internally coordinated implementation of the Marshall plan. It was chaired by the Prime Minister and it comprised the Foreign Minister, the Minister of Economy and Finance and other members of the government whose portfolios included issues appearing in the committee's agenda. Its tasks were threefold. First, it was responsible for the preparation of the guidelines to be given to the French negotiators for the programme of European reconstruction. It prepared the
decisions of the French Council of Ministers and it proposed the necessary measures of implementation. The committee was serviced by the Secrétariat Général du Comité Interministériel pour les questions de coopération économique européenne (Secretariat General of the Interministerial Committee for European Economic Co-operation Questions), a small secretariat which became known as SGCI (Décret n° 48-1029, art. 3). Initially, it was composed of one official of the Ministry of Economy and Finance but its staff grew gradually. The Secretary-General of SGCI would be chosen from the ranks of the Ministry of Economy and Finance (Décret n° 52-1016, art. 7). Its tasks included the preparation of the committee's deliberations and decisions and their implementation, in association with the relevant parts of the French politico-administrative machinery. He was also a member of the French delegation participating in OEEC negotiations along with officials from other relevant ministries.

The ratification of the Treaties of Rome in August 1957 (Loi n° 57-880) brought about new changes to the French institutional framework (Décret n° 58-344) namely the extension of the committee's remit to deal with EC issues and the limitation of its members to the ministers of Foreign affairs, Economy and Finance, Industry and Trade. Two technical interministerial committees (chaired by the Prime Minister and the Minister of Economy and Finance respectively and composed of the relevant ministers and officials) took over the responsibility for the coordination of the national authorities responsible for the implementation of the Treaties.
De Gaulle's tenure as President of the Republic had a significant impact on these structures. On the one hand, he abolished the post of the Minister for European affairs and streamlined this policy through his close personal friend Couve de Muroville, then Foreign Minister. This choice is explained not only through de Gaulle's willingness to downgrade the importance of the integration process but also his firm belief in the need to centralise mechanisms and procedures dealing with foreign policy, a part of the President's prerogatives. This was also illustrated by the gradual abandonment of the so-called Élysée committees (named after the President's formal basis) that he had created. The same pattern had been followed by his successors (Pompidou and Giscard d'Estaing) until 1980.

The development of the administrative structures dealing with EC policy was based on the diffusion of EC policy in the vertical specialised services dealing with the 'domestic' dimension of each policy area (Gerbet 1969, 196). On the one hand, technical ministries (like the ministries of Agriculture and Industry) reinforced the existing structures dealing with international affairs by creating specialised units for EC policy. This was the result of the need for some type of co-ordination brought about by the diffusion of EC policy in the various vertical services. On the other hand, as far as the two important horizontal ministries are concerned, namely the Ministry of Economy and

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1 They also included the Prime Minister, the principal ministers and senior civil servants. There were four Élysée committees dealing with Algeria, foreign affairs, European affairs and economic policy (Gerbet 1969, 205).
Finance and the Quai d'Orsay, that is the location of Ministry of Foreign affairs (Gerbet 1969, 198-201), both relied on previously existing structures (DREE, the Directorate General for Economic and Financial Affairs in the first case, and the Directorate for Political Affairs in the second case).

The interpretation of EC policy as part of foreign policy (underlined by the role of the Foreign Minister) had direct repercussions on the French permanent representation to the EC, where the Quai d'Orsay took the leading role, although two thirds of the staff came from the technical ministries. This reflected the internal diffusion of EC affairs into the vertical ministerial structures and the increasing specialisation of the EC's Council of Ministers. The appointment during the 1960s of Secretary-Generals of the SGCI who (at the same time) occupied the post of director of Pompidou's cabinet\(^2\), the posts of the PM's technical adviser or the President's economic and financial adviser (Gerbet 1975, 391) enhanced the status and authority of this post.

\(^2\)The cabinet is a distinctive feature of the French administrative system (Thuillier 1982). At the interface between the political and the administrative level, a cabinet is the team of personal advisers of the President of the Republic, the PM and the ministers. They perform three fundamental roles, namely advice to ministers, control of the administration and defence of a minister's policy in interministerial negotiations.
4.1.2. POLICY FORMULATION

The absence of a specialised minister dealing with EC policy and the gradual abandonment of the use of the Élysée committees lead us to the conclusion that the institutional locus for policy formulation (at the political level) was constituted by the government and the President of the Republic. Issues that could not be resolved at the administrative level, ascended to the political level, where the Prime Minister or even the President of the Republic took the decisions. The specificity of the French dual Executive is based on article 5 of the Constitution of 1958 which stipulates that the President ensures the normal function of the French institutions and the continuity of the state through his arbitrage (arbitration). This provision is reinforced by his power to chair the French Council of Ministers (art. 9) which is the supreme political body and to nominate the Prime Minister (art. 8). The Prime Minister directs the government's action (art. 21) which determines and conducts the nation's policy (art. 20).

Although the function of political institutions depends heavily on the political context, in general terms, it was the President of the Republic who defined the general lines of the French policy on EC issues, while the Prime Minister was the co-ordinator of ministerial action. The orientations of EC policy were shaped in the Council of Ministers. Apart from the President and the Prime Minister, it also includes the ministres d'État (ministers of state) and the ministres (ministers), while the participation of the ministres délégués (deputy ministers) and the
secrétaires d'État (under secretaries) varies from one government to another. The President defined the agenda. Previous decisions and projects were finalised after having been prepared by other governmental institutions (Quermonne and Chagnollaud 1991, 200). The abandonment of the Élysée committees has reinforced the role of the Prime Minister without depriving the President of his power of orientation.

Despite the wide use of various types of Cabinet-level committees throughout the Fifth French Republic, the

3 While the title of minister of state is honorary and underlines the importance attached to a portfolio, a minister normally heads a ministerial department, a deputy minister exercises limitatively enumerated powers conferred upon them by a minister. Finally, an under secretary normally follows a particular aspect of a ministerial portfolio (Quermonne and Chagnollaud 1991, 212-3).

4 The Conseils permanents (permanent councils) meet regularly, they are chaired by the President of the Republic and composed of the PM, senior ministers and civil servants. The Conseils restreints (limited councils) meet irregularly and their composition varies from time to time although they always include the President of the Republic, ministers and senior civil servants. The Comités interministériels (interministerial committees) are permanent bodies established by a legal text and include both ministers and senior civil servants The Comités restreints (limited committees) include ministers and civil servants and are convened by the PM at irregular intervals in order to discuss a specific topic while Réunions interministérielles (interministerial meetings) are chaired by members of the PM's cabinet or the Secretary General of the Government and include members of ministerial cabinets and senior officials of the relevant departments (Quermonne and Chagnollaud 1991, 202-4, 220-4).
Interministerial Committee has not been convened frequently (Achard 1972, 43). If de Gaulle's strong personality explains this phenomenon during the 1960s, the same cannot be said of his successors. The reinforcement of the Council of Ministers as a collective body and the role of the Prime Minister as co-ordinator of the ministers' action are two factors that probably explain this phenomenon.

At the administrative level, the SGCI's important role has been confirmed throughout the 1960s and 1970s (Gerbet 1969, 204; 1975, 392). Being at the interface between the political and the administrative level (but belonging to the latter), the SGCI performed a set of roles. First, it became the official channel for communication between the French central administration and Brussels. Secondly, it took the decision on the French officials who would participate in the negotiations in Brussels. Thirdly, the most important aspect of its role was the co-ordination of the views of the various ministries. The SGCI became the neutral locus where these views were confronted in the quest for a coherent national position.

In this process, the SGCI benefited from its organic link to one part of the dual French Executive, namely the Prime Minister. Indeed, this link undermined the possibility of challenges to the role of the SGCI as the co-ordinator at the administrative level, by placing it away and above the interministerial tensions. It performed this role by convening meetings with senior officials from administrative units dealing with EC policy, including members of the ministerial cabinets. It was not a service that managed policy. This was done by the ministries. The
SGCI brought together officials from these ministries in order to create an interministerial position that took into consideration the need for coherence. Important persistent problems between ministries (e.g. budgetary issues) could only lead to the transfer of a dossier to higher levels of the hierarchy. Its only function was the preparation of the negotiations by distributing documents, alerting the relevant parts of the French administration and by trying to reconcile diverging positions.

4.2. THE PERIOD AFTER 1981

4.2.1. INSTITUTIONAL DEVELOPMENT

The re-establishment of the political post for European affairs is the main institutional development that characterises the development of the French framework for EC policy after 1981. In the first socialist government formed by Mauroy in May 1981 it was Chandernagor who occupied the post of deputy minister responsible for European affairs at the Ministry of external relations. His powers and institutional position (Décret n° 81-665) were characterised by three elements. He received a delegation of power to 'follow' the issues relating to the implementation of the Treaties. He had the power to chair the Interministerial Committee whenever the Prime Minister could not attend. More importantly, he took charge of the SGCI although the Quai d'Orsay became the new minister's administrative basis. Throughout the 1980s and 1990s the pattern of institutional
development at the political level was characterised by three fundamental aspects.

First, the post of a Minister for European affairs became a permanent feature of the French institutional structure that dealt with EC affairs. Indeed, this post ceased to exist only during the first six months (March-August 1986) of the first cohabitation, that is the period during which the President of the Republic and the government are supported by two different political groups. It has been restored (Décret n° 86-1029) at the request of Raimond, then Foreign Minister, who was overwhelmed by the functional pressures produced by this 'dual' portfolio. This request was backed by President Mitterrand's clear pro-European stance and his subsequent willingness to provide an institutional political profile to this portfolio.

Second, the profile of the holders of this post and their proximity to (or distance from) President Mitterrand has been reflected through their formal title and subsequently its status. Indeed, in most cases, the appointees were close friends, like Dumas (Décret n° 83-1135) and Cresson (Décret n° 88-724) or collaborators of President Mitterrand, like Guigou (Décret n° 90-980) when the government and the President were backed by the same majority. This underlined not only the importance attached to this portfolio by the latter but also his willingness to participate actively in the policy process.

Third, this portfolio included the responsibility not only for the monitoring of EC policy but more importantly, the implementation of the Treaties, despite the lack of a proper administrative basis and the shifting of the
responsibility for the SGCI back to the Prime Minister in 1984. The political importance attached to this post is clearly illustrated in Cresson's terms of reference which included the responsibility for the implementation of the single market project and the adaptation of the French economy, in collaboration with economic and social actors. The remit has remained unchanged thereafter (Décret n° 93-802; Décret n° 95-809).

The development of the administrative structures dealing with EC policy after 1980 followed (in general terms) the patterns of the 1960s and 1970s. Despite the differences concerning their status, the services dealing with international affairs within technical ministries, continued the handling of EC policy. This phenomenon has been observed (Lequesne 1987b, 281-9) both in ministries dealing with policy areas where EC activity is weak (e.g. culture and communication, and education) and ministries responsible for policy areas with intensive EC involvement such as agriculture, social affairs and environment. Lequesne (1993, 39-42) distinguished between three types of institutional development.

First, the cases of Economy and Finance (Le Vigan 1990), Budget and External Trade followed the model of the Ministry of Agriculture, where EC policy has been diffused into the specialised vertical services. Secondly, horizontal units co-ordinating the work of the vertical services of the same ministries have appeared in technical ministries, like the international affairs unit serving the ministries of Employment, Social Affairs and Health (Carnelutti 1992, 467). Thirdly, ad hoc units or posts have
been created in order to promote the EC dimension within ministries without a wide previous experience in these affairs, like the ministries of Equipment, Housing, Transport and Environment. As far as the Quai d'Orsay is concerned, the reform of November 1993 (Lequertier 1994) led to the creation of a directorate general for European and economic affairs (Décret n° 93-1210).

The expansion and the diversification of the EC's agenda affected the SGCI in the sense that the number of the specialised sections grew from ten in 1986 (Lequesne 1987a, 46) to eighteen in the mid-1990s (Doutriaux and Lequesne 1995, 104). If this expansion has been the natural result of the process of integration, the same cannot be said of the officials in charge of the SGCI. The traditional (but informal) link between the Secretary-General of the SGCI and the Presidency of the Republic or of the Government has also been temporarily interrupted between 1982 and 1985 as a result of the transfer of the political responsibility for the SGCI to the deputy minister. The previous link served a purpose that existed only in the period during which important issues had to be transferred to the top échelons of the hierarchy, before being resolved. The appointment of the 'Euro-minister' meant that the quest for a solution had to be confined to the ministerial level. Guigou's appointment as Secretary-General of the SGCI in 1985 re-established the previous link given that, at the same time, she was also technical adviser to the President of the Republic.
4.2.2. POLICY FORMULATION

The intensity of the Interministerial Committee's role continued to decline during the first part of the 1980s when the two branches of the Executive were supported by the same majority. This phenomenon can be explained by the activity of President Mitterrand and the French Prime Ministers, especially Mauroy who made the EC an important priority of his tenure (Cargai 1985, 99-101). The Prime Minister's activity is illustrated by the more frequent use of interministerial committees which met in Matignon, that is the Prime Minister's formal basis (Fournier 1987a, 224). Moreover, the number of the issues necessitating the intervention of the President increased until March 1986 (Lequesne 1987a, 50).

The period of cohabitation changed the political scene in which EC policy was formulated in a rather different way. The previous restoration of the PM's power over the SGCI facilitated his activism. The Prime Minister's cabinet intervened more systematically in order to take decisions on unresolved issues. This development was in line with Chirac's wish to see his cabinet play a more active role in EC policy formulation. The increase in the use of interministerial meetings and limited committees meeting in Matignon testify to the aforementioned change. Despite Chirac's attempts to limit President Mitterrand's influence upon the policy process, the latter managed to maintain an important role. Four factors facilitated this task. First, like his predecessors, Mitterrand headed the French delegation participating in the European Council meetings.
Second, when it came to issues falling in his remit, the President convened meetings where both the Prime Minister and the relevant ministers participated. Third, Delors (then President of the European Commission), Scheer (then French Permanent Representative in Brussels) and above all Guigou (then Secretary-General of the SGCI) constituted the network that enabled President Mitterrand to be kept informed of developments in this policy area (Cohen 1989, 492). Guigou's role was instrumental in preserving the principle of the President's participation. Her post meant that she had access to the important issues of EC policy, thereby facilitating her role as Mitterrand's technical adviser. Fourth, despite Chirac's criticism (before the election that brought him to power) of the socialist government's choice to sign the SEA and agree to the EC's second southern enlargement, when he became Prime Minister, a de facto compromise has been established with the President's fundamental stance on EC affairs.

During Rocard's tenure (1988-1991) the role of the two branches of the Executive moved closer to a more co-operative model. Despite the confirmation of i) the SGCI's link to Matignon through a circular (République Française 1988) addressed to the members of the government and ii) the Secretary-General's obligation to have recourse to the PM's arbitrage (the exceptional character of which, has again been underlined) the President's activism led to a kind of 'presidentialisation' of the process as a result of the increase in the number of issues finally resolved by the President. The re-activation of the Interministerial Committee through weekly meetings chaired by the Prime
Minister in the mid-1990s reflects the need for the co-ordination, at the political level, of the French policy in the crucial post-Maastricht era and the need to ensure the adoption (and implementation) of the measures necessary for the process of economic and monetary union. The new period of cohabitation that commenced in June 1997 seems to have provoked a mutual attempt to find a new equilibrium after some initial tensions (Robert-Diard, de Bresson and Franco 1997; Védrine 1997).

The predominant role of the SGCI remained the most important element of the process of policy formulation at the administrative level. The interministerial meetings convened by the Heads of the Secretariat's specialised sectors are the loci of confrontation of the sectoral ministerial positions. Each ministry chooses the officials who will represent the ministry's position. Normally, they are chosen from the vertical specialised units, but members of the cabinets are occasionally present. The bargaining that takes place within the ministries should lead to a single position presented in the interministerial meetings. These meetings are convened despite the fact that the ministries do not always respond to the Secretariat's initiative as a result of tensions between various directorates. Thus, it can be said that the SGCI intensifies the pressure for intraministerial co-ordination.

The chairman of the meeting, normally a Head of sector or a Deputy Secretary General, shapes the interministerial position on the basis of the participants' contributions.

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5The documents emanating from the European institutions constitute the basis of this process.
The sectoral (policy-orientated) logic of ministerial representatives is confronted with the SGCI's horizontal view. Indeed, it is the only actor capable of having a view that transcends the boundaries of ministerial competence. Thus, the establishment of linkages between the various issues is the SGCI's fundamental prerogative. Nevertheless, the Quai d'Orsay and the Ministry of Economy and Finance can be said to have a horizontal view. In the first case, the Quai d'Orsay has a

global political and legal view on various issues

as one of its officials has put it to us. Moreover, it has an

eye on the bilateral aspects of these issues.

In the second case, the Ministry of Economy and Finance deals with budgetary issues which have horizontal implications. Yet, both of these ministries defend a sectoral viewpoint as the linkages that they can establish are based on the external or budgetary implications. On the contrary, the SGCI has a view that transcends these boundaries in the sense that political, budgetary and technical/sectoral implications are taken into account in the process of elaboration of compromises. This constitutes the value added to the process by the SGCI. This objective is achieved through the secondment of officials from vertical ministries who are thus in a position to have a sectoral view although
the imperative here is the interministerial dimension as a French official has put it. Its position close to the Prime Minister enables it to escape accusations of departmental bias because it acts on behalf of the Prime Minister, as an institution which - despite the lack of technical knowledge - is respected by everybody.

This is also an indirect reflection of the French tradition of the use of the Prime Minister's services (his cabinet in particular) in the co-ordination of the wider government work. Indeed, in cases of other interministerial meetings the SGCI participates just like any other ministry thus underlining its high profile and the horizontal implications of the issues it deals with.

The formulation process is also characterised by an uneven pattern of consultation of interest groups. On the one hand, the impact of Jacobin ideology, based on the view that state is the only legitimate interpreter of the public interest (Hall 1993, 159-60), and the fragmented nature of some groups along partisan lines militate against the exercise of direct influence upon the formulation process although the extension of the fields covered by public policies led to increased need for information and advice while the proliferation of consultative bodies produced a
rather uneasy compromise between Jacobin ideals and pluralist politics

(Hall 1993, 162).

On the other hand, the latest developments in the integration process (mainly the SEA and therefore the single market and the extension of QMV) had two important repercussions.

First, Cresson sought to institutionalise the links to interest groups through the establishment of Groupes d’Étude et de Mobilisation, that is Study and Mobilisation Groups, (Lequesne 1993, 72). These specialised sectoral structures brought together civil servants, local politicians and representatives of industry who sought to formulate and propose to the government joint positions in policy areas like the environment, social affairs, telecommunications etc. They were instituted in the late 1980s and followed Cresson's decline from her ministerial and prime ministerial post in the early 1990s. Second, the increased use of QMV meant that French business groups tend to shift the focus of their efforts to Brussels. Their action is thought to be supplementing - rather than challenging - the efforts of the government (Schmidt 1996, 241) to protect the national interest.

The imperative of the creation of a single and coherent French position constitutes the main objective of circulars emanating from the top échelons of the hierarchy. They underline the need for the ministries to go through the SGCI (and the permanent representation in Brussels) in order to
communicate with the European administration. For example, Chirac noted in his circular of June 1986 (Lequesne 1992, 2:685) the need to channel 

every piece of written correspondence between the French authorities and Community institutions, in particular the Commission, through the SGCI. (Author's translation)

This is a general objective transcending the boundaries of the policies adopted by the various governments, be they overtly pro-European (like the Rocard government) or less so (like the Chirac government between 1986 and 1988). More importantly, the SGCI continued to constitute the link between the political and the administrative level. It can provoke the intervention of the Prime Minister's cabinet or even his personal intervention in cases of persistent disagreement. Yet, this instrument is still considered as the ultimate instrument. Let us turn now to the role of the French Parliament.

4.3. THE FRENCH PARLIAMENT AND EC POLICY

4.3.1. THE FRENCH PARLIAMENT AS AN IMPOTENT ACTOR: 1958-1990

Although after the establishment of the ECSC the two Houses had created two 'commissions of control and co-ordination' (Gerbet 1969, 206) in order to follow the implementation of the Treaty of Paris, the same pattern did not follow the adoption of the Treaties of Rome. As they
were deprived of true power, these commissions could only function as channels of information, but soon their role lost its significance as a result of the transition from the Fourth to the Fifth French Republic. This reflected not only the wider weakness of the French Parliament under the Fifth Republic but also the Gaullist view that EC affairs were part of foreign policy, a domain where the President of the Republic is an important institutional player. These factors militated against the establishment of an EC-related committee.

It was only in 1979 that the National Assembly and the Senate created institutional mechanisms to monitor EC policy (Loi n° 79-564). They took the form of one parliamentary delegation for each House. It was the second time that this type of parliamentary mechanism has been used for the monitoring of a particular policy area (Laporte 1981). The delegations were a rather weak type of scrutiny mechanism. They were created in order to inform the two Houses about the activities of the EC's institutions. Moreover, they depended on the government for the provision of information and documents. The government had to circulate the documents right after receiving them and in any case before their final examination by the EC's Council of Ministers. Despite the large number of documents that the delegations could examine, their role was limited to the submission of i) their conclusions to the parliamentary commission covering the relevant policy area and ii) an information report covering the activity of six months, addressed to their respective House.
These new instruments call for a number of observations. First, the delegations seemed weak, in line with the debate that took place in the two Houses (Cottereau 1982, 37). It indicated clearly that the delegations were intended to be a simple intermediary between the government and the parliamentary commissions whose right to deal with substantial questions of policy remained intact (Laporte 1981, 133). Second, their weakness was further underlined by the fact that the institutions of the EC, not the national Executive, were the focus of their attention. Third, despite the organisational and functional similarities (Cottereau 1982, 45) with the commissions (proportional representation of the political groups, right to meet whenever they wanted, same length of the mandate), significant functional differences existed. They did not have the right to modify the position of the Executive, nor could they influence the national agenda. In practice, they complemented the work of the commissions. The commissions dealing with economic issues constituted the main forum of discussion of the delegations' conclusions (Cottereau 1982, 52). Yet, even the importance of their most significant contribution to the scrutiny process, namely their conclusions, was mitigated by the fact that they remained confined to the parliamentary level. As a result of the aforementioned structural, functional and contextual weaknesses, the delegations were overtaken by events the very moment they were instituted (Cot 1982, 36).
This was the direct result of the constitutional provision (art. 43) that limits the number of commissions to six and the wider weakness that characterises the position of the Legislature, undoubtedly an 'inheritance' of the Fourth Republic. The development of the integration process during the late 1980s (SEA) triggered a parliamentary initiative that led in 1990 to the modification of the delegations' status and role.

4.3.2. POST-1990 DEVELOPMENTS: CONSTITUTIONAL CHANGE AND THE PERSISTENT PREDOMINANCE OF THE GOVERNMENT

At the functional level, the focus on the institutions of the EC remained unchanged. The same can be said of the delegations' main function as channels of information of the National Assembly and the Senate on EC affairs and the government's obligation to provide the necessary documents whose scrutiny would start before their adoption by the EC's Council of Ministers. However, a number of important modifications have been introduced. The delegations have been empowered to organise hearings of ministers and representatives of EC institutions. Yet, the ministers were not obliged to accept the invitation. Despite the absence of an obligation, the importance of this development should be underlined as it introduces the principle of a link between government ministers and the only parliamentary mechanism responsible for the examination of EC policy. The French MEPs were granted a consultative vote when invited by the delegations. The special and the permanent
parliamentary commissions could consult them on issues falling in the delegations' realm. The field of competence of the delegations has been enlarged as a result of the abolition of the clause limiting their action to the legislative domain.

Law no 90-385 (known as Loi Josselin after the MP who promoted it) which modified the parliamentary mechanisms for the scrutiny of EC policy had a number of important characteristic features. First, the balanced representation of the commissions ensured a better diffusion of information on EC affairs affecting their respective policy areas. Secondly, the right of French MEPs to participate in the proceedings of the delegations reflects i) a change towards a more co-operative attitude towards the European Parliament and ii) a method that the delegations had already started using. Thirdly, the delegations would examine a larger number of documents given that the clause which limited their action to the legislative domain has been abolished. This development is important because EC legislation transcends the boundaries between regulations (falling in the remit of the government) and laws (a prerogative of the Parliament), a distinction which is an inherent feature of French public law (Groud 1991, 1324). Despite the important changes in the institutional framework of the delegations, they remained unable to influence the government's EC policy. The changes concerned the organisational and functional aspects of the delegations but the most important problem, namely the constitutional arrangements, remained unresolved.
The debate that took place after the adoption of the Treaty on European Union revived the issue of parliamentary scrutiny of the French policy on EC affairs. Indeed, the national dimension of the so-called 'democratic deficit' constituted one of the key arguments of the anti-Maastricht camp, led by important politicians of the opposition like Séguin. This debate has been triggered by the decision of the Conseil Constitutionnel (Constitutional Council) which stipulated that the French Constitution had to be amended before the ratification of the Treaty and President Mitterrand's subsequent decision to call a referendum before the ratification of the Maastricht Treaty.

The constitutional amendment resulted in the introduction of a new title to the French Constitution specifically devoted to European integration. Art. 88-4 stipulates that

[t]he government submits to the National Assembly and the Senate, right after their submission to the Community Council, the proposals for Community acts, involving provisions of legislative nature...[R]esolutions can be passed according to the provisions of each assembly's rules of procedure (Author's translation).

The reinforcement of the Parliament's role in this process has been depicted as the price that the government had to pay for the ratification of the Treaty on European Union (Alberton 1995, 922). Did this development change the role of the French Parliament in EC affairs?
First, the introduction of this clause to the French Constitution is of great symbolic significance in the sense that it increases the role of the Parliament in this process to the top level of the hierarchy of legal norms. Second, the obligation of the government to send to the Parliament the documents that are necessary for the scrutiny now has the form of a constitutional rule. Third, the two Houses obtained the right to pass resolutions on EC policy. Fourth, the constitutional provision refers only to EC proposals involving provisions of legislative nature. This limited the scope of the process to the pre-1990 arrangements, by excluding Community proposals involving provisions relating to the regulatory domain. Finally, the new constitutional provision does not mention the delegations but refers to the National Assembly and the Senate. The implementation of the constitutional clause stipulating the participation of the Parliament in the national process of policy formulation gave rise to a number of important issues.

A circular of the Prime Minister (République Française 1993) stipulated that the Conseil d'État (State Council, the top French administrative court) and the competent ministers have to clarify the legislative or regulatory nature of a given document thus limiting the Parliament's autonomy. More important is the fact that the decision of the Conseil d'État (which is the ultimate arbiter in that case) is not subject to any review (Rullier 1994, 1712). Despite the symbolic importance of the 'constitutionalisation' of the government's obligation to consult the Parliament, the lack of a clause that would sanction the violation of this
obligation, undermines its practical significance (Verdier 1994b, 1141).

The introduction of resolutions as a means for each House to express its view on EC affairs constitutes the most important innovation. Nevertheless, the importance of this innovation is mitigated by the impact that they can have on the Executive. They cannot oblige ministers to take a specific course of action as this would constitute a violation of the constitutional rules relating to the division of power between the Legislature and the Executive. The combination of articles 20 and 52 of the French Constitution clearly creates a barrier against a type of parliamentary participation that would result in the Executive being led by the Legislature. Consequently, the resolutions should only be construed as a manifestation of the Parliament's opinion on a specific issue. This view is compatible with the jurisprudence of the Conseil Constitutionnel which has ruled in 1959 against the obligatory effect of parliamentary resolutions (Guillaume 1992, 440; Burdeau, Hamon and Troper 1993, 592).

However, the government took concrete action (République Française 1994b) in order to ensure that the innovation is not totally deprived of substance. Clear instructions have been given to the French Permanent Representative to place a 'parliamentary reserve' in COREPER in cases where a decision is about to be taken by the Council of Ministers on a document for which one of the Houses has illustrated its intention to express its opinion but has not yet completed its scrutiny. This is possible only when there is no urgency or a particular motive for the
government to proceed or when there is a gap of at least 14 days between the placement of the reserve and the meeting of the Council. The nature of these conditions testifies to the reluctance of the government to allow too much space for the use of this kind of reserves.

Once a resolution\(^6\) has been adopted, the question of the concrete repercussions that it can have on the action of the Executive is raised. Initially, the government retained the right to decide (through the SGCI and the Interministerial Committee) on the follow-up of the parliamentary resolutions (République Française 1993, point III; République Française 1994b, point IV). Later the government took four measures in order to facilitate the information of the Houses on the follow-up of the resolutions initially through their Speakers, then through the delegations, the relevant commissions and finally through the routine legislative work (Rullier 1994, 1725).

The development of the French Parliament's role in the formulation of EC policy is one of slow but steady change. It took more than twenty years for the Parliament to introduce the first mechanisms for the scrutiny of EC policy. The beginning of the 1990s has been characterised by an increase in the pace of change in the sense that in three years (1990-1992) it has been enhanced considerably. Currently, it has a set of institutional mechanisms that

\(^6\)Between 1992 and 1994 they have tended to form three categories: i) Those calling the government to oppose a particular EC legislative measure; ii) those proposing amendments or changes of emphasis and iii) those including general comments on specific policy areas (Rizutto 1995, 55).
enable it to form, express and publicise its view. Furthermore, the Balladur government has taken measures enabling the Parliament to delay an EC decision until it has completed the scrutiny of a document. These are the limits of its powers. Constitutional arrangements ensure that the government always has a large freedom of action in the conduct of EC policy. Moreover, the political context in which the latest measures have been introduced, can lead to the conclusion that changes in the political balance of power may very well result in a limitation of the Parliament's role. Last, but not least, the lack of specific provisions ensuring that the government will be sanctioned in cases of its constitutional obligation to inform the Parliament further illustrates the limits of parliamentary scrutiny.

4.4. THE FORMAL IMPLEMENTATION OF EC POLICY IN FRANCE

4.4.1. THE LEGAL FRAMEWORK

The French Constitution of 1958 provides a wide variety of instruments for the formal implementation of EC policy. This set is characterised by the existence of instruments falling either in the domain of the Legislature or the domain of the Executive. Indeed, in the first case these areas include issues relating to nationality, the definition of crimes and penalties, the electoral system, the nationalisation and the privatisation of companies (art. 34 of the French Constitution). Clearly, the issues covered by
the law only marginally affect the implementation of EC policy in France.

On the contrary, the role of the government is very extensive. Its domain covers the remaining fields of public policy. Moreover, art. 38 of the French Constitution stipulates that *ordonnances* can be adopted by the French Council of Ministers in order to enable the government to implement its programme, in fields which are normally covered by the law. However, the use of this measure has to be limited in time. The government normally exercises its regulatory powers through two types of acts: a) Autonomous regulations are adopted on the basis of article 37 of the Constitution; b) classic regulations are adopted in order to implement the provisions of an existing law (Burdeau, Hamon and Troper 1993, 617). This set of constitutional provisions covers a wide range of legal measures that can be adopted for the implementation of EC policy in France. However, one should also note the imbalance between the two branches. This imbalance is revealed a) through the examination of the fields covered by each of the aforementioned categories of measures and b) the fundamental elements of the procedure for their adoption.

So far as laws are concerned, one should note the fact that the constitutional basis of a predominant Executive can easily be found. Indeed, the fact that MPs and the Prime Minister share the right of initiative (art. 39) results from the need to ensure that the government has all the necessary powers to determine and conduct 'the policy of the Nation' (art. 20). Moreover, other constitutional provisions ensure that the government has the means to
impose its priorities on the Legislature. Indeed, article 48 of the Constitution stipulates that the bills introduced by the government have priority status in the agenda of the Houses. The right of the government to determine the priorities of the agenda of the Houses is one of the innovations introduced by the Constitution of 1958 (Camby 1994, 9).

Furthermore, although *ordonnances* are the result of a delegation of power, the procedure leading to their adoption underlines their exceptional nature: i) The government requests the Parliament's authorisation; ii) the Parliament defines the programme that the government will implement through the *ordonnance*; iii) the Parliament sets a deadline for the adoption of the *ordonnance* and the submission of the draft ratification law; iv) the *ordonnance* adopted by the Council of Ministers has to be signed by the President of the Republic. If this is a simple procedural rule, it has an important political dimension in the cases of the so-called *cohabitation* resulting from the President's right to refuse to sign the *ordonnances*.

The preceding presentation of the various measures that can be used for the formal implementation of EC policy in France calls for a number of comments. Firstly, most of these measures are adopted on the basis of procedures dominated by the powerful French Executive. This is illustrated by the fact that even in cases of issues covered by the law, the constitutional provisions regulating the

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7 Indeed, between 1986 and 1988 President Mitterrand refused to sign a number of *ordonnances* embodying the programme of privatisation promoted by Chirac's government (Burdeau, Hamon and Troper 1993, 623).

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proceedings in the two assemblies ensure that the government has the means to push the measures through until they are adopted. The same comment can be made about the ordonnances. Despite their exceptional character, the philosophy behind this instrument is characterised by the need for the government to implement its programme more rapidly. Secondly, despite the fact that the aforementioned set includes a wide range of measures, it is also characterised by the lack of an EC-specific provision, a kind of horizontal legal arrangement that would enable the government to proceed with the creation of the legal framework necessary for the formal implementation of EC policy in France. Nevertheless, the existence of a wide variety of legal instruments ensures that the government can make the appropriate choice on an ad hoc basis.

4.4.2. THE INSTITUTIONAL DIMENSION

The first question relating to the institutional dimension concerns the identity of the services responsible for the formal implementation of EC policy. The French administration is characterised by the absence of services specialising in the implementation of EC policy. This is the result of a fundamental characteristic of the French administration, namely the organisation on the basis of policy areas instead of parts of the policy process.

The responsibility for the definition of the measures which were necessary for the implementation of the decisions of the French Council of Ministers relating to the participation of France in the programme of European
economic reconstruction was one of the most important powers of the Interministerial Committee for the questions of European economic co-operation (Décret n° 48-1029, art. 2). However, this general provision did not necessarily mean that the SGCI would have the exclusive competence in this domain. On the contrary, the SGCI had to co-operate with the relevant parts of the French administrative apparatus in order to 'ensure the execution' of the Committee's decisions (Décret n° 48-1029, art. 3). This arrangement was the result of i) the need to bring in the process the expertise of the vertical services, especially in the light of the nature of this policy, and ii) the fact that initially the SGCI was weak in terms of staffing. The validity of this argument has further been underlined by the fact that the SGCI took over the same responsibility for the ECSC-related policy of France (Décret n° 52-1016, art. 6).

This development followed the expansion of the Interministerial Committee's remit which took place in order to cover i) the preparation of the decisions of the French Council of Ministers concerning the implementation of the Treaty and ii) their implementation (Décret n° 52-1016, art. 2) and has been confirmed by the French provisions relating to the Treaties of Rome (Décret n° 58-344, art. 1). This attribution of formal powers to the SGCI should not lead to the conclusion that it is the only actor in this process. On the contrary, the weak wording used in the aforementioned provisions illustrates an attempt to establish a horizontal role for the SGCI without limiting the number of other actors involved in this process. This significant, albeit timid, extension of the role of the SGCI had no
repercussions upon the political level. On the contrary, the SGCI never played an active role in the process of formal implementation until 1986 thus leading Sauron (1995, 56) to note that France had no centralised body that could follow this process.

The consistent lack of a Minister for European affairs until 1980 confirms this view. However, even after 1980 this view remained valid as a result of the division of labour within the government. Indeed, this minister had to 'follow' the issues relating to this field, or to 'assist' the Minister of Foreign affairs without having any specific reference to this stage of the policy process. Even the case of Cresson was exceptional for a number of reasons: i) The emphasis on the 'completion of the internal market through the implementation of the Single Act' (Décret no 88-724, art. 1) was the result of the need for a wider remit given her status as a minister. ii) It was also exceptional in the sense that this division of labour lasted only for two years.

The next question concerns the nature of the process whereby EC policy is implemented in France. Increasing awareness that the Single European Act would provide new impetus to the process of integration leading to the creation of the single market has been illustrated by Chirac's circular of May 1986 (Lequesne 1992, 2:681) relating to the formal implementation of EC policy. The procedure was characterised by the rather static focus on formal implementation. After the adoption of the directive, the SGCI would send to the SGG (Secrétariat Général du Gouvernement, that is the Secretariat General of the
Government) a file containing the text of the directive, a note relating to the process of its adoption, its objective, an indication of the deadline for the formal implementation, an indication of the lead ministry responsible for this policy area, a list of other ministries and their relevant officials with an interest in this European legislative instrument. Moreover, the SGCI would also designate one of its officials as a contact point. The Secretary-General of the government would request from the lead ministry a detailed plan (including a specific timetable) concerning the procedure for the adoption of the relevant measures. A copy of this plan had to be sent to the SGCI and to the Prime Minister's cabinet. Finally, the responsibility for the implementation of this plan (and timetable) rest with the SGG. The latter element is of great importance given the SGG's position at the heart of the French government. Indeed, this position enabled it to have direct recourse to the Prime Minister or his cabinet in case of interministerial tensions. The effectiveness of the procedure outlined in Chirac's circular has been mitigated by the lack of staff in SGG which would keep up with the deadlines for the formal implementation by putting pressure on the relevant ministries (Lequesne 1993, 128) despite an 'alert procedure' which enabled the SGCI to be informed by the European Commission - through the use of a telex - of any problems relating to the process of formal implementation (Carnelutti 1988, 17).

Nevertheless, the fact that the need for proper implementation of EC policy in France was also a major preoccupation of the Rocard government reflects not only his
personal pro-European beliefs but also the importance of the post-SEA stage of the wider integration process. This was illustrated by his circular of 22 September 1988 whereby he placed special emphasis on the nature of the Community of law as an integral part of the state of law and the constitutional dimension of the obligation to respect it. Moreover, the SGCI has gradually developed a role in the process of formal implementation after 1987 by demonstrating to other parts of the French central administration that they should develop closer and more co-operative links with the European Commission (Lequesne 1993, 128).

The Maastricht Treaty provided the new impetus for further refinement of the process of formal implementation. A circular of March 1994 (République Française 1994a) emphasised the quality of the legal texts necessary for the formal implementation of EC policy and more importantly, it stressed (indirectly) the importance of the link between the process of negotiation and that of implementation. In the light of this fact, the circular stipulated that a study of the legal impact should be prepared by the lead ministry in view of the European negotiation. This study includes an opinion on the principle of the text (from a legal viewpoint and that of subsidiarity), a table comprising the proposed European provisions and the national legal texts that have to be amended or abolished, a list of issues posing a problem from the point of view of national law and a note of comparative law prepared by the lead ministry (if necessary). This study has to be sent to the SGCI within a month after the lead ministry has received the draft EC act. In turn, the SGCI sends copies to the relevant parts of the
administration and the Conseil d'État and has the right to call a meeting. A fiche de suivi juridique (legal follow-up document) is created (and constantly kept up-dated) by the lead ministry and distributed to the SGCI, and the Conseil d'État\(^8\) thus enabling the administration to have a precise and clear picture of the process. Furthermore, one official of the SGCI keeps up-dated a data-base including all EC directives that have been adopted and the stage of formal implementation that they have reached. This data-base includes specific data concerning the exact administrative units that deal with each directive thus facilitating contacts with them in cases of problems.

Consequently, the role of the SGCI in the process of formal implementation is more subtle compared to its extensive presence in the formulation stage. Like its British counterpart, it is more active in cases of conflict during this process. In these cases it is the mechanism that may trigger the intervention of the PM or even the President through an interministerial meeting, thus maintaining what Lequesne described (1993, 132) as a procedure of political review. Indeed, a French official highlighted the fact that

the political solution is always available

\(^8\)The Conseil d'État is consulted in order to determine the regulatory or the legislative nature of the national implementing text. Thus it defines the route that has to be followed (through the government or the French Parliament).
within the French system. Another French official underlined the fact that

the ministerial cabinets frequently provide a political impetus, even at the request of the administration.

Otherwise, the SGCI performs the role of a source of pressure put on the technical ministries in order to facilitate the smooth development of the process. This is achieved mainly through the establishment of the aforementioned calendars for the formal implementation of EC policy and also the pressure placed on the sectoral actors to think of implementation and its problems during the formulation process. This has led Lequesne (1993, 132) to argue that it is the capacity of the ministries to implement and the ability of interest groups to resist that should explain problems of formal implementation in France, rather than the lack of a co-ordinator.

One should certainly add the fact that at the intra-ministerial level the units which formulate the national French position and then negotiate in Brussels are also responsible for the formal implementation of EC policy. This is considered within the central administration as a major positive aspect of the system because in the eyes of a French civil servant

it leads to the integration of reality to the final decision.
This view is echoed by the complex and technical nature of many legislative measures relating to the single market project highlighted by French officials. The role of the SGCI re-emerges in cases of conflict between ministries during the process of formal implementation. Moreover, it is active in the réunions-paquets (supra, Chapter 2) where problems of the wider implementation process are discussed by French and Commission officials.

Despite the centralised nature of the process9, that in turn ensures better monitoring, other parts of the administration are also active participants. This is especially true (Lequesne 1993, 91-6) in the case of DAJ (Direction des Affaires Juridiques, that is the Directorate for Legal Affairs). Its sub-directorate for international economic law and EC law and the legal sector of the SGCI are the two actors that have a horizontal competence for legal issues. Despite its modest staffing (in terms of size) DAJ performs two fundamental functions: i) It acts as a think tank for issues requiring legal expertise especially when it comes to interpreting EC law. This is a source of tensions resulting from the different approach (Lequesne 1993, 92) of the relevant actors. Indeed, while DAJ quite naturally places emphasis on legal aspects, economic or other sectoral interests are highlighted by the technical ministries. ii) DAJ monopolises the right to represent France in the ECJ. Furthermore, the intensity of the role of DAJ has also led to the establishment of its image as a promoter of the ECJ's

9Pressure groups usually do not have the opportunity to contribute to this stage of the policy process as the administration considers this as one of its own prerogatives.
jurisprudence within the French machinery of government (Lequesne 1993, 95).

4.4.3. THE FRENCH IMPLEMENTATION PROFILE

Figure 4.1 illustrates the broad characteristics of the French implementation profile. Despite the fact that the nature of the problems that led to the formal letters and the referrals to the ECJ cannot be depicted through this set of data, there is a number of comments that one can make on this basis.

Figure 4.1: Number of letters and referrals of cases to the ECJ under art. 169 procedures regarding France, 1978-96
Source: Commission of the European Communities 1986b, 32; 1991a, 91; 1997a, 145.

The first comment that can be made concerns the rather unstable pattern of the number of letters sent to France on the basis of art. 169. Only parts of this pattern can be linked to the previous analysis. Indeed, although the
constant increase in the number of letters between 1978 and 1985 explains the pre-occupations that led to Chirac's circular, the number of letters has fallen only marginally between 1986 and 1988. A significant increase followed Rocard's similar attempts of 1988. The new increase which appeared in 1992 is more likely to be the result of the increased post-SEA legislative output relating to the single market. In general, this pattern is rather inconclusive.

Secondly, the pattern of the number of cases that reached the ECJ only marginally reflects the number of letters. Indeed, the increase of 1994 reflects the increase in the number of letters sent in 1990 and the deadlines for the formal implementation of measures relating to the single market project. Nevertheless, one must underline the steady fall of the number of cases that reached the ECJ between 1988 and 1992, a period which is characterised by the substantial reinforcement of the role of the SGCI in the process of formal implementation, the use of the réunions-paquets and 'alert procedures' under the impetus of Rocard's government. This means that the role of the aforementioned mechanisms is more visible in the second rather than the first pattern. This, in turn, points in the direction of a re-active role which means that they are geared towards a function of problem-solving rather than the detection of such problems.

In more general terms, the problematic areas during the first half of the 1980s included the internal market and industrial affairs, the free movement of persons and services, the operation of the customs union and financial institutions (Commission of the European Communities 1985,
24-6). The same areas remained problematic during the second half of the 1980s while problems have occurred in employment, social affairs, agriculture and the environment (Commission of the European Communities 1991a, 130-3). So far as the first half of the 1990s is concerned, problems have appeared in consumer protection and the internal market, while problems in agriculture and the environment have persisted (Commission des Communautés européennes 1996, 114-8). Problems relating to the non-implementation of judgments of the ECJ during the same period concerned the free provision of services and the environment (Commission of the European Communities 1993a, 412-3). In short, problems have existed in policy areas where the EC is heavily involved, mainly through regulatory policies.

Finally, the attitude of the French courts towards the EC law has been quite problematic until the beginning of the 1990s. The jurisprudence of the Conseil d'État has created the greatest number and more significant problems in this field. Indeed, based on a strict interpretation of the traditional division of legislative, executive and judicial powers, the top administrative court of the country has systematically refused to acknowledge the supremacy of EC law over domestic legislation, until 1989 (Plötner 1995, 6-7). However, it changed this view radically through its judgment in the Nicolo case (regarding the annulment of the 1989 European election) where it acknowledged that it had the right to examine the conformity of laws with international treaties (and more importantly, assert their incompatibility) although it based this new view on art. 55 of the French Constitution (Galmot 1990, 10) which entails a
clause of reciprocity, instead of the specificity and the originality of the EC's legal order\textsuperscript{10}.

The same court has also been rather reluctant to use the mechanism of preliminary rulings of art. 177, by using excessively the so-called theory of acte clair (clear act) which effectively prevents the ECJ from interpreting EC law in a uniform manner (Vandersanden 1992, 3:299) by largely reserving for the domestic court the right to interpret the provisions of EC law (Coussirat-Coustère 1988, 87-8). Similar - although not quite as extensive and rigorous - were the reservations (Plötner 1995, 2-5) used by the Cour de Cassation (Supreme Court of Appeal) and the Conseil Constitutionnel.

The preceding analysis illustrates the importance of the SGCI as a strong co-ordinating mechanism, especially in the light of the multitude of actors that participate in the formulation process. We shall now turn to the case of Greece.

\textsuperscript{10}This is the legal reasoning promoted by the ECJ (supra, Chapter 2). However, some points of tension with the jurisprudence of the ECJ, mainly in the field of direct effect of directives, still persist (Stirn 1993, 244).
Chapter 5

GREECE

5.1. FROM ASSOCIATION TO ACCESSION

5.1.1. INSTITUTIONAL DEVELOPMENT

The process of institutional development and some basic characteristics of the formulation process have been developed during the 1960s and the 1970s. This was the result of the fact that art. 72 of the association agreement specifically referred to the principle of the Greek accession as soon as the country's economy was able to fulfil the obligations resulting from full membership thus leading Skandamis (1981, 19) to conclude that this was an 'agreement of postponed accession'.

The law passed in 1962 for the ratification of the association agreement (Law 4226/1962) also served as the legal basis of the framework of the national policy formulation process vis-à-vis the EC. The Minister of Coordination\(^1\) had the general competence for the relations

\(^1\)This ministry has been created in 1910 as Ministry of Agriculture, Trade and Industry (Athanassopoulos 1986, 206). After World War II this post and the relevant ministry have been re-created in 1945 (Obligatory Law 718/1945) in order to co-ordinate the reconstruction of the Greek economy. It became a permanent feature of the Greek government and it took the third position in the hierarchy of the ministries. It has been re-named as 'Ministry of National Economy' in 1982.
with the EC. More specifically, this general competence had two dimensions. He was responsible for defining the orientations of this policy, the adaptation of the Greek economy to the new context and the co-ordination of the relevant measures taken by other ministries. He was also responsible for the conduct of the negotiations which were to take place with the European institutions and the representations of the member states. However, the principle of the Foreign Secretary's involvement has also been introduced albeit in an unclear manner based on the distinction between 'technical' and 'political' affairs.

The period that followed the restoration of the democratic regime and the positive response to the Greek application for full membership has been characterised by two basic trends. First, although the new operational framework laid down by Law 445/1976 went along the lines of Law 4226/1962 given that political responsibility for EC policy remained a prerogative of the Minister of Co-ordination, three significant limitations were established. The Prime Minister had the power not only to give personal instructions as to the conduct of the negotiations but he could personally represent Greece. The Foreign Secretary obtained the power to participate in the negotiation process and the same applied to technical ministers for issues falling in their remit. Secondly, a Minister without portfolio responsible for the relations with the EC

2By virtue of art. 83 § 1 of the Greek Constitution Ministers without portfolio are members of the Ministerial Council, the supreme collective governmental body. Their powers are defined by the Prime Minister.
(Presidential Decree 1141/1977) has been appointed. Although this was thought to be the first step towards the creation of a post of a Minister for European Affairs (Anastopoulos 1986, 638) this has not materialised. Politically, this event marked the first breach of the principle according to which EC policy was going to be considered as a part of domestic policy. His remit was very wide given that he was responsible for the whole range of the relations between Greece and the EC (Decision of the Prime Minister n° 565).

At the administrative level, institutional changes had two basic dimensions. On the one hand, new administrative units have been created within the various branches of the central administration in order to handle the new form of policy. On the other hand, new interministerial administrative bodies have also been instituted as a response to the multidimensional nature of the new policy. In the first case, the pattern of change was based on the intensity of the involvement in EC affairs. Thus, the ministries of Co-ordination, Foreign affairs and Agriculture rapidly created new specialised units to deal with EC policy. Although the relations between Greece and the newly established European Communities dated from 1959, it was only in 1962 that the Permanent Representation to the EC has been established in Brussels. It was a part of the administrative machinery of the Ministry of Co-ordination and comprised eleven staff. The Permanent Representative came either from the ranks of the Greek diplomatic corps or was a specialist of European economic affairs.
5.1.2. POLICY FORMULATION

The multifaceted nature of EC policy underlined the need for some kind of interministerial co-ordination at the political level. During the 1960s and 1970s, the lack of a specific forum of discussion between ministers dealing with EC policy leads to the conclusion that tensions between ministers could be resolved either at the level of the Ministerial Council or by the Prime Minister. At the level of administrative interministerial bodies, the so-called European Co-operation Committee has been instituted within the framework of the Ministry of Co-ordination. This committee comprised a) senior officials from the ministries of Co-ordination, Foreign affairs, Economy, Trade, Agriculture, Industry and Labour and b) up to four renowned experts in the committee's field of competence. This element reflected a chronic deficiency of the Greek administration. Moreover, other national officials who were normally based outside or in other parts of the central administration could be invited on an ad hoc basis in order to facilitate the committee's work.

The Ministry of Co-ordination played a pivotal role given that the other 'EC units' had to consult it during the various stages of the policy formulation process. Their role included a) the collection of data on specific issues of their competence and the submission of proposals relating to the negotiations, b) the conduct of the negotiations and

3In an attempt to resolve this problem, specialised training programmes for civil servants have been created. Similar programmes were established for judges.
c) the modifications of the Greek legal and institutional framework necessary for the adaptation of the Greek administration and economy to the EC régime.

Furthermore, Law 445/1976 stipulated that a Consultative Committee on the Relations with the EC would be instituted in the Ministry of Co-ordination along with other specialised consultative committees which were instituted in order to facilitate the formulation of the Greek negotiating positions. Nevertheless, the appointment of a senior official of the Ministry of Foreign affairs as Chairman of the Central Negotiating Committee in 1977 underlined the greater involvement of this ministry in the policy process. Moreover, this has been interpreted as an informal reallocation of the political aspects of the negotiations to the Ministry of Foreign affairs (Passas and Makridimitris 1994, 39). This was a prelude of the formal shift of power towards this ministry after the Greek accession.

5.2. POST-1980 ARRANGEMENTS

5.2.1. INSTITUTIONAL DEVELOPMENT

The changes to the structure of the institutional framework brought about by Law 1104/1980 were threefold. On the one hand, the distinction between the internal co-ordination and the external representation has been introduced. On the other hand, the role of the Minister and the Ministry of Foreign affairs has been further reinforced. Finally, the distinction between political and technical issues has been institutionalised and became a criterion
which determined the role of various actors in the policy process.

The Minister of Foreign affairs took over the responsibility for EC affairs. He was responsible for the definition of policy orientations on institutional issues, the implementation and amendment of Treaty provisions and the relations with the member states. The pattern of institutional development at the political level had three basic dimensions. First, the need for a Minister for European affairs has been understood and accepted by the newly formed socialist government after the election of October 1981 although PASOK was initially opposed to the principle of Greek accession. The formal status of this minister (under secretary or deputy minister) fluctuated on the basis of the personalities involved and their political clout within the ruling party irrespective of i) which party that was and ii) whether they were hostile to (PASOK 1981-4) or in favour of the principle of Greek membership (PASOK after 1985, New Democracy)\(^4\). The same pattern has been followed in the Ministry of National Economy which has the responsibility for the management of EC funds.

Secondly, the powers of these ministers remained unchanged throughout the 1980s and 1990s and included not only the traditional parliamentary dimension, but also the \textit{de facto} power to co-ordinate the participants in the policy

\(^4\)Examples of Deputy Ministers include Pangalos (Decision of the Prime Minister \(^0\) Y. 57) and Christodoulou (Decision of the Prime Minister \(^0\) DGP/Q-493) while Varfis (Joint Decision of the Prime Minister and the Minister of Foreign Affairs \(^0\) 010/464) and Papastamkos (Presidential Decree 478/1990) are examples of Under Secretaries.
formulation process, the formal power to represent Greece in EC bodies thus assisting or substituting the Minister of Foreign affairs. More importantly, they had the responsibility for the fulfilment of the obligations deriving from EC membership. Thirdly, the Economic Committee⁵ has been replaced by the Governmental Council (Law 1266/1982) as the only collective political body specifically dealing with EC policy.

The pattern of institutional development at the administrative level was fourfold. First, new specialised bodies have been established in order to deal with specific parts of the policy process or specific significant aspects of European integration. The establishment of the Special EC Legal Service (ENYEK) in 1986 (Law 1640/1986) was the result of the need to deal with the increasing number of cases against Greece brought before the ECJ while the establishment of the Council of Economic Experts (SOE) in 1987 (Law 1682/1987) reflected the need for specialist advice on EC-related economic issues and the representation of Greece to the EC's Monetary Committee. Secondly, the expansion of the EC's agenda led to the establishment of EC units in other parts of the administration like the ministries of Industry, Energy and Technology (Presidential Decree 381/1989), Health, Welfare and Social Security (Presidential Decree 138/1992), Finance (Presidential Decree 284/1988) and Transport and Communications (Presidential Decree 198/1988). This development went hand in hand with the diffusion of the responsibility for EC affairs to the

⁵It comprised ministers mainly dealing with economic portfolios (Law 400/1976).
specialised/technical units and directorates within the various ministries.

Thirdly, the transfer of power for issues relating to the Permanent Representation in Brussels from the Ministry of Co-ordination to the Ministry of Foreign affairs was the natural consequence of the changes brought about at the political level. More importantly, two thirds of its personnel are seconded from technical ministries. This has been interpreted as the result of the tendency of those ministries to create their own links to Brussels, thus bypassing the official route of information through the Ministry of Foreign affairs (Stephanou 1992, 16). Nevertheless, it would be difficult to see any other effective alternative. Fourthly, the use of party political criteria for the selection of senior officials, which was part of a phenomenon widely characterising the Greek administrative system (Makridimitris 1992, 45) affected the ability of the administration to develop its own expertise given that the changes at the political level after the elections resulted in changes in the senior staff that dealt with this policy. Furthermore, the initial recruitment of a new group of officials (Law 992/1979) who had solid knowledge of EC affairs and whose expertise was way above the average of Greek officials has not been matched by arrangements needed as a result of the development of EC policy. Currently (Minakaki 1992, 49) the situation is characterised by i) the existence of a large number of highly qualified officials in the ministries of Foreign
affairs and National Economy and ii) the relative lack of specialised staff in other ministries.

5.2.2. POLICY FORMULATION

The abolition of the Economic Committee meant that the function of co-ordination could be exercised at three different levels (Passas and Makridimitris 1994, 66): i) The level of the Prime Minister who by virtue of art. 10 § 1 of Law 1558/1985 is responsible for resolving the disputes between ministers, ii) in the Ministerial Council (art. 82 § 1 of the Greek Constitution) or iii) at the level of the Governmental Council. Only in exceptional cases did this body deal with EC-related issues of the sphere of high politics like the preparation of European Council meetings.

Nevertheless, the constitutional dimension of policy formulation at the top political échelon is of great importance. According to article 82 § 1 of the Greek Constitution, the Government defines and orientates the general policy of the country. The various committees and councils that meet under the government reflect a long-

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6The accumulation of large specialised staff in the two most 'EC-intensive' ministries has been attributed to the centralised nature of the process of policy formulation (Stephanou 1992, 14). This does not reflect the fragmented process that we have discovered through the interviews.

7By virtue of art. 81 § 1 of the Greek Constitution, it is composed of the Ministerial Council constituted by the Prime Minister and the Ministers. Law 1558/1985 has added the Deputy Ministers and the Ministers without portfolio to the members of the Ministerial Council.
standing practice which started in the late 1920s. The existence of a large number of ministers, the different degrees of political proximity between some ministers and the Prime Minister, the complexity of issues, the fact that the participation of some ministers in the Ministerial Council would result in significant loss of time given their lack of knowledge on the issues that are under discussion are the factors that explain the existence of three types of committees and councils (Loverdos 1991, 211). i) Some of them handle and clarify (on a permanent basis) important policy choices of the government in large policy areas (foreign affairs, economic policy etc.), ii) others deal with specific issues while iii) ad hoc institutions deal with specific questions and cease to exist after the end of their deliberations. The flexible and rapid way in which those governmental structures can then take decisions does not resolve the issue of the status of those decisions in terms the Greek Constitution. This issue results from the fact that in the Greek constitutional framework the function of government is exercised by the Ministerial Council which is a single, indivisible and collective instrument of the state (Loverdos 1991, 210).

Under the aforementioned circumstances, the devolution of power from the supreme collective governmental body (Ministerial Council) to committees or councils constitutes a violation of the Constitution. This devolution of power is compatible with the Constitution only when the committees prepare the Ministerial Council's decisions or when they clarify them. The use of those committees as decision-making instruments which have not necessarily been asked to
clarify or prepare the decisions of the government has constituted the basis of the government's operation in the post-dictatorial era. The fact that the governmental programme (presented to the Parliament before the vote of confidence) has been used as a substitute of the decisions which are supposed to be clarified by the committees (Athanassopoulos 1986, 92) testifies to the failure of the government to function within the constitutional limits. This is also illustrated by the fact that (at least) between 1982 and 1989 KYSYM (a sort of inner Cabinet) was the body that met regularly, contrary to the Ministerial Council which met only occasionally (Tsatsos 1993, 265). The informal creation of the so-called Governmental Committee\(^8\) (Makridimitris 1992, 128) by the conservative government in April 1990 served the same objective (co-ordination) but it is doubtful whether this objective has been achieved (Passas and Makridimitris 1994, 67).

The fact that decision-making in those committees, under the aforementioned circumstances is frequently unconstitutional, is important for a number of reasons: i) The continuous use of this practice attaches a debatable element to a process which should lead to the clarification of policy positions. ii) As a result of that, the validity of those decisions seems to depend largely on the political will of the government either to function along the lines of the Constitution or not. iii) Thereby it also reflects the

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\(^8\)It was chaired by the Prime Minister and composed of the ministers of the Presidency of the Government, Foreign affairs, National Economy, Finance, Defence, Internal affairs and Education.
uncertainty which characterises the nature of the decision-making process at the top political level.

The lack of an ad hoc collective body which would deal regularly with the differences between ministers and the formulation of a coherent policy leads to the reinforcement of the role of the Prime Minister as ultimate arbiter within the government. This is also the result of the general development of his role in the post-dictatorial era (Loverdos 1991, 252; Makridimitris 1992, 21). Nevertheless, in circumstances where the participation of the Prime Minister in the policy process is less visible, one is led to the conclusion that either the ministers act on a unilateral basis regardless of the need for co-ordination or the Prime Minister's Political Office resolves the problem. However, this permanent pattern may have just entered a process of change as a result of two recent developments.

First, the new socialist government headed by Simitis has established a number of collective political bodies whose main or secondary role is the co-ordination of EC policy. The main collective body in EC policy is the Committee for the Co-ordination of Government Policy in the Relations with the EU (Act of the Ministerial Council no 288 of 23 December 1996) which is chaired either by the Minister of Foreign affairs or his Deputy and normally includes as full members the Ministers of National Economy, Finance, Development, Agriculture, Employment and Social Security, Merchant Shipping, Transport and Communications. It is responsible for the co-ordination of the Greek policy in the field of European integration. Moreover, the Committee for the Organisation and the Co-ordination of International
Economic Relations also deals with EC affairs to the extent that it is responsible for the fulfilment of the country's international economic obligations. More important though is the second pattern established by the substantive re-activation of the Ministerial Council where many important decisions are now taken collectively. Yet, long practice will be needed in order to establish the extent to which this newly emerging trend has survived or not and, more importantly, its impact upon the policy process.

As far as external representation is concerned, the Minister of Foreign affairs has the general competence for the representation of Greece within the EC. However, the general character of this clause has been mitigated by two factors. First, it is up to the Prime Minister to decide when to take over and secondly, the relevant technical minister represents Greece in the specialised sessions of the Council of Ministers. In the latter case, the relevant minister has to act in conjunction with the Minister of Foreign affairs who thereby has a horizontal competence.

At the administrative level, the Ministry of Co-ordination has a horizontal co-ordinating role for the formulation of policy on the economic aspects of EC policy. Moreover, this ministry is responsible for the adaptation of the Greek economy and administration to the Community regime. The EC units perform a twofold role in the process of policy formulation (Passas and Makridimitris 1994, 48). In the internal domain they co-ordinate the technical units dealing with various aspects of EC policy but they also inform them on new developments in this policy area (distribution of documents etc.). In the external domain
they communicate with the Permanent Representation in Brussels, the EC units of other ministries and they also represent the ministries in negotiations both at the national and the European level. Greek officials have underlined the tendency of some EC units to prefer the contacts with their opposite numbers in other ministries because we speak the same language.

as one official has put it. Formally the decision-making process takes the following route: specialised unit - EC unit - Ministry of Foreign affairs - Permanent Representation - EC and backwards (Minakaki 1992, 47). Nevertheless, this two-way communication is undermined by the tendency of the specialised units to work autonomously, in a manner which counterbalances the confinement of a debate over an issue between the EC units, while it reinforces the forces of fragmentation. Although in some cases this tendency is counterbalanced by circulars issued by the ministers, they are implemented only for a short period following their publication.

The fact that the Ministry of Foreign affairs occasionally circulates similar documents illustrates i) the tendency of the ministries to act in an autonomous manner and ii) the de facto role of the Ministry of Foreign affairs as an internal co-ordinator. In many cases this role constitutes the basis for accusations of active expansionism within the central administration.
which emanate from officials of other ministries.

Although Law 1104/1980 stipulated that interministerial committees composed of national officials would be instituted in the various ministries, including the Ministry of Co-ordination/National Economy in order to co-ordinate the administrative actors involved in the process of policy formulation, this system has been abandoned in practice since the early years of the Greek participation in the EC. Furthermore, the Consultative Committee on the Relations with the EC has been abolished and substituted by the Committee on Community Affairs. Senior officials from the ministries of Co-ordination, Justice, Foreign affairs, Trade, Finance, Agriculture, Industry and Energy were permanent members while officials from other ministries could also participate when the agenda included issues of their remit. Over the years, this committee has ceased to exist without being replaced by another collective body.

The function of co-ordination is exercised in a piecemeal manner through irregular ad hoc meetings or through personal contacts (Passas and Makridimitris 1994, 74). Thus,

co-ordination at the administrative level relies on the quality of personal contacts between the ever-mobile officials in a manner that ends up being uncontrolled, opportunistic and above all personified (Passas 1993, 251).
Indeed, a major factor behind this phenomenon is the fact that after each meeting at EC level, the diffusion of information to other ministries relies on the patriotism of the official who attended the meeting as a Greek official has put it. This produces the problem of lack of coherence in the positions presented by the various administrative actors in the EC. This problem becomes worse as a result of the tendency of the actors to act autonomously in a manner that is underpinned by their own ministry's priorities or wider functional logics defined on the basis of a specific stage of the policy process. The frequent absence of Greek representatives from the various committees convened by the Council or the Commission is another symptom. Furthermore, officials of the Ministry of Foreign affairs underlined the fact that Greek negotiators frequently consent to the adoption of a policy proposal not because they agree with its content but because

An illustration of this phenomenon is the insertion of long transitional periods to EC legislation in a manner that is not a part of a wider concrete idea regarding their subsequent effective use.

Minakaki (1992, 48) attributes this phenomenon to 'financial and other reasons' but as Passas and Makridimitris rightly note (1994, 61-2) the EC covers the cost of the trip to and from Brussels. Nevertheless, the Ministry of Finance which receives those refunds does not always pass them on to the relevant ministries with the exception of the Ministry of National Economy since the beginning of the 1990s.
the use of a negative vote is taken into account when it is backed by an argument. Consequently, we tend to consent either because of a lack of a specific argument or because otherwise we would constantly use the same argument.

The extent to which the administration also consults interested parts of the target groups also differs from one ministry to another and is widely linked to the personal views of senior officials. In general, the trend is to protect equally a given administrative domain not only from other parts of the administration, but from excessive 'pressure' from interested parties as well. While some officials try to ensure that groups are kept informed of developments in some policy areas, others just read the documents that they submit as a Greek official has put it. Nevertheless, it is also clear, that when it comes to major issues, these parties have easier access to the political rather than the administrative level. The latter tends to be overwhelmed by the number of small organisations claiming to represent industry, thus either practically excluding them from the policy process, or leading them to the political level.

5.3. THE GREEK PARLIAMENT IN EC POLICY FORMULATION

Art. 3 of Law 945/1979 by which the Greek Parliament has ratified the Treaty of Accession stipulated that before
the end of each parliamentary session the government would submit to the Parliament a report concerning the development of EC affairs. This report has not been submitted until well after the Greek accession. This event was just one illustration of the Greek Parliament's inability to influence the process of policy formulation.

However, the role of the Parliament during the period that preceded the accession was that of a forum for debate on the principle of Greek membership (Frangakis 1986, 85-93) instead of the institutional mechanism that would give to the Parliament the possibility to exert influence upon the government's policy by articulating its own views. This debate took place within a political and constitutional framework which was characterised by a dominant ruling party and the weak role of the Parliament in the field of foreign policy (Venizelos 1986, 49).

During the first half of the 1980s, the Parliament has been informed in very few occasions about EC affairs. The lack of a specific intra-parliamentary institution that would deal with this policy area was the main factor that explains this phenomenon. However, on various occasions, the government presented to the Parliament elements of its EC policy. In 1984 Prime Minister Papandreou announced to the Parliament the reasons which led him to the decision to use the veto in the Dublin summit of the same year while discussing the next Mediterranean enlargement of the EC. Moreover, while the socialist government remained rather reserved vis-à-vis the process of integration, the Parliament constituted the forum where its pro-European
members begun substituting the previous anti-EC image with a more positive attitude.

The strong socialist majority constituted another factor which led (until the end of the 1980s) the Parliament to constitute the forum where EC policy has occasionally been clarified or presented rather than formulated. The wider political context has also contributed to the same effect. Indeed, the submission in May 1989 of a general report on the development of the participation of Greece in the EC did not provide the basis for a more active involvement of the Parliament in EC policy formulation as a result of the elections that took place in the same month (Ioakimidis 1991, 15).

Nevertheless, a new active Speaker (Tsaldaris) who was supported by the newly established conservative majority changed partially this situation. The Parliament's internal rules of procedure provided the legal basis for the creation of the EC Affairs Committee (Decision no 3076/2008 of the Speaker). Article 49 § 1 stipulated that the Speaker can create international relations committees provided for by international treaties or committees necessary for the co-operation between the national and the European Parliament.

11It should be noted that in the Greek constitutional system, there have been cases in the past where the Parliament had created institutions in order to monitor the formulation and the implementation of foreign policy. The international relations committee stipulated by art. 35 of the 1927 Greek Constitution where former Prime Ministers were ex officio members thereby underlining its high profile is an example of this practice (Venizelos 1986, 51).
the Parliaments of other states or international organisations.

Initially the committee had twenty-five members: Chaired by one of the Deputy Speakers of the Parliament, it also comprised twelve national MPs and twelve Greek MEPs. While the chairman of the committee is designated by the Speaker, the vice chairmen (one MP and one MEP) and the secretary are elected by the committee. The distribution of seats between the political parties is based on the number of their parliamentary seats, consequently, the ruling party always has a majority in the committee. Although the number of the members has been augmented to twenty-nine in 1992 (Decision no 5197/4001 of the Speaker) and thirty-one in November 1993 (Decision no 6412/4665 of the Speaker), the criterion remained unchanged thereby giving a clear majority to the ruling party.

The internal rules of procedure of the Parliament have also been modified, so now art. 32A constitutes the legal basis of the special permanent European Community Affairs Committee. From the institutional viewpoint, the change in the title of the committee is not insignificant. Normally, permanent committees (Tsatsos 1993, 214) deal with specific policy areas, scrutinise legislative proposals or projects relating to their field of competence and have thirty-seven to fifty members. In other words, unlike the international relations committees, they are permanent integral parts of the parliamentary machinery. Consequently, this change meant the reinforcement of the role of the committee at the intra-parliamentary level. As far as the terms of reference are concerned, initially the committee dealt with
institutional issues, questions relating to the European Parliament, EC policy issues, texts emanating from EC institutions which must be submitted to the Parliament for ratification and EC-related decisions of other permanent and special parliamentary committees. After the amendment of the Parliament's internal rules of procedure, the committee's remit has been extended.

Although the terms of reference remain quite vague, it can monitor the process of convergence between Greece and the EC and the development of the process of integration in general. While the government keeps the committee informed about the projects relating to EC policy, the proposals put forward in the Council of Ministers and the actions of the Greek public authorities, the committee also deals with issues brought to its attention by its chairman, MPs, MEPs or other parliamentary committees. Consequently, the remit of the committee is quite wide and so is (theoretically) its margin of manoeuvre in the policy process. However, the crucial point concerns the relations between the committee and the government.

The committee works in a rather decentralised manner. A rapporteur plays the leading role and the committee can call for ministers (whose presence is, then, obligatory), MPs, officials. According to art. 32A § 3 of the internal rules of parliamentary procedure ministers can also be invited before and after the meetings of the Council of Ministers. Decisions need the assent of the absolute majority of the present members. The committee's report (which also includes the opinion of the minority) is then submitted to the Parliament. Depending on its content, it
is either sent to the relevant permanent committee or to the plenary session.

The report has no binding effect upon the government. Although the right of the plenary session to discuss and deliberate on political issues and pass resolutions has not been foreseen by the internal rules of parliamentary procedure, this can be based on the following elements (Giannis 1991): i) The constitutional right of the Parliament to monitor the action of the government, ii) the fact that if the plenary session did not have this right, then the committee would practically lose a substantial part of its powers, thereby contradicting its own existence, iii) the right of the Parliament to contribute in more substantial ways to the political process which leads to the conclusion that it can also express its opinion and iv) the lack of an explicit clause forbidding such resolutions. In practice, although the committee has a wide remit, the impact that it can have on the policy formulation process is rather limited. Its membership and the nature of its decisions do not enable it to exert influence on ministers during the policy formulation process.

Indeed, the participation of MEPs constitutes both an advantage and a disadvantage for the committee. On the one hand, their experience and knowledge of EC institutions and policies constitute a precious source of information for the committee. On the other hand, precisely because they are primarily members of a body which is not part of the Greek polity they could not control the actions of the Greek ministers. Even when the Parliament used classic methods of
parliamentary scrutiny\textsuperscript{12} the result has been limited thereby not permitting the Parliament\textsuperscript{13} to play a substantial role in the policy formulation process (Vassilouni 1990, 7). Finally, the committee's orientation towards more general issues, such as the Conference of the Parliaments of the EC and the Conference of the Specialised EC Affairs Committees (Giannis 1993, 8) rather than the day-to-day negotiation between the member states, testifies to its inability to influence EC policy.

5.4. THE FORMAL IMPLEMENTATION EC POLICY IN GREECE

5.4.1. THE LEGAL FRAMEWORK

The Greek Constitution of 1975 as amended in 1986 incorporates a set of provisions that constitute the basis of the legal framework for the formal implementation of EC

\textsuperscript{12}Both the Greek Constitution and the internal rules of parliamentary procedure provide a wide range of means that enable the Parliament to control the action of the government. Those methods include reports, the submission of documents, various types of questions, the creation of \textit{ad hoc} committees and the Prime Minister's question time (Tsatsos 1993, 218-21). It should also be mentioned that one of each year's four extraordinary debates concerns the Greek policy on EC affairs.

\textsuperscript{13}The case of the ratification of the Single European Act through the use of art. 36 § 2 of the Greek Constitution - according to which the President of the Republic needs the assent of the Parliament in order to ratify some international agreements - without this assent testifies to the Parliament's inability to play a substantial role in the policy process (Passas 1988b, 111). 

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policy in Greece. Indeed, apart from the normal legislative procedure which is based on articles 73-77 of the Constitution, articles 43, 44 and 78 have served as the general constitutional framework for this purpose. The general provision of article 43 enables the Executive to take a wide range of measures in this process. These measures take three forms. On the one hand, article 43 §1 stipulates that the President of the Republic has the power to adopt decrees for the implementation of laws. The use of this provision for the adoption of legal acts necessary for the formal implementation of EC policy depends on the existence of a clear legal basis in a previously existing law (Louis 1978, 297). On the other hand, the provision of art. 43 §2 empowers the President to adopt regulatory decrees on the basis of a proposal submitted by the relevant minister. These decrees have to be based on - and are limited by - a special delegation of legislative power. Furthermore, they can be adopted by other administrative institutions, but in that case they can only regulate particular issues, issues of local interest, or technical issues.

The provision of article 43 §4 has constituted in practice the main legal basis for the adoption of measures of secondary legislation facilitating the formal implementation of EC policy in Greece. Indeed, according to this provision the Parliament meeting in plenary session may adopt laws delegating power to the President of the Republic to adopt regulatory decrees for the regulation of issues specified by the laws in a general framework. These laws determine the general principles and the orientation of the
regulation and the time-limit for the use of the delegation of power.

The President of the Republic also has the power, by virtue of art. 44 § 1, to adopt legislative acts on a proposal of the Ministerial Council, in cases of exceptional urgency and unforeseen necessity. These acts must be submitted to the Parliament for ratification (by virtue of article 72 § 1) within forty days from their adoption or forty days from the convocation of the Parliament. They become invalid if they are not submitted to the Parliament within the aforementioned periods or if they are not ratified by the Parliament within three months after their submission. Finally, article 78 § 5 stipulates that anti-dumping or compensatory measures can be adopted in the framework of the relations of Greece with international economic organisations on the basis of framework-laws, or measures aiming at ensuring the country's position from the point of view of the balance of trade.

The need for the creation of a secondary legislative framework for the formal implementation of EC policy in Greece has been felt immediately after the conclusion of the association agreement. Indeed, the role of the Minister of Co-ordination as stipulated by Law 4226/1962 seemed to cover the stage of formal implementation. This is the result of the general clause by virtue of which this minister was responsible for the adoption of measures aiming at the 'adaptation of the Greek economy'. The horizontal role of the Ministry of Co-ordination also included the supervision of the relevant measures taken by other ministries.
Law 445/1976 confirmed the pivotal role of the Minister of Co-ordination through the introduction of a clearer clause stipulating that he was responsible for the adoption of the measures necessary for the implementation of the agreements with the EC and the 'adaptation' of the Greek administration (and economy) to the Community regime. Moreover, this ministry retained the power to supervise the implementation of the relevant measures adopted by other ministries. The role of the specialised services responsible for the relations with the EC has been reinforced through the attribution of the power to submit proposals for the adaptation of the legal and institutional framework and the implementation of the Treaty of Accession.

Law 945/1979 passed for the ratification of the Treaty of Accession specified the form of the legal instruments that would be used for the formal implementation of i) the acquis communautaire and ii) future EC policies. Indeed, presidential decrees were going to be adopted before the end of 1981 (first year of Greek membership) in order to bring the Greek legislation in line with EC law and also for the formal implementation of transitional provisions of the Treaty of Accession, on the basis of the general principles and the spirit of EC law (supra, Chapter 2). Law 992/1979 empowered interministerial committees to prepare the legislative measures for the formal implementation of the acquis communautaire.

The need to provide a horizontal legal basis for the formal implementation of EC policy led to the adoption of Law 1338/1983. This was necessary because of the failure of the Greek administration to complete within the prescribed
period the process initiated by Law 945/1979 and Law 992/1979. The duration of the delegation of legislative power has been extended until the end of 1983. However, this provision contained two exceptions. First, EC legislation which has been adopted before but entered into force after the accession of Greece had to be implemented formally before the end of 1985. Secondly, the same deadline applied to transitional provisions included in the Treaty of Accession (Law 1338/1983, article 4 § 2). Moreover, it extended the field covered by the previous provision by specifically referring to secondary EC legislation (Law 1338/1983, article 1 § 1) instead of simply providing for the formal implementation of Treaty provisions. Furthermore, it also provided the basis for the adoption of additional measures, like the creation of new institutions and the definition of administrative procedures and sanctions, necessary for the wider implementation process.

The development of the legislative framework for the implementation of EC policy after 1983 has been characterised by the extension of the deadline set for the use of this delegation of legislative power. Indeed, a number of laws passed in the 1980s and 1990s have subsequently extended the deadline until the end of 1987 (Law 1440/1984, art. 6), 1992 (Law 1775/1988, art. 7), 1995 (Law 2076/1992, art. 31) and 2000 (Law 2367/1995, art. 19). Moreover, the scope of the delegation of legislative power has been extended in 1990 (Law 1880/1990, art. 2).

The nature of the legal instruments used for the creation of the legislative framework for the formal
implementation of EC policy in Greece presents a number of important characteristics. First, it includes a wide variety of instruments covering extensive delegations of legislative power, others that are limited in time or purpose, framework-laws but also rules occupying the top position in the internal legal hierarchy (constitutional rules). Secondly, the extensive use of delegations of legislative power entails important political implications. Indeed, the use of this technique underlines the marginalisation of the Greek Parliament in the formal implementation of EC policy. The Parliament has the possibility to participate formally in this process only during the preparation of the laws that embody the delegations of legislative power.

5.4.2. THE INSTITUTIONAL DIMENSION

The establishment of the legislative framework for the formal implementation of EC policy in Greece has been affected by the wider process of institutional development of the country's politico-administrative machinery. The institutional dimension of the framework reflected two fundamental objectives, namely specificity and pragmatism. Firstly, the solutions had to be able to accommodate the particular characteristics of EC policy. Secondly, these solutions had to be compatible with the more general characteristics of Greek administration and in particular, the solutions adopted for the formulation of EC policy at the national level. The combination of these elements led to a number of specific outcomes.
The horizontal role of the Ministry of Co-ordination has initially been enhanced by the creation of the European Co-operation Committee. Its interministerial membership and the link to the Ministry of Co-ordination reflected both i) the specificity of the new policy area and ii) the subsequent need for inputs from various ministries. Moreover, pragmatism has been mirrored by the link to the co-ordinating ministry and the direct supervision of the Minister of Co-ordination. Nevertheless, the input of the European Co-operation Committee in this process was limited to the submission of opinions and suggestions.

The attribution of power to the specialised EC units to formulate proposals for the formal implementation of EC policy resulted from an attempt to concentrate the handling of a significant part of EC affairs to these units. Yet, the limitation of this role to the mere submission of proposals constitutes an attempt to avoid total exclusion of other administrative actors from this process. Indeed, this attempt stems from the wider process of institutional development which was based on the need to combine arrangements reflecting the specific nature of EC policy and the widest possible diffusion of EC material within the administration.

Furthermore, the establishment of interministerial committees for the adaptation of Greek legislation shortly after the Greek accession illustrated the increasing awareness of the nature of the issue. The same conclusion can be drawn from the fact that Law 992/1979 (articles 23-32) included detailed provisions relating to the organisation of the administration for the handling of the
Common Agricultural Policy. The Service for the Management of the Agricultural Product Markets took over the responsibility to implement CAP in Greece. Moreover, it was the only responsible service vis-à-vis the institutions of the EC thus accumulating a wide range of powers.

The formal establishment of ENYEK at the Ministry of Foreign Affairs in 1986 ended the period of its informal operation within the Greek structure dealing with EC policy. Initially, it was responsible for the legal issues deriving from the wider implementation of EC law, or issues that are linked to the representation in courts of the member states, or other judicial or administrative authorities responsible for EC law, a set of responsibilities which made it the only ad hoc service dealing with the implementation of EC policy in Greece. The EC-specific nature of this service was also illustrated by the qualifications of its staff. Lawyers specialising in EC law with good knowledge of French and English were recruited.

ENYEK's profile was significantly reduced in 1991 as a result of the conservative government's decision to attribute to the NSK the power to represent Greece in the ECJ and the courts of the member states (Law 1947/1991). This decision reflected a pre-electoral promise of Prime Minister Mitsotakis rather than the result of a functional pre-occupation. Indeed, ENYEK at the time had been seen as too close to Pangalos, a leading member of the opposition and former Deputy Minister responsible for European affairs, who had established it formally five years earlier (Passas and Makridimitris 1994, fn. 88). Yet, in 1994 the socialist government not only restored ENYEK's powers, but also
created a wider and more explicit legal basis (Law 2197/1994).

ENYEK is now responsible for a) issues emanating from the wider implementation of EC policy in Greece, b) the submission of opinions on the interpretation and implementation of EC law, c) the handling of issues and disputes emanating from the relations between Greece and EC institutions, d) the representation of Greece in the courts of the member states, e) assistance to the Permanent Representation on legal issues and f) the participation in working groups of the Council of Ministers and the Commission dealing with legal issues. More important though is the restoration of ENYEK's power to represent Greece in the ECJ. The plenipotentiary of the Greek government is appointed by the Minister of Foreign affairs or the Deputy Minister on an ad hoc basis. However, ENYEK and the NSK share the responsibility for the handling of issues relating to art. 177 of the Treaty of Rome. The reinforcement of ENYEK's role resulted in the recruitment of fourteen additional scientific staff.

The institutional dimension of the framework for the formal implementation of EC policy is also characterised by a set of important elements. First, the horizontal role of the Ministry of Co-ordination was compatible with the basic organisational philosophy of the post-1976 laws. The importance of its role emanates from the need to create a veritable power centre that would enable the administration to implement formally EC policy. The framework is characterised by the need to combine the role of the EC units with the role of the vertical units within the Greek
administrative apparatus. This element, in turn, reflects the imperative of the combination of pragmatism and specificity.

Secondly, the specific nature of EC policy had to be integrated in a wider system characterised by centralisation and the existence of sectoral units. Consequently, the need for a strong co-ordinating mechanism was evident. This need resulted in i) the creation of the aforementioned interministerial committees based in the Ministry of Co-ordination which would prepare the relevant legal texts and ii) the attribution to the Minister of Co-ordination of the power to sign the legal texts necessary for the formal implementation of EC policy. The fact that the relevant political post had a high political profile\(^{14}\) further reinforced the status of this mechanism. This could have important political implications in cases of interministerial tensions, in the light of the lack of active collective bodies, especially in the initial stages of EC membership.

However, the establishment of this framework should not lead to the conclusion that it was going to function in a rigid manner. The use of general terms such as 'adaptation of Greek economy and administration' and 'adaptation to the Community regime' illustrate that the government was aware of the need for flexibility. This is further underlined by the vague references to the role of the EC units in the formal implementation of EC policy. This vagueness reflects

\(^{14}\)Law 400/1976 stipulated that the Ministry of Co-ordination occupied the top position in the ministerial hierarchy. Law 1558/1985 placed the Ministry of National Economy in the fifth position.
the belief that the system would eventually be led de facto to a modus operandi. This belief in the system's capacity to adjust itself to the new policy environment also resulted from a vague idea about the practical implications of EC membership. Despite the existence of multiple access points interest groups do not necessarily have significant influence. They are certainly not treated in a coherent manner (Passas 1993, 251).

Thirdly, inspite of the relative vagueness that characterised the provisions relating to the institutional dimension of the framework, one should note the specificity of the provisions relating to the Ministry of Agriculture and ENYΕΚ. A number of factors explain the specificity and the detailed nature of these provisions. The fact that CAP is the most integrated policy of the EC based on a set of detailed provisions rendered the creation of a detailed framework for the formal implementation of EC policy not only easier but necessary as well. The importance of this policy for Greece further promoted the establishment of a specific framework. Finally, the institutionalisation of ENYΕΚ in 1986 results from the end of the transitional period stipulated by the Treaty of Accession and the growing awareness that the end of this period would lead to an increase in the number of cases brought to the ECJ against Greece.

Moreover, ENYΕΚ's institutionalisation was symmetrical to the specificity of the relevant provisions of the Treaty (articles 169 and 170) and the resulting need for an easily identifiable national mechanism that would represent Greece in cases brought before the courts (European and national).
Furthermore, the same development can be interpreted as a result of the gradual shift towards a more pro-European attitude of the socialist government. Indeed, the link between these arrangements and the political context is further enhanced by the decision of the conservative government to transfer ENYEK's powers to the NSK. This development is compatible with the growing role of the Ministry of Foreign affairs, the awkward division of labour between this ministry and the Ministry of Coordination/National Economy established by Law 1104/1980 which is characterised by the distinction between the internal and the external sphere of competence and the subsequent interpretation of ENYEK's role as a part of the external dimension of EC policy-making.

Much more important though is the fourth element, namely the fact that total confusion reigns within the Greek central administration over the distribution of power for the formal implementation of EC policy. Indeed, the rapid abandonment of the interministerial committees right after the accession in the beginning of the 1980s has not led to the establishment of a clear alternative mechanism. On the contrary, much seems to be left at the initiative of EC units or their technical counterparts. Another solution consists of the preparation of the relevant legal text either by the ministerial units of legal affairs or, more alarmingly, by the advisers of the ministers (Passas 1993, 251). This pattern is extremely ineffective in the long term because these individuals leave the ministry in every ministerial re-shuffle frequently taking the relevant dossiers with them. Moreover, this practice is ineffective
in the short term as well because these individuals have not necessarily participated in the formulation process or the negotiations at EC-level. This means that functional logics are established and re-produced in a way which leads participants to the confinement to a single stage of the policy process without placing it into a wider context.

The aforementioned functional gap means that formal implementation takes a rather passive form which largely depends on the efficacy of two learned officials of the Ministry of National Economy. Yet, significant problems persist because their calls for timely adoption of the legal measures in conjunction with the relevant ministries are ignored while the same applies to their recourse to the ministers whose circulars are equally ineffective. The extensive use of informal means like telephone calls does not enhance the authority of the messages. However, this is the only way one could have direct access to the relevant officials in other ministries.

Officials in these ministries complain for the lack of specialised (legal) staff but even if this is a valid problem it does not explain the fact that very often the same ministries fail to notify to the European Commission (To Vima 1995c) the measures that they have adopted in the process of formal implementation. The operation of this anarchical framework clearly reflects the lack of a co-ordinator at this stage of the European policy process which could first detect problems and then provide the impetus for their resolution. Moreover, the already unclear lines of authority are further blurred by chronic problems like the mobility of ministerial advisers who are not members of the
administrative hierarchy, a factor that undermines the ability of the administration to learn by developing its proper memory. Furthermore, the use of the political players at the ministerial level for effective fixing largely depends on the civil servants involved in the process as a Greek official has put it.

This has two direct implications. First, it frequently leads to violations of the deadlines for the formal implementation of EC policy which is an item of major importance in the agenda of the réunions-paquets. Secondly, it leads to the de facto adoption of the copy-out technique because of the lack of time for the preparation of accurate legal texts. The lack of time is by no means an excuse for this phenomenon, but results from an endemic use of longer transitional periods that Greek negotiators manage to get agreement for in the European negotiations. Typically, the administration then seems to forget these EC policies, instead of using the extended transitional periods for their effective implementation, until either the aforementioned officials of the Ministry of National Economy, one of whom also represents Greece in the EC's group of national coordinators for the single market project, or an official of the Permanent Representation flags out the deadline. The

Draft presidential decrees are submitted to the administrative section of the State Council (Passas and Stephanou 1997, 259) which checks their compatibility with EC law. This is a time-consuming process but does not affect the ability to keep up with the deadlines.
lack of a high profile co-ordinator at this stage means that far too much depends on the unpredictable sensitivities of individuals.

Moreover, one has to underline the symmetry that exists between the extent of participation of the Parliament and the Executive in the stages of formulation and formal implementation. The Parliament-Executive tandem is characterised by the inability of the Parliament to influence substantially the nature and the operation of the framework. Moreover, the Executive has a wide margin of manoeuvre resulting from the fact that the framework is based on the delegation of legislative power from the Parliament, that takes various forms, the main one being specific (in terms of the subject that it covers) and quite extensive (in terms of time). In the case of the technical and EC units, symmetry is linked to the ambiguity resulting from a set of provisions whose objective was to set guidelines for the division of labour within the ministries. These guidelines were meant to be flexible in order to enable the administration to find its own *modus operandi* within the new policy environment.

The attitude of the politico-administrative structures towards pressure groups in the process of formal implementation is a mixture of hostility and provision of opportunities. The administration does not provide any clear opportunities for the participation of pressure groups in this stage. These groups occasionally have access to ministerial advisers who in some cases prepare the draft legislative instruments necessary for the formal
implementation of policy. This mixture produces an uneven and unpredictable pattern.

Finally, the fundamental organisation of the Greek administration has not been challenged by EC membership. Consequently, there are no administrations de mission dealing with the implementation of EC policy in Greece, ENYEK being an exception whose importance should not be over-estimated given that its role is limited to the judicial element of policy implementation.

5.4.3. THE GREEK IMPLEMENTATION PROFILE

Figure 5.1 illustrates the broad lines of the Greek implementation profile although it is impossible to have a clear picture of the problems that led to the use of art. 169 procedures against Greece.

![Graph showing number of letters and referrals of cases to the ECJ under art. 169 procedures regarding Greece, 1981-96](graph.png)

Figure 5.1: Number of letters and referrals of cases to the ECJ under art. 169 procedures regarding Greece, 1981-96

Source: Commission of the European Communities 1986b, 32; 1991a, 91; 1997a, 145.
A number of comments can be made on the basis of this set of data. Firstly, there is an overall increase in the number of issues raised by the European Commission through formal letters under art. 169. The pattern of this increase presents high points in 1986, 1990, 1993 and 1995. The first points can be attributed to the end of various transitional periods stipulated by the Treaty of Accession, most of which ended in 1985. The second point is linked to the political instability of 1989 and 1990 and the successive general elections which temporarily prevented the establishment of a routine pattern of governmental activity.

Although the number of letters has fallen dramatically in 1991, an event that may be attributed to the activism of the new conservative government, it was clearly not a part of a wider pattern, because increases appeared again in 1993 and 1995. They are more likely to be linked to the post-SEA increased legislative output relating to the single market, rather than a set of specific domestic political events. Secondly, the major increases of 1986 and 1990 are clearly reflected by the increased number of cases that reached the ECJ in 1988 and 1994 respectively. Nevertheless, one must also note the fact that if one leaves these increases aside, the pattern of the number of cases that reach the ECJ is rather stable.

What are then the major areas of conflict, that is the policy areas where implementation problems have occurred in Greece? Most of these areas concern economic issues most notable of which are trade and agriculture (Tsinisizelis 1996, 224-8) but one could also add the environment (Commission of the European Communities 1991a, 278).
However, one must also note particular areas like the restrictive regulation of the right to buy land close to the borders, which is a political choice dictated by the country's specific existing security pre-occupations. The conflict between the right of EC citizens to buy land in these areas and the restrictive domestic legislation has been resolved through the relaxation of the latter. Furthermore, a look at the ECJ's judgments that have not been implemented (Commission of the European Communities 1993a, 411; Commission des Communautés européennes 1996, 401-3) illustrates that problems exist in the free movement of services, the mutual recognition of diplomas and the environment.

Finally, so far as the attitude of the Greek courts is concerned, they are widely thought to have accepted and used the concepts of supremacy and direct effect (Kerameus and Kremlis 1988; Frangakis 1994). The same comment applies to the use of the procedures of art. 177 (preliminary references) despite some initial ambivalence which is a typical characteristic of new member states.

After having discussed the ways in which the British, French and Greek politico-administrative structures deal with the formulation and the formal implementation of EC policy, we shall now look at the theoretical insights that one can draw in relation to the wider implementation process.
Chapter 6

COMPARATIVE FINDINGS AND POTENTIAL INSIGHTS

6.1. THE UTILITY OF COMPARISONS IN PERSPECTIVE

Our analysis so far has dealt with a number of issues. The nature of the EC as an implementation structure has been explored in a manner that has highlighted i) the extensive role of the member states in the implementation process, ii) the extent and iii) the intensity of the regulation of this role through iv) the action of supranational institutions. Nevertheless, this dissertation is about the extent to which national governments can change their implementation profile.

Indeed, in Chapter 1 we have identified a number of reasons why the comparative method is a useful way to analyse this, because after all, the wider objective underpinning this dissertation is the identification of lessons that one can draw from this analysis in relation to the process of integration in Europe. Bearing in mind the conceptual link between formulation and implementation processes, we have examined in Chapters 3, 4 and 5 a number of characteristics of the institutional structures that deal with EC policy in the UK, France and Greece. The first objective in Chapter 6 is to bring them together in order to outline the similarities and differences in a manner that will identify the extent to which national politico-administrative structures that deal with EC policy are fragmented or integrated. The second objective is to draw
insights regarding the implementation process that we shall then test on the basis of a case study. The use of the comparative method implies the need for a set of criteria which will form the basis of the comparison.

6.2. THE CRITERIA FOR THE COMPARISON

The choice of the criteria upon which this comparison must be based will have to be determined by the focus of this dissertation on the conceptual link between formulation and implementation that we have identified in Chapter 1. Indeed, given that we have construed implementation as the forging of links in a causal chain that commences with formulation, here we must try to identify the nature of various types of fragmentation and their impact upon the European policy process. The criteria that we have chosen reflect this research priority. The six criteria adopted here concern fragmentation along three functional lines, namely i) the relations between governments and parliaments, ii) the division of labour within national governments (the role of Ministers for European affairs, the distinction between the political and the administrative level, coordination at the administrative level and the intra-ministerial division of labour) and iii) the relations between national governments and pressure groups.

The first criterion concerns the division of labour between national governments and national parliaments. Although the emphasis of this dissertation is on what the national governments can do in order to ameliorate their implementation profile, they have to operate in national
polities which are marked by the presence of parliamentary bodies with some legislative powers. To what extent can national parliaments then influence the national processes of formulation and formal implementation?

Secondly, national governments, are not monolithic bodies. Various degrees of functional differentiation exist at this level. To what extent has EC policy constituted the basis for a separate ministerial post within the governments and what is the nature of its powers? Three solutions can be envisaged. EC policy can be managed at the political level as a part of i) domestic policy, ii) foreign policy or iii) as a specific policy area. The answer to this question is important because it determines, up to a certain extent, the form of the national institutional development.

Thirdly, the functional differentiation on the basis of policy areas which marks every West European government creates the need for co-ordination. What is the answer of the British, French and Greek governments to this problem in relation to EC policy, especially in relation to the distinction between the political and the administrative levels?

Fourthly, the conceptual link between policy formulation and implementation leads to the identification of another criterion. Have national governments created horizontal mechanisms that reflect this conceptual link between these two stages of the policy process? In particular, does the division of labour within the national administrations embody this conceptual link or not?

Following the same chain of thought regarding the multi-faceted nature of national governments leads us to a
fifth criterion, namely the division of labour within national ministries. Given that ministries are not monolithic actors, the question of the division of labour and intra-ministerial co-ordination is also posed at this level. The salience of this issue is based on the very nature of EC policy which transcends the boundaries between the various ministries and between the specialised units within each ministry. The example of the most integrated policy, namely CAP is very illustrative. Although it is handled as a single policy area at EC level, it comprises a set of dimensions (finance, external trade, production) which at the national level are dealt with by various units. What are the national approaches to this issue?

Finally, national politico-administrative structures in West European liberal systems have contacts with pressure groups which represent sectoral interests. What is the nature of their role in the national processes of policy formulation and formal implementation? In the following two sections we shall firstly identify the similarities (Section 6.3) and then we shall discuss the differences (Section 6.4) between the three politico-administrative structures.

6.3. EC POLICY AT THE NATIONAL LEVEL: CONCEPTUALISING NATIONAL SIMILARITIES

6.3.1. THE LIMITED ROLE OF NATIONAL PARLIAMENTS IN FORMULATION AND FORMAL IMPLEMENTATION

Do parliaments matter in the formulation process? The answer to this question must be negative. Following
Norton’s typology (1984, 1990) we will endeavour to classify the national parliaments in one of the following three categories: i) Policy-making; ii) policy influencing and iii) parliaments without any such powers. The classification of the British, French and Greek Parliaments in one of these categories will be based on a set of two criteria: i) The selection of the documents that come under scrutiny and ii) the quality of the parliamentary intervention.

So far as the choice of the documents that come under scrutiny is concerned, the House of Commons and the Greek Parliament constitute the two extremes of the continuum while the House of Lords and the French Parliament occupy the intermediate position. The method employed in the House of Commons derives from the politically contentious nature of EC policy and the British membership. Given that the initial sift leads to the exclusion of some documents from the subsequent phases of the scrutiny process, the choice is of high political importance. This is further underlined by the fact that the Select Committee’s main role is to single out the documents of political or legal importance. Consequently, one is led to the conclusion that the sift is a part of the philosophy underpinning its very existence and functional orientation. It is not surprising that, as a result of this fact, the committee en bloc undertakes this task thus distinguishing it from its counterparts. The Select Committee in the House of Commons thus finds itself in a position where an increasing number of documents have to be scrutinised. The enormous strain put on the committee is further enhanced by the vagueness of the criteria
(political and legal importance) upon which it has to base its work.

On the contrary, the double sift of documents in the House of Lords enables the Committee to focus on a smaller number of issues which are then analysed in more depth. This produces one of the committee's most important features, namely the scrutiny of policy trends rather than specific pieces of draft legislation. The case of the two French assemblies is similar to the House of Lords. The similarity consists in the fact that the sift is not a political issue per se inspite of being the main prerogative of the delegations. The method employed in the Greek Parliament for the sift of documents clearly illustrates that this is not a political issue. This reflects the consensus on EC membership and the fundamentally different philosophy of the committee, the provision of more information on EC affairs being the reason behind its creation.

The need to obtain the EC documents as soon as they emanate from the institutions of the EC has been felt by all three parliaments right from the beginning of the process of institutional development. Three factors have contributed to this fact. First, the unpredictable pace of decision-making at EC level led to the conclusion that the timely reception of the documents would help maximise the opportunities for a substantial contribution to the national process of policy formulation. Secondly, national parliaments were aware of the fact that the national dimension of the European policy process is also one of multiple interactions between numerous actors.
Consequently, early information was necessary for a prompt reaction to developments taking place at the national level. Thirdly, the pace of EC decision-making has been further accelerated after the entry into force of the Single European Act which has significantly broadened the field of application of QMV. This development further underlined the need for early information and prompt reaction by the national parliaments which felt the limitation of their margin for action resulting from the limitation of the policy areas where unanimity would be required.1

This development was mirrored by the institutional development at the parliamentary level. Westminster and the Greek Parliament again constitute the two extremes of the continuum while the French Parliament occupies the intermediate position. If the use of a parliamentary reserve appears to constitute the most important constraint2, it is more helpful for the government than for the Commons. The time of the change in the government's attitude is crucial for the understanding of this argument. The relevant Resolution adopted in 1980, that is the beginning of the Thatcherite era, was consistent with her criticism of the EC and could also be used as an argument in the EC negotiation process. Moreover, the British government maintained a significant margin for action by stating that ministers can overcome this constraint when

1Practically this meant that even if the national parliaments had the power to shape national policy, the governments could easily be outvoted in the Council of Ministers.

2Norton (1995b, 107) rightly points to the fact that this 'constraint' is envied by some other national parliaments.
'special reasons' render it necessary. The political terms in which these reasons were defined and more importantly, the fact that the ministers assess the need for this kind of action further enhance the validity of this argument.

In the case of the French Parliament, one should not over-estimate the importance of the 'constitutionalisation' of the scrutiny process. The same comment applies to the government's undertaking to place a parliamentary reserve whenever the scrutiny of a document has not been completed before it comes to the EC's Council of Ministers. Three factors back this view. On the one hand, this undertaking is based on a circular which is not legally binding for the government. On the other hand, this undertaking has been mitigated by two conditions based on the EC decision-making process which escapes the exclusive control of the French government. The final and most important factor of all is the constitutional constraint imposed on the Parliament. The creation of a framework in which the government's action would be significantly limited by the Parliament would clearly contradict the wider political logic of the French Constitution of 1958 which clearly favours the Executive. Finally, despite having recognised the need for prompt information, the absence of 'alert procedures' from the Greek Parliament is the mere result of the relevant committee's different orientation. The preceding analysis leads us to the conclusion that the British and French Parliaments can be classified as policy influencing while the Greek Parliament is unable to influence substantially the EC policy of the Greek government.
Westminster is clearly the most powerful of the parliaments examined here. The power derives from a number of political and constitutional factors. The contentious nature of EC policy (and more fundamentally EC membership) is the political factor which constitutes the power basis of Westminster in this policy area. Furthermore, this factor is inextricably linked to the constitutional principle of parliamentary sovereignty. The current institutional arrangements for the scrutiny of this policy reflect both factors in the sense that the government is formally obliged to withhold agreement at EC level until the end of the scrutiny process. In the opposite case, the relevant minister must explain his action to the Parliament. Consequently, the pressure emanating from Westminster is of a negative character. This constitutes the reason why this system is classified in the second (policy influencing) rather than the first category (policy-making parliament). Westminster does not have the power to oblige the government to adopt specific policies but it can exert influence by placing an issue on the public agenda. Paradoxically, this system is more helpful for the government which can use it in order to enhance its negotiating position. Nevertheless, the validity of this argument is limited by the extension of the scope for QMV in the Council of Ministers.

The importance of the political element also accounts for the classification of the French Parliament as a policy influencing legislature. However, here the salience of the political factor derives from the informal nature of the

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3The current robust majority of the Labour party will test the systemic impact of the mechanism operating in the House of Commons.
arrangements. Indeed, it was a part of the coalition of the Centre-Right which was in power between March 1993 and May 1997 that led to the adoption of this system\textsuperscript{4}. The constitutional element has acted here as a constraint both for the Parliament and the government given that it privileges the latter over the former. Thus the French Parliament is limited to placing items on the public agenda mainly through influential individuals like Séguin. Finally, both political and constitutional constraints account for the Greek Parliament's weakness in the national process of policy formulation. They result from a constitution dominated by the Executive and a political scene where the main actors agree on the issue of European integration and the participation of Greece therein thus removing any party political element. Consequently, although differences exist, the common element is the inability of national parliaments to make policy, hence the need to focus our attention to national governments. Let us now turn to formal implementation.

The legislative dimension of the pattern of formal implementation is identical in these three member states and is characterised by the predominance of the governments in a way which largely excludes the national parliaments. Indeed, in all three countries the typical characteristic of this stage of implementation is the extensive use of delegations of legislative power to the national governments and the rather rare recourse to legislative instruments

\textsuperscript{4}Long parliamentary practice will be needed in order to draw a conclusion relating to the use of the same procedures under the current majority of the Left.
which require the active participation of the national parliaments.

This empirical finding has a significant implication for the study of the implementation process in the EC. Indeed, it places firmly the focus of the researcher on the role of national Executives as the main participants in the stage of formal implementation. In other words, this finding means that explanations of failure (or even success) in implementation are unlikely to be based on the role of national parliaments precisely because the latter have delegated a large part of their power to the national governments thus facilitating the adoption of the relevant measures.

6.3.2. THE ROLE OF THE MINISTERS FOR EUROPEAN AFFAIRS

On the one hand, the three countries have created a post of Minister for European affairs. In none of the three cases, is this post of a senior political rank. In more

5 A word of caution is necessary here. The preceding argument does not constitute a pledge for the total elimination of national parliaments from the factors that explain success and failure in this pressure. It is about the substantial limitation of these explanations only to the cases where a parliament must extend or renew the delegation or where it must be involved in the process of formal implementation because of constitutional constraints.

6 The fact that during the 1980s some French Ministers for European affairs occupied a senior ministerial post was the result of their close personal relations to President Mitterrand, rather than a typical characteristic of the post (supra, Chapter 4).
general terms, the creation of this post results from the typical need for functional specialisation which is a permanent feature of modern governments. This is especially true for the Ministers of Foreign affairs, who are their immediate political supervisors.

The creation of this post does not imply that EC policy is considered as an autonomous policy area. This is illustrated not only through the lack of a corresponding administrative basis but also through the close supervision exercised by the Ministers of Foreign affairs and their inability to influence the processes of formulation and formal implementation. Another factor that influences the status of the Ministers of European affairs is the salience of this policy area for domestic politics. The UK can be singled out as EC policy is a highly contentious issue in this member state. However, that leads to the reinforcement of the role of the Foreign Secretary, rather than the Minister for European affairs at the FCO.

6.3.3. THE DIVISION OF LABOUR BETWEEN THE POLITICAL AND THE ADMINISTRATIVE LEVEL WITHIN NATIONAL GOVERNMENTS

The division of labour between these levels of analysis is of crucial importance for the co-ordination of policy. Its importance derives from the fact that both machineries can be 'short-circuited' in cases where the division of labour is unclear but also whenever excessive burden is placed on one of the two levels. In all three cases the division of labour appears to be clearly delineated between the political and the administrative level. This division
is based on two fundamental criteria: i) The criterion of the political importance and ii) that of the contentious nature of a given issue. Despite the fact that the two criteria seem to be very closely related there is one element that facilitates the distinction between them. While resolving political issues requires the participation of politicians as the only actors who have the legitimacy to take the relevant decision, contentious issues can be dealt with at the administrative level with or without the contribution of co-ordinating mechanisms like the priorities attached to industrial policy or the environment, or even the style of regulation of a market sector (e.g. through legislative measures or codes of practice).

Yet, these issues have an inherent tendency to link the two levels of analysis when the administrative actors involved are unable to find a solution. All three countries follow the typical pattern of West European governmental systems whereby the administrators deal with the bulk of issues along the lines of (more or less) pre-defined orientations while politicians resolve issues that ascend to the political level whenever a compromise cannot be found at the administrative level. However, we shall see (infra, Sub-section 6.4.3) that the operation of this distinction is a different issue altogether.

6.3.4. THE DIVISION OF LABOUR BETWEEN TECHNICAL AND HORIZONTAL MINISTRIES

The division of labour between the technical and the horizontal ministries reflects the degree of diffusion of EC
policy to the specialised (technical) ministries and determines the extent of the need for co-ordination. In other words, the more specialised ministries deal with EC policy, the greater the need for co-ordination. All three countries present a quite large degree of diffusion of EC policy to the technical ministries. In fact, there seems to be a correlation between the extent of diffusion of EC policy and the intensity of the EC's involvement in a given policy area. Consequently, a fairly large number of technical ministries deal with parts of EC policy given the expanding EC agenda.

Yet, the view of the horizontal ministries is (in all three cases) very important for a number of reasons. They deal with the implications of EC policy on foreign policy and financial affairs, two areas that transcend the boundaries of responsibility between the various ministries. On the other hand, recent developments in the process of integration, namely EMU and the subsequent need for limitation of public expenditure but also the link between CFSP and the EC's external relations, have provided the impetus for greater involvement of the horizontal ministries in national processes of policy co-ordination. Finally, they (along with the ministries of Defence) are the only ministries that have a previous experience in international negotiations. However, the significance of this element is limited by the increasing participation of technical ministries in international (particularly European) negotiations.

In all three cases, the tensions between these two groups of ministries constitute a typical phenomenon
characterising the national processes of policy formulation and co-ordination irrespective of the institutional nature of these processes. This being the general rule, the case of the UK differs in the sense that the accusations against the FCO do not emanate only from the administration, but from politicians as well, thereby reflecting once again the contentious nature of EC membership.

6.3.5. THE DIVISION OF LABOUR WITHIN MINISTRIES

In all three countries the development of the process of integration has led to the creation of specialised EC units in the vertical ministries, especially those which are most involved in the formulation of EC policy. Their mere existence tends to reproduce (at the intra-ministerial level) the tensions between the horizontal and the technical ministries. On the one hand, the EC units are often bypassed by other specialised actors when dealing with EC policy. On the other hand, the latter accuse the former of impinging upon their affairs. Despite the lack of a clear-cut pattern characterising the role of EC units in relation to other specialised units, it seems that some degree of general validity can be found in the following three elements. Firstly, these units seem to be more active in the horizontal rather than the technical ministries. Secondly, their role is dominated by one function, namely the distribution of information to the vertical units, rather than the co-ordination of the ministerial position. Thirdly, the function of representation to the EC (negotiations and consultations) is occasionally performed
by these units. However, given that effective representation presupposes some form of co-ordination this also constitutes one of the sources of tension with the vertical units.

6.3.6. FORMAL IMPLEMENTATION AS THE PREROGATIVE OF INDIVIDUAL MINISTRIES

In all three countries that we have examined each ministry has the power to implement formally EC policy falling in its remit. Nevertheless, the importance of this similarity should not be over-emphasised. Indeed, the fact that most of the policies agreed upon at EC level have dimensions that transcend the boundaries between the various national ministries underlines the need for caution. Regional policy for example combines aspects of economic policy, social policy, industrial policy and competition. The list of similar examples is endless. This, in turn, has two significant repercussions. On the one hand, it creates the possibility of inter-ministerial tensions. On the other hand, it highlights the need for effective co-ordination in this stage of the European policy process. Although the

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7Studies of policy formulation at EC level (Cram 1997, 77-8; Cini 1996, 221-4) have underlined these difficulties even before the policy reaches the national level. This fact further underlines the validity of the views which highlight the need for co-ordination within the European Commission (Page 1997) and the crucial role of COREPER within the Council of Ministers (Hayes 1984; Hayes-Renshaw and Wallace 1997, 72-84). The expanding role of the European Parliament is likely to create the same problem for this institution.
formal arrangement is the same in all three countries, their responses to this problem are different. This aspect then leads us to the discussion of the differences between the three national settings.

6.4. EC POLICY AT THE NATIONAL LEVEL: CONCEPTUALISING NATIONAL DIFFERENCES

6.4.1. TWO LEVELS OF IMPORTANCE

A distinction can be drawn between differences of primary and secondary importance. This distinction is based on the direct or indirect impact that these differences can have upon the implementation process. While relations between pressure groups and national governments are important (infra, Sub-section 6.4.2) in the formulation process, they are less important in formal implementation because i) the choice between various legislative instruments is rather well defined within the national polities and ii) the regulation by the ECJ and the European Commission of this aspect of formal implementation is quite robust (supra, Chapter 2). In short, there is only a limited number of choices towards which a government can be led by a group.

In the same vein, the role of political co-ordinators (infra, Sub-section 6.4.3) is of secondary importance because it pre-supposes the ineffectiveness of administrative co-ordinators or the lack thereof. This does not mean that the role of the former is not important. Rather, the argument here is that administrative co-
ordinators are of primary importance not only in the formulation stage (infra, Sub-section 6.4.4) but also in the stage of formal implementation (infra, Sub-section 6.4.5) because they are at the interface between various ministries, in a way that makes them a filter of what ascends to the political level and what remains within the administrative remit. In short, their impact on the fragmented or integrated European policy process is direct.

6.4.2. THE DIFFERENTIATED TREATMENT OF PRESSURE GROUPS

The relations between national politico-administrative structures and pressure groups differ between the three member states that we examine here. On one extreme of the continuum the UK is the case of the widest consultation which covers not only the formulation stage, where pressure groups are vital sources of information for the administration to such extent that the latter actually construes it as one of its strengths in European negotiations, also the stage of formal implementation where pressure groups have some input, especially in terms of the minimisation of the unnecessary regulatory burden imposed by a policy. Nevertheless, there is no symmetry between the two stages, mainly due to the regulation of formal implementation by the ECJ and the European Commission.

Secondly, pressure groups in France have some access to the politico-administrative structures, during the formulation stage but their input in the stage of formal implementation is extremely limited. On the one hand, the French system seems to be seeking to balance the traditional
view of the state as the embodiment of the common interest with the sectoral approaches of groups, which can be either i) organised on the basis of sectors or ii) major market players ('national champions'). A major factor that influences the attitude of the French politico-administrative structures in the formulation stage is the fragmentation of many groups along the lines of organisations which are occasionally affiliated to political parties. That raises the cost of consultation in terms of time and risks bringing intra-sectoral conflicts into the administration. On the other hand, things in the stage of formal implementation are much clearer in the sense that the process is firmly in the hands of the relevant politico-administrative structures which seem to see no concrete reason to open a new round of consultation on what they see as their prerogative.

Finally, the pattern of consultation of interest groups in Greece is variable and unpredictable in both stages. While the fragmentation of interests along party political lines is a major factor, the administration also seems to be rather reserved towards actors that i) it cannot control and ii) may challenge its 'monopoly' over a dossier during the formulation stage. The direct repercussion of this fact is the increasing attempts of major groups to have access to the political level mainly through ministerial advisers. The same pattern though is not re-produced in the stage of formal implementation where interest groups are simply ignored.
6.4.3. THE ROLE OF POLITICAL CO-ORDINATORS

We have already highlighted (Sub-section 6.3.3) the fact that a certain division of labour between the political and the administrative level exists in all three member states examined here. Nevertheless, this distinction is useful when problems that occur at the administrative level can ascend to the political level where a solution can be found. This is not the case of Greece where tensions between ministries that reach the political level are resolved on the basis of an unpredictable pattern that consists of the personal relations between the political appointees and their proximity to the Prime Minister. This is the result of the lack of collective bodies that will deal with these issues arising from the formulation or implementation processes. Although the current government led by Simitis has certainly made the first step in the right direction by establishing such bodies, long practice will be needed, at least for the change of the political ethos that reflects the previous institutional gap.

On the contrary, both the British and French systems are characterised by the existence of strong political co-ordinators in the form of collective bodies which meet regularly. These mechanisms include various Cabinet committees in the UK and a number of committees composed of ministers with or without the participation of senior officials in France. Nevertheless, one should not place too much emphasis upon this point because of the existence of co-ordinating bodies at the administrative level in both of these member states. Indeed, the lack of effective
political co-ordinators is more important in Greece because of the lack of effective co-ordination at the administrative level. This is the most important difference that we have identified between Greece on the one hand and the UK and France on the other.

6.4.4. THE IMPORTANCE OF CO-ORDINATION AT THE ADMINISTRATIVE LEVEL

The lack of an effective mechanism for the co-ordination of policy formulation is a major characteristic of the Greek system. This means that tensions which occur in the daily operation of the structures that deal with EC policy are resolved in a piecemeal manner that tends to reproduce a sectoral ethos. However, the administration is still in need of guidance. This leads us to the third aspect, namely the extensive use of ministerial advisers. As they are not permanent members of the administration they tend to reproduce rather than resolve the problem of lack of co-ordination because they do not necessarily have a knowledge of previous issues and they are unable to provide a permanent impetus for problem-solving, let alone prospective thinking. Thus, Greek officials

8Although the comparison with the French ministerial cabinets is inevitable, it enhances our argument about the disruptive effect of ministerial advisers in Greece because, unlike the latter, the former have to operate much more eclectically in a context which is characterised by the existence of strong co-ordinating mechanisms which are answerable to a superior level of authority, that is the Prime Minister.
do not always comprehend the implications of the agreements [they] reach in Europe

as an official of the Greek Ministry of Foreign affairs said.

This, in turn, has direct repercussions on the administrative level given that the absence of properly functioning political co-ordinating mechanisms means that there is no direct pressure put on the administration to prepare for the 'battle' of interministerial co-ordination. On the contrary, whenever co-ordination occurs, it is the result of an initiative taken by one actor, without a specific permanent pattern being followed in every case thus promoting fragmentation along the lines of specific sectors of EC policy.

The lack of an administrative co-ordinator is also based on the formal but impractical distinction between external representation (attributed to the Ministry of Foreign affairs) and internal formulation of policy (attributed to the technical ministries). This distinction could be explained by the fact that unlike the former, the latter had no experience, or at best a limited one, in international negotiations. However, when the technical ministries acquired a degree of experience in these negotiations, the balance of power shifted to the detriment of the Ministry of Foreign affairs which now challenges the power of technical ministries in a manner that i) leads to the absence of Greek officials from committees of the Council of Ministers, or ii) even the participation of
insufficiently informed officials of the Permanent Representation. This in turn leads to the frequent use of reserves in the negotiations and more importantly, the inability of the Greek negotiators to influence the course of the negotiations.

On the other hand, both the European Secretariat and the SGCI have become permanent features of the two politico-administrative systems. Processes for co-ordination in the formulation stage have also remained practically unchanged despite changes in the wider political context, especially in the case of France although one may detect between 1988 and 1993 a slight move of the centre of the mechanism towards the President of the Republic who has taken up an important part of the responsibility for co-ordination in politically important issues. The lack of formal arrangements has not proved to be a factor that affects the efficiency of the processes in a negative manner. The British system constitutes a very illustrative example. At the same time, the Greek system proves that the existence of formal arrangements for the co-ordination cannot guarantee a positive result.

Both in the UK and France the co-ordinating mechanisms do not take the form of decision-making bodies which decide on a unilateral basis. On the contrary, meetings constitute the main form of co-ordinating mechanisms. Indeed, a senior official of the SGCI went as far as calling it an empty space where officials meet.

Nevertheless, much of this activity has been channeled through the SGCI.
This description could easily apply to the European Secretariat in the sense that both institutions provide the incentive and the means for meetings where co-ordination is achieved. The importance of the use of such mechanisms derives from the 'socialisation effect' that they produce. In other words, the constant participation of officials in these bodies leads to the creation of a kind of 'European conscience' (by the means of a spill-over effect) and above all, the certainty that individualism cannot prevail. This, in turn, further enhances the idea that EC policy is not an autonomous policy area but a part of domestic policy which should be constantly taken into account. This leads to a cultural point: We do talk to each other, here in Whitehall. Everybody is brought together as a DTI official told us. This view is echoed by an official of the European Secretariat who told us that problems where technical ministries try to freeze out other departments are unusual.

The same spirit prevails in France where tensions may appear due to inter-personal problems only, although Europe is frequently seen as an external constraint by many technical ministries as a French official has put it.
Formally, the European Secretariat and the SGCI are parts of the two administrative machineries. However, their proximity to the hard core of the two Executives provides the basis for the mitigation of their administrative character and the reinforcement of their political side. Their proximity to the centre of the government provides them with the authority which is necessary for the accomplishment of their task. These actors provide the basis for liaison between the two levels, a function which constitutes the foundation of co-ordination. The power deriving from this link is of fundamental importance as it enables the two bodies to overcome the difficulties arising from the sectoral approaches of the other participants.

In the ascendant phase of the policy process, this enables the administrative actors to seek the adoption of their sectoral position as the national position in the negotiations that take place in co-ordination meetings, while in the descendant phase ministers can be fairly sure that their guidelines will be transmitted properly to the administrative level, for example in the field of budgetary constraints used in the run up to the single currency. The same bodies act as filters between the two levels as they constitute the basis for the resolution of conflicts between various actors. This function is, by definition, part of the process of co-ordination given that it leads to the drastic limitation of the number of issues that end-up being dealt with at the political level.

The distinction between the positive and negative forms of co-ordination, proposed by Metcalfe (1987, 1988) is a useful instrument that sheds light on the role of the
European Secretariat, the SGCI and the problematic Greek system. Departing from a definition of co-ordination as

the combination of several interrelated decisions and actions to serve a common purpose

(Metcalfe 1988, 5)

which depicts this function as a property of a system, not the prerogative of one part of it, he defined negative co-ordination as the avoidance of conflicts and divergence of opinion between the various actors while he construed positive co-ordination as the attempt to achieve a coherent position through the establishment of a link between various ministerial positions and strategic objectives (Metcalfe 1987, 16-7).

Metcalfe (1988, 6-9) used a nine-level unidimensional and cumulative Guttman scale in order to compare the co-ordination capacities of twelve member states. This scale includes a single set of steps. Each step is a precondition for those that follow and it introduces additional elements that cannot be found in previous steps. Step 1 (independent ministerial decision-making) is characterised by the completely independent action of the ministries without any kind of co-ordination. In step 2 (communication to other ministries) ministerial independence is mitigated by the obligation of communication through which some diffusion of information is achieved. Step 3 (consultation with other ministries) is characterised by consultation procedures employed by the various ministries in the process of policy formulation. In step 4 (avoiding divergence among
negative co-ordination occurs through mechanisms aiming to avoid the pursuit of divergent and inconsistent lines in European negotiations. Step 5 (interministerial search for agreement) comprises mechanisms promoting consensus on common objectives and complementary policies. In step 6 (arbitration of interministerial differences) third party arbitration is used in order to resolve conflicts between the various actors. Step 7 (setting parameters for ministries) involves the setting of parameters by central authorities at the discretion of ministries while in step 8 (establishing governmental priorities) common priorities constitute the basis upon which interministerial differences are resolved and policy is formulated. Finally, in step 9 (overall governmental strategy) governments are totally unified policy formulating systems where basic choices are made at the top before being handed down to the lower levels through strong interministerial co-ordinating mechanisms.

This capacity-orientated scale does not imply that co-ordination always takes this form. On the contrary, it outlines the capacities of the national systems of co-ordination. Metcalfe (1988, 14) concludes that the member states can be classified in four groups: i) tightly organised systems, ii) loosely coupled systems, iii) small informal systems and iv) developing systems. He classified the British and French systems in the first and the Greek system in the second category. More specifically, the co-ordination capacities of the UK, France and Greece are
classified in steps 8, 6 and 4 respectively (Metcalfe 1987, 19-21).

The findings of the present study only partially agree with Metcalfe's findings. Indeed, despite the fact that in Greece, as a rule, the focus is on negative co-ordination, the formal institutional capacities go beyond this stage. One cannot deny the formal existence of mechanisms where forms of positive co-ordination can be utilised, especially at the political level where a Committee for the Coordination of Government Policy in the Relations with the EU and the re-activated Ministerial Council can play a co-ordinating role. These mechanisms are employed very rarely for problem-solving in EC policy but given that this scale is capacity-orientated, one can draw the conclusion that the capabilities for some type of (political) positive co-ordination actually exist. This view is reinforced by the recent creation of collective political bodies by the government led by Simitis. Consequently, the Greek system appears to be closer to step 5.

In the case of the French system, previous governments (under Mauroy, Fabius, Chirac, Balladur and Juppé) have set specific parameters in order to guide the action of the technical ministries and the co-ordinating bodies. The fact that this pattern has been observed over a number of years covering different governments illustrates that it is an inherent capacity of the system. The same comment

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10 However, Metcalfe did not explain these classifications, as he was presenting the conclusions of a wider project.

11 Interestingly, the guidelines concerned budgetary constraints linked (directly or indirectly) to the process of economic integration.
applies in the case of the UK. Officials whom we interviewed were eager to stress i) the fact that their function relies heavily on governmental priorities and ii) the crucial link between European and domestic policy developments. Hence the establishment of clear governmental priorities (step 8) is a part of the capacities of both systems, in a manner that combines pivotal actors and authoritative decisions. In practice both systems are characterised by the frequent recourse to the governmental priorities either as a means of justification for a choice or as a problem-solving mechanism.

6.4.5. THE REFLECTION OF FORMULATION PATTERNS UPON FORMAL IMPLEMENTATION

We have already identified (supra, Sub-section 6.3.6) the power of individual ministries for the formal implementation of EC as a common characteristic of all three member states examined here. Yet, we have also underlined the fact that in most cases EC policy transcends the boundaries between various ministries thus producing the need for co-ordination in this part of the implementation process. This, then, is a major difference between Greece on the one hand and the UK and France on the other.

The Greek system is a clear illustration of the disruptive effect that unco-ordinated formulation may have upon the process of formal implementation. The absence of Greek official from negotiations at EC level, or even the simple presence of an official of the Permanent Representation who does not necessarily possess in depth
knowledge of the previous stages of the European policy process means that the administration is frequently obliged to implement a policy whose philosophy, methods and objectives, are not fully understood. The same problem results from the frequent participation of ministerial advisers in the negotiations. As they are not permanent members of the administration, they actually re-produce the problem by undermining the capacity of the administration to develop its own methods of learning and a coherent administrative memory that will then be used in order to facilitate the wider implementation process.

They certainly leave files concerning violations of EC law

said ironically an official of the Ministry of National Economy.

On the contrary, both the European Secretariat and the SGCI have developed the capacity to monitor the process of formal implementation. While this function has always been a part of the European Secretariat's prerogatives, the French system has discovered the virtues of linking formulation and implementation processes during the second half of the 1980s, as a result of the problems that it had faced. Moreover, both institutions have developed methods which promote prospective (that is implementation-orientated) thinking in the previous stage of the European policy process.
6.5. THE WIDER SIGNIFICANCE OF FRAGMENTATION: IMPLEMENTATION AS A POLITICAL ISSUE

6.5.1. SOURCES OF FRAGMENTATION

The preceding analysis enables us to identify a number of sources of fragmentation within national institutional settings that deal with EC policy. First, fragmentation occurs as a result of the lack of mechanisms that would lead national administrations to take account of implementation during the formulation stage. Second, fragmentation is also produced by the lack of co-ordination at the administrative level during the formulation and formal implementation stages. Third, fragmentation occurs when the units which have formulated a policy at the national level, either have not negotiated at EC level, or are not the ones that implement it formally in the domestic context. Fourth, the lack of political co-ordinators means that fragmentation occurs when conflict at the administrative level ascends to the political level.

The preceding analysis demonstrates that Greece is the only member state examined here whose politico-administrative structures embody all these sources of fragmentation. One could therefore hypothesise that the implementation process in Greece would be less effective than in the UK and France. Figure 6.112 constitutes a first crude indication of this chain of thought.

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12The period between 1985 and 1996 has been chosen because it excludes the transitional period for Greece while it incorporates the most recent available data relating to procedures under art. 169.
Although caution is necessary here because it is impossible to examine the quality of the problems that led to these referrals, two general comments can be made on this basis. First, Greece has almost constantly a larger number of cases that reach the ECJ than the UK or France. The significance of this finding is highlighted by the fact that Greek negotiators frequently manage to get longer transitional periods for the implementation of EC policy, than most of their counterparts. Consequently, it is the operation of the fragmented politico-administrative structures during these periods that poses the problem, not the lack of time.

Secondly, one can also highlight the fact that the UK and France have been brought before the ECJ. Thus the

13The liberalisation of telecommunications services and capital movement constitute two examples.
presence of integrated politico-administrative structures seems to be unable to guarantee the absence of problems in the implementation process. In the next section we shall try to identify the ways in which fragmentation can affect the wider implementation process at the macro-level that we defined in Chapter 1.

6.5.2. THE DISRUPTIVE EFFECTS OF FRAGMENTATION UPON IMPLEMENTATION

The effect of fragmentation of national politico-administrative structures upon the implementation process will be disruptive\textsuperscript{14} for a number of reasons. First, fragmentation is likely to undermine the stability of the implementation process by limiting the predictability of the behaviour of those involved in it. The importance of this element derives from the fact that different institutions have different agendas, priorities and methods of operation. Consequently, fragmented structures increase complexity thus reducing the likelihood of effective implementation. This is crucial for the detection of problems which is easier in integrated systems whose operation is similar to a chain of events. Locating the weak or ineffective link is thus easier.

Second, the same chain of thought leads to another important factor, namely the likely increase in the number

\textsuperscript{14}Discussing the implementation of public policy in the German federal system, Mayntz (1980a, 10) has argued that the likelihood of a gap between objectives and reality is smaller when the same services formulate and implement a policy.
of decision points within the European policy process. Indeed, the more sets of actors involved, the more likely it is for a conflict to occur that will block the process. Moreover, package deals promoted by the co-ordinaing mechanisms are less likely to occur because of the increased number of actors whose interests must be taken into account and the resulting limitation of the possibility to reach a sufficiently satisfactory solution. In other words, even if a solution is found, it is more likely to be sub-optimal.

Third, fragmentation means that each stage of the process is viewed as a separate entity. Pressman and Wildavsky (1984, 143) note that

[t]he great problem...is to make the difficulties of implementation a part of the initial formulation of policy. Implementation must not be conceived as a process that takes place after, and independent of, the design of policy. Means and ends can be brought into somewhat closer correspondence only by making each partially dependent on the other.

This underlines the role of the co-ordinating mechanisms which are uniquely placed to act in strategic terms as to the pursued outcome of the European policy process. Fragmented structures are also likely to suffer from a peculiar type of goal displacement, that is the pursuit of

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15One must also underline the fact that the role of co-ordinating mechanisms should not be construed as an ever-present aspect of implementation. On the contrary, it is construed here as an important resource which can be effective when it is used selectively.
an unrealistic policy which will ignore certain realities although it may be close to an optimum. For example, adopting optimal norms for the assessment of air quality is one thing. Ensuring their use through the necessary instruments and specialised staff is another.

Fourth, even if co-ordination is achieved in a fragmented framework, it is more likely to be more costly, at least in terms of time which is an important resource\textsuperscript{16}. Thus it is likely to make the policy less appealing, more contentious (politically) or both. Clearly, we are not referring to the time which is naturally necessary for a policy to produce its effects. On the contrary, the emphasis here is on the excessive time-lag that can be avoided, or more importantly, the time which can be saved in a manner that may, for example, reduce conflict. Moreover, as contexts change responses to implementation problems need to be given at the right time in order to be effective (Hood 1976, 25). For example, recruiting specialised staff will be an effective tool for problem-solving if it is used when shortages exist.

Fifth, integrated structures are more likely to be stake-sensitive\textsuperscript{17}. This is an inherent element built into the implementation structure, that encourages prospective

\textsuperscript{16}O'Toole and Montjoy (1984, 499) rightly underline the link ('tradeoff') between co-ordination and speed of action. This element is particularly relevant in the study of implementation in the context of the EC because of the deadlines included in the EC legislative measures.

\textsuperscript{17}Elmore's (1978) model of the implementation of social programmes as organisational development stresses the importance of this element.
thinking. In other words, integrated structures are more likely to feel that they have a stake in the policy which is going to be implemented if they have formulated it. The stake can be analysed not only in terms of the personal interest that the officials may have for a given policy (due to career development, ideology etc.), but also in terms of the importance for the unit or institution, that is its credibility and profile within the national context.

Sixth, given that the detection of implementation problems is easier in integrated structures, their resolution (fixing) is likely to be easier, at least in the short term. This is so because irrespective of the complexity of a problem, the primary part of any problem-solving operation is the detection of the problem. How can officers of a local authority responsible for monitoring the quality of air use instruments that a central unit has not purchased?

Seventh, to one extent or another EC policies introduce changes at the national level. The fragmentation of politico-administrative structures is likely to affect the effectiveness of these changes because of the limited coordination or the total lack thereof. In other words, as complexity increases along with the fragmentation of the structures, the constituent parts are increasingly 'individualistic'. That undermines the implementability of changes because they have to be diluted in some way in order to accommodate at least some of the pre-occupations of the individual parts of the structures.

Although we have identified seven important reasons why fragmentation matters in the implementation process caution
is necessary here. Discussing the role of the European Commission in the implementation process Peters rightly argued (1997, 189) that the discourse on an implementation or a management deficit in the EC (Metcalfe 1992) appears to have an implicit basis on what Hood (1976) called 'perfect administration' where policies are converted into actions exactly as intended. In other words, the use of the term 'deficit' implies that optimal implementation is achievable. Gunn (1978) has demonstrated that there are at least ten reasons why perfect implementation is not only unattainable but may well be unacceptable in a free society\textsuperscript{18}. This would include perfect obedience which would not necessarily take account of the content of an order. Following the same vein we shall argue that our focus on the negative impact of fragmentation upon implementation does not mean that integrated structures actually secure faultless implementation. Other factors, e.g. culture, may be equally or even more important.

Our focus results from the realisation of the fact that i) governments matter (supra, Chapter 1) and ii) they are multi-faceted rather than unitary actors in the European policy process. Nevertheless, this focus does not exclude the existence of other powerful explanations. The broad thrust of the argument is that implementation in the EC is political because it depends on a number of subjective

\textsuperscript{18}Some of the pre-conditions of perfect implementation such as the existence of a completely unitary administration, like a huge army characterised by a single line of authority according to Hood's accurate parallel (1976, 6) and perfect obedience are not necessarily welcome in free societies.
judgments made primarily by governments and other actors as well. The use of fragmented or integrated structures is one of them. Moreover, this process is political because the operation of these structures over time may lead to changes. Drawing theoretical conclusions from the federal system of the USA Rein and Rabinovitz state that the Congress frequently tries to influence implementation by specifying which department will administer a new programme because different agencies have characteristically different approaches to programs in the same subject area (Rein and Rabinovitz 1977, 26).

Again, just like individuals, governments have the capacity to learn from past experiences. Subsequent action implies a set of choices regarding the tools (Mayntz 1980a, 5) that they possess. These choices are subjective. This is why implementation within the context of the EC is political.

One reaches the same conclusion through the use of the concept of 'fixing' outlined in Chapter 1. The function of a fixer as the promoter of a given policy can only be understood as a resultant of a stake, the information and the power which is necessary in order to promote it. Therefore fixing is a political function that occurs in the implementation process. The study of implementation in the federal system of the USA led Bardach (1977, 280) to assert that effective game-fixing strategies might emanate from the bureaucratic or the legislative side. The analysis of this concept in the context of the EC should be based on a wider political perspective which includes European and national
institutions along with interest groups with a stake in a given policy.

Nevertheless, fixing is not a permanent feature of implementation and more importantly the demand for it varies depending on the context. We shall argue here that the demand for fixing is greater in fragmented politico-administrative structures because of the increased likelihood of problematic implementation. Although the sources of fixing are predictable (European Commission, ECJ, national political and administrative actors, target groups), the same does not apply to the precise identification of their relative impact. That is likely to depend largely on the problems that produce the need for their participation.

Although the preceding discussion of the various institutional settings has enabled us to formulate these general insights regarding the quality of macro-implementation, the exploration of their validity necessitates the recourse to a case study. The liberalisation of public procurement will be examined in Chapters 7 and 8 before we draw general conclusions (Chapter 9).
Chapter 7

THE EC'S PUBLIC PROCUREMENT POLICY: CONTENT, INSTITUTIONAL MAPPING AND FORMAL IMPLEMENTATION

7.1. PUBLIC PROCUREMENT POLICY AS A CASE STUDY

We have noted in Chapter 1 that a case study approach is necessary for the analysis of the implementation of EC policy by fragmented or integrated national politico-administrative structures. Chapter 7 serves this purpose in the sense that we shall commence the analysis of the insights that we have drawn in Chapter 6. This will cover the analysis of the implementation of the EC's public procurement policy which will span over to Chapter 8.

Public procurement is a useful case study for a number of reasons. Firstly, we shall see that it is a regulatory policy (infra, Section 7.2), that is an example of the dominant type of policy used by the EC. Consequently, insights based on the examination of this policy may have a wider field of application. Secondly, it is an important policy area not only in terms of its size, but also in terms of its potential for the European economy.

Thirdly, procurement policy constitutes a cornerstone of the single market project. On the one hand, the general philosophy of the policy promotes liberalisation which is at the heart of the single market. On the other hand, the scope of the policy has expanded in functional terms and from the point of view of the type of actors that it covers
(public and private). Moreover, it places substantial emphasis on market players without neglecting the role of public institutions. Indeed, two of the most important, albeit asymmetrical, instruments used by the EC in the liberalisation process include i) the implicit belief that tenderers will take awarding entities to court if the latter violate the relevant provisions and ii) a horizontal supervisory role for the European Commission. Fourthly, the distinction between the levels of macro-implementation and micro-implementation discussed in Chapter 1 is fairly easy to establish.

In the light of the fact that the EC's policy in this field is focused upon the regulation of the behaviour of awarding entities (public and private) the analysis of micro-implementation would require the examination of the award procedures used by them. This is a Herculean task in the sense that the said policy covers some 110,000 entities across the EC (European Commission 1996a, 5). Although only one part of them exists in the UK, France and Greece one cannot aspire to examine the behaviour of every single one of them and cover every single advertised contract. After all, focusing on the award of the advertised contracts would necessarily be based on the dangerous assumption that all awarding entities have actually implemented a fundamental aspect of the policy, namely the obligation to advertise at EC-level every contract that falls in the remit of the relevant directives. In other words, this approach takes for granted that a fundamental objective of the policy has

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1The total number of invitations to tender in the UK, France and Greece reached 23792 in 1996 (Source: TED).
been achieved. Clearly, this is an unrealistic assumption, because this is not a perfect world.

On the contrary, we shall endeavour to discuss macro-implementation, that is the tools that the national governments actually utilise in order to steer the behaviour of the awarding entities in the desired direction, that is the equal treatment of tenderers based in the EC, irrespective of their nationality. In the light of the approach to implementation analysis that we have outlined in Chapter 1, we shall first seek to create a map of the relevant national institutions, that is describe the division of labour relating to this policy area at the national level (Section 7.3). Which institutions deal with procurement policy? What kind of changes, if any, has the EC's policy in this field brought about to the national institutional structures? More generally, have they evolved and if so, how?

Then, we shall seek to analyse the process of formal implementation, that is the form and the content of the implementing instruments, their timely or belated adoption and also the reasons that may explain the lack thereof (Section 7.4). What are the basic instruments used by the national governments in this process and to what effect? Have they evolved and if so, how and why? Furthermore, we shall attempt to identify the role of European institutions in this process. Administrative implementation will then be discussed in Chapter 8.

\(^2\text{Analysis here will not include the stage of comitology because the directives were precise enough to eliminate the need for complementary action at the European level.}\)
7.2. THE EC'S PUBLIC PROCUREMENT POLICY

Theoretically public procurement can be approached from two different angles. Strictly speaking, it can be defined as the attempt of public authorities to satisfy their needs through the use of public money (micro-economic dimension). However, wider socio-economic objectives can be pursued by directing the choices made by public authorities as they attempt to achieve the traditional objectives (macro-economic dimension). These methods may concern segments of the society e.g. the unemployed, sectors of the economy e.g. information technology, specific firms ('national champions'), or territorial units e.g. regions. These methods contradict the free market which is at the heart of the process of economic integration in Europe, precisely because they entail the use of some sort of discriminatory measures. Yet, these are ideal types which are frequently combined in various policy mixes.

This second approach to public procurement is known to every member state (Woolcock, Hodges and Schreiber 1991, 28-9). Some of them (including Greece and the UK) have used in the past discriminatory measures in the field of public procurement in order to achieve wider socio-economic objectives (Commission of the European Communities 1989b). In the UK these methods consisted in i) a price advantage of 5% given to tenderers if their tender had a positive effect on employment in Northern Ireland, ii) the purchase by British airline corporations of home-made aircraft material and iii) the purchase of British-made computers when there was no undue price differential (Turpin 1972, 251-3). In
the case of Greece, a price advantage of i) up to 7% over the lowest tender was applied to enterprises established at a distance of more than 50 kilometres from Athens and ii) up to 10% in cases of companies established in the Greek islands.

Public procurement is important not only because of its potential use, but also because of its quantitative dimension. Companies which are active in fields like high technology or even traditional heavy industries, may depend on public procurement for a very significant portion of their sales (Jeanrenaud 1984, 152). Moreover, the importance of public procurement is also based on its overall volume. Indeed, it has been estimated (WS Atkins Management Consultants 1988, 16-9) that between 10 and 20% of government expenditure (excluding public companies) concerns payments for the purchase of goods and services. Furthermore, the total volume of public procurement in the mid-1980s represented around 15% of the EC's GDP. These figures concerned mainly building and construction, equipment goods, services, energy, water, transport and communication which are areas of economic activity regulated by the EC's public procurement policy. More importantly, the aforementioned report (which covered only France, Germany, Belgium, Italy and the UK) estimated that less than 2% of public purchases came from foreign suppliers, thus illustrating a very low level of import penetration. The potential and actual importance of public procurement for the European economy and its importance for the establishment of a proper single market provided the impetus for the involvement of the EC in this policy area.
The philosophy of the Community's action in this sector of the economy is characterised by the predominance of the free-market model. The approach adopted at EC-level embodies the belief that

many benefits...will accrue from a genuine liberalization of this sector throughout the EC...First, the introduction of EC-wide competitive tendering...will greatly increase the opportunities for industry...to expand both on the Community and the home market. Expansion will enable economies of scale to be realized, thus reducing costs, while the spur of competition will stimulate efficiency. A considerable part of the resultant savings is likely to be put back into developing the businesses concerned through modernization of plant and infrastructure and research and development, leading to the creation of new jobs. Secondly, governments and the users of the services they provide will benefit from a wider choice of goods and services both in terms of quality and price. Substantial savings in government budgets will be possible and the general public's wants will be satisfied at lower cost

(Commission of the European Communities 1987b, 1-2).

Until the beginning of the 1970s the provisions of the Treaty (articles 7, 30, 52 and 59 in particular) were the only possible legal basis for the action of the EC. They incorporated basic principles of the EC like the prohibition of discrimination on the basis of nationality among citizens
of the member states, the free movement of goods, the freedom of establishment and the freedom to provide services enjoyed by individuals and companies.

It is precisely the general character of these provisions that rendered them insufficient for the creation of a free market in public procurement. The adoption of the minimalist legal strategy would mean that the proper implementation of the policy would place substantial emphasis on the ability and the willingness of private actors - indeed, the target groups affected by the policy namely potential suppliers - to actively employ the concept of direct effect\(^3\) as the basic method leading to the liberalisation of the market. The rejection of a minimalist legal strategy reflected an indirect but unambiguous recognition of the inability of the market to regulate itself.

Thus, at least a minimum of European legislation has been recognised as necessary in order to open the market. From an implementation perspective, the exclusive use of directives constitutes a clear political choice because it automatically creates a two-tier system whereby the member states are obliged to adopt national measures for the formal implementation. This in turn entails the involvement of an increased number of actors with different - and possibly conflicting interests - and the subsequent possible creation of tensions between them. The possible resulting extension of the time which is needed for the implementation of the

\(^3\)The ECJ has acknowledged the direct effect of these provisions (Rideau 1994, 683-4).
policy also means that a window of opportunity\textsuperscript{4} is created for the participants. In other words, they may try to protect interests that have not been taken into account 'sufficiently' in the formulation process, by attempting to steer it in the direction that suits them.

The philosophy of the EC's policy is based on three fundamental elements, namely selectivity, the principle of transparency and the equal treatment of tenderers. Firstly, the selective (non-exhaustive) character of the policy is the direct result of the unwillingness of the member states to abolish their national systems. This characteristic of the EC's policy is illustrated through the use of quantitative thresholds for the definition of its scope. In other words, the directives cover contracts whose value equals or exceeds the thresholds.

Secondly, the basic means used for the liberalisation of the market is the principle of transparency. The awarding entities covered by the directives are obliged to advertise the contracts across the EC\textsuperscript{5} if their value equals or exceeds the threshold. The scope of this obligation covers a number of awarding entities whose definition is integrated into the directives. It is believed that the principle of transparency enables potential tenderers from

\textsuperscript{4}This concept has been defined by Kingdon (1995, 165) as an opportunity for advocates of proposals to push their pet solutions, or to direct attention to their special problems.

\textsuperscript{5}This is achieved through the publication of notices in a supplement of the Official Journal of the European Communities and their electronic dissemination through the Tenders Electronic Daily database. In both cases the EC covers the cost of the publication.
other member states to submit tenders thus reinforcing the competition game.

Thirdly, this principle is complemented by the obligation of awarding entities to treat European tenderers equally, irrespective of their nationality. Indeed, objective criteria aim at the radical limitation of discriminatory practices used by awarding entities thus enhancing competition between tenderers. Moreover, these criteria operate both at the level of the initial selection of viable and reliable companies and the award of contracts to them. Consequently, the EC's policy mix focuses mainly on the allocation of the contracts through the regulation of the behaviour of the awarding authorities.

The very frequent use of EC funds by national authorities for public procurement (mainly works) automatically raises the issue of competitive tendering in the relevant award procedures. Indeed, it would be paradoxical to regulate the award procedures where national funds are used and to ignore EC funds. The Commission (1989a) has therefore instituted a system of monitoring the compatibility of national award practices where EC funds are used with the EC's public procurement policy. The system is based on a questionnaire which has to be completed by the national authorities which apply to the EC for financial assistance. It contains information about the type of the awarding authority, the purpose, value and duration of the contract, the award procedure, the publication of the tender notice, the technical capacity and commercial standing of the participants. On making the payments, the European Commission assumes that the contracting authority has
complied with the EC's public procurement rules. Payment is suspended if no references are given relating to the publication of notices in the Official Journal of the European Communities and no declaration is made to the effect that the proper procedures have been followed. The European Commission makes sample checks mainly in relation to qualitative selection criteria and award procedures. In cases of breaches of EC obligations, both suspension of payments and refunds are used in accordance with the specific rules of each Fund.

The EC-wide regulation of public procurement commenced from the field of public works (early 1970s) and went on to cover supplies (late 1970s) and the provision of services.

6The increasing role of the European Commission in this policy area had direct repercussions on the part of its internal administrative structure that deals with this policy area. Responsibility has been diffused to the vertical units of DG III until 1984 when a specific division has been established although it did not deal exclusively with this policy area. It became focused on public procurement between 1985 and 1988 after its up-grading to a separate directorate composed of two divisions dealing with a) the formulation and b) the implementation of the EC's policy respectively. Additional Commission officials and national experts have been recruited thus producing an increase of more than 40% in the staff dealing with this policy area. Although its internal structure remained unchanged, the directorate lost its autonomy in September 1990 after its integration into Directorate B dealing with horizontal instruments of the internal market. The same structure exists today after the attribution of the competence for the single market to DG XV (Fernández Martín 1996, 23-4).
(early 1990s). Directive 71/305 became a cornerstone of the EC's policy in this field as it contained i) a set of principles guiding the co-ordination of national award procedures, ii) a definition of the awarding authorities that it covered, iii) a definition of an open and a restricted award procedure, iv) a set of obligatory rules regarding the publicity of contracts, v) a set of objective qualitative selection criteria regarding the technical and financial capacity and reliability of the companies and most importantly, two mutually excluding award criteria, namely the lowest price and the most economically advantageous offer.

The definition of public supplies has moved from a rather general reference to the 'delivery of products' that included siting and installation operations to a more precise definition (Flamme and Flamme 1988, 456) that covers the purchase, lease, rental and hire purchase with or without option to buy products. The regulation of public supplies' procedures at the level of the EC has been based on a strong element of commercial policy which has direct repercussions upon the unity of the single market in the sense that, unlike public works, supplies are frequent and repetitive, they concern a wide range of products and every public authority.

The regulation of the provision of services completed the regulatory framework of public procurement in the EC. The definition of services included in Directive 92/50 by the means of a negative phrase which excludes (among other aspects) supplies, works, arbitration and conciliation, employment, voice telephony and satellite services reflects
i) the very technical nature of the field and the willingness of the formulators to avoid 'loopholes' facilitating ineffective implementation and ii) the difficulty of defining this activity.

Moreover, the last extension of this policy's scope led to the inclusion of utilities - in addition to public authorities⁷ - which are active in the fields of water, energy, transport and telecommunications. The initial exclusion of these companies from the EC's regulatory framework was mainly based on their legal status. Some of them are bodies governed by public law while others are governed by private law (Berlin 1991, 14). Furthermore, their function in the market included commercial and industrial aspects which had to be taken into consideration. Although it took almost twenty years from the adoption of Directive 71/305 to the final inclusion of utilities in this regulatory framework, their initial exclusion has never escaped the attention of the EC for reasons which finally led to the adoption of Directives 90/531, 92/13 and 93/38.

⁷Public authorities falling in the scope of the directives are mentioned in more or less exhaustive lists (categorised by member state) attached to them. Although there is a clear pattern which has produced the continuous extension of the lists through their occasional modifications by decisions of the European Commission (e.g. Decision 90/380), one is struck by the divergence that characterises the lists relating to different states. While some of the lists are very detailed, others use rather general expressions in order to include categories of authorities without mentioning specific names (Rees 1994, 174). The pattern is not consistent along the lines of specific states. It differs from one directive to another.
These reasons are twofold. First, attention has shifted from the question whether they were governed by public or private law to the function that they perform thus leading to the indisputable recognition of the fact that they perform public functions by providing goods (water and energy) and services (transport and telecommunications) to the public and private sectors. Secondly, the Commission (1988a) found out that they operated in significant (in terms of size) but closed markets frequently as a result of the use of their 'exclusive or special rights' in a way that restricted competition. Defined as entities which are public authorities or undertakings or (in the opposite case) entities which operate on the basis of special or exclusive rights granted by a competent authority of a member state (art. 2 § 1 of Directive 90/531) utilities are covered by the EC's policy in this field only so far as their activities in the water, energy transport and telecommunications sectors are concerned.

However, i) the fact that the directives do not contain clauses ensuring their effectiveness, ii) the inadequacy of the existing national and European legal arrangements, especially in the light of the rapidity of the award procedures and iii) the unreliability of undertakings for the correction of certain infringements led to the establishment of a set of minimum review procedures in the field of public procurement, commonly known as 'Remedies Directives' (Flamme and Flamme 1990; Arrowsmith 1993b) which

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8This provision excludes their activities in other sectors where they are active players as a result of their diversification. Special thresholds apply to them for supply contracts.
concern both public authorities (Directive 89/665) and utilities (Directive 92/13).

National rules must be available to any person having or having had an interest in obtaining a contract and must include a) **interim measures** for the suspension of award procedures or the implementation of any decision taken by award entities, b) the **setting aside** of decisions taken unlawfully and c) the award of **damages** to persons harmed by an infringement. The effective implementation of the decisions taken by the bodies which are responsible for the review procedures must be ensured by the member states. These bodies need not be judicial in character but their decisions must be legally binding. The set of policy instruments is completed by the transitional periods which are longer for Greece, Portugal and Spain. So far as Greece is concerned, her current three exemptions concern the utilities directives and will have expired by December 1997.

The EC's public procurement policy is a regulatory policy **par excellence** for a number of reasons. It is based predominantly on the use of coercion. The objective is the establishment of an EC-wide free market. The achievement of this objective is sought through the use of coercion for i) the elimination of discriminatory practices and ii) the promotion of transparent and objective procedures stipulated in the directives. Hence, the theory incorporated into the policy can be summarised as follows: **If** the market is transparent and objective, **then** it will also be free.

The development of the policy has led it beyond the limits of a mere framework for the co-ordination of national policies which was the initial objective. It is a
comprehensive legislative framework covering almost all aspects of this policy area\(^9\). The first sign of support for this view comes from the use of secondary legislation due to the ineffectiveness of art. 30 and other 'state-building' provisions (Page and Dimitrakopoulos 1997) of the Treaty. In more general terms, the content of these provisions is characterised by the constant reinforcement of two dimensions, namely i) scope and ii) density. The scope has been extended a) from works to supplies and then services and b) from the public to the private arena. Density has been reinforced by the regulation of an increasing number of policy dimensions, mainly publicity requirements, selection criteria and award criteria. The development of these directives and the changes introduced as a result of European or wider international negotiations has led to the need for legislative consolidation achieved through Directives 93/36 (supplies), 93/37 (works) and 93/38 (utilities).

Important differences exist in the treatment of public authorities and utilities. The latter have to face a much weaker regulatory framework than public authorities (Cox and Sanderson 1994). Indeed, one could describe the part of the policy that concerns utilities as a safety net which is meant to deter them from adopting uncompetitive practices. In that sense the content of the policy is rather negative, unlike the part that concerns public authorities which is characterised by a more resolute drive towards competitive practices.

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\(^9\)This regulatory framework does not cover the execution of the procurement contracts.
Coercion is used in order to allocate obligations and rights to the awarding entities. The content of the obligations is geared towards the constant limitation of the ability to use discretion and the drive towards transparent and objective procedures. This reflects the extent of change introduced by the policy, in the sense that change is quite extensive: Previously uncompetitive markets are sought to be liberalised. The increasing intensity of the policy which has been mentioned earlier is orientated primarily towards the allocation of the contracts and concerns the definition of their content only in a subsidiary manner. The efficacy of coercion presupposes the existence of credible sanctions regulated by Directives 89/665 and 92/13.

Although the content of the policy does not necessarily lead to the adoption of a centralised or a decentralised procurement system - thus avoiding the re-allocation of regulatory power at the national level - it does place substantial emphasis on the role of market players, mainly the actual and potential tenderers. The willingness of the member states to entrust market players (rather than public institutions like the European Commission) with the task of monitoring the competition game is illustrated by the adoption of the Remedies Directives. This idea emanates from the general philosophy of the policy which is based on the strict economic dimension of public procurement and the subsequent substantial limitation of its scope. However, this choice is not without negative repercussions. Both the use of market forces in general and the specific use of the legal concept of direct effect by market players rely heavily on the willingness of the latter to 'bite the hand
that feeds them' (Commission of the European Communities 1990, 25). Clearly, this rather natural danger of market failure (Woolcock 1991, 128) is an inherent feature of the approach adopted by the EC.

On a more normative note, one must also underline the direct repercussion of the Remedies Directives upon the institutional autonomy of the member states. Although this is not the policy's most developed dimension, the mere existence of these directives limits the institutional autonomy of the member states by prescribing minimum levels of legal protection for actual or potential tenderers, thus mitigating their ability to regulate the relations between market players on the one hand and public authorities and utilities on the other. This in turn illustrates the growing importance of the idea of effectiveness which is at the heart not only of the concept of implementation but also the priority attached to art. 5 of the Treaty.

The premium that the policy has placed upon the market players and awarding entities (both of the public and the private sector) does not mean that they are they only parts of the implementation structure built into the policy. This structure also includes national and European public authorities such as ministries, courts and possibly parliaments. Regulating is one thing though, implementing the regulatory policy is another. The use of directives obliges us to commence the analysis of the implementation process from its formal phase after the presentation of the national institutions that deal with this policy.
7.3. INSTITUTIONAL MAPPING AT THE NATIONAL LEVEL

7.3.1. THE UK: THE TREASURY AS THE EMBODIMENT OF CONTINUITY

The implementation of the EC's procurement policy in the UK has not led to the creation of new administrative units. The only significant change concerns the recruitment of some additional staff to the services of the Treasury which has overall responsibility for this policy area. The remit of the Treasury covers the formulation, negotiation and (formal and administrative) implementation stages. Moreover, the partial responsibility of the Department of the Environment (alongside the three regional departments) for local authorities, has left the primacy of the Treasury intact. This responsibility follows organisational rather than functional lines. In other words, it covers all aspects of procurement policy (works, supplies and services) and the dividing lines concern sets of bodies (local government authorities) rather than aspects of the policy or stages of the policy process.

Within the Treasury, this policy is dealt with by the Procurement Group which is headed by an under secretary and comprises the Central Unit on Purchasing (CUP) and the Procurement Policy Team whose Head also represents the UK to the EC's Advisory Committee for Public Contracts.\(^{10}\)

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\(^{10}\)This is a consultative committee, initially created in the early 1970s (Decision 71/306) in order to examine problems in the field of public works, in which Commission officials meet with national representatives in order to discuss issues regarding the EC's policy, including implementation problems.
Moreover, the group draws many of its staff (including three of its recent Heads) from outside the civil service. The intensity of the Treasury's lead in this policy area is illustrated by the fact that the CUP also advises central government departments on the use of best procurement practice. The Treasury's traditional leading role reflects a view of this policy as a predominantly economic issue focusing on procurement as a fundamental part of public expenditure.

7.3.2. FRANCE: CONFIRMING THE ROLE OF CCM

On the other hand, stability also characterises the French administrative structures which deal with procurement policy. The most prominent part of these structures is the Commission Centrale des Marchés (CCM) that is the Central Committee for Procurement. This interministerial body has been created in the 1930s in order to resolve the problems that emanated from the dispersed methods used by various public bodies in the field of procurement (Dillemann 1987, 96). The Code des Marchés Publics (Public Procurement Code) which incorporates most of the French legislation regarding public procurement also constitutes the legal basis (art. 3-21) for this pivotal structure. CCM is placed under the authority of the Minister of Economy and Finance, and has the responsibility for the formulation and the implementation of policy.

CCM is composed of three sections (administrative, technical and economic) and an international affairs unit. The establishment of the latter along with the recruitment
of additional staff absorbed by the existing administrative structures and the creation of a post at the SGCI at desk officer level were the only changes linked to the EC directives. Furthermore, other ministries are also responsible for some aspects of policy, like the Interior Ministry which deals with local authorities and the Ministry of Equipment, Housing, Transport and Tourism which deals with some public works and has also absorbed some of the new staff. However, the authority of the CCM is uncontested and unlike the aforementioned departments, covers every aspect of this policy area and the whole of the policy process.

7.3.3. GREECE: THE POLITICS OF SHIFTING RESPONSIBILITIES AND OBJECTIVES

Finally the organisation of the Greek administration in this policy area reflects the three strands covered by the directives, namely works (covered by the Ministry of the Environment, Spatial Planning and Public Works), supplies (covered by the Ministry of Trade which since 1996 is part of the so-called Ministry of Development\textsuperscript{11}) and services dealt with by the Ministry of National Economy. While the first two ministerial departments have a long experience in their respective parts of this policy area, the latter has been chosen to deal with services not only due to lack of another solution but also because of the long experience and the academic background of a particular official.

\textsuperscript{11}The Ministry of Development also incorporates two previously individual ministries, namely the Ministry of Industry, Energy and Technology and the Ministry of Tourism.
Furthermore, it has to be noted that the constant transfer of the responsibility for public supplies from one ministry to another throughout the twentieth century (Zorbala 1992, 151) constitutes an illustration of a certain lack of long-term perspective in this policy area, especially because the last transfers coincide with the first period of EC membership\textsuperscript{12}.

Each one of the aforementioned ministries deals with every aspect of the policy process within its particular remit despite the fact that utilities' procurement is dealt with by technical ministries\textsuperscript{13}. The problems that characterised the implementation process in the field of supplies in the 1980s (infra, Sub-section 7.4.3 and Chapter 8) led to the creation of a Community Affairs Unit (Presidential Decree 397/1988) in the Ministry of Trade. Despite the existence of a separate Legal Affairs Unit, it had the responsibility mainly for problems relating to procedures under art. 169 of the Treaty.

The establishment in 1988 of a Secretariat General for State Purchasing covering every aspect of public supplies including the European dimension reflects the effort made in order to modernise the existing legal framework. The need to end a cycle of EC-related problems has been a fundamental

\textsuperscript{12}The transfer of the responsibility for public supplies from the Ministry of Trade to the Ministry of National Economy in 1982 (where it remained until 1985) coincides with the initial phase of the process of formal implementation of the EC's policy in Greece and is linked to some problems in this process (infra, Sub-section 7.4.3).

\textsuperscript{13}For example, the Ministry of Transport and Communications is responsible for the Telecommunications Organisation of Greece.
incentive for this effort. Its abolition by the conservative government four years later (Presidential Decree 304/1992) constituted a symbolic gesture of its willingness to limit the role of the state in the economy while the end of a cycle of conflict with the European Commission is illustrated by the reinforcement of the role of the Community Affairs Unit in the formulation of policy, negotiation and formal implementation rather than the preparation of litigation. The return of the socialists to power in 1993 led to the establishment in 1995 (Law 2286/1995) of a Directorate General for State Purchasing.

Furthermore, the need for specialised managers who would manage co-financed public works projects led to the establishment (Law 2372/1996) of the Community Support Framework Management Unit, a semi-independent body which is supervised by the Minister of National Economy. This body is staffed by officials from the private and the public sectors and has the responsibility for the assessment of the needs of the administration in terms of staff and has the power to recruit new staff from the private sector or second civil servants and to provide technical expertise in the management of projects in order to assist host public bodies to meet EC criteria and obligations for funding. Its establishment has been delayed by the strong opposition of the officials of the Ministry of National Economy and their union (Chaikalis 1995b) who argued that this would simply establish a new power centre blurring the existing lines of
authority. Moreover, they argued that the recruitment of staff from the private sector did not constitute a guarantee for success. Far from that, they felt that the mentality and the methods of the private sector were simply inappropriate for this particular task.

Further proposals regarding changes within the same ministry that would enable it to monitor the behaviour of awarding entities in the field of services contracts, have not been implemented. The same result followed a proposal of the Ministers of Development and Transport who argued in favour of the establishment of an independent administrative authority which would monitor the implementation of public procurement policy. This proposal has been rejected by the Ministry of the Environment, Spatial Planning and Public Works and also officials of the Ministry of Trade which is part of the Ministry of Development! Senior government officials took the same view (Lampsias 1997) because they, rightly, felt that the establishment of this authority in the Greek context would be construed as a transfer of political responsibility.

Finally, the extensive use of EC funds for a number of important public works projects including the new underground of Athens, the new Athens Airport and a number of motorways has led to significant recent changes in the structure of the Ministry of the Environment, Spatial Planning and Public Works. Aside from the creation of a Directorate General for Quality Control in Public Works in 1997, strong opposition also came from the construction companies (Chaikalis 1995a) which interpreted this development as an attempt to limit their 'freedom'.

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14 Strong opposition also came from the construction companies (Chaikalis 1995a) which interpreted this development as an attempt to limit their 'freedom'.

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the Secretariat General for Public Works (Presidential Decree 428/1995) as a result of the recent problems in the administrative implementation of the public works directives and the pressure exercised by the European Commission for better quality control in co-financed public works, the most significant change concerns the establishment of a Secretariat General for Co-financed Public Works (Presidential Decree 166/1996) which, uniquely, reports directly to the Minister. This fact underlines the 'hands-on' approach of Minister Laliotis and the importance attached to this new structure which has been created not only in order to formulate the policy of the ministry in this field but to implement and control policy as well and to collaborate with the institutions of the EC on issues falling in its remit.

The political and economic significance of public works in Greece has also been reflected through the establishment of an interministerial committee comprising ministers and senior officials, entitled Committee of Major Works (Decision of the Prime Minister no 3307). It is chaired by the Minister of the Environment, Spatial Planning and Public Works and it includes the Ministers of Development, Transport and Communications, the Under Secretaries of National Economy, one of the Under Secretaries for Environment, Spatial Planning and Public Works, and three advisers to the Prime Minister. The committee monitors the development of all major public works and prepares the relevant work of the Ministerial Council. Let us now turn to formal implementation.
7.4. FORMAL IMPLEMENTATION

7.4.1. THE UK: THE CHANGING FORM OF AUTHORITY

Formal implementation in the UK has been characterised by the initial use of administrative circulars and guidelines by the administration which were partly replaced by subordinate legislation in the form of statutory instruments after the beginning of the 1990s. The choice of circulars and guidelines (issued by the Treasury, 'regional' and other ministerial departments) reflects the traditional lack of legislation covering this policy area before the EC directives, a period during which these issues were dealt with as a matter of administration as a British official has put it.\textsuperscript{15}

Moreover, the use of directives at EC-level in the stage of collective policy formulation certainly constitutes a valid argument in favour of the use of any form of national implementing measures not only because of its very definition found in art. 189 of the Treaty but because the content of the directives as well gives the member states the right to choose the laws, regulations and administrative provisions necessary for the formal implementation. This, in turn, constitutes a clear expression of the principle of

\textsuperscript{15}This action was based on a number of principles and procedures developed by the Treasury and Committees of the House of Commons like the Public Accounts Committee (Turpin 1989, 62).
institutional autonomy in the wide sense of the term. However, a number of developments have led the British administration to abandon this practice.

First and foremost, the long and consistent case law of the ECJ has rejected the use of purely administrative measures for formal implementation (supra, Chapter 2; Labayle 1989, 628). Indeed an important distinction has been drawn on the basis of ECJ's case law (Fernández Martín 1996, 103) between two situations i) where a directive's intended effect is limited to the internal sphere of the administration, without the creation of any effects on third parties and ii) where a directive is intended to produce benefits for third parties. The EC's public procurement directives clearly fall into the second category because their objective is the creation of opportunities for potential tenderers to bid for public contracts through a set of obligations imposed on the awarding entities, thus rendering the use of circulars and guidelines inappropriate for the formal implementation. The validity of the ECJ's view that circulars and guidelines are not suitable for the formal implementation of EC policy is also illustrated (infra, Chapter 8) by the fact that in the case of the UK they enabled the continuing use of discriminatory practices in pursuit of other policies. Moreover,

an administrative circular is simply an administrative device, it is not law, in the way a statutory instrument is

as a Treasury official has put it.
Secondly, the very nature of circulars and guidelines as internal administrative instruments defeats the purpose of the EC's policy in this field, which presupposes a transparent market where informed players transform rights conferred upon them into business opportunities. This potential fails to be fulfilled when the relevant directives are not brought to the attention of these players through the appropriate implementing measures. However, one must also acknowledge the fact that, as a British official has put it,

even the use of legislation cannot guarantee the wide diffusion of information.

In other words, active market players have the way to get information about contracts.

Thirdly, the extension of the remit of the EC's policy to utilities has certainly contributed to the switch to legislative measures. Private ownership of many utilities in the UK meant that circulars and guidelines could not be used precisely because these companies are not parts of the British administration. Thus legislation was needed. Finally, one must also underline the link between the shift to legislative measures on the one hand, the completion and more importantly the reinforcement of the normative force of the EC's policy in this area on the other, as illustrated by the extension to services and the finishing touches given through the consolidation directives. One must underline here the significant role played by the Treasury in this process. Indeed, it used its authority and nodality in
order to implement change in a framework which is characterised by the absence of any substantive challenges to the views that it takes in the European policy process. This means that this combination of authority and nodality reduces the number of decision points involved in the implementation process in a way which reinforces effectiveness.

The form of legislation which has been chosen (statutory instruments) reflects the dominant position of the British Executive in the implementation process. The limitation of the participation of Westminster is embodied in the European Communities Act 1972 whose section 2 § 2 constitutes the necessary enabling basis for the adoption of the legislative instruments (supra, Chapter 3) thus justifying the use of the term\(^\text{16}\) legislation without legislature

(Miers and Page 1990, 104).

The answer to the question whether the formal implementation was timely or not, is directly linked to the content of the implementing measures. Although the broad picture of this stage of the policy process in the UK is one

\(^{16}\text{Miers and Page (1990, 110) regard section 2 § 2 of the European Communities Act 1972 as the provision that contains the most extensive delegation of law-making power. The fact that these legislative instruments had to be laid in the House does not alter the validity of this point, especially in the light of the fact that in this case the statutory instruments in question had immediate effect subject only to annulment through a negative resolution of the Parliament.}
of timely and accurate formal implementation, one must underline the case which opposed the Treasury and BT in relation to the formal implementation of the first two directives covering the formerly excluded sectors. The significance of this case is also based on the fact that it coincides with the shift from the administrative circulars and guidelines to legislative instruments and also the extension of the EC's regulatory framework to utilities.

Indeed, the change from administrative circulars and guidelines to statutory instruments for the formal implementation of policy in the UK has been marked by a challenge relating to their content emanating from a private company which is covered by the utilities directives. The case opposed BT to the Treasury on the way in which art. 8§1 and §2 of Directive 90/531 had to be implemented. This provision - which exemplifies the much wider margin for manoeuvre left at the discretion of utilities - stipulates that the directive will not apply to contracts awarded by utilities for purchases intended exclusively to enable them to provide telecommunications services where other entities are free to offer the same services in the same geographical area and under substantially the same conditions. These contracts concern activities described in art. 2§2 (d) of Directive 90/531 namely the provision or operation of public telecommunications networks or the provision of one or more public telecommunications services. Art. 8§2 further stipulates that the contracting entities shall notify the Commission at its request of any services they regard as covered by the aforementioned exclusion, thus enabling it to publish periodically a comprehensive list of these services.
The Treasury, in formally implementing Directives 90/531 and 92/13 through the Utilities Supply and Works Contracts Regulations 1992, took the view that it had the responsibility to define the services which fall outside the remit of the said directive and so it did in Schedule 2 which was linked to Regulation 7 § 1. Furthermore, the Treasury implemented the procedural aspect of the provision in a way (Regulation 7 § 2) which obliged utilities to notify to it the services provided by them that they consider as services which fall into the remit of the exemption, instead of sending the relevant list directly to the Commission. BT thus brought to the High Court an action against the Treasury for annulment of Schedule 2. The High Court's Queen's Bench Division, Divisional Court, in turn, submitted to the ECJ a reference for a preliminary ruling (case C-392/93) relating to the interpretation of Directive 90/53117. Basically the questions concerned i) the division of power between the UK government (in this case the Treasury) and the utilities as to who must identify the services falling under the exemption and then submit them to the Commission at its request and ii) whether the UK government must compensate BT if the ECJ found that the relevant national provision implements incorrectly art. 8 of Directive 90/531.

The Treasury's approach according to which the directive does not preclude the member states from using their authority in order to define the services which are covered by the exemption was based on the view - also shared

17 This reference for a preliminary ruling was based on art. 177 of the Treaty.
by the French, German and the Italian governments - that in this way they specify the content of the provision, thus enabling the exercise of judicial review which would otherwise be impossible. Moreover, the Treasury (supported by the German government) considered that this form of implementation might be necessary in case of a conflict of view with utilities, thus jeopardising legal certainty.

The ECJ dismissed the view of the Treasury, following the opinion of the Advocate General, thus accepting that the power to determine which telecommunications services are to be excluded is vested in the utilities, not the national governments. Nevertheless, it did not go as far as accepting that the UK government had to compensate BT. It based its view on the fact in this particular case, one of the three conditions for state liability in case of incorrect implementation had not been fulfilled because the interpretation of the directive that the Treasury adopted was not manifestly contrary to the wording of the directive or to the objective pursued by it. Finally, this judgment of the ECJ rightly underlined the failure of the European Commission to spot this problem when the Treasury communicated the implementing text to it thereby fulfilling the national obligation incorporated into the directives which is designed to facilitate the Commission's monitoring function (supra, Chapter 2).

The case delayed the adoption of the Utilities Contracts Regulations 1996 which i) implements through Regulation 7 § 1 and § 2 the necessary changes thus bringing the British legislation in line with the judgment and ii) further implements Directive 93/38. The shift to
legislative measures did not mean the abolition of the use of circulars and guidelines. On the contrary, they are still used by the Treasury or other departments not only for the administrative implementation of the EC's public procurement policy but in order to remind awarding authorities of their EC obligations in case of domestic changes in other aspects of procurement policy\textsuperscript{18} as well.

7.4.2. FRANCE: BUSINESS AS USUAL?

The process of formal implementation in France is equally one of accurate and in most cases timely formal implementation based on the use of formal and informal authority. Before discussing the case of late implementation, it is worth noting that the French pattern is characterised by the incorporation of the directives into the Code des Marchés Publics through the extensive use of decrees followed by arrêtés ministériels, that is ministerial decisions, and ministerial instructions which are prepared by the CCM, published in the Journal Officiel de la République Française (Official Journal of the French Republic) and integrated into the Code whose Livre V (Book V) created in 1989 concerns the EC's public procurement policy, thus ensuring widespread publicity.

\textsuperscript{18}Joint circular 5/96-11/96 issued recently (United Kingdom. Department of the Environment/Welsh Office 1996) relating to compulsory competitive tendering constitutes an example of this practice.
While the extensive use of decrees\textsuperscript{19} confirms the preponderance of the French government one must also underline the repercussions of the extension of the EC policy's agenda upon the choice of the national implementing measures. Indeed, the modification of the French penal code through the creation of the crime of favoritism and also the regulation of utilities, which fall in the remit of the French Parliament by virtue of art. 34 of the Constitution of 1958, necessarily brought the latter into the process of formal implementation. Nevertheless, the participation of the Parliament did not produce spectacular results. It certainly seemed to be a matter of constitutional procedural necessity.

The process of formal implementation in France has been marked by the absence for almost four years of implementing measures for Directive 92/50 (services). When the deadline for the entry into force expired (July 1993) the European Commission used the procedure of art. 169 of the Treaty in order to bring a case to the ECJ (case C-234/95). The French government did not deny that it had not implemented formally the said directive, despite the formal notice that the European Commission had sent in August 1993. In the absence of a reply, it proceeded to the stage of the reasoned opinion (September 1994) where the French

\textsuperscript{19}Drago (1975, 864) interpreted the initial use of rather succinct texts which were interpreted by extremely detailed ministerial instructions as an attempt by the government to keep its hands free through the formal implementation of the essential minimum required. There is no evidence that this technique has affected the wider implementation process.
government unsuccessfully argued that the relevant decrees were under preparation. Given that when the case reached the ECJ France had not yet implemented the directive, the judgment could only be one of condemnation.

The clear acknowledgment of a senior French official who told us that

no one has an interest in being the first to transpose. One must be pragmatic in implementation certainly provides a valid explanation along with the delay caused by the general election of 1993, although CCM officials claimed to have instructed the administration to implement the directive in practice. The situation relating to Directive 92/50 has been described as 'alarming' (Commission of the European Communities 1995, 25; Commission des Communautés européennes 1996, 57). The countries which contributed to this situation included, significantly, Germany and Greece. The French authorities finally implemented this directive in January 1997 (Loi n° 97-50).

7.4.3. GREECE: AUTHORITY AND CONFLICT IN CONTEXT

The process of formal implementation in Greece has been characterised by three fundamental elements. First, the Greek accession in January 1981 meant that the EC's policy had already developed its basic characteristics thus producing the need for Greece to adapt to an existing situation rather than influence its shape. Secondly, the first four years of Greek membership were marked by the
socialist government's reluctance to implement some of the fundamental aspects of the Treaty of Accession. The memorandum that it submitted in spring 1982 reflected the need for longer transitional periods, especially in the field of public supplies. Thirdly, the intensity of protectionist policies which had been implemented in the past (Zorbala 1992) meant that not only was there a need to implement EC policy formally by integrating the relevant rules into Greek law, but an important effort had to be made in order to modify or abolish a large number of legislative instruments which incorporated these policies. This has been partly achieved through the Treaty of Accession (Zorbala 1992, 217-8).

The difficulties associated with the task of formal implementation of the EC's procurement policy in Greece is exemplified by the adoption of Law 936/1979. It has been adopted in the short period between the conclusion of the Treaty of Accession (May 1979) and its ratification by the Greek Parliament (July 1979). Art. 6 § 6 facilitated the implementation of discriminatory practices against imported products in the field of supplies, along the lines of a protectionist policy dating from 195520. Having already missed this opportunity to commence the process of formal implementation even before her accession, Greece followed the same pattern throughout the 1980s. The problems that have been observed also concerned services contracts and the

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20 Zorbala (1992, 206-7) notes that Law 3215/1955 instituted a general preferential scheme which was characterised by the addition of a number of taxes and levies to imports, in a manner that clearly protected domestic products.
system of remedies. Throughout the 1980s, laws have been used extensively, followed by presidential decrees which specified some of the provisions of laws, frequently based on the delegations of legislative power to implement EC policy.

The process of formal implementation in the field of supplies has been characterised by the conflict between the EC policy and the overt policy of the so-called 'Hellenisation'\(^{21}\) of supplies implemented by the socialist government between 1981 and 1986. The conflict took the form of the non-implementation of the EC's policy (that is the lack of any national implementing measures) and the use of existing legislation for the protection of the domestic market\(^{22}\). This has attracted the attention of the European Commission which initiated the procedure of art. 169 of the Treaty (case C-84/86). Nevertheless, it exercised discretion by not bringing the case to the ECJ because the dialogue that it opened with the Greek administration illustrated that the latter was about to commence the process of formal implementation. The initial result took the form of Law 1797/1988 which did not constitute a satisfactory solution because it abolished the distinction between domestic and international competitions only indirectly while it did not abolish the system for the protection of regional/provincial industries at all (Zorbala

\(^{21}\) The term referred to the preference for Greek products.

\(^{22}\) The second aspect concerns the administrative implementation of policy. Therefore, it shall be analysed in Chapter 8. However, it is mentioned here because it has been facilitated by the formal non-implementation of EC policy.
1992, 208). It has been followed and completed by Presidential Decree 105/1989 which implemented correctly Directive 77/62. This measure has been followed by Presidential Decree 173/1990 containing discriminatory provisions (e.g. art. 19 § 2) subsequently abolished by Presidential Decree 137/1991. The process has been completed by Law 2286/1995 which has abolished every remaining discriminatory provision expressis verbis. It was only because the European Commission has used every ounce of its good will that Greece has avoided an embarrassing judgment of the ECJ.

Formal implementation in the field of public works has been characterised by problems regarding the specificity and accuracy of the Greek legislation (Law 1418/1984). The Commission's view (Spathopoulos 1990, 109-10) was that i) the mere introduction of the principle of non-discrimination between Greek and EC tenderers was insufficient for the liberalisation of the market, ii) the use of administrative circulars for the follow up of legislation was contestable and iii) a number of important provisions, including those regarding the selection criteria, had either been ignored or implemented incorrectly. The problem has been resolved in 1991 with the adoption of Presidential Decree 265/1991 whose content was almost identical to EC legislation. The use of the copy-out technique certainly enabled Greece to avoid a condemnation in the ECJ for non-implementation but created a number of problems in the stage of administrative implementation (infra, Chapter 8).

The formal implementation of Directive 92/50 (services) differed in a number of ways. The fundamental
characteristic of the process in this case is the challenge to the responsibility of the Ministry of National Economy for this area. Given that no implementing measures have been adopted, the European Commission initiated the procedure of art. 169 (case C-311/95). The initial action (formal notice of August 1993 and the reasoned opinion of May 1994) had no result thus leading to a condemning judgment issued by the ECJ. In the proceedings before the ECJ, the Greek government, despite not disputing that it failed to implement formally the said directive, argued that its initial steps in the implementation process included the setting-up in November 1994 of an interministerial committee at official level which would prepare the necessary legislative instrument. Moreover, the Ministry of the Environment, Spatial Planning and Public Works had already issued a circular and a draft Presidential Decree for the provisional implementation of Directive 92/50. The activism of this ministerial department is at the heart of the problem of non-implementation.

Indeed, officials of the Ministry of National Economy which is formally responsible for this part of procurement policy prefer the adoption of a single text because the directive covers many different forms of services. On the contrary, officials of the Ministry of the Environment, Spatial Planning and Public Works prefer the adoption of two legislative instruments, one of which must cover the regulation of plans and studies prepared for public works projects while the other must cover the remaining forms of services. Essentially, the position of the latter is one which tends to maintain the status quo which contains many
discriminatory clauses that protect domestic planning and research firms from European competition\textsuperscript{23}. The problem is based on the radical change which is necessary. This means that it is a matter of interests as one of its officials has put it. This power game is directly linked to the high profile of the Ministry of the Environment, Spatial Planning and Public Works which is based on the use of important EC and national funds and its subsequent role as a major mechanism for economic development. A forthcoming judgment of the ECJ based on the revised art. 171 of the Treaty may provide the incentive for the final resolution of the problem.

One must certainly underline here the diffused nature of nodality and authority in a form which represents the opposite of the mix that we observed in the UK (supra, Sub-section 7.4.1). Indeed, unlike the case of the UK where only one actor (Treasury) had to accumulate the relevant information (need for change) and then take the necessary measures (choice of statutory instruments), the Greek case illustrates the negative effect of the existence of diffused forms of authority and nodality, in a manner that increases the number of decision points involved in the implementation process. In short, instead of an authoritative decision of the main body responsible for this aspect of public

\textsuperscript{23}The unwillingness of the interested organisations to accept the opening of the profession to European competition was a major factor behind the condemnation of Greece by the ECJ (Spathopoulos 1990, 110).
procurement (Ministry of National Economy), the Ministry of the Environment, Spatial Planning and Public Works used this window of opportunity in order to promote its sectoral logic thus undermining the effectiveness of the process through the additional decision point that it created.

The implementation of Directive 89/665 (remedies) has been marked by a legal dispute regarding the issue whether Greek legislation is adequate or not. The European Commission underlined the lack of measures implementing the directive in the field of public supplies despite accepting that the Greek legislation contained sufficient provisions in the field of public works (Presidential Decree 23/1993). Indeed, an official of the Ministry of National Economy observed that

the Ministry of the Environment, Spatial Planning and Public Works pushed through the necessary legislation in a manner that completely ignored the Ministry of Trade and the need for a global solution. In the proceedings before the ECJ (case C-236/95) the Greek government admitted not having adopted the necessary measures. Nevertheless, it argued i) that the existing system of remedies offered some legal protection to tenderers and ii) that the recent case law of the State Council (especially its judgments in cases 355/1995, 470/1995, 471/1995, 473/1995 and 559/1995) made explicit reference to the said directive. Moreover, the Greek government used domestic formal and procedural

24I am indebted to Mr. I. Kymionis of the Athens Bar for providing copies of these judgments.
difficulties as an argument but it did not avoid a condemnation in line with the ECJ's case law on the issue. The committee composed of two members of the State Council and a member of the Court of Appeal which had already started work on a draft legislative text while the case was open, has completed its work in August 1997. The new text will introduce significant changes to the Greek system of remedies (Marinos 1997). Clearly, this was an issue that could have been resolved in less than a year, if the right alert procedures had been established and used by a co-ordinating mechanism.

Finally, if the derogations which have been granted to Greece in the field of utilities (until July and December 1997 for Directives 92/13 and 90/531 respectively) were aimed at the proper, albeit belated, formal implementation of policy, no legislative measures have been produced so far. Although the administrative implementation of policy (infra, Chapter 8) regarding utilities is rather different, one must underline the fact that the functional logics that we have identified (Chapter 5) as part of the Greek politico-administrative structures are evident here. Indeed, the Greek negotiators who have managed to insert these longer transitional periods in the EC's directives have achieved a narrowly defined objective which was not part of a wider concrete plan regarding the use of these periods e.g. for the preparation of a better implementing text. Let us now turn to the administrative stage, some outcomes and the overall patterns of implementation.
Chapter 8

ADMINISTRATIVE IMPLEMENTATION, OUTCOMES AND A DISCUSSION OF DIFFERENTIATED PATTERNS

8.1. ADMINISTRATIVE IMPLEMENTATION

8.1.1. THE UK: THE CONFIRMATION OF NODALITY

Administrative implementation of EC public procurement policy in the UK reflects the wider transition to a free market where market players compete for public contracts through the fundamental changes brought about by the Conservative party after 1979. The process of administrative implementation during the 1970s has been characterised by the use of preferential schemes dating from the immediate post-war period (Turpin 1989, 77). Their aim was the allocation of contracts to firms based in specific developing regions. While the General Preference Scheme led government departments to award contracts to firms based in these areas when factors such as price, quality and delivery were equal, the Special Preference Scheme gave the opportunity to firms of the said areas to obtain 25% of the order if no additional cost occurred and if other considerations were equal. Both schemes were running counter to the very philosophy of the EC's policy not because of their discriminatory nature per se but because of the fact that their emphasis was put on the allocation of contracts to British regions thus discriminating against EC firms. The same can be said of the attempts of British
governments during the 1970s (and even the 1960s) to enhance the domestic computer industry through a preferential policy which meant that large computers were purchased from a British company through single tender\(^1\), subject to satisfactory price and delivery. This policy has been abandoned in the end of the 1970s not only as a result of the change of government but also because the exemption granted by the EC\(^2\) had expired (Turpin 1989, 76).

Although some reforms had already been adopted in the late 1960s by the Labour government which had decided to contract-out cleaning services in central government departments (Turpin 1989, 72) the first signs of change date from 1972 when the Conservative government led by Heath introduced the Local Government Act 1972 which established compulsory competitive tendering procedures for local authorities in cases of some purchases of goods or the execution of works (art. 135 § 3). The Department of the Environment, contrary to its previous practice, arranged to issue weekly press releases which included information about notices which had already been sent to the Official Journal of the European Communities for publication. These notices were published in the specialised press in order to enable

\(^1\)This method involves the direct negotiations between the relevant user and one supplier chosen on the basis of pre-defined criteria. The selection that precedes these negotiations has a restrictive effect upon competition. Various degrees of this restriction can be envisaged.

\(^2\)This exemption could only have been based on art. 92 § 3 of the Treaty covering competition policy, thus having a limited impact at least in terms of time.
interested UK contractors to be informed of forthcoming competitions.

During the 1980s, the implementation process has been underpinned by the clear preference for competitive procedures, the limitation of public expenditure and the predominance of the Treasury. The role of the Treasury here goes far beyond the mere formal implementation and the actions taken in order to bring developments in EC public procurement policy to the attention of awarding entities. It was after the Treasury's intervention through guidance that some authorities abolished the requirement - previously imposed on prospective contractors - to provide information about the composition of their workforce and an indication of plans to use their own or local workforce for the execution of works contracts. Moreover, the Treasury collected data on the award of works contracts before submitting them to the Commission and offered guidance on a number of instances such as like the case where local protesters attempted to use the EC's procurement policy in order to oppose the plans relating to Ipswich airport. This guidance included not only the detailed explanation of EC policy, but more importantly day-to-day advice to awarding authorities.

It is important that advice takes account of a) policy requirements and b) the EC procurement rules, particularly detailed things like technical specifications

as one Treasury official has put it.
This effort to implement EC policy takes rather diverse forms which reflect the pivotal role of the Treasury in the implementation process. Its authority is used in order to convince interested parties as to the procedures that have to be followed in the purchasing process, like the case of a university professor who was exerting pressure on his university’s purchasing officer to purchase an important piece of equipment necessary for his work, without taking account of the EC’s directives. It was only when the officer asked for and obtained an official letter from the Treasury detailing the procedure that had to be followed and thereby confirming the view of the purchasing officer, that the professor’s pressure ceased.

Other, more general forms of action include the publication of basic guidance notes addressing particular issues which some awarding authorities face as a result of lack of experience, and significant practical problems such as the change in the cost of a purchase between the initial and the final estimate, and the handling of the issue of advertisement. More importantly, it constitutes the UK’s privileged contact point for the European Commission with which contact is maintained on a day-to-day basis, frequently as a means of resolving problems in the implementation stage resulting from the actions of awarding entities, although the officials of the Treasury were eager to stress that they determine autonomously the issues that they raise. This contact with European Commission officials is facilitated by the previous participation of Treasury officials in discussions and negotiations at EC-level. The role of the Treasury as a nodal contact point concerns also
tenderers who occasionally 'air' their complaints with this department. The role of the Treasury in this case takes the form of an informal legal adviser, given that its officials draw attention to the rights conferred upon tenderers by the directives and the relevant implementing instruments, leaving them to decide as to how to pursue a given issue. We shall return to this point at a later stage.

Apart from these procedural aspects, the role of the Treasury is inextricably linked to significant policy developments at the domestic level, channeled through this ministerial department. This is more evident in the case of policies which have a horizontal economic dimension. Indeed, the traditional primacy of the principle of 'value for money' in public procurement policy in the UK is channeled through the Treasury. This emphasis leads to the primacy of the criterion of the most economically advantageous offer. The Treasury here implements policy by specifying which award criterion should be preferred by awarding authorities. The Treasury defined this concept as

the optimum combination of the whole life cost and quality to meet the customer's requirement

(United Kingdom 1995, 6).

It further sought to promote flexibility by i) acknowledging that there is no single organisational model for effective procurement and identified key factors characterising effective procurement activity including, inter alia, central co-ordination of activities ensuring sharing of
expertise, and a pro-active approach\textsuperscript{3} and ii) by organising courses (Williams and Smellie 185, 28) for purchasing officers\textsuperscript{4} in order to facilitate the implementation of the 'value for money' principle.

A significant domestic development that affected the implementation process concerns the privatisation of central purchasing agencies. This, in turn, is directly linked to the concept of 'untying'. It meant the abolition of the obligation to procure products through central agencies. This meant in practice that alternative arrangements could be made by departments for their procurement needs, e.g. through contracts with commercial suppliers (Turpin 1989, 3). Previously, the use of central purchasing agencies\textsuperscript{5} meant that they had assumed responsibility for meeting the purchasers' international obligations, in line with the Treasury's guidance. The abandonment of this traditional feature of the UK procurement policy, which commenced in 1982 when ministerial departments were formally untied from HMSO, had direct repercussions on the implementation of EC policy in this field.

\textsuperscript{3}Market testing (the recourse to the market in order to determine the best choice for a particular need) is one of the basic elements of the Treasury's approach which exemplifies pro-activeness.

\textsuperscript{4}This activity has become an important feature of the Treasury's action (United Kingdom 1995, 31).

\textsuperscript{5}Five 'horizontal' purchasing agencies (Gohon 1991, 116) were being used until then for the procurement of stationery (HMSO), computers and telecommunications material (CCTA), land and buildings (PSA), fuel and electrical equipment (CS) and information services (COI).
It enabled central government to seek competitive procurement methods thus reinforcing the drive towards effective implementation of EC policy. Untying meant that responsibility for effective implementation of EC policy went back to the relevant users (departments) thus reinforcing the role of the Treasury as the latter has an unchallenged lead in this field within Whitehall. Moreover, the privatisation of central purchasing agencies meant that they are obliged to behave as proper market players by becoming more competitive and by aiming at the generation of profit. In these cases guidance from the Treasury, issued after consultation with the European Commission, emphasised the right of private bodies to advertise contracts in TED and the OJEC when acting as a purchasing agent for one or more departments while also underlining the need for the latter to ensure that the private body has a contractual responsibility to act in conformity with EC policy.

The role of the Treasury in the implementation process, just like every part of public administration for that matter, is conditioned by the action of the target groups, that is potential and actual tenderers. What is then the role of the tenderers in the implementation process in the UK? One must draw a distinction between i) their willingness to submit offers and ii) their willingness to protect their rights during or after the award procedure. On the one hand, the market of local government procurement in the UK constitutes an important 'test case'. Indeed, the British policy on compulsory competitive tendering - enhanced in 1980 through the Local Government, Planning and Land Act 1980 and subsequently extended to cover more
aspects of public procurement (Local Government Act 1988; Local Government Act 1992) means that local authorities in the UK are obliged to put out for tender procurement contracts, even when they have the in-house expertise to cover their needs and the value of the contract is not equal or higher than the thresholds included in the directives. It is only after this stage that the EC policy comes into play, meaning that in-house units must be treated as any other tenderer. Despite the size of UK local government authorities, evidence shows (Paddon 1993, 168-72) that very little interest has been generated in the form of 'foreign tenders'. What has actually happened is a wave of joint ventures and acquisitions of British companies, two strategies used by French, German, Dutch and Italian companies, especially in the 1980s. Significantly, Paddon (1993, 172-3) underlined the fact that

\[\text{i}\]t is in these services that the pursuit of Europe-wide development and acquisition strategies by a number of EC-based multinational service companies, with particular targeting of the UK public sector, is most evident,

even before the inclusion of the services sector into the EC's regulatory framework. The same trend has been observed by an official of the Treasury who also observed that

in many cases foreign companies have set up their UK subsidiaries and what happens is that it is the UK subsidiary which responds.
On the other hand, the willingness of firms to contact the Treasury and the European Commission in order to pursue a case when they believe that their interests have been damaged seems to be more readily used than the formal legal procedures. The existence of limited case law\(^6\) has been noted not only by academics (Birkinshaw 1990, 303) but also by the administration itself and the Confederation of British Industry (United Kingdom. Department of Trade and Industry 1994, § 104). British officials attribute this phenomenon to the fact that although companies actually bring to the attention of public authorities the irregularities that they face, it is not a part of the business ethos to pursue alleged violations further.

Finally, the Private Finance Initiative (Clark 1996a, CS87) which aims to attract private capital to public works and services has been streamlined through the Treasury which provided both a 'carrot' (relaxation of rules relating to free-standing projects and the provision of services to the public sector) and a 'stick' (the refusal to authorise expenditure for projects which have not been PFI-tested) to

\(^6\)A recent case (Arrowsmith 1996) in the Queen's Bench Division, where Portsmouth City Council has been found to have failed to advertise a contract whose initial value did not exceed the threshold, although both the value and the time length had subsequently been altered in a substantial manner and the subsequent use of proceedings in the Court of Appeal (Kunzlik 1997) by some of the aggrieved tenderers are not considered as sufficient evidence of a change in that respect.
public bodies. The issue of the right of public authorities to use the competitive negotiated procedure\(^7\) has been settled (Clark 1997, CS28) by Treasury guidance which i) stipulated that the onus for the proof of the need to use it rests with the relevant public authority and ii) suggested ways to go about it.

Implementation in cases of utilities is complicated by private ownership. The Treasury comes into the process in cases where the suppliers - to whom utilities have an obligation to implement the statutory instruments - raise issues of incorrect implementation. However, private ownership means that some of these companies are more likely to use competitive procedures anyway in order to minimise costs and that constitutes the basis of their objections - for being subjected to supranational regulation just like public utilities - that they expressed successfully during the preparation of the directives (Cox and Sanderson 1994).

The pivotal role of the Treasury in the implementation process does not prevent the emergence of cases of conflict. Currently there is a number of cases regarding the implementation of EC public procurement policy in the UK (Single Market News 1997a) including violations of Directive 92/50 the most important of which is the one involving the Audit Commission which is alleged to have not advertised contracts with external auditors appointed in 1992 and 1993

\(^7\)This is an important issue in the sense that public authorities need a margin for negotiation in order to maximise the contribution of private funds. At the same time though, this needs to be managed in a way that does not constitute a violation of the directives which place emphasis on open procedures.
worth 14 and 18 million pounds respectively, that is way above the thresholds of the directives.

8.1.2. FRANCE: NODALITY AND AUTHORITY IN COMPETITION

The role of the Treasury in the UK is echoed by the role of the CCM in the process of administrative implementation in France. The action of this institution, whose economic section took the initiative to open the debate in France on the implementation of the basic principles of the Treaty of Rome in public procurement as early as 1960, takes a number of forms (Dillemann 1987). First, it constitutes an important contact point not only for individual tenderers but more importantly, for every part of the administration which deals with procurement. Using its experience from the negotiations at the European level and the rich background knowledge incorporated into a number of reports that its sections have produced, the CCM is an interministerial body which provides a sense of continuity in terms of the guidance given to other parts of the administration.

Continuity is reflected through the definition of the concept of 'awarding authority' and its concrete application on a day-to-day basis8, the choice of the correct award procedure, the concept of the concession contract which is becoming increasingly important in the light of the budgetary limitations in the run-up to the establishment of the single currency and also the necessary distinctions

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8This function is more important in the case of the so-called sociétés d'économie mixte (semi-private companies).
between services and works contracts. Furthermore, CCM officials provide answers to questions regarding the extent to which a company whose status has changed (from the public to the private sector) is covered by the directives, and other issues such as the definition of what constitutes a single works project and what can be considered as part of such a project. This function is especially important in cases where a principle has to be established. This is when recourse to the CCM is necessary in the eyes of a French official.

The studies produced by the CCM (especially the previously autonomous prices' section) have enabled the administration to specify the content of the most frequently used award criterion, namely 'the most interesting offer', a typical characteristic of the Public Procurement Code which means that a number of elements has to be taken into account during the award procedure\(^9\). The initial vagueness of this criterion underlines the significance of the role of the CCM in the precise definition of its content on the basis of a number of elements including the price, the cost of use, the technical value and the time scale for the execution of the contract. These criteria have subsequently been integrated into the Code (e.g. art. 97 bis, 299 ter). Clearly, 'the most interesting offer' is the French equivalent of 'the most advantageous offer'.

\(^9\)Nevertheless, the mythical dimension of the lowest price remains present (Gohon 1991, 106).
The high profile that the CCM has developed over the years enables its officials to have direct access to the Minister of Economy and Finance and more importantly, to the members of his cabinet in order to resolve problems relating to day-to-day implementation. This channel works both ways. Indeed, the current effort to reform the Code in order to further enhance transparency and simplicity in the preparation and the execution of the contracts links directly CCM with the political sphere within the same ministry and in co-operation with trade and industry organisations (large construction companies, small and medium-sized suppliers etc.), which are an important driving force behind this effort.

The CCM maintains close institutionalised contacts with these organisations, primarily through its economic and technical sections. This, in turn, constitutes a fundamental part of this body's ethos. Indeed, extensive consultation procedures also concern the wider public administration. In the mid-1980s between 2000 and 3000 members of the wider public sector and professional organisations (like civil engineers) were associated to the work of this body (Dillemann 1987, 100).

This contact is important because it enables the CCM to take account of many views in the administrative implementation of EC policy. This action includes the standardisation of documents used by the administration in award procedures, thus facilitating comparisons and the detection of irregularities, and more importantly the standardisation of norms and specifications which are necessary for the definition of works, supplies and services.
and the award of the relevant contracts. The importance of this aspect of the implementation process is illustrated by the frequent complaints of French firms for the treatment of their offers in other European countries. Although the principle of mutual recognition\(^{10}\) resolves the problem in legal terms, the question of the comparability of offers can only be resolved through the creation of comparable standards which will then constitute the basis for the assessment of these offers.

The establishment of comparable norms is a function performed by the technical section of the CCM in collaboration with other parts of the administration and covers whole groups of functions and supplies. This function underlines the importance of the role performed by horizontal bodies like CCM which are in a position to develop solutions to problems faced by other parts of the implementation structure. Finally, the CCM also performs the role of an educator not only by preparing guides for the attention of the awarding authorities relating to each phase of the award procedure, but also by organising training schemes (through the Cellule formation, that is training office, of its secretariat) which are meant to diffuse expertise on various aspects of public purchasing including cost limitation, negotiation techniques.

\(^{10}\)Briefly, the principle of mutual recognition established by the ECJ (case 120/78) means that products which are legally produced and marketed in one member state (for example, in compliance with its rules regarding public health) must be able to circulate freely within the EC irrespective of differences regarding national regulations.
This need is limited in the case of utilities which - despite a traditional disorder (Delvolvé 1970) that characterised the regulation of their purchasing activity - are more used to various commercial techniques aiming at the limitation of costs through the use of competitive procedures although they traditionally have a wider margin for manoeuvre when choosing an award procedure. The question of implementation here is of great importance because normally they are not covered by the Code (Valadou 1992, 376). However, the control that the state exercises over them, restricts their freedom to choose the award procedure, as a result of the extension of the EC policy's scope through the use of the functional criterion (supra, Chapter 7). It is an established view of the CCM that they also come under the provisions of the Code when they act as purchasing agents for other authorities. Furthermore, it is an established principle of public purchasing in France that the officer responsible for the award must at any time be able to prove that each choice rests on objective criteria and considerations.

The limits of the role of CCM are also illustrated through the formal and informal means employed by tenderers and trade organisations during the implementation process. The very notion of précontentieux, that is pre-judicial review (Gaudemet 1994) is very familiar to French lawyers and it constitutes an important instrument for the preservation of a free market, through the use of three methods namely administrative review, conciliation and
The increasing French case law on public procurement (Martin 1994a, 1994b, 1996) cannot hide a certain timidity of French companies in the implementation process. This timidity is reflected through their unwillingness to attack their clients in court (Bréchons-Moulènes 1990, 164) by way of the traditional legal procedures, despite the reinforcement of other relevant institutional structures like the Competition Council, an independent administrative authority which has already dealt with procurement cases relating to collusion between tenderers (Bazex 1994, 104). French civil servants underlined a correlation between the size of the company and its willingness to pursue a politique jurisprudentielle, that is a policy of judicial review. This means that significant market players are more able and willing than small and medium-sized companies to afford the high cost of litigation. The fact that the large companies are also those which use an active acquisition policy in order to obtain a part of the market in other member states further underlines the significance of this point. French officials have highlighted this development as a major characteristic of the implementation process in France.

11The essence of these procedures is based on the fact that time and money is saved through the regulated review procedures linking the administration and the tenderers, without necessary recourse to traditional judicial review procedures.
Furthermore, one should not over-estimate the importance of the aforementioned timidity, mainly for three reasons. On the one hand, the formal implementation of the Remedies Directives has produced an important innovation in French law, the so-called référé précontractuel (Valadou 1993, 331) that is the recourse to rapid judicial review before the conclusion of a contract. More specifically this procedure enables the state and certain persons to bring before the courts an action relating to the breach of obligations for publicity and the competitive procedures, during selection or award procedures but in any case prior to the conclusion of a contract. The use of this procedure is becoming increasingly popular with companies (Cartron 1997) although the CCM considers that the success rate is limited. Indeed 59% of the référés introduced between 1992 and the beginning of 1997 have been rejected, half of them for substantive reasons (République Française. Commission Centrale des Marchés 1997).

The legal concept of the so-called acte détachable (Fernández Martin 1996, 231-3) that is a detachable act, established by the French Conseil d'État means that instead of treating the administrative actions during the award procedure and the subsequent contract as a whole that cannot be divided into separate parts, the two are considered as separable. Hence any interested party may attack in court as unlawful the validity of the acts preceding the conclusion of the contract, including the decision to award it thereby extending their mechanisms for protection without necessarily affecting the contract and legal certainty. Thus, an awarding authority may have to pay compensation for
unlawful award of a contract although the latter may still remain valid, thereby preserving the rights of the company that won it.

The fact that informal and formal measures for the protection of the interests of companies complement rather than exclude each other is illustrated by a case brought to the Conseil d'État (Maljean-Dubois 1997) by two trade organisations, namely the Fédération nationale des travaux publics (National Federation for Public Works) and the Fédération nationale du bâtiment (National Federation of Building Constructors) in 1994. The case concerned an interministerial circular of December 1993 which attempted to implement a decision reached by the Comité interministériel pour la ville (Interministerial Committee for Urban Affairs) in July 1994. The objective was the insertion to contract notices of a clause relating to the local impact of the execution of public works upon unemployment and the development of professional skills. Although it is not clear from the text of the circular whether this would become an additional award criterion, in direct conflict with the very philosophy of EC policy, especially in the light of the fact that the same text made direct reference to EC obligations and the need to avoid the use of these elements for the choice of inappropriate tenders\(^\text{12}\), the two organisations contacted informally the Minister of Economy and Finance. It was only when they considered the lack of a response as an illustration that

\(^{12}\text{These aspects clearly diluted any substantial potential impact of the circular.}\)
their view has been rejected, that they took the case to the Conseil d'État demanding the annulment of the said texts.

Although their demand has been rejected because the Conseil d'État considered that the circular was devoid of any regulatory effect as it constituted a simple declaration of intentions, this example is important because it shows the complementary nature of legal and informal/political means of implementation and the willingness of the market players to use both of them. Furthermore, the fact that the conservative French government has followed-up these developments with a much more strong-worded circular even before the election of a socialist government in a French context of high unemployment means that the issue is far from over.

Finally, the European Commission is another instrument that is being used in France in a rather extensive manner in conjunction with purely domestic mechanisms including the CCM. Currently the European Commission is pursuing a number of cases involving France (Single Market News 1995b, 1996c). The one with the highest profile concerns the construction of the Grand Stade de France in the Parisian suburb of Saint-Denis. The case has already gone through the first two stages of art. 169 procedure. Moreover, in a decision issued in July 1996 the Administrative Tribunal of Paris has annulled the decision of the Prime Minister to award the contract. The European Commission challenges the French government which holds the view that this is a concession contract. On the contrary, European Commission officials believe that although the objective of the awarding authority was indeed a concession contract containing the
essential requirements for the exploitation of the stadium, it is a works contract that has been actually concluded\textsuperscript{13} because both the final offer that has been chosen and the contract that has been signed have effectively led to the disappearance of the risk for the winning tenderer.

The Commission also holds the view that the principle of equal treatment has been violated because the winning tenderer has been allowed to modify substantially its offer during the consultation procedure. It also accuses France of breaching art. 59 of the Treaty and Directives 92/50 (services) and 93/37 (works) by allocating additional important works projects to the winning tenderer without any competitive procedure and also by reserving a part of the related services and works contracts for local companies. The officials of CCM argue that the whole issue emanates from the unclear definition of concession contracts which has been included into the directives and that the appropriate procedures have been followed. Given that the stadium is very close to its completion, it is clear that if the Commission is proven to be right in its allegations, the final decision can involve only a financial element.

\textsuperscript{13}Essentially, the difference between the two types of contract is based on the fact that the cost of concessions contracts is taken up either exclusively or partially by the constructor who then exploits the work commercially. Clearly, unlike the former, the latter is best suited by a negotiated procedure. Nevertheless, given that it necessarily entails a limitation of competition, the use of this procedure is allowed only in very limited cases specified by the directives.
Administrative implementation in Greece presents rather different characteristics. One must distinguish between i) supplies ii) works and iii) services contracts. Supplies contracts were the first point of tension between the Greek administration and the European Commission. The policy of 'Hellenisation' meant the use by the administration of a number of discriminatory clauses in domestic law, which enabled it to protect the domestic market from European imports. This policy used by the socialist government between 1982 and 1985 simply reproduced a pattern which was well entrenched in domestic economic affairs since the 1950s. The deliberate nature of the policy of Hellenisation is illustrated not only by the transfer of the responsibility for this policy area from the Ministry of Trade to the Ministry of National Economy but also the appointment of an economist and advocate of Keynesian policies (Lazaris) as Minister of Co-ordination in the first socialist government.

The transitional period stipulated in the Treaty of Accession has been used for prolonging the protection of the domestic producers instead of the gradual implementation of the EC's policy. This effort was backed by a campaign aiming to convince domestic consumers to 'buy Greek'. This period is also characterised by the use of a political approach employed by the European Commission. The fact that the transitional period had a solid legal basis (Treaty of Accession) meant that there was not much the Commission could do until 1985. It initiated the infringement
procedure of art. 169 of the Treaty as a token sign of vigilance (case C-84/86) but even in that case it did not take the Greek government to the ECJ. On the contrary, it used this procedure in order to exert pressure on the Greek administration during the implementation process. This approach had three important repercussions which also concern the other parts of procurement policy.

First, it led to the slow and gradual shift to effective implementation of EC policy. This shift has been facilitated by the continuous contact with Community reality and the change in the attitude of the socialist government vis-à-vis the integration process as illustrated by the appointment of pro-European politicians (like Pangalos, Vasso Papandreou and Simitis) to key ministerial posts, including the Ministry of National Economy. Secondly, the increasing contacts with the European Commission have led to the creation of an impression of this institution as a scapegoat. Indeed, the European Commission was seen by Greek civil servants as a useful mechanism for blame avoidance whenever they were faced with pressure or protests from domestic suppliers. Thirdly, the increasing number of infringement procedures initiated on the basis of art. 169 (Commission of the European Communities 1990, 45) gave a semi-institutionalised form to the contacts with the European Commission. The so-called réunions-paquets (supra, Chapter 2) which bring together European and Greek officials twice a year produced significant results in various forms. Some infringements are being corrected, Commission officials are informed of recent changes in legislation and case law while they also highlight outstanding complaints which have
been brought to their attention by tenderers. These informal procedures have not eliminated every problem as case C-79/94 illustrates.

This case concerned a three-year framework agreement concluded in July 1991 by the Ministry of Industry, Energy and Technology and six textile manufacturers for the supply of dressing materials for hospitals. The agreement could be extended in the future in order to cover the needs of other institutions for these materials, exclusively supplied by the six manufacturers. In the dialogue that followed between the Greek administration and the European Commission, the former i) admitted that it had not advertised the contract but argued that ii) canceling the contract unilaterally would expose the Greek state to claims for damages from the manufacturers. iii) The ministry in question had already abolished a clause stipulating that the manufacturers were to use only domestic primary products. iv) It also stated its intention to organise a competition before the end of 1993 thus fulfilling EC obligations. Concrete action did not follow, so the case reached the ECJ where a condemnation was inevitable because the mere promise to fulfil EC obligations in the future was clearly insufficient, despite the attempt of the Greek government i) to demonstrate that Directive 77/62 was not applicable because the value of each contract did not exceed the threshold and ii) to use of the argument that in the past no foreign tenders have been submitted in similar competitions thus reducing the notice to a mere formality.

The field of public works is characterised by an extensive political and administrative activity followed by
formal measures. Indeed, the first characteristic of the implementation process here is the very extensive use (until the beginning of the 1990s) of the criterion of the lowest price for the award of contracts. This meant practically that the emphasis had been placed on ways which would enable the constructors to limit the cost in the construction process. This in turn, had direct repercussions on the quality of the works many of which had structural problems, while the quality of the materials used was very poor (Chaikalis 1996c, 1997a). Nevertheless, the artificially low prices (Kosmidis 1997) did not mean that the constructors were unable to make a profit. On the contrary, they used their legal right (Koutoupa 1995, CS98) to claim the difference between the initial offer and the final cost of the work after its completion, thus falsifying the competition game on a post hoc basis.

This problem was directly linked to that of incomplete or insufficient plans upon which these works were based. The problem stemmed from the fact that the administration was not in a position to assess the quality of the proposed plans, mainly because of the lack of specialised staff. Furthermore, the system of control of public works was deficient because it was based on post hoc examinations thus presenting the administration with a fait accompli every time there was a problem. Moreover, the fact that many awarding authorities were unaware of a visible and reliable source of information
was a major problem even when their officials actively sought to use the right selection and award procedures, as an official of the Ministry of the Environment, Spatial Planning and Public Works has put it. The European Commission and a group of determined ministers were the catalysts that commenced the process of change.

The involvement of the European Commission is based on the fact that most of these public works are co-financed by the Greek state and the EC through the Structural Funds. The conditional nature of the provision of European funding (supra, Chapter 7) gave a de facto role to the European Commission. Although the EC's public procurement policy does not cover the execution of public contracts, the role of the European Commission was mainly informal and based on this phase. It constituted an important source of pressure in favour of the establishment of the Community Support Framework Management Unit (Stamboglis 1996). Moreover, constant threats emanating from the Head of DG XVI (Chaikalis 1996a) and Commissioner Millan, who was responsible for this area, that the flow of funding would stop\(^\text{14}\) if the necessary measures were not taken helped create the necessary political impetus at the national level.

The first sign of the new political impetus for a radical solution was the formal letter of three ministers of the new socialist government after the general election of 1993 to the European Commission. This letter embodied a

\(^{14}\)This has actually happened in 1993 in the case of the Evinos' dam (Charalambidou 1997c) due to the incorrect award procedure followed by the conservative government.
clear political undertaking for the adoption of all the necessary measures, legislative, administrative or other which were to be channeled through the Ministry of the Environment, Spatial Planning and Public Works, under the supervision of the Joint Steering Committee composed of officials of the said ministry, the Ministry of National Economy and the European Commission. The most significant legislative measure was the limitation of the right of constructors to re-assess the cost of a works project on a post hoc basis. The total cannot exceed a 10% (instead of 50%) supplement to the initial assessment. This measure has obliged constructors to submit realistic offers while enabling them to re-assess the total cost within a reasonable margin. Moreover, the result of the re-assessment is not automatically accepted by the administration but is subject to its own evaluation. The procedures for the preparation and submission of plans have been codified and simplified while a register of public works designers (including those who are responsible for the evaluation of the environmental impact of public works) will be established in the Ministry of the Environment, Spatial Planning and Public Works.

The focus of the mechanism for control shifted to control during rather than after the works. The mechanisms for control of the co-financed works have been extended to include private companies which are hired through competitive procedures. The competitive procedures for the award of contracts have been extended to below the threshold of the directives and a contract has been signed with a prestigious academic research centre (Centre for
International and European Economic Law, University of Thessaloniki) which now can provide legal advice to any public body that is covered by the directives,

despite opposition from the Ministry of the Environment, Spatial Planning and Public Works resulting from its power game with the Ministry of National Economy as an official of the latter has put it. New administrative units have been established within the Ministry of the Environment, Spatial Planning and Public Works (supra, Chapter 7) in order to monitor the implementation process.

Fines have also been imposed on companies which do not fulfil their contractual obligations (Chaikalis 1997a) while a number of award procedures have already been suspended because incorrect procedures have been followed (Chaikalis 1996c). Model notices have been established in order to oblige awarding authorities to use comparable documents before the award procedures. Major public works are now covered by insurance schemes adopted by the constructors and this is mirrored by the expansion of this part of the insurance market (Chaikalis 1996b). Specialised staff has been recruited in order to enhance existing organisational structures, especially at the regional level, while maintaining direct links with the central administration. A major effort to codify the dispersed existing legislation is already under way.

Nevertheless, a number of cases involving Greece are being examined by the European Commission while others have been resolved (Single Market News 1995a). Most notable of
the unresolved cases is the one concerning Thessaloniki's underground. The conservative government's decision in the beginning of the 1990s to build an underground in the second largest Greek city has led to an international competition where two international consortia have prevailed as the major competitors for this large concession contract (worth around £300 million). The negotiations with the first consortium (led by a Greek constructor) reached an impasse in November 1996 because junior partners of the consortium went into liquidation. This meant that the first consortium was no longer a credible tenderer thus leading the socialist government to commence negotiations with the second consortium (led by the French company Bouygues).

In response to this action, the first consortium informed the European Commission whose officials found out that a number of problems existed in the award procedure (To Vima 1997g) including i) the shift from a concession contract to a works contract and ii) the submission by Bouygues of an offer which did not correspond to the specifications included in the advertised notice. Thus DG XV has threatened to withdraw the assent regarding EC funding. Yet, this is only the tip of the iceberg. The explanation of the problem seems to be linked (Marinos 1997) to a new decision of the government to scrap the whole project in favour of a tram network. In other words, the European Commission is being used as a scapegoat by 'transferring' to it the blame for the decision not to fund the project which therefore cannot go ahead.

Furthermore, a lot seems to depend on the professionalism and the personal sensitivities of purchasing
officers within awarding entities. We were actually interviewing a senior official of the Ministry of National Economy when a purchasing officer from an awarding authority interrupted the interview in order to ask about the award procedure that he had to follow in relation to a specific contract. He had to have recourse to this ministry - which did not have the responsibility for this aspect of public procurement - as he was unable to find someone who could answer his query in the other ministries that he contacted.

In services contracts and until the adoption of the relevant legislative measures, the implementation process relies on i) the willingness of interested parties to use the concept of direct effect in order to oblige the administration to use the proper award procedures, ii) the possible action of the European Commission under the revised art. 171 of the Treaty for non-implementation of a judgment of the ECJ and iii) the professionalism and personal sensitivities of purchasing officers. Although the use of the second instrument is likely to lead to the imposition of a heavy fine on Greece, thus constituting a rather significant incentive for implementation, the first possibility does not seem to be very likely, if the previous attitude of suppliers is anything to go by (Spathopoulos 1990, 126) despite the fact that the State Council has used the theory of detachable act (Spathopoulos 1990, 121; Koutoupa-Rengakos 1993, 395).

Finally, Greek utilities have already started implementing the relevant directives despite the lack of formal implementing measures. This is mainly due to the fact that public ownership means that they fall in the remit
of the national legislative measures implementing the much more stringent directives relating to the public sector and also the professionalism of key officials (mainly lawyers) within these companies who are vigilant and follow the development of EC legislation in this field. Their attempts to enhance competition take the form of the choice of the most competitive available procedure during which we try not to exclude anyone as one of them has put it. Complaints of tenderers are more frequently addressed to the Ministry of Development rather than the utilities themselves. Therefore, the political level seems to act as some sort of review mechanism.

8.2. SOME POLICY OUTCOMES: A RATHER SHORT STORY

The policy outcomes can be approached from two rather complementary perspectives, i) the view of the potential and actual tenderers and ii) the quantitative dimension. The last option can be easily excluded because of strong doubts as to the validity of the data that can be found in TED. Indeed, quantitative analysis offers a number of interesting data sets, like the number of the advertised contracts, the type of contract (works, supplies, services) and procedure that has been followed, the type of the awarding entity, and also some opportunities for cross-category searches. However, this method does not answer the questions regarding the impact of fragmented or integrated structures upon the implementation process. Moreover, it does not provide
answers relating to the other parts of the implementation structure, such as the European Commission, courts or even tenderers (actual and potential).

The argument against this method can be taken a step further. The set of data found in TED\textsuperscript{15} is unreliable for this kind of study because, as the European Commission acknowledged (1996a, 7-11), some member states have not adopted national implementing measures, other problems relate to the quality and the content of the implementing measures, as a result of which certain contracting authorities have endeavoured to evade the implementation of the directives. Clearly, there are contracts which are not advertised. Why and how this actually happens and the role of the various parts of the implementation structure, especially after formal implementation, is what this study set out to analyse and this objective cannot be achieved through this method. On the contrary, the brief analysis of the view of the market players offers some interesting findings.

A recent survey of opinion conducted in 1995 for the European Commission as to the perceived impact on public procurement of the drive towards the single market showed (Single Market News 1996a) that most respondents (71%) in the industrial sector found that there was no impact while only 9% had found a positive impact. These figures, which concern the whole of the EC, were echoed by the responses in the services sector (73% and 9% respectively). These results reflect the same pessimism that leads companies to

\textsuperscript{15}Furthermore, data were available on-line only for 1993, 1994, 1995 and 1996.
avoid legal challenges and makes them prefer mergers and acquisitions rather than the submission of tenders.

The increased business opportunities that the EC's policy in this field has created in the three countries is illustrated by the responses to a survey (European Commission. Directorate General XV 1996, 215) where more than 60% of all respondents acknowledged that the information provided by TED and the OJEC was adequate for their business purposes. The sevenfold increase in the number of tender notices advertised in Greece between 1987 and 1995 (European Commission. Directorate General XV 1996, 125) reflect the pressures for more transparent procedures embodied in the EC's policy although it is difficult to draw a direct causal link between the two events. France and the UK presented predictable (due to the quality of implementation) increases of about 300% and 400% respectively. Indeed the overall picture of implementation of comparable quality in the UK and France is illustrated by similar trends in all of the aforementioned categories of data.

The overall picture reflects not only the growing opportunities created for firms as a result of the implementation of the EC's public procurement policy in these three countries, but also the dynamic nature of the implementation process. The fact that some national implementing measures have just been adopted while others are being prepared during 1997 means that this is a trend that should continue to appear in the foreseeable future. This conclusion is supported by the fact that although according to the aforementioned survey procurement
expenditure as part of each country's GDP has fallen between 1987 and 1994 by about 1% in France, 2% in the UK and 50% in Greece, more notices are being published (European Commission. Directorate General XV 1996, 19). That is evidence of the market's increasing transparency (which is a fundamental objective of the EC's policy in this field). Thus decreasing expenditure does not seem to affect business opportunities. Let us now turn to the discussion of the wider implementation patterns.

8.3. IMPLEMENTATION PATTERNS: EXPLAINING THE DIFFERENTIATED USE OF THE TOOLS OF GOVERNMENT

In the light of the fact that we have set out to examine the use of the tools of government for the improvement of national implementation profiles, we shall endeavour to depict and explain the implementation patterns by answering the following questions: i) What are the tools used for the implementation of this policy by these member states and why? ii) Have there been changes over time, and if so, how can we interpret them? iii) Does the implementation process in these member states reveal links to fundamental characteristics of their respective systems of policy formulation? In short, does fragmentation matter?

A distinction can be made between effective (UK and France) and problematic (Greece) implementation16. This is

16Effective implementation is construed as a rather orderly follow-up from formulation in a way which produces outcomes which are close to the desired objectives. In problematic implementation disruptions occur, thus disorientating the process from the desired outcomes.
reflected through the use of different tools. In the first case, smoothness characterises both the formal and the administrative stages of implementation. The use of authority for the adoption of the implementing measures was generally prompt while their form and content came to reflect both the spirit of EC policy (expansion of the agenda) and the wider developments in the European policy process (case law of the ECJ). National case law is very limited in the UK but rather significant in France, although in the latter case the initial impact of the new procedures is rather limited. Thus one can argue that the French and British case law reflects fundamental attitudes (business ethos) of the market players rather than failure of the respective administrations. Moreover, the ECJ has not yet issued any condemning judgments for substantive reasons (that is in relation to administrative implementation) against the UK or France in this policy area. This is something that officials of the Treasury and CCM were eager to underline, in a manner that illustrates that they consider it as a part of the stake involved in their daily functions.

At the institutional level it is clear that the UK and France present a high degree of similarity in the philosophy which underpins the organisation of the services dealing with EC procurement policy given that overall responsibility has been attributed to high profile departments in the central administration. Consequently, the use of organisation has been limited to the absolute minimum. The same departments also deal with economic policy thus reflecting a view of procurement policy as a spending...
activity. This, in turn, constitutes an important sign of compatibility with the neo-liberal philosophy of EC public procurement policy which places special emphasis on savings through the reinforcement of competition resulting from the liberalisation of the market. The influence of this approach on the implementation process is illustrated through the extensive use of the 'most advantageous offer' as the basic award criterion in both countries.

The integrated nature of the relevant institutional structures automatically puts them in a pivotal position where they are able to answer the queries emanating from the wider public sector during the implementation process. The significance of this function is reinforced by the kind of questions that they receive. They concern the interpretation of fundamental concepts, the definition of rights and obligations and the compatibility of domestic actions with EC policy. In other words, they perform the role of the domestic interpreter of the European policy that they have helped shape.

They also constitute the privileged partners of the European Commission both in terms of standardised procedures (e.g. the collection of statistics) and more importantly for the consultation which is necessary in cases of tensions between a tenderer and an awarding authority. This function is mirrored by their role as 'advisers' to tenderers who sometimes are not prepared to go as far as contacting the European Commission.

The fact that their competence for the whole of this policy area is a traditional aspect of their domestic prerogatives has two important implications. a) Their
status within the administration is unchallenged by other participants, thus enabling them to avoid costly tensions during the implementation process, through the limitation of the number and the power attached to the decision points. This aspect is reinforced in the case of CCM by its interministerial nature which enables it to synthesise various views through its specialised sections. b) Their knowledge of the evolution of this policy encompasses domestic developments which are filtered through the European aspects of the policy area. This means that up to a large extent, these units act as domestic gatekeepers of EC policy. This constitutes a significant illustration of the principle of institutional autonomy which largely characterises the implementation process in the UK and France.

The quality of implementation in the UK and France is also the result of the significant use of nodality. This is reflected through the role of the Treasury and the CCM and is the direct result of their traditional role in this policy area. Nodality here takes the form of a number of actions that facilitate implementation, the most important of which is the constant translation of EC policy into practice, not only in terms of formal implementation, but more importantly in terms of its continuous interpretation produced at the request of the wider public sector (target group). In other words, nodality concerns not only the role of these two bodies as effectors but also as detectors. It is reinforced by authority resulting from the fact that responsibility for this policy area is a traditional prerogative of these bodies. Put simply, there is no
challenge to their authority. Therefore, institutional stability over time leads to the constant use of nodality which in turn reinforces authority.

On the contrary, the problematic nature of the implementation process in Greece is illustrated through i) the belated adoption of national implementing measures (despite the existence of transitional periods), ii) their occasionally unsatisfactory content or even iii) the total lack thereof and iv) the incorrect use of fundamental concepts such as 'the lowest price' and 'framework agreement'. Nevertheless, some of these problems are being resolved through a variety of mechanisms which are characterised by the extensive use of treasure and organisation. The use of treasure emanates from the participation of the European Commission in the implementation process as an institution which manages EC funds. That constitutes its power base which also legitimises i) the functional spill-overs from the execution of the contracts (which is not covered by the EC's policy) to their allocation and ii) the substantial violations of the principle of institutional autonomy.

Fragmentation in institutional terms is a major source of the implementation problems in the case of Greece. The fragmentation of administrative responsibility for this policy area is evident in a number of ways. a) The constant transfer of responsibility from one ministry to another has not enabled the administration to develop the kind of coherent memory that is necessary for successful implementation. The case of a senior legal adviser in the Greek Ministry of Trade who was unaware of the fact that the
first directives on the liberalisation of supplies (70/32 and 77/62) dated from the 1970s rather than 1988 illustrates that the absence of a minimum of administrative memory undermines the ability of the administration to implement effectively. Thus the official in question advised the awarding entities on the basis of her experience which was limited to the 1990s.

b) Even when stability exists, like the present conjuncture, responsibility for public procurement policy is fragmented and allocated to three different ministerial departments. This enables the development of sectoral logics rather than a global coherent approach, even when successful attempts are being made to resolve problems within each sector. The effects of this polyarchy are self-reproducing because they deter the Greek administration from developing the spirit of co-operation which is necessary for effective implementation.

The need to handle this functional pressure leads to organisational changes at the intra-ministerial level which is matched by the recruitment of new staff in the quest for efficacy. Success, in turn, has a fundamental repercussion, namely the reinforcement of the authority of the body in question (Ministry of the Environment, Spatial Planning and Public Works) in the wider domestic context where public procurement policy is dealt with. This is illustrated by its ability to block the formal implementation process in the field of services. Finally, political authority has been used quite extensively immediately after the Greek accession in order to implement the protectionist policies of the first socialist government.
Have these 'mixes' evolved over time or not? One must answer the question in the affirmative for the UK and France, and in the negative for Greece. Institutional stability and continuity in terms of the content of domestic policy are the key factors that explain the existence of the same mix in the UK and France. Precisely because these countries (mainly France) did not have to change radically their domestic policy which was dealt with by a clearly identifiable and well established power centre within each national administration, the mix has basically remained unaltered. The situation in the UK is slightly different from the French case only in terms of the limited problems that existed during the last part of the 1970s when discriminatory measures had been implemented. However, one should not over-estimate the importance of this point because a) it was limited in time, b) had been resolved right after the adoption of Directive 77/62 and c) it is only a matter of degree because it highlights the significance of authority which emanated from the newly elected Conservative government.

On the contrary, the case of Greece is characterised by the initial predominance of domestic political authority highlighted by the deliberate implementation of discriminatory measures during the best part of the 1980s. This has been matched by fragmentation in terms of responsibility at the administrative level. The limited institutional change during this period has been succeeded by the significant changes (within the same fragmented framework) which resulted from the participation of an active fixer, namely, the European Commission. The radical
change in policy terms has been implemented mainly through the use of formal politico-administrative authority (cases brought to the ECJ and 'hands-on' approach of ministers) and the extensive use of treasure both as a penalty and as an incentive.

Indeed, while the Commission has stopped the flow of funding in some cases (penalty), the administration could also perceive this flow as an incentive for change through the use of award procedures which are compatible not only with the letter but also the spirit of the policy. This has been a major factor that changed the quality of the implementation process albeit in a way that has been channelled through the political sphere (involvement of ministers in conjunction with the Commission). This underlines the salience of the concept of stake. In both of the aforementioned uses of treasure, the stakes for the Greek politico-administrative structures were high as the flow of funding constituted the basis for the assessment of the effectiveness of ministers and the ability of the administration to handle intensive complex and demanding projects which by nature require co-ordination. This characteristic of the implementation process in Greece also reveals a significant element regarding the role of the European Commission.

Asymmetry characterises the role of this body in the three domestic contexts. This characteristic concerns not only the intensity of the role of the Commission, but also the content of its activity, that is the tools that it has used. On the one hand, it is much more intensive in the Greek context which is characterised by weak administrative
structures and fragmented responsibility. The role of the Commission seems to fill the gaps of political authority through the use of functional spill-overs from one policy to another and from regulated to un-regulated stages of the European policy process. It is precisely the use of managerial authority that legitimises not only these spill-overs but also the intensity of its action in the implementation stage, where treasure is used extensively. This intensity constitutes a sign of the priority attached to the concept of efficacy in the implementation process.

On the other hand, the role of the European Commission in implementation in the UK and France differs markedly, given the extensive use of formal authority. Not only is it less intensive but it is also characterised by the constant endeavour to safeguard legality either by providing advice to the relevant administrations or, more importantly, by taking formal legal action in the ECJ. The integrated nature of the politico-administrative structures in these countries simply seems to leave no functional gaps that the Commission could fill although it is in these cases that the informal channels for the administrative solution of problems are most frequently used.

Finally, the ECJ is another fixer which participates in the implementation process albeit in a subsidiary and secondary manner. This role is illustrated not only in relation to the choice of national implementing measures or the lack thereof but also on a post hoc basis in cases of conflict between national authorities and the Commission. Indeed, this is the most prominent characteristic of the
role of the ECJ which reflects its dependent position in the EC's implementation structure.

Can one then take this argument a step further by arguing that the characteristics of the implementation process in these three member states reflect fundamental elements of their politico-administrative structures? This question must be answered in the affirmative for a number of reasons. First, the UK and France have instituted strong co-ordinating mechanisms at the formulation stage which have led to the creation of an ethos of collaboration and sharing of information and experience. Even when problems exist, these mechanisms are capable of finding solutions which may not please every sector of the administration, but are bound to be followed by them. This in turn leads to a sense of respect for the prerogatives of other ministerial departments and the certainty that even at the last minute, co-ordinated solutions can be found. This is reflected upon the behaviour of the administration in the implementation stage where officials follow the line of authority which is clearly visible and deal with translation of policy into practice rather than interministerial disputes. This is certainly facilitated by the existing division of responsibility and the visibility of the main actors.

On the contrary, implementation in Greece is much more untidy in a way that reflects fragmentation which is based on temporary solutions without clear long term objectives and the personalised nature of the function of co-ordination within a context which is underpinned by shortages of specialised staff. These weaknesses are highlighted by the fundamental change in policy terms that Greece had to
implement (shift from protectionist practices to free competition). The lack of a problem-solving mechanism which would enable the administration to define clear lines of authority and policy direction leads to the development of sub-sectoral or even personal logics thereby promoting fragmentation rather than integration and efficacy. Precisely because of the lack of mechanisms like the European Secretariat and the SGCI where disputes or other problems can be forwarded, gaps in terms of authority are inevitably created. These gaps highlight the significant role of fixers, mainly the European Commission or other fixers like ministers and companies. It is now time to look at the general conclusions that one can draw from this dissertation.
Chapter 9

CONCLUSIONS: CONCEPTUALISING IMPLEMENTATION IN THE EC

9.1. WHY FRAGMENTATION MATTERS

In this dissertation we have sought to explore the ways in which national governments can ameliorate their implementation profile. Firstly, we have defined a macro-implementation level of analysis that includes not only the formal implementation of EC policy, that is the incorporation of EC legislation into the national legal orders, but also a number of measures that national governments can take in order to steer the wider implementation process (Chapter 1). Secondly, we have identified the basic characteristics of the EC as an implementation structure, that is its nature as a loosely coupled system of government where the national governments have an important role as the main implementing agencies, along with the identification of the regulatory limits of this role and the action that the European Commission and the ECJ can play in the same process.

Thirdly, we have identified the fundamental characteristics of the British, French and Greek politico-administrative structures which deal with EC policy (Chapters 3-5). On the basis of this analysis we have linked theoretically the fragmented or integrated nature of the national politico-administrative structures with the wider implementation process (Chapter 6). Fourthly, we went on to examine these insights on the basis of a case study...
which concerned the implementation of the EC's public procurement policy (Chapters 7-8). Here the objective is threefold. First, we shall attempt to draw conclusions on the basis of the case study (Section 9.1). Then we shall explore the concept of European implementation style in order to link systematically the comparative findings with the characteristics of the EC (Section 9.2). Finally, we will endeavour to draw wider conclusions regarding the process of European integration (Section 9.3).

In Chapter 6 we have identified seven reasons why fragmentation may affect the implementation process. The analysis that followed in Chapters 7 and 8 confirmed this link. First, we argued that fragmentation affects the predictability of behaviour of the actors and therefore, the stability of the process. Indeed, the adoption of two contradictory laws within the space of a few months in 1979, when the accession of Greece was imminent, illustrates that the same actors may adopt incoherent or even contradictory courses of action in a manner that undermines the ability of other participants to act in a coherent manner when they are parts of a fragmented framework. What was a purchasing officer of a Greek awarding entity supposed to do in this case? Was he expected to implement the Treaty of Accession - stipulating that suppliers from the EC would have to be treated equally - or the law that followed it which included discriminatory clauses? Clearly, too much would depend on his intellect and his personal views. In other words, we argue here that fragmentation affects implementation by obscuring or even destroying the clear line that must exist in the process of 'forging links in a causal chain'. The
validity of this point is further underlined by the lack of administrative and political co-ordinating mechanisms which would resolve the problem directly or indirectly.

Second, we have argued that fragmentation increases the number of decision points thereby undermining effective implementation. The objections raised by the Greek Ministry of Trade in relation to the creation of an independent administrative authority that would monitor the award of public contracts, despite the fact that the proposal emanated from the Ministry of Development which was about to absorb the former ministry demonstrates that fragmentation affects implementation by allowing the growing number of decision points to think in terms of their own sectoral or even bureaucratic rationality.

Third, we argued that fragmentation tends to produce different functional logics based on the various stages of the policy process. The problems that Greece faced with the unsuccessful use of the longer transitional periods that Greek negotiators managed to insert in the directives clearly demonstrate that the achievement of the objectives set in one stage need to be parts of a wider logic underpinning the whole process, if they are to be effective. Otherwise the administration is unable to develop the sort of administrative memory which is necessary for effective implementation.

Fourth, we argued that even if co-ordination is achieved within fragmented politico-administrative structures, it is likely to be more costly, at least in terms of time. It took seven years and a condemnation by the ECJ for the Greek authorities to implement Directive
formally, while the issue was simply a matter of bringing together a small number of judges who were familiar with the directive and the Greek legislation on judicial review. This did not happen as a result of the lack of a co-ordinating mechanism. Moreover, we argue here that the longer time which is necessary for co-ordination increases reliance on the sensitivities and the professionalism of the individuals involved.

Fifth, we argued that integrated structures are more stake-sensitive than fragmented ones. CCM placed substantial emphasis on the fact that the ECJ had never issued a condemning judgment against France for reasons regarding substantive, that is administrative, implementation. Although this may very well mean that implementation problems may have not been discovered, it also constitutes an additional incentive for the relevant structures to think and act prospectively, in order to maintain what seems to be construed as an aspect that defines the profile of CCM within the French administration. Moreover, the stake may also be externally induced. Indeed, the case of the Greek Ministry of the Environment, Spatial Planning and Public Works, whose officials have the additional incentive to be seen as effective users of EC funds employed in a number of public works, is another example of the same point. The same comment can also be made about the relevant minister, whose action has a substantial impact upon the use of EC funds in Greece.

Sixth, we argued that the detection of problems is easier in integrated politico-administrative structures. Again, the Greek Ministry of the Environment, Spatial
Planning and Public Works constitutes an example in the sense that its officials were able to detect problems in the various notices used by awarding entities, before adopting uniform model notices for various categories of works projects. The validity of this point is also underlined by the important role performed by the CCM in relation to technical norms used for the definition of a works project and the comparability of alternative offers.

Finally, we have argued that the implementation of changes is more difficult in a fragmented politico-administrative structure. Change underlines the need for adaptation which in turn necessitates a certain ability to learn. **Fragmented structures find it more difficult to learn because each actor is confined to limited (sectorally defined) sources of input.** This is illustrated by the Greek Ministry of the Environment, Spatial Planning and Public Works which used its relative success after the beginning of the 1990s in the implementation of the works directives as a power basis in order to promote sectoral interests in a manner that impeded another part of the structure (Ministry of National Economy) to implement formally Directive 92/50. The lack of a strong co-ordinator at both levels of analysis (political and administrative) meant the perpetuation of the conflict, possibly until the stakes are raised by a fine under art. 171 of the Treaty. What conclusions can we draw about the use of the tools of government identified by Hood, within the context discussed here? First, we shall examine the actions of the Greek government which faced a number of problems in the implementation process and then we shall
discuss what else it could do in order to ameliorate the country's implementation profile.

On the one hand, there is a number of useful lessons that could be drawn on the basis of the Greek government's action in the field of public works. The first lesson concerns the fact that the issue of effective implementation has been placed at the top of the ministry's political agenda as a symbolic gesture that demonstrated a political commitment to 'change the tide'. That has sent a clear message to the administration. Indeed, the use of political authority through a number of symbolic and pragmatic measures has been construed by the administration at least as a sign of awareness that something was wrong. This has increased the sensitivity of crucial parts of the administration who were subsequently much less inclined to take decisions without due consideration.

Secondly, treasure has also been used through the imposition of fines against constructors for problems regarding the quality of public works. This, in turn, has been based on the changes made to the system of quality control, from a post hoc basis, to control during construction. That necessitated the recourse to organisation through the recruitment of staff who could perform these functions. Indeed, organisation has been used as a part of a wider effort that has been co-ordinated by the Ministry of National Economy. The objective of this effort was to identify and resolve staffing problems resulting from the inability of the administration to handle demanding multi-faceted projects. Nevertheless, this effort is under way and long practice will be needed before one can
safely argue that the structural dimension of the problem has been resolved.

Thirdly, formal authority has been used in order to push a number of legislative measures through the Greek Parliament. The objective was the limitation of the right of constructors to re-assess the cost of a works project on a post hoc basis and the imposition of the obligation to insure these works. These measures have certainly led to the limitation of the constructors' ability to bend the law.

The use of nodality by the Greek government has been limited by the nature of the problems that the politico-administrative structure faced. In other words, we argue here that there is no pre-defined perfect mix of the tools of government. Clearly, the content of this mix depends on the nature of the problems that they are meant to resolve. On the other hand, another important aspect that must be underlined, concerns the wider Greek politico-administrative structure. Indeed, Greece still lacks the effective administrative co-ordinators which would enable it to resolve the problems that occur, as in every multi-organisational environment. The use of authority for the establishment of this actor is likely to lead to a gradual change of ethos. The British and French cases are illustrative of this potential function of co-ordinators. Arguably, it is inconceivable for parts of the British or French administrations to act unilaterally because the operation of these structures has created a 'socialisation effect' which raises awareness that most issues have more than one facets, thus requiring co-ordination. A strong co-ordinating mechanism i) would 'remind' the respective actors
of the interministerial position previously agreed upon; ii) would authoritatively resolve the issue by choosing the 'appropriate' solution or iii) would facilitate the adoption of a solution at the purely political level. The situation at the political level in Greece has begun to change recently through the formal creation of sectoral co-ordinating bodies, but this is insufficient in the light of the number and the quality of the problems that exist at the administrative level.

On the other side of the coin, the cases of the UK and France illustrate that increased predictability, unity in terms of the interpretation of the policy on a day-to-day basis, transparency in terms of the relations with other parts of the implementation structure and more importantly continuity in all these actions characterise the operation of integrated politico-administrative structures. These characteristics, which are produced by the existence of a stable and unchallenged institutional structure, lead to the use of nodality backed by authority thus reducing the number of decision points. This increases the likelihood of effective implementation.

Contrary to the Greek case, it is clear that strictly speaking we have found no hard evidence illustrating a clear-cut direct role in macro-implementation of the strong horizontal co-ordinating mechanisms that we have identified in the UK and France. In other words, the implementation of public procurement policy has not been characterised by the

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1 One could add, in a rather cynical manner, than the second option could easily include a conscious implementation of an alternative policy that could conflict with the policy of the EC.
existence of cases where problems have ascended to the European Secretariat or the SGCI. However, this is largely due to the fact that public procurement policy is dealt with by strong sectoral co-ordinators (the Treasury and CCM) which thus reduce the need for co-ordination at a higher level. In more general terms we can conclude that implementation in the EC largely depends on the integrated or fragmented nature of the domestic politico-administrative structures. Could one then move to a wider discussion of implementation in the EC in order to outline a European implementation style?

9.2. IS THERE A EUROPEAN IMPLEMENTATION STYLE?

Defined in rather flexible terms, this concept covers the patterns which are routinely observed in the implementation process within the EC, in a manner that links them systematically to the characteristics of this particular implementation structure. It is thus influenced by the wider concept of policy style proposed by Richardson, Gustafsson and Jordan (1982) although it is substantially less refined. We shall argue here that a number of factors point to the direction of a European implementation style. If we return to the cases of the UK and France, we may look at two significant exceptions relating to the efficacy of their integrated politico-administrative structures, namely i) the existence of regional preferential schemes and ii)  

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2 Following Freeman (1985, 477) we argue that empirical data from other types of policy and also micro-implementation are necessary for a more refined definition of this concept.
the preference for a specific computer manufacturer during the 1970s in the UK and the initial unwillingness of the French authorities to implement the provisions covering public services contracts (Directive 92/50). One should draw a distinction between the two cases.

The case of the UK helps refine our view of implementation as a political process. Indeed, while it was the Conservative government that negotiated the terms of the British accession (formulation), it was a Labour government that implemented the preferential schemes thus illustrating the disruptive effect that political changes can have upon the implementation process. In short, implementation in the EC is political because it is influenced by changes in the political priorities of major domestic actors. At the end of the day, shifting majorities constitute a characteristic built in the liberal systems that constitute the EC. In other words, this is an inherent source of fragmentation within the EC.

The case of France constitutes a useful basis for the refinement of the same idea. First, it was a socialist government that negotiated Directive 92/50 in the beginning of the 1990s and the same government had the opportunity to commence the implementation process by at least implementing it formally. Not only did this not happen, but after the election of March 1993 the in-coming government of the Right followed exactly the same pattern. The reason why this happened is linked to the wider context within which implementation takes place. Indeed, the unwillingness of a major competitor, namely the Federal Republic of Germany, to open its own market led the French authorities to violate a
policy decision that they helped formulate. Thus, implementation in the EC is political because it is influenced by the behavior of other European competitors. In other words, implementation must be co-ordinated within each domestic context but also between domestic contexts, on an EC-wide scale. That is the prerogative of other parts of the implementation structure (European Commission and ECJ) whose objective is to give a maximum degree of uniformity in implementation.

Although the bargaining that takes place in the formulation stage means that every negotiator has to make some sort of concession, thus altering his initial position, member states with co-ordinated views are more likely to 'lead' than be led, thus significantly reducing the need for changes in their own position. That means that the national policies of these actors are frequently projected upon the EC\textsuperscript{3} thus facilitating implementation at their own domestic level. This is one aspect of what can be called systemic repercussion of formulation upon implementation through the definition of the extent of policy change, which also illustrates a part of the concealed influence exercised by the co-ordinating mechanisms\textsuperscript{4}.

Can the examination of the theory incorporated in this policy, which is a significant analytical parameter that we identified in Chapter 1, shed light to the nature of the European implementation style? Given that the EC's public

\textsuperscript{3}Indeed, this seems to be a common objective of all national governments, at least in regulatory policies (Héritier 1996, 150-1).

\textsuperscript{4}In this sense the UK is not, contrary to George's view (1994; 1995) such an 'awkward partner' after all.
procurement policy embodies basic characteristics of the single market project (competition, reliance on the target groups for a large part of implementation) could one draw wider conclusions for the European implementation style? Our analysis does not reveal any significant misconceptions as to the validity of the theory that has been incorporated into the EC's public procurement policy. The fact that the information found in notices advertised by awarding entities seems to be satisfactory (supra, Chapter 8) and above all the increasing number of notices that have been published despite the decreasing procurement expenditure underline the validity of the theory which linked transparency with competition.

Nevertheless, a weakness in the implicit assumptions upon which this theory is based, has been revealed. This assumption places substantial emphasis on the role of the target group and the subsequent use of direct effect in the implementation process. The rather limited national case law\(^5\) underlines the psychological factor that influences the behaviour of market players. In other words, this dissertation provides an illustration of the limits of the concept of direct effect. Its utility in the implementation process is limited by the time and the financial resources that have to be spent. More important though is the

\(^{5}\)Interestingly, the French courts that presented problems in the acceptance of the concept of direct effect (supra, Chapter 4) were those with the most extensive case law. On the contrary, the British and Greek courts, where such problems did not exist, dealt with a rather limited number of cases. This illustrates the dependent nature of the action of national courts in the implementation process.
criterion that underpins the aforementioned psychological constraint that tenderers may sometimes face. The substance behind this fear lay in the perceived capacity of the awarding entities to 'take revenge' against tenderers who have previously challenged award decisions. That implies their capacity to award future contracts based on subjective criteria, an action that goes against the spirit and the letter of the EC's policy in this field.

Although this cannot be an entirely water-proof conclusion, it has three immediate implications for the concept of European implementation style. First, it is a useful illustration of another dimension of change. It shows that the establishment of useful policy instruments by public institutions at the European level does not necessarily coincide with an immediate change in the attitudes of their potential users. In short, this gap underlines the limits of the action of public institutions. Secondly, it highlights the utility of informal channels to European and national fixers. Thirdly, it leads us to ask whether there were alternative approaches that could have been followed by the EC. The availability of other alternatives was limited to a stronger role for the European Commission which could be given the right to suspend an award procedure until the validity of the complaints has been established. Although this possibility has been discussed during the formulation process that led to the

6Such conclusions would require the analysis of every single case where tenderers have avoided litigation because of these fears and an accurate assessment of their honesty. This exercise is simply impossible.
adoption of Directive 89/665, the national governments did not want a stronger role for the Commission (Woolcock 1991, 132-3) because it would set a dangerous precedent of 'unwelcome' reinforcement of the European regulators. Yet, it is doubtful whether such a role would automatically reduce the likelihood of problems, not only because it would necessitate action from tenderers who would still be easy to identify, but also because it would suffer from practical problems, like the need to be able to intervene in every single award procedure. Clearly, this is impossible.

Thus one is led to the conclusion that there are inherent problems in the nature of the activity pursued here (regulation). Indeed, Majone has rightly argued that the regulatory activity is characterised by a limited influence of budgetary constraints upon the activity of the regulator. On the contrary,

the real costs of most regulatory programmes are borne directly by the firms and the individuals who have to comply with them

(Majone 1994, 87).

The cost here is construed in its wide sense, thus including the change in the behaviour of European tenderers, who are meant to benefit from this policy. More generally, this chain of thought leads us to identify excessive reliance on the concept of direct effect as a factor which may explain some implementation problems in a context that is characterised by the increasing use of regulatory policies (Majone 1996a, 54; McGowan and Wallace 1996, 565). In a
less ambitious vein, it certainly underlines the validity of the methodological imperative that we have followed here, namely that implementation analysis in the EC has to take account of the type of the policy which is being implemented. Nevertheless, the same finding underlines the need to take account of developments in other policy areas whose repercussions spill-over to our field of research. The extensive use by major market players of opportunities created by competition policy and the free movement of capital (for mergers and acquisitions of companies respectively) within the EC highlight this point while they also place in a wider context the previous analysis relating to the impact of direct effect.

Moreover, another structural weakness embodied in the policy concerns the fact that it does not cover the execution of the public contracts whose award it is meant to regulate. Problems in the Greek and the French context illustrate that this is a factor that fragments artificially the policy process thus undermining cohesion in implementation. The execution stage has been left outside the remit of the directives presumably because it has no impact upon the common objective, that is the establishment of a free market. This question illustrates not only difficulties relating to the tractability of the problem but also a rather incomplete understanding of the field in question primarily influenced by the constant attempts of the member states to preserve a wide margin for manoeuvre.

After having established some of the factors that underline the political nature of implementation in the EC, it is now time to attempt to link them to the nature of the
EC as an implementation structure, in order to further examine the nature of the European implementation style. The lack of external implementing services is the first major characteristic that has to be discussed. In a sense, it is the source of many of the problems that we have identified in the implementation process because it constitutes a vehicle for the participation of national politico-administrative structures. Its importance derives from the fact that these structures operate, up to a certain extent, under the direct guidance of political actors whose primary focus seems to be the achievement of narrowly defined 'national' interests. However, they also participate in the formulation stage. In other words, contrary to what some national politicians would like us to believe, national governments are not the passive recipients of 'mandates' emanating from the EC. They shape policies along with a number of other important actors like the European Commission and Parliament. How can we explain this apparent contradiction regarding problematic implementation?

The distance between 'Brussels' and the national capitals is the main factor that contributes to this phenomenon. Distance here is construed in terms of the latitude that the national structures have in the implementation process. Clearly, the principle of institutional autonomy that we identified (supra, Chapter 2) as a major determinant of the nature of the EC as a loosely coupled implementation structure, is at the heart of this phenomenon. It seems to have been largely preserved at the level of the structures, but less so at the level of the functions. That means that commonly agreed policies at EC-
level, are processed by a number of structures which act as filters constantly refining their content. The degree and the direction of this refinement largely depend on the integrated or fragmented nature of these structures.

Moreover, this distance alters the balance between the collective (formulation) and the individual (implementation) level of action in favour of the latter. In other words, it creates a window of opportunity for the national structures which sometimes try to orientate implementation in a direction that serves their own particular interests. The misuse of the lowest price as the award criterion in Greece is an illustration of this phenomenon, because it was the direct product of the need to tighten-up public expenditure as a result of the country's problematic public finances and the pre-election pledges of the conservative party.

These operations confront the national structures with European institutions and mainly the European Commission in a context which is characterised by the initial use of negotiation. Indeed, the implementation process occasionally takes the form of negotiation because of the distance that exists between Brussels and the national contexts and the formal inability of the European Commission to fix implementation directly. This is an indirect but very clear sign that the European Commission acknowledges the privileged knowledge of the field that the national politico-administrative structures actually possess. Yet, the use of the term 'negotiation' should not be construed as evidence of a balanced relationship. The European Commission possesses a number of tools that enable it to pursue its own objectives, although their efficacy is
variable. It is the efficacy of these tools that defines more accurately this relationship. Hence negotiation varies from simple exchange to penalties. Exchange covers national contexts characterised by a limited policy change, while penalties are used in cases of overt conflict.

Irrespective of the form of interaction, the role of the European Commission in the implementation process also takes the form of a scapegoat in the EC's politics of blame avoidance7. This phenomenon is more evident in the implementation process in fragmented politico-administrative structures. Indeed, this is so because tensions are stronger there, although the same phenomenon appears in other national contexts as well. In practice, this is a mechanism which enables the national actors to implement changes without taking the blame for them. Distance is used here in order to 'explain' or interpret policy changes that have to be implemented, that is 'we have to do it because they told us so'. The main idea behind this practice is that not only are 'they' beyond 'our' individual control, but 'they' also possess the means (penalties) to make ineffective implementation too costly thus enhancing de facto the obligation to implement their wishes.

Hence, the role of the European Commission and national public institutions can also be construed as a resource. This is illustrated by the tendency of some national officials to avoid dealing with problems in implementation until they reach a point of conflict whose resolution can be

7We borrowed the term from Weaver (1986) who used it in order to depict one of the main motivations behind the behaviour of policymakers, mainly in the USA.
based on blame avoidance. Nevertheless, these practices also cover procedural or formal changes e.g. the switch from administrative circulars to statutory instruments in the UK. There is though a wider significant implication for the European Commission, namely the need to find flexible responses to implementation problems. This functional need has resulted in the extensive use of informal mechanisms which avoid the rigid and confrontational aspects that characterise formal procedures like art. 169 of the Treaty. The flexible responses utilised by the European Commission illustrate the entrepreneurial spirit used in the linkages between policy areas for the achievement of the cardinal objective, that is efficacy. This spirit is exemplified by the use of the spill-over effect from the management of EC funds for the liberalisation of public procurement and also the action that it took in order to fill the functional gap created by the artificial fragmentation of the policy which left the execution of public contracts outside the remit of the directives.

The penalties are of crucial importance here because they help identify what is at stake in the implementation process. This is more useful when it is quantifiable, as was the case of the provision of EC funding for public works in Greece. It may also take other forms and can be construed in terms of prestige, principles, or even political capital, for example by reinforcing or undermining the status of a minister in a given national context. It is important not only for national politico-administrative actors but also for the European Commission which attaches special emphasis to the concept of uniformity not only for
political reasons, that is its need to be seen to act in an even-handed manner, but also for normative reasons deriving from the concept of Community of law.

The potential use of penalties exerts direct influence upon the ability of the national actors to learn how to implement EC policy. Indeed, implementation is also a learning process which potentially leads to the adoption of practices that have either been tested in other contexts, or have been authoritatively proposed by the European Commission. Again, the switch to statutory instruments in the UK provides a clear example, similar to the extensive refinements in the use of the lowest price as the main award criterion in Greece. However, the typical characteristics of each national institutional setting clearly affect the efficacy of the learning process. The mobility of officials on the basis of partisan criteria in Greece - despite a recently observed mitigating trend (Passas and Stephanou 1997, 255) - and the lack of specialised staff certainly undermine the ability of the structures to learn, a function that presupposes a strong memory and ability to understand.

The ability of the implementing politico-administrative structures to learn then becomes a crucial aspect in the European Commission's search for uniformity. Uniform implementation is an objective mainly because of the regulatory type of policy discussed here. Although other normative aspects like equality are also important, uniformity in cases of regulatory policy is important because free-riding automatically creates a cost for the other market players. This has two important implications for the analysis of macro-implementation in the EC. First,
it can be construed as a competitive process. Indeed, national actors monitor and assess the quality of implementation in other member states (another form of learning), hence the occasional variation in an otherwise undifferentiated implementation pattern (Directive 92/50 in France).

Thus, implementation in other member states is used as a resource. This resource is utilised both actively and passively. It is used actively by the member states when they shape their own behaviour during implementation as illustrated by the implementation of Directive 92/50 in France, while its passive use takes place at the European level where they formulate policy collectively. The latter use is more evident in the distribution of power between the European and the national institutions. In turn, this aspect of the policy process illustrates what we shall call systemic implementation deficit of the EC defined as the set of problems which emerge in implementation as a result of the choices made previously on the basis of other priorities. The extent to which national governments are willing to accept\(^8\) a stronger role for the European Commission is an example of these choices. In the same vein, we would also underline the lack of any sign of proper use of the temporary derogations agreed upon in the

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\(^8\)In other words, we argue here - largely following Gunn (1978) and Hogwood and Gunn (1984, 198-206) and also the discussion by Chayes and Handler Chayes (1993, 197-8) of the acceptable level of compliance with international treaties - that perfect implementation in the EC is unattainable, at least because of other over-riding priorities which are linked to the nature of the EC.
formulation stage and more importantly, the absence of any coherent strategy on behalf of the European Commission in the management of these cases. They certainly seem to be a vehicle which enables member states to buy time for the maintenance of an existing policy rather than the preparation for the implementation of change. Moreover, it is argued here that the action of the French authorities in the case of Directive 92/50 and the behaviour of the Greek government between 1981 and 1985 have also highlighted the function of implementation as an agenda-setting mechanism. Indeed, in both cases the issue of uniformity has been firmly placed on the political agenda at EC-level.

The need for uniformity raises the stakes for the European Commission whose credibility largely depends on the uniformity of its action. This underlines not only the importance of its monitoring function, but it also highlights the systemic repercussions that the use of direct effect may have. Market players occupy a pivotal position resulting from their constant interactions with implementing authorities. Although this does not necessarily enable them to have a clear and accurate horizontal view of the implementation process, it certainly makes them a privileged source of information for the European Commission and the sectoral national macro-implementers like the Treasury and CCM.

In this discussion of the European implementation style we have so far identified the basic features of the role of the European Commission as the dominant fixer. However, the European Commission does not have a monopoly over fixing within the EC. Indeed, the ECJ and national actors
participate in the same activity albeit in a less intensive manner. On the one hand, the action of the ECJ is subject to a number of factors that escape its direct control. These factors are the national courts and their willingness to submit preliminary references for the interpretation of EC law and the action of target groups. This largely depends on the number of cases that reach national courts which in turn, is dependent upon the quality of implementation and also the willingness and the ability of private actors to use legal procedures for the protection of their interests.

On the other hand, the role of national actors in fixing depends on the interplay between the aforementioned factors and their inability to have an accurate horizontal view of implementation in the EC as a whole. The very weak position of the national Parliaments means that fixing at the political level emanates from the government, while the administrative and the private spheres are less important sources of this activity. On a more general note, it can be argued that fixing at the national level can only be partial and linked to the particular characteristics of a given national politico-administrative structure, thus leaving the European Commission and the ECJ as the only potential gatekeepers of uniformity in the EC. Moreover, there is ample evidence that the role of fixers is much stronger and visible in cases where implementation is problematic, although the precise choice of the tool that the fixer will use depends on the nature of the problem. The repercussion upon the principle of institutional autonomy is that its
normative intensity is preserved only in integrated politico-administrative settings.

We shall therefore argue that the nature of the EC actually favours variable implementation through i) the reliance on idiosyncratic national politico-administrative structures and the subsequent distance between the two levels of government where implementation takes place; ii) the partial subordination of these structures to national developments; iii) the spirit of competition which is embedded in a growing number of EC policies; iv) the more or less obligatory reliance on private actors whose motivation and definition of what is at stake is not necessarily consistent with the objectives of EC policy and v) the imperfect information and variable margin for manoeuvre possessed by the European fixers.

Using the broad concept of European implementation style we have identified a number of linkages between the nature of the EC as an implementation structure and the political characteristics of implementation. This is based on various forms of fragmentation, mainly that of the national politico-administrative structures. What are the lessons that one can draw from this study in relation to the wider process of European integration?

9.3. LESSONS FOR THE INTEGRATION PROCESS: A MACRO-IMPLEMENTATION PERSPECTIVE

We have noted in Chapter 1 that the emphasis placed in this dissertation upon the action of national governments can be misleading in the sense that it may give the
impression that we have come to adopt an intergovernmentalist perspective on European integration. In this sense, placing these conclusions into the wider political context within which the integration process takes place can be even more misleading. Indeed, recently the French government led by Balladur proposed measures to harmonise at EC-level penalties for breaches of EC law (Buchan 1994) and argued in favour of the insertion to European legislative texts of a clause specifying these penalties. More recently, Major not only threatened to implement merely 'symbolically' the directive on the 48-hour working week but he went even further, by threatening to block the IGC that would reform the Maastricht Treaty if the changes which he wanted were not adopted (Southey and Peston 1996; White 1996). The first example demonstrates the significance attached by national governments to the concept of efficacy. The second example illustrates the limits that national governments can place on the concept of efficacy during the implementation process and the level of political salience that an issue regarding implementation can reach.

Is then implementation the domain where national governments can find so strong ammunition in their attempts to shape political realities according to their own individual wishes? The last example mentioned above certainly seems to support this view, as the leader of a member state was prepared to raise the stakes in such a radical manner which, from a pro-integrationist perspective, amounted to blackmail.
Discussing the policy-making process from the perspective of integration theories, Webb (1983, 30) argued that
governments will be far less likely to agree common policies and rule-making while there are doubts over the extent to which these will be observed uniformly throughout the Community area.

Although the recent developments (SEA and TEU) which led to the reinforcement of the role of the European Parliament mainly and the European Commission necessarily mean that more players may follow the same chain of thought, one begins to conceptualise the systemic repercussions of implementation upon the wider integration process in terms of the legitimacy that it is capable of attaching to it. Interestingly, Haas (1975, 64) and Moravcsik (1993, 512), two proponents of the neo-functionalist and the intergovernmentalist perspectives (respectively) converged on the same idea. What could then produce this effect and above all how can we link implementation with legitimacy?

The argument presented here is rather simple. Irrespective of the theoretical perspective that one adopts in order to explain the emergence and development of European integration as a political phenomenon, it is clear that the belief that the EC can be an effective problem-solving arena is common ground. Implementation systematically links legitimacy to integration because the effectiveness of policies (a possible result of implementation) is one source of legitimacy, along with
tradition and participation\textsuperscript{9}. In different terms, the EC needs to be effective in order to be legitimate. On the contrary, it risks being watered down or even abandoned if it does not produce at least some of the expected results.

This argument is reinforced by the dominant policy type, that is \textit{regulation}, which is used within the EC for the liberalisation of the market, an important but certainly not the only dimension of economic integration. The pursuit of policies which are dominated by the spirit of competition means that the main focus is on the establishment of a level playing field. Systematic distortion of competition may produce increased pressures for the re-nationalisation of policy, thus initiating a process which may lead to the limitation or abandonment of the whole endeavour. The precise definition of this point is beyond the scope of this dissertation. However, it is certainly the result of a political assessment which will be influenced by the possible existence of alternative solutions to the problems that produced this edifice in the first place. The discussion of the impact of implementation upon the legitimacy of the EC should not be limited to the central role of the governments.

\textsuperscript{9}Tradition and participation are elements that can be found in the EC. Indeed, while tradition affects both structures and processes, e.g. through the observance of rules based on the concept of Rechtsstaat (state of law), participation is another source of legitimacy illustrated not only through the direct election of MEPs, but also through the participation of representatives of the member states in the European policy process.
The wider public could have an interest in the implementation of unpopular policies (e.g. the prohibition of state subsidies to national airlines and the subsequent need for redundancies) to the extent that their effectiveness enables the emergence and identification of the positive outcomes that they may have (e.g. lower fares). In this sense, differentiated patterns of implementation may not be such a bad thing after all as effectiveness enhances the visibility of the intended result by transforming it from a theoretical concept into practical reality. Thus, those actors who promote the causes of ineffectiveness are more likely to be challenged as the stakes for those who suffer the negative consequences (regular travelers and taxpayers in our example) are easier to identify. Consequently, one can argue that the link between implementation and legitimacy goes through a wider number of actors. Furthermore, although it could be argued that ineffective implementation is one way of avoiding hostility against the EC (given that the latter is thought to be the source of unpopular policies) one may ask what is the reason for their formulation in the first place? That is the essence of the link that we have established between implementation and legitimacy.

If we cannot define the point where integration suffering from ineffective implementation risks being abandoned, we may at least attempt to assess the relative importance of the actors that we have identified as the main participants in the implementation process. This discussion will be based on the predominant theoretical perspectives on integration, namely intergovernmentalism, neo-functionalism
and federalism. One of the most important assumptions of early versions of intergovernmentalism was the view of the state as a unitary actor. Intergovernmentalists initially saw the state as a single decision-making unit which was in a position to make rational decisions of the basis of more or less specific conceptions of its own interests, the national government being the central actor in this process. This study has illustrated that these assumptions are largely inaccurate. Indeed, on the one hand national governments are not single actors but multi-faceted complex organisations whose action is, at least up to a certain extent, subject to internal tensions.

If this finding is clearly exhibited by the implementation process in Greece, it is not less evident in the UK or France. The existence and the importance attached to co-ordinating mechanisms constitutes a direct acknowledgment of the tensions that exist within national governments. Secondly, governments are subject to change. Change concerns not only the direction of their action, but also its precise content during implementation. Although governments are themselves sources of change thus being capable of influencing, at least partly, the environment where they operate largely shapes their behaviour. This is very evident in the regulatory policy that we have discussed, because by its very objective (competition) it requires uniformity which in turn is subject to the behaviour of a number of actors. The content of their action is largely shaped with reference to the wider environment. The argument that
Only where the actions of supranational leaders systematically bias outcomes away from the long-term self-interest of Member States can we speak of serious challenge to an intergovernmentalist view (Emphasis in original)

(Moravcsik 1993, 514)

is largely arbitrary because it seems to take for granted that there is a single definition of this interest. This study has illustrated that this is not the case. On the contrary, changes occur, at least up to a certain extent, in a manner which underlines the reactive rather than pro-active action of the national governments.

The conclusion of this dissertation also undermines another important dimension of liberal intergovernmentalism which construes national governments as users of EC institutions (Moravcsik 1993, 515). Although we have demonstrated that this is an accurate view of the relations between these actors, we have also underlined the fact that there is another, equally important, side to it. National governments are increasingly subject to the action of EC institutions whose role is underpinned by an entrepreneurial spirit that largely escapes the control of individual actors. Sandholtz (1996, 408) captured this reality in even more specific terms by stating that these institutions produce

changes [to] the discourse surrounding conduct...This discourse clarifies the meaning of the rules and provides reasons for later rounds of behaviour and
subsequent discourses about the rules. Continued violation of the rules undermines the legitimacy of the system that brings...a variety of benefits. (Emphasis added)

In more general terms, implementation constitutes the domain, *par excellence*, where the national governments illustrate the socialisation effects produced by European integration. In a wider view of the relations between national governments and non-state actors, one must underline the expansion of the tools possessed by the latter in their day-to-day interactions with the former. The rather limited use of the concept of direct effect cannot mitigate the validity of this view because what matters here is the ability of non-state actors to shape their behaviour on the basis of their own priorities and the (formal and informal) opportunities that they have to pursue their objectives in arenas which largely escape the control of governments, like courts.

In that respect, it is important to note that the cautious reception of supremacy and direct effect in the national legal orders has not affected the attitudes of private actors. The case of France, where the new legal instruments have been used shows that there is certainly a socialisation effect that influences the behaviour of private actors in the implementation process. That means, that some time is needed before a full assessment of this phenomenon can be established. However, one must also note the significance of two other, but equally important factors. First, the case of the UK shows the importance of
the so-called *business ethos* upon this behaviour. That means that the use of the new instruments need not be equally important in every single national context. National traditions will inevitably affect this phenomenon.

Secondly, the availability of other, informal means of action will also affect the behaviour of private actors in the legal domain. This means that despite the importance of national traditions, the extensive use of regulatory policies based on competition may lead private actors to the development of a different ethos, one which is reflected through the recourse to *informal* channels of influence. Clearly, the European institutions are an important point of reference as they tend to absorb this functional pressure\(^\text{10}\). Therefore, although this perspective partly justifies the neo-functionalist emphasis on private actors, it also highlights the regulated autonomy that characterises their action within the implementation process\(^\text{11}\).

Following the same line of reasoning, one could also argue that the European institutions, the European Commission in particular, tend to use the private actors as a significant *resource* in the implementation process. Although we have not found evidence of a coherent strategy

\(^{10}\text{Sandholtz (1996, 419) rightly construes European institutions and private actors as potential coalition partners.}\)

\(^{11}\text{The two extremes of this regulated autonomy are illustrated by i) the systemic impact that the judgment of the ECJ in the Cassis de Dijon case (C-120/78) had through the establishment of the principle of mutual recognition (Alter and Meunier-Aitsahalia 1994) as an instrument for regulatory policy and ii) the unwillingness to use litigation as a tool in implementation.}\)
for the mobilisation of these actors by the European Commission advocated in recent scholarship (Richardson 1996a, 292) we have illustrated the two-level strategy that these actors follow in order to promote their interests.

Has this emphasis on European institutions as significant players in the implementation process gone as far as justifying the federalist perspective? Discussing the possible emergence of a 'European federal balance' Scharpf (1991, 426) has recently underlined the significance of a Grundeinstellung (basic pre-disposition) of each political level to define and pursue, within the limits of its powers, its own objectives, but only to the extent that they do not conflict with those of other political levels, thus largely capturing the spirit of federalism. The emphasis on conflict revealed by the analysis of implementation in the EC is certainly misleading to the extent that it does not do justice to the EC's federal elements.

First, this study has largely confirmed the view (Spinelli 1978, 80) that the ECJ is an evidently federal court which exercises powers attributed to it in order to resolve conflicts between and within various levels of government. Secondly, we have also found evidence suggesting that the European Commission is acting as a federal government by monitoring and fixing the implementation process. Thirdly, we have identified the compétence liée (regulated power) that the member states exercise by implementing EC policy. Evidence of this includes the interaction with the European Commission and the role of the ECJ. In other words, we have identified the
instrumental nature of the role of the member states which implement policies formulated collectively at the European level. However, we have also identified a major potential weakness of the EC which is the inability to implement judgments of the ECJ that go against the will of member states. Although we have found only one case of a judgment that has not been implemented, we argue here that this reveals a structural weakness which on the one hand illustrates that the EC is not yet a complete federation, while it also provides an indication that this is the direction that it has taken.

Indeed Taylor (1981, 251-2), discussing the extent to which the EC is short of a federal model, argued that the EC was closer to a confederal model because the member states still possessed the right to choose the laws (and more importantly for our argument, the judgments) that applied within their territory. That was correct in 1981 but is not accurate any more. Our argument is based not only on the entrepreneurial spirit - or purposeful opportunism (Cram 1997, 170) - that we have identified in the role of the European Commission but also on the development of more formal mechanisms which do not depend on this spirit. The new form of art. 171 is at the heart of this argument because the fines that can be imposed on member states largely reduce the efficacy of a conscious non-implementation of a judgment to a short-term technicality.

The lack of such a case in the field of public procurement - although Greece is very close to a judgment based on art. 171 relating to Directive 92/50 - does not limit the validity of the argument. On the contrary, the
significance attached by a large number of diverse actors (Diez-Hochleitner 1994, 126; Ritleng 1995, 575-6) to the effective implementation of EC policies was the origin of the change. The importance of this development must be qualified in the light of two facts.

First, the imposition of a fine does not necessarily constitute effective implementation. On the contrary, the utility of this instrument can be found in the potential that it has to dissuade member states from not implementing judgments of the ECJ. Secondly, a time-consuming procedure has to precede the imposition of a fine, thus still enabling the member state in question to take advantage of this situation. The ECJ had already opened a window of opportunity for individuals by recognising in its judgment in the Francovich case (joined cases C-6 and 9/90) that member states may be liable to pay damages if they violate a directive conferring rights on individuals, which is more important in cases of provisions lacking direct effect (Ross 1993, 60). More importantly, we would underline the clear need to examine the dynamics of the EC's operation instead of focusing upon the static analysis of the formal distribution of powers between the EC and the member states. The analysis of the implementation process in the EC substantially reinforces the view that a combination of

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12Mény (1985, 9) rightly argues that the fact that studies of the implementation process have first appeared in federal states like the USA and Germany is not a coincidence, as the inherent difficulties of implementation are reinforced by the fragmented nature of their structures.
existing theoretical perspectives is best suited for the understanding of integration (Peterson 1995a, 84).

How could one describe the contribution of this dissertation to our understanding of implementation in the EC? This contribution could be summarised in the following points. First, we have illustrated the direct link between the fragmented or integrated nature of national politico-administrative structures and the quality of implementation. In that sense we have identified a cause of problematic and successful implementation of EC policy at the national level.

Secondly, we have identified the ways in which national governments use the tools of government (nodality, authority, treasure and organisation) in order to improve their implementation profile.

Thirdly, we have identified the nature and the limits of the role of European institutions and target groups in implementation. They are parts of a wider implementation structure which is directly linked to the wider patterns of implementation that we have identified. In particular, we have demonstrated the political nature of implementation in the EC.

Fourth, we have also demonstrated the value of a significant methodological point, namely the need to take account of formal implementation only as a part of the wider implementation process. In this sense, we illustrated that formal implementation is only a minor part of the problems that some member states face in the implementation of EC policy. Therefore, existing research and political strategies which focus on this aspect of implementation
(like the attempts of the Greek conservative government in the beginning of the 1990s) can, at best, address only a minor part of these problems and certainly not the most difficult ones.

Fifth, we have illustrated that there is a stage of macro-implementation in the European policy process. Its analysis gives a wider view of the factors that shape the national implementation profiles. In other words, we have illustrated that one need not analyse implementation at street-level (micro-implementation) as a part of the existing literature has done, in order to understand why some member states implement EC policy more effectively than others.

Sixth, although we left unexplored the potential lessons that one may draw from micro-implementation (e.g. the precise nature of interactions between target groups and street-level bureaucrats) we have identified factors which affect the national implementation profiles in a horizontal manner. The weakness of this methodological choice is the lack of precision and the subsequent need to have recourse to broad concepts and analytical tools. Nevertheless, the strength of this approach is the possibility to address problems of implementation in wider strategic terms which help us depict a broader outline of this stage of the European policy process and the ways in which national governments can act in order to change their respective implementation profiles.

Seventh, we have identified the contribution of the European fixers in the implementation process in a manner which could not have been achieved through the focus on
street-level implementation. Indeed, the analysis of macro-
implementation of the EC's public procurement policy has
been characterised by the very limited direct role of the
European Commission at street-level. Therefore, one could
not have identified the interactions between this
institution and national governments and the subsequent
action of the latter by focusing, for example, on the action
of awarding entities.

Eighth, it is only through this wider perspective and
the analysis of informal channels that one could identify
the potential and the limits of the role of target groups
(potential and actual tenderers in our case study) in the
implementation process.

Highlighting these points does not imply that we claim
to have identified the only factors affecting the
implementation of EC policy at the national level. On the
contrary, research at street-level may reveal that there are
other factors that also influence implementation along with
fragmented or integrated politico-administrative structures.
Furthermore, comparing the implementation of various
policies will produce useful lessons. In any case, it is
clear that analysis must certainly include and go beyond
transposition in order to capture the rich political
activity that is an inherent part of implementation.
Forty-three élite interviews have been carried out between March 1996 and June 1997 in the following institutions (numbers in parentheses indicate the number of interviews in each institution):

Athens' Water, and Sewage Company, Athens (1).
Commission Centrale des Marchés, Paris (3).
Department of Trade and Industry, London (3).
European Commission/Directorate General XV: Internal Market and Financial Services, Brussels (2).
European Secretariat/Cabinet Office, London (3).
Foreign and Commonwealth Office, London (1).
HM Treasury, London (2).
Kingston Communications, Hull (1).
Kingston upon Hull City Council, Hull (1).
Ministère de l'Agriculture, de la Pêche et de l'Alimentation, Paris (1).
Ministère de l'Économie et des Finances, Paris (2).
Ministère de l'Industrie, Postes et Télécommunications, Paris (1).
Ministère des Affaires Étrangères, Paris (2).
Ministère du Travail et des Affaires Sociales, Paris (1).
Ministry of Development, Athens (3).
Ministry of Foreign Affairs, Athens (2).
Ministry of National Economy, Athens (4).
Ministry of the Environment, Spatial Planning and Public Works, Athens (1).
Permanent Representation of Greece to the EU, Brussels (1).
Permanent Representation of the UK to the EU, Brussels (2).
Secrétariat Général du Comité Interministériel pour les questions de coopération économique européenne, Paris (1).
Secrétariat Général du Gouvernement, Paris (1).
Special EC Legal Service/Ministry of Foreign Affairs, Athens (2).

Thirteen interviews have been carried out with British officials, thirteen with French officials, fifteen with Greek officials and two with officials of the European Commission.

These officials have been identified through the Civil Service Yearbook, the Répertoire de l'Administration Française, the EC's interinstitutional directory and direct contacts with Greek ministries. The overall positive response rate exceeded 90%.

Although senior officials have been chosen (Heads of Unit, Sector, Directorate) as the main target group, an effort has been made in order to include desk officers as well.
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*For ease of reference this list has been divided into Part A which contains material from books, journals, non-legislative documents, newspapers and magazines and Part B which contains cases and legislation.


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