The European Commission and the Construction of Information Society: Regulatory Law from a Processual Perspective

A thesis presented
by
Katerina Sideri

to the London School of Economics and Political Science Department
of Law

in fulfillment of the requirements
for the degree of

Doctor of Philosophy

in the subject of

Law

London School of Economics and Political Science
London, UK
June 2003

UMI Number: U615846

UMI

Dissertation Publishing

ProQuest

THESES

F

8224

To Andreas

for constant support and inspiration

Abstract

The focus of this thesis is on information society regulation in Europe and on the European Commission when forming legislative proposals and implementing laws by means of *decentred and flexible* regulation, respectful of *difference*, seeking to promote the engagement of diverse interested parties in the formation of laws affecting them. I seek to explain the above processes in a dynamic way, breaking away with a conceptualisation of regulation as (only) efficiently pursuing the public good and neutrally mediating among autonomous communities, and public administration as being (only) about reasoned choices and rational action. Bourdieu's theoretical tools are employed to argue that although it would be within agents' intention to design neutral rules and within regulatory law's original function to promote participation and deliberation, law encapsulates a vision that outruns its function and agents perceive the social world in a way that outruns perception. To illustrate this, I look at the following case studies: Architectural solutions introduced by the industry in DVDs to prevent copying, domain name dispute resolution by ICANN, Internet filters used to block harmful material on the net, and the proposal to introduce patent protection in computer-implemented inventions in the EU. In a nutshell, in the above instances the European Commission strives to reproduce or preserve its juridical, technocratic, social and symbolic capital, while one of the main strategies supported by its juridical capital is to sustain the belief in the neutrality and objectivity of regulatory law. However, the ways in which the administration perceives the potentialities inscribed in capital are subject to unspoken general cognitive schemas shaped by nationality and professional background, and by the subjective construction of notions such as recognition, reputation and communality, as formed in everyday interaction in the Commission. Yet, cognitive schemas and capital are not conceived as static, but as open to experience. In this way, although regulation is viewed as manifesting the freezing of power relations, dynamism is injected as all definitions in the field are potentially subject to re-definition, by virtue of struggles amongst the administration and interest groups, which, although they occupy different fields, strive to influence regulation. Redefinitions then result in re-orderings in the field, as for example, new forms of capital may enter it or cognitive schemas may be altered.

Acknowledgements

Contents

Chapter III
INSIDE THE EUROPEAN COMMISSION

Chapter IV
THE DOXIC ELEMENT OF THE FIELD: INTERNET REGULATION

Chapter V

SOCIAL CAPITAL: THE CONSTRUCTION OF INTELLECTUAL PROPERTY PROTECTION

Chapter VI

CONCLUSIONS   324-340

METHODOLOGICAL APPENDIX   341-346

BIBLIOGRAPHY 347-374

List of Figures

List of Tables

I

The European Commission and the Construction of Information Society

Toute définition de la liberté donnera raison au déterminisme.

Henri Bergson, Les Données Immédiates de la Conscience.

The will to create is to create the fiction of a world that corresponds to our desires...

associating everything we honour and find pleasant with this true world.

Friedrich Nietzsche, Nietzsche's Notebooks Fall 1887 9 [60].

Opening

The focus of this thesis is on decentralised regulation employed in the context of information society in Europe. In this instance, decentralised regulation, for example, as in co-regulation, self-regulation and soft law, engages a variety of public and private actors in the process of forming proposals and implementing laws and the European Commission assumes an important role in providing expertise, hierarchical assistance (when required), and support for forums of discussion.

Against this background, the questions addressed in this thesis are: What is the effect of decentred regulation? How does it work in practice? Does it really fulfil its promise to promote deliberation and participation? What is the role of the European Commission in the process? Is it really a neutral regulator objectively intermediating amongst interested parties? If not, what are its

'interests'? Can they be defined in an non-economic sense and beyond the limits of intentionality?

These general questions I wish to address in the context of efforts to employ decentred instruments to regulate the information society in Europe as we are presented with an example of efforts to promote *reflexive* and *heterarchical* regulation, respectful of the diverse codes of conduct of interest groups and networks of actors. Relying on the conceptual tools of social theory, I seek to understand the formation and function of these processes.

Alternative regulation and the information society in Europe

The concept of information society entails that the social is built around the processes underlying the exchange and commodification of information.[1] Such trade in information is often decentralised, as in the case of the Internet. In this instance, information *'wants to be free.'*[2] It is routed in a smart way to find its

---

[1] Boyle, J. (1996) *Shamans, Software, and Spleens. Law and the Construction of Information Society* (Cambridge, Mass: Harvard University Press), at p. 1-6. Note that Boyle makes the point that the information society is not only characterised by electronic information and the Internet, but also genetic information and biotechnology. In this thesis I limit my analysis on electronic information as I look at the official definitions produced by the European Commission and how these are debated.

[2] Barlow, P. (1996) 'A declaration of the independence of cyberspace,' at http://www.eff.org/~barlow/Declaration-Final.html, (web page visited on 14 May 2003). This phrase ('*information want to be free*') is a popular aphorism circulating on the net.

destination.[3] It has no borders. It promotes communication amongst people around the world.[4]

The Internet for example, has been used to organise demonstrations against the war in Yugoslavia and Iraq.[5] It has further been employed to coordinate a petition against the proposal to protect computer-implemented inventions by patent law in the EU, which received an overwhelming response.[6] At the same time, trading in genetic and electronic information has become a central feature of the economy leading to efforts to strengthen international intellectual property in view of problems such as software piracy.[7]

However, much debate surrounds whether we are moving to a new paradigm of social organisation, the information society.[8] The economy is trading

---

[3] Cerf, V. G., Clark, D. D., Leiner, Lynch, D. C., B. M., Kahn, R. E., Kleinrock, L., Postel, J., Roberts, L. G. and Wolff, S., 'A Brief History of the Internet by those who made the history, including Barry M. Leiner, Vinton G. Cerf, David D. Clark, Robert E. Kahn, Leonard Kleinrock, Daniel C. Lynch, Jon Postel, Lawrence G. Roberts, Stephen Wolff' available at http://www.isoc.org/internet/history/, (web page visited on 14 May 2003). Also see Sassen, S. (2000) 'Digital networks and the state: Some governance questions' (2000) 17 *Culture, Theory and Society* 19-32.

[4] Barlow note 2 above.

[5] For the organisation of social movements against the war in Iraq see the article by Glasner, J. 'Protests to start when war does' story published in *Wired News* in 19 March 2003 at http://www.wired.com/news/politics/0,1283,58101,00.html, (web page visited on 14 May 2003). Wired News cites Howard Rheingold, author of <u>Smart Mobs</u>, a book investigating the impact of mobile computing, who claims that *'the quick pace at which protests are organized and publicized nowadays is almost entirely attributable to improvements in communications technology. Whereas in the Vietnam era, it took years for a viable, nationwide antiwar movement to coalesce, the recent protests against military action have come together quite rapidly on a worldwide scale.. Instead of having some hierarchical top-down coalition, it's possible to have loose coalitions of small groups that organize very quickly...These groups get the word out by attracting media coverage and augmenting their efforts with weblogs, e-mail, telephone campaigns and, more often in parts of Europe and Asia, cell-phone text messaging.'*

[6] PbT Consultants, 'The results of the European Commission exercise on the patentability of computer implemented inventions' (2000) available at http://europa.eu.int/comm/internal_market/en/indprop/comp/softanalyse.pdf, (web page visited on 14 May 2003).

[7] Boyle note 1 above.

[8] Webster, F. (second ed 1995) *Theories of the Information Society* (London: Routledge). Webster approaches the concept of information society from a technological, economic, spatial, cultural and occupational point of view. It is interesting to note that the Internet has attracted much hype when viewed from almost a religious point of view as a new organism or as a new eco-society

in intangible goods and the citizen is engaged in politics in more direct ways,[9] but sceptics would say that information has always been central to the organisation of societies.

Yet, both the EU and the US have considered the creation of information society to be a policy priority, acknowledging the centrality of information in today's economy and polity and the importance of innovation as being the driving force behind modern economies resulting in social re-organisation and in the transformation of our socio-political experience. Innovation in particular is important as, fostering technological experimentation is at the heart of promoting novel ways to manipulate and transmit information.

Accepting the centrality of innovation and information further results in accepting that novel models of governance are required, as, when information travels or is traded, virtues and distinctive problems emerge from its communication in a global and differentiated world.

Therefore, although the question as to whether the creation of information society is a new model of society may be difficult to answer, one cannot deny that the creation of a *European information society* is particular to the specific socio-historical circumstances of our time, around which our polity is organised, our laws are emerging, and notions such as innovation and information acquire

---

with its own collective memory in electronic form, see for example http://www.aec.at/meme/symp/, (web page visited on 14 May 2003).

[9] Castells, M. (first ed 1996) *The Rise of the Network Society* (Oxford: Blackwell), at p. 228. Castells insists that '*information technologies allow a direct, online linkage between different types of activity in the same process of production, management and distribution, establish a close, structural, connection between the sphere of work and employment artificially separated by obsolete statistical categories*'.

meaning, and therefore the study of information society in Europe should be concerned with uncovering these.

To illustrate this, the Internet in particular is positioned at the heart of efforts to promote the information society in Europe, hence issues relating to its governance, content and privacy, intellectual property rights and the creation of global networks, are of prime importance as it presents us with an example of decentralised organisation and regulation. Yet, although it is a global network, co-ordination of local centres is required as in the creation of accepted global standards.

Moreover, national governments and the EU have to reinvent the ways they regulate conduct on the Internet. Decentralised, *'soft'* instruments, such as self-regulation and co-regulation are employed alongside more traditional hierarchical regulatory instruments, such as competition law, a process which nonetheless shows a tendency to promote ways to involve governments and various other interested parties acting in networks,[10] manifesting a novel role for the state and the nature of its interaction with society.

Nevertheless, information about the function and needs of such networks is necessary, when the European Commission engages in providing some form of hierarchical co-ordination or assistance. In other words, a fragmented world, consisting of communities and networks at a global level, has to rely more than ever on information about local needs.

---

[10] Black, J. (2002) 'Critical reflections on regulation' *Centre for the Analysis of Risk and Regulation (CARR) Discussion Paper 4/2002*, at p. 19, available at http://www.lse.ac.uk/Depts/carr/publications.htm, (web page visited on 20 May 2003). On self-regulation also see Ogus, A (1995) 'Rethinking self-regulation' 15 *Oxford Journal of Legal Studies* 97-108.

All these characteristics are particular to the European information society and give birth to an understanding of regulatory law as being something more than the sum of secondary rules and standards emanating from the positive character of the state, attributed to an efficient regulator or being an instrument for intervention in the economy.[11] Regulatory law is not only tied to a centre,[12] but is though to have to move to *'decentred,'*[13] *'heterarchical'* forms.[14] Alternatively, regulatory law is thought to have to be more *'flexible.'*[15]

Various agents participate in its formation and implementation, and various tools are employed to regulate conduct. Markets and laws are not thought to be separate entities, but are interdependent.[16] In the above instances, the term *regulation* is used in a broad sense, and as such is equated with *governing*. Hence, it is conceived as the sum of ways in which public purposes are

---

[11] Baldwin, R., Scott, C. and Hood, C. (eds) *A Reader on Regulation* (Oxford: Oxford University Press, 1998).

[12] Black note 10 above, at p. 24, questioning whether private law can be value neutral. She refers to Luhmann, who considers law as stabilising expectations, while regulation is not thought to be a separate system but the attempt of the realm of politics to influence other systems by using the medium of law, see p. 24-25. She further contrasts this view with pluralists, such as Cotterell, who argues that law's formal rationality and its consistency with a body of doctrine seems less vital today than it used to be, see Cotterell, R. (second ed 1992) *The Sociology of Law: An Introduction* (London: Butterworth). Finally, contrary to Hart and Kelsen, anthropologists and sociologists have long ago pointed to that rules governing conduct need not emanate from the state, amongst the many references see Gurvitch, G. (1947) *Sociology of Law* (Butler and Tanner); Gulliver, P. H. (1979) *Disputes and Negotiations: A Cross-Cultural Perspective* (New York: Academic Press); Lévi-Strauss, C. (1963) *Structural Anthropology* (New York: Basic Books, orig. 1958).

[13] Black note 10 above.

[14] Everson, M. (1998) 'Administering Europe?' 36 *Journal of Common Market Studies* 195-216.

[15] Teubner, G. (1993) *Law as an Autopoietic System* (Oxford, UK; Cambridge, Mass., USA: Blackwell Publishers); Ayres, I. and Braithwaite, J. (1992) *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, New York).

[16] Everson note 14 above; Black note 10 above. For a different view see Daintith, T. (1979) *Regulation* (Tübingen: Mohr Siebeck), following economic analysis and thus considering that markets and regulatory law are different spheres of activity, the latter intervening to correct market failures. Also see Hayek, F. A. (1982) *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (London: Routledge); Mitnick, B. M. (1980) *The Political Economy of Regulation: Creating, Designing and Removing Regulatory Forms* (New York: Columbia University Press); Wilson, J. Q. (1980) *The Politics of Regulation* (New York: Basic Books).

authoritatively decided on and implemented,[17] with various actors being active

in the shaping of their content, and a variety of bodies involved in the process.

In its normative conceptualisation, regulatory law is thought to have to

move from substantial to more procedural and flexible regulatory instruments,

promoting soft law, information and participatory rights and the use of expertise.

Law should be concerned with empowering people by creating forums for

discussion and guaranteeing the fair structure of such dialogue.

The basic assumptions underlying this position is that law can neutrally

mediate amongst communities by providing the necessary objective legal

procedures, that law is only one structure amongst other constraining the action

of intelligible agents, or that it can help achieve social justice (by means of

promoting public policy goals) and access to justice.[18]

---

[17] Pildes, R. and Sunstein, C. R. (1995) 'Reinventing the regulatory state' 62 *University of Chicago Law Review* 7-33. Doern and Wilks offer four definitions. According to the authors, regulation is often viewed in the context of *Constitutional provisions* that inform the division of powers between levels of government and the separation of powers between the executive body, the legislature and courts. Regulation may also be defined in a narrow way as *delegated legislation*. In this form it may include guidelines, rules of procedures, and voluntary codes. Alternatively, regulation may be conceived as a *policy instrument*, and as such is distinguished from other instruments such as exhortation, spending, taxation, or the direct delivery of services. *Governing* though should be viewed in an overall sense (including Constitutions, statutes, regimes) so as to be able to address questions as to the *impact* of regulation, and in particular as to how difficult it is to tell whether regulation is expanding or being reconfigured, see Doern, B. and Wilks, S. (eds) (1998) *Changing Regulatory Institutions in Britain and North America* (Toronto: Toronto University Press), at p. 4-6. Furthermore, the *normative theory of market failure* premised on the assumptions of economic analysis understands society and economy as being separate phenomena and prescribes that regulation is required to improve economic efficiency and correct market imperfections. In this instance, regulation encapsulates a new form of governance (*regulatory state*) as opposed to the redistribution functions of the positive state and is legitimised when market-failures occur. These are: Natural monopolies, externalities, public goods, asymmetric information, moral hazards, and transaction costs. Anyone of these six failures legitimises regulation. On these issues see Majone, M. (1997) 'From the positive to the regulatory state: Causes and consequences of changes in the mode of governance' 17 *Journal of Public Policy* 139-165; Ogus, A (1994) *Legal Form and Economic Theory* (Clarendon Law Series, Oxford, 1994); Baldwin, R. and Cave, M. (1999) *Understanding Regulation* (Oxford: Oxford University Press). Finally, regulation may be concerned with risk management, see Black note 10 above, at p. 7.

[18] Teubner note 15 above; Ayres and Braithwaite note 15 above.

Simultaneously though, this movement away from command and control rules, empowering people to participate in forums of discussion and relying on information to regulate conduct, implies that the stage of formation of legislative proposals and implementation acquire considerable importance, more than ever before. It is in this context that this thesis examines the role of the European Commission in regulating the information society.

The main argument advanced is that law, be it soft, non binding or merely at the stage of implementation, still engulfs a vision of the social world by means of encapsulating conceptions about, for example, the role of property and individuality. In other words, the European Commission has not lost its central role, but is actively pursuing its *'interests,'* which are not exogenously given but are the product of history, and regulatory law can never be *neutral* and *objective*, as it always excludes alternative visions of the social world.

This is because, although it would be within agents' intention to design neutral and fair rules pursuing well-defined goals and within regulatory law's original function to promote participation and deliberation, law encapsulates a vision that outruns its function and agents perceive the social world in a way that outruns perception.

If one accepts that regulation is not the crystallisation of the concerted effort of knowledgeable agents engaging in problem solving activity,[19] or the

---

[19] For this proposition see for example Black's work, Black, J. (1997) 'New institutionalism and naturalism in socio-legal analysis: Institutionalist approaches to regulatory decision making' 19 *Law and Policy* 59–93; Black, J. (1998) 'Talking about regulation' *Public Law* 77-112; Black, J. (2002) 'Regulatory conversations' 29 *Journal of Law and Society* 163-196; Black, J. (1997) *Rules and Regulators* (Oxford: Clarendon). The author retains intentionality as crucial in her analysis, since regulation is viewed as a problem solving activity. For the institutionalist argument, generally see Powel, W. and DiMaggio, P. J. (1991) *The New Institutionalism in Organisational Analysis* (Chicago:

construct of powerful interests[20] or a reflexive instrument aiming at promoting

participation and deliberation,[21] or a technical administrative project seeking to

integrate markets,[22] or a policy instrument in the hands of governments,[23] but

that most of the time entails the reproduction of common ways of thinking about

the social world, then the possibility opens up to view regulation from a different

perspective.[24]

In particular, looking at the early stages of identifying a *social* problem as a

legal problem and transforming it into a plausible legal proposal is very

important, in order to understand what views are excluded, which are included,

and why. We can further see whether and to what extent the taken for granted

conceptions about the social world are challenged by interest groups striving to

influence regulation.

Similarly, examining the implementation of EU legislation reveals how

'truth' claims furnished by science, benchmarks and indicators regulate our

---

University of Chicago Press); Koeble, J. (1995) 'The new institutionalism in political science and sociology' 27 *Comparative Politics* 231-244; Immergut, E. M. (1998) 'The theoretical core of new institutionalism' 26 *Politics and Society* 5-34; Grendstad, G. and Selle, P. (1995) 'Cultural theory and the new institutionalism' (1995) 7 *Journal of Theoretical Politics* 5-27.

[20] The Internet is then viewed as being potentially dominated by powerful corporations in the future. For the importance of information to multinational enterprises see, Wallertsein, I. (1979) *The Capitalist World-Economy* (Cambridge: Cambridge University Press/Maison des Sciences de l'Homme). Generally, structuralists focused on the ways in which structures impose a way of thinking and acting, see for example Althusser, L. (1984) *Essays on Ideology* (London: Verso). Structuralists derived inspiration from *language* and its function to describe for example a cultural setting, see Lévi-Strauss note 14 above.

[21] Teubner note 15 above; Ayres and Braithwaite note 15 above.

[22] Majone, G. (1996) *Regulating Europe* (London; New York: Routledge).

[23] For the use of law as a policy instrument see Daintith, T. C. (ed) (1988) *Law as an Instrument of Economic Policy: Comparative and Critical Approaches* (Berlin: Walter de Gruyter).

[24] This perspective comes close to the one adopted by Hall, C., Hood, C. and Scott, C. (1999) *Telecommunications Regulation: Culture, Chaos and Interdependence inside the Regulatory Process* (London: Routledge).

conduct by virtue of reproducing taken for granted assumptions about, for example, what harmful content on the Internet is.

I thus seek to look at the above processes as reproducing well-embedded perceptions about the role of law as promoting fair and neutral participation and about individuals as actively participating in communities and networks promoting consensus within legal *'informalism.'* In this sense, when regulation is understood as governance *'is characterised by mechanisms by which a child, an economy or a community can be guided to produce desirable objectives whilst it simultaneously respecting their autonomy.'*[25]

The following will elaborate on the theoretical underpinnings of this proposition. I will concentrate on theories of regulation in general, putting emphasis on the role of the European administration, while making sporadic references to issues relating to Internet governance, intellectual property rights and harmful Internet content regulation.

---

[25] Rose, N. S. (1994) 'Expertise and the government of conduct' 14 *Studies in Law, Politics & Society* 359-397; Generally see, Pavlich, G. (1996) 'The power of community mediation: Government and formation of self-identity' 30 *Law & Society Review* 707-733; Rose, N. S. (1987) 'Beyond the public/private division: Law, power and the family' 14 *Journal of Law & Society* 61-76; Rose, N. S. (1996) 'The death of the social? Re-figuring the territory of government' 25 *Economy & Society* 327-356; Rose, N. S. (1996) 'Governing "advanced" liberal democracies,' in Barry, A., Osborne, T. and Rose, N. (eds) (1996) *Foucault and Political Reason* (London: UCL Press); Rose, N. S. (1999) *Powers of Freedom: Reframing Political Thought* (Cambridge: Cambridge University Press); Rose, N. S. and Valverde, M. (1998) 'Governed by law?' 7 *Social & Legal Studies* 541-551; Rose, N. S. and Miller, P. (1992) 'Political power beyond the state: Problematics of government' *British Journal of Sociology* 173-205. *Informal or popular justice* is the idea that mechanisms for dispute resolution in general can be developed outside formal legal procedures and litigation, see Fitzpatrick, P. (1988) 'The rise of informalism' in Matthews, R. (ed) *Informal Justice?* (London: Sage: 178-198); Fitzpatrick, P. (1992) 'The impossibility of popular justice' 1 *Social & Legal Studies* 199-215; Fitzpatrick, P. (1992) *The Mythology of Modern Law* (London: Routledge); Harrington, C. B. and Merry, S. E. (1988) 'Ideological production: The making of community mediation' 22 *Law and Society Review* 709-735; Abel, R. L. (1982) 'The contradictions of informal justice' in Abel, R. L. (ed.) *The Politics of Informal Justice Vol 1: The American Experience* (New York: Academic Press); Matthews, R. (1988) 'Reassessing informal justice' in Matthews, R. (ed) *Informal Justice?* (London: Sage).

Before proceeding, it is required to provide a few technical definitions. With regard to the term *'information society'* the European Commission has extensively used the term in its official papers and linked it to the technological convergence between mobile and satellite communications services eventually being offered by fixed telecommunications, and to Internet and digital TV becoming the future platforms for multimedia services.

Multimedia is defined as the convergence of image, sound and text all being delivered through a single wire due to digitalisation, which has made it technically possible to transmit a vast amount of information.[26]

More definitions involve terms such as *'digital data networks,' 'Internet'* and *'infrastructure.'* Digital data networks are *'virtual'* networks giving the impression of being one single network, but are in reality owned and operated by different persons, a phenomenon intensified due to the liberalisation of infrastructure. [27]

Data networks are supported by physical infrastructure, which can be cable, copper wire, fibre optic or microwaves (as in the case of satellite transmission). Above this physical layer there is a data network, being an indefinite number of computers being interconnected and transmitting messages the one to the other by making a copy of the message at each computer that goes through until, it reaches its final destination. These copies may take even hours to be transmitted in the next computer.[28]

---

[26] Cameron, J. (1998) 'Patents, copyright, trademarks, and literary property course handbook series' 507 *Practicing Law Institute* 919-945.
[27] ibid.
[28] Millard, C. (1996) 'A European perspective' 14 *John Marshall Journal of Computer and Information Law* 269-294.

The model described perfectly fits the function of Internet, which is operated by service providers that lease lines from telecommunications incumbents, hence the bulk of my case studies are taken from Internet regulation, as it represents a unique example of decentralised organisation and a prominent component of the emerging information society.

A. CONCEPTUALISING REGULATION

1. From the regulatory state to the post-regulatory model of governance?

Various theoretical models lend themselves as a conceptual lens in order to understand the function of the EU, the role of the European Commission, and the proper character of regulatory law. For example, Majone has described the EU as a *regulatory state*,[29] with a view to understand its function in the context of the promotion of the efficient management of markets, intervening to correct market failures.

The EU is viewed as having limited powers, as it does not have the budget and bureaucratic organisation to impose policies. Hence, its power is restricted in the overseeing of selected spheres of competence such as economic and social regulation. For this reason, it is thought to be different than modern states, and in fact as being incapable of becoming a modern state organised around traditional models of democracy. Its function is technocratic and its organisation should remain non-majoritarian.[30]

In Majone's conceptualisation of regulatory state, the latter abstains form the redistribution of resources.[31] There is one single will, one interest: The

---

[29] Majone note 23 above.
[30] On these issues also see Moran, L. (2002) 'Review article: Understanding the regulatory state' 32 *British Journal of Political Science* 391-413; Grabosky, P. N. (1995) 'Using non-governmental resources to foster regulatory compliance' 8 *Governance* 527-550.
[31] Majone note 23 above.

efficient function of markets. The administration is above political considerations, and law is neutral and technical.[32]

However, this model is contested and looking at the function of committees is important to come to grips with the possibility of an array of views about what the EU should be and who should participate in the making of regulatory laws and policies, struggling for recognition.[33] *'Comitology'* committees in particular are established to ensure that Member States keep an eye on the administration in the course of implementing legislation. This may result in bringing in Member States' view of what constitutes a regulatory problem.[34]

Expertise is also drawn from a variety of committees apart from the comitology ones. Industry bodies such as the European Industrialists Roundtable[35] and working groups, such as the one supporting the use of open

---

[32] ibid.

[33] Vos, E. (1997) 'The rise of committees' 3 *European Law Journal* 210-229.

[34] ibid. In this instance, the European Commission exercises its executive power to implement legislation. Such power is delegated by the Council and the European Parliament, but comitology committees, where Member States representatives sit, have to be consulted to keep an eye on the conduct of the European Commission. Comitology has been criticised as, issues which could have been debated in the Council (and the Parliament where appropriate), may have been *'baptised'* technical and thus not debated. The European Commission has been further exposed to criticism, as commentators noted that its 2001 White Paper on Governance essentially proposes to substantially abandon comitology in favour of greater power to itself, see White Paper on Governance COM (2001) 428 Final available at http://europa.eu.int/eur-lex/en/com/cnc/2001/com2001_0428en01.pdf, (web page visited on 20 May 2003). Critics of the White Paper have also noted that the proposals aim at placing greater dependence on independent agencies and thus implicitly suggest a shift towards more expert decision making within the control of the European Commission. However, the White Paper acknowledges that the initiation of regulatory policy can neither be only state-centred nor delegated to non-governmental actors. For a critique of the White Paper on Governance see Scott, C. (2002) 'The governance of the European Union: The potential for multi-level control' 8 *European Law Journal* 59-79. There is a series of highly sceptical papers on the White Paper hosted on the EUI and Harvard web pages http://www.jeanmonnetprogram.org/papers/01/010601.html, (web page visited on 14 May 2003).

[35] Lawton, T. C. (2000) 'Uniting European industrial policy: A commission agenda for integration' in Nugent, N. (ed) (second ed 2000) *At the Heart of the Union: Studies of the European Commission*

source software, where academics, software developers and civil servants sit,[36] have actively participated in the shaping of regulatory policy. In this way unforeseeable risks are quickly identified and information as to possible ways to come up with solutions is swiftly furnished.[37]

It appears then that the European Commission can no longer be viewed as efficiently managing economic affairs detached from the social milieu. Similarly, the administration cannot be seen as the executor of legal mandates being constrained by the limits of constitutional and administrative law. Real life administration is highly perplexed, seeking to accommodate various diverse views about the content of regulatory law in conditions of scientific and economic uncertainty.[38]

The neo-functionalist thesis takes this latter point on board. It acknowledges a plethora of participant actors, but focuses on the possibility of a transfer of national loyalties from the national to the supranational level. In this context, the European administration manifests the amalgamation of different national administrative styles, which ultimately supersede the national interest to serve European ideals, such as the creation of the single European market.[39]

(Macmillan; St Martins), at p. 146. In the late 1980s, the European Industrialists Roundtable had considerable influence in the decision-making process in IT projects that were funded under ESPRIT and RACE, which focused on research in advanced communications and offered EU funding directed towards the development of new integrated digital telecommunication networks across the European Union.

[36] http://eu.conecta.it/ee.htm, (web page visited on 14 May 2003).

[37] Ladeur, H. K. (1997) 'The integration of scientific and technological expertise into the process of standard setting according to German law' in Joerges, C. et al (eds) (1997) *Integrating Scientific Expertise into Regulatory Decision -Making* (Baden-Baden: Nomos).

[38] Everson note 14 above.

[39] In European integration studies neo-functionalism is supported by Haas, B. E. (1958) *The Uniting of Europe: Political, Economic and Social Forces, 1950 – 1957* (London: Stevens). Also see Shore, C. (2000) *Building Europe, The Cultural Politics of European Integration* (London: Routledge); Shore, C. (2001) 'European Union and the politics of culture' *Bruges Group Occasional Paper No 42,*

Working together to build the single market would result in the development of working practices imposing on recipients their logic, a European consciousness. In a nutshell, the aim is to establish convergence and build consensus in the name of a European ideology. Therefore, networks of actors should be transparent and devoted to the making of regulatory law genuinely oriented towards the European interest.[40]

Everson takes this point further by referring to Harlow's work to argue that the administrative legal discourse is increasingly accepting that the European polity is a space of play of diverse actors, thus the debate now is whether *'the European administration should be overseen by the detailed provisions of the Rechtstaat, the vaguer premises of the "common" rule of law, or the half-way codified house of an American type "Administrative Procedures Act".'*

The above clearly recognises that the EU cannot longer be seen as a purely technocratic project, as there are multiple interests to be balanced.[41] How this

---

at http://www.eurocritic.demon.co.uk/ppr43-2.htm, (web page visited on 14 May 2003); Egeberg, M. (1996) 'Organisation and nationality in the European Commission services' (1996) 3 *Public Administration* 235-248; Spence, D. (1994) 'Staff and personnel policy in the Commission' in Edwards, G. and Spence, D. (eds) (1994) *The European Commission* (Harlow, UK: Longman Current Affairs).

[40] Dehousse, R. (1997) 'Regulating by networks in the European Community: The role of European agencies' 4 *Journal of Public Policy* 246-255.

[41] For the normative aspect of this process from the point of view of administrative law see Everson note 14 above, at p. 203. On these issues also see Harlow, C. (1996) 'Codification of EC administrative procedures? Fitting foot to the shoe or the shoe to the foot' 2 *European Law Journal* 3-25 and Harlow, C. (2002) *Accountability in the European Union* (Oxford: Oxford University Press, 2002). The problem is that the administration has little *'Constitutional'* guidance from primary legislation (the EU Treaties), as to what the European public interest is in view of the increased politicisation of the European Union after Maastricht. In other words, there are competing interests to be balanced in the course of administering Europe, but how these should be balanced is not clearly provided in the Treaties. Everson notes that although Article 36 EC states the interest of Member States in social regulation, the *'four freedoms'* direct economic integration, Article F (TEU) indirectly addresses the human right of fair administration, subsidiarity suggests that decisions should be made closer to the citizen and Articles 190 and 191 (EC) state that decisions should be well reasoned, these do not provide enough legal basis to direct

should be done is not clearly provided in the Treaties, hence administrative law should be concerned with this problem.

Further contributing to the debate surrounding the nature and role of regulatory law and of the European administration, institutionalism seeks to come to grips with how norms encapsulated in institutional structures constrain and shape policy outcomes and regulatory decisions. Institutionalists conceive institutions as carrying values, often competing ones, while law, formal organisations, unwritten norms, all constrain action.[42]

Markets and social norms are also perceived as powerful regulators of individual behaviour. For example, Reidenberg adopted the term *'Lex Informatica'*[43] to argue that technology imposes a set of rules that policy makers should take into

---

administrative decision-making, thus leaving considerable space for discretion, see Everson at p. 204.

[42] For the historical institutionalist argument see Scott, C. (1995) 'Changing patterns of European community utilities law and policy: An institutional hypothesis' in Shaw, J. and More, G. (eds) (1995) *New Legal Dynamics of European Union* (New York: Clarendon Press), at p. 196. The author argues that within the historical institutionalist approach there is no agreed definition of the notion of *institution*, as it may entail formal organisations, informal rules and procedures. For an institutional analysis of the regulatory framework of privatised industries see Graham, C. and Prosser, T. (1991) *Privatising Public Enterprises: Constitutions, the State and Regulation in Comparative Perspective* (Oxford: Clarendon Press). The authors are concerned with the normative aspect of public law, understood as a structure constraining governments when implementing policy, but also accept the broad conceptualisation of government as encompassing various actors. Also see Prosser, T. (1999) 'Theorising utility regulation' 62 *Modern Law Review* 196-217, where the author argues that privatised industries, such as telecommunications, gas, and electricity, required constant regulatory intervention over many years by OFTEL, OFFER, and OFGAS, as the creation of truly competitive markets required breaking down the dominant market position of the incumbent firms. Prosser suggested that the principal-agent theory, as in a bilateral contractual relationship of one regulator and the regulatee, needs to be modified to include a variety of public and private actors involved, who interact on the basis of the constraints imposed by structures and in view of speculations as to what other players will do. For this approach on EU matters see Goldberg, D., Prosser, T. and Verhulst, S. (eds) (1989) *Regulating the Changing Media: A Comparative Study* (Oxford: Clarendon Press; New York: Oxford University Press). In the same spirit, Gibbons looks at the regulation of the British media industry with a view to understand the processes informing decisions. Law is only one indicator to grasp the rationale behind regulation, while value systems and the processes of technological innovation should also be taken into account, see Gibbons, T. (second ed 1998) *Regulating the Media* (London: Sweet and Maxwell).

[43] Reidenberg, J. (1998) 'The formulation of information policy rules through technology' 76 *Texas Law Review* 553-594. Also see Barlow note 2 above.

account, as regulation is deemed to fail in the event it is not sensitive to them. Therefore, technology offers a set of potentialities, which frame policy makers' choices.

The analysis of policy networks[44] offers a new understanding of governance alternative to hierarchies and markets. Premised on the assumptions made by actor-centred institutionalism, it is based on the understanding that networks are formed to pursue common goals, while rational actors strive to maximise their preferences and to achieve certain policy outcomes.[45] This school of thought seeks to explain the formulation and implementation of policy by looking at informal interactions between public and private actors, who strive to solve problems at a non-hierarchical level.

It is interesting to note that various studies on policy networks also stress the need to use a cognitive approach according to which, members of a network

---

[44] A policy network is comprised of a number of actors who share common interests and exchange resources to pursue them, acknowledging that co-operation is the best way to achieve common goals, see Börzel, T. A. (1997) 'What's so special about policy networks? – An exploration of the concept and its usefulness in studying European governance' *European Integration Online Papers (EIoP) No 16*, Florence: European University Institute, available at http://eiop.or.at/eiop/texte/1997-016a.htm. Policy networks are best understood as *'webs of relatively stable and ongoing relationships which mobilise and pool dispersed resources so that collective (or parallel) action can be orchestrated toward the solution of a common policy,'* see Kenis, P. and Schneider, V. (1991) 'Policy networks and policy analysis: Scrutinising a new analytical toolbox' in Marin, B. and Mayntz, R. (eds) (1991) *Policy Networks - Empirical Evidence and Theoretical Considerations* (Frankfurt/M.: Campus), at p. 36.

[45] Works on European governance using policy networks as an analytical tool to study the relationship between the European Commission and national and transnational interest groups, include: Peterson, J. (1992) 'The European technology community. Policy networks in a supranational setting' in Marsh, D. and Rhodes, R. A. W. (eds) (1992) *Policy Networks in British Government* (Oxford: Clarendon Press; Oxford; New York: Oxford University Press); Sandholtz, W. (1992) *High-tech Europe. The Politics of International Cooperation* (Berkeley: University of California Press); Mazey, S. and Richardson, J. (eds) (1993) *Lobbying in the European Union* (Oxford; New York: Oxford University Press); Kohler-Kock, B. (1996) 'Catching up with change: The transformation of governance in the European Union' 3 *Journal of European Public Policy* 359-380 *(Supplement)*; Christiansen, T. (1994) 'European integration between political science and international relations theory: The end of sovereignty' *European Integration Online Papers (EIoP) No 4*, Florence: European University Institute.

share collective ideas and values and seek to influence policy outcomes according to these.[46]

The central preoccupation of all of the above approaches is that the role of regulatory law and of the European Commission as a regulator is currently under transformation. Against this background, Hancher and Moran argue that economic regulation of markets under advanced capitalism is characterised by the *interdependence* of powerful organisations.[47] These organisations can no longer be thought to be confined in the realm of a private sphere, as they increasingly fulfil public functions. In the same spirit, Ayres and Braithwaite argue for the inclusion of interest groups in the processes of forming regulatory proposals.[48]

In adopting this view, a pluralist conceptualisation of regulation as being the product of *'private governments,'* such as corporations, is promoted.[49] Regulatory law then should be sensitive to their needs. Black's discussion on *'decentred'* forms of regulation[50] draws attention to the fact that there is no clear distinction between the public and private sphere, in view of the complexity and

---

[46] Sabatier, P. and Hank, C. (eds) (1993) *Policy Change and Learning: An Advocacy Coalition Approach* (Boulder; Colo: Westview Press); Singer, O. (1990) 'Policy communities and discourse coalitions. The role of policy analysis in economic policy making' 11 *Knowledge: Creation, Diffusion, Utilization* 428-458.

[47] Hancher, L. and Moran, M. (1989) *Capitalism, Culture and Economic Regulation* (Oxford: Clarendon Press).

[48] Ayres and Braithwaite note 15 above; Freeman, J. (1996) 'Collaborative governance in the administrative state' 45 *UCLA Law Review* 1-98, arguing that what is exactly included in such *'reinvention'* of regulatory mechanisms is quite ambiguous, but calling for the inclusion of interested parties. Also see Breyer, S. (1993) *Breaking the Vicious circle: Towards Effective Risk Regulation* (Harvard University Press); Ackerman, B. and Stewart, R. (1985) 'Reforming environmental law' 37 *Stanford Law Review* 1333-1367.

[49] Hancher and Moran note 47 above.

[50] Black note 10 above. Also see Scott, C. (2002) 'Private regulation of the public sector: A neglected facet of contemporary governance' 29 *Journal of Law and Society* 56-76; Black, J. (2001) 'Decentring regulation: The role of regulation and self-regulation in a 'post-regulatory' world' *Current Legal Problems* 103-146; Grabosky, P. N. (1995) 'Using non-governmental resources to foster regulatory compliance' 8 *Governance* 527-550; Gunningham, N. and Grabosky, P. N. (1998) *Smart Regulation: Designing Environmental Policy* (Oxford: Oxford University Press).

fragmentation characteristic of modern societies, being the result of a variety of legal norms, actors, networks or differentiated systems, all being interconnected within the European polity.

Interdependencies exist as no single actor has enough information to effectively pursue its interest. Similarly, no regulatory law can effectively intrude other autonomous social systems in a direct way, as it cannot fully comprehend systems' internal mode of functioning. Moreover, networks have their own understanding of what a regulatory problem is and what solution is required based upon shared classificatory schemes constructing a culturally informed point of view. Therefore, regulatory law should be engaged with steering activity rather than imposing goals.[51]

This is crucial in a world characterised by increased scientific uncertainty requiring the co-operation of the administration with private forces in order to come up with decisions informing regulatory policy and implementation. This understanding further provides the background feeding into current debates as to the nature of global governance.[52] To this effect, a variety of instruments, other than command and control rules, should be put in place, such as non-binding soft law.[53]

A decentralised approach to regulation reminds us that law need not only be initiated by a central government, but also by the internal codes of conduct of

---

[51] Scott, C. (2003) 'Regulation in the age of governance: The rise of the post-regulatory state' in Jordana, J. and Levy-Faur, D. (2003) *The Politics of Regulation* (Cheltenham: Edward Elgar).

[52] ibid. According to the author, the debate surrounding global governance generally links to the possibility of creating autonomous legal orders, see Held, D. (2002) 'Law of states, law of peoples' 8 *Legal Theory* 1-44. It also reflects the fear that undemocratic structures of governance may emerge, see Weiss, L. (1998) *The Myth of the Powerless State* (Cambridge: Polity Press, 1998).

[53] ibid.

groups, networks and systems, self-regulating their conduct. For example, Consumers International, a non-governmental organisation (NGO), created a *Consumer Charter for Global Business* in 1997.[54] Standardised contractual agreements can play the same role.[55]

Nevertheless, most of the time such internal codes of conduct require some form of state assistance. Contractual rules are set by the parties, but state laws have to regulate their enforcement, as it may prove to be problematic. To illustrate this, although the industry strived to develop software codes placed inside software aiming at rendering illegal copying of DVDs more difficult, individuals managed to crack these codes, proving that hierarchical assistance is required, as technical solutions are not enough.

The above discussion on alternative and decentred forms of regulation further links to the demand to create forums for discussion, in order to effectively enable the participation of a multitude of actors.[56] In such forums each stakeholder will come to understand the concerns of others, as long as they are positively engaged in taking her interests into account.[57] The following will further elaborate on the theoretical underpinnings of all the above propositions.

---

[54] European Internet foundation (EIF) Soft Law Working Group, 'Governance and Regulation for the Digital Age: Issues and Choices for Europe' (2001) Preliminary Consultation Document, rapporteur for the European Commission C. Scott, at p. 6.

[55] As regards the use of contract in particular, see Daintith, T. (1979) 'Regulation by contract: The new prerogative' *Current Legal Problems* 42-64; Vincent-Jones, P. (2002) 'Regulating government by contract: Towards a public law framework?' 65 *Modern Law Review* 611-628; Macaulay, S. (1963) 'Non-contractual relations in business: A preliminary study' 28 *American Sociological Review* 55-83.

[56] Ayres and Braithwaite note 15 above.

[57] Dunlop, J. (1984) *Dispute Resolution: Negotiation and Consensus Building* (Auburn Publishing, Dover, Massachusetts); Harter, P. (1997) 'Fear of commitment: An affliction of adolescents' 46 *Duke Law Journal* 1389-1423; Freeman note 48 above; Shearing, C. (1993) 'A constitutive conception of regulation' in P Grabowsky, P. and Braithwaite, J. (eds) (1993) *Business Regulation and Australia's Future* (Canberra: Australian Institute of Criminology).

2. Teubner and Foucault: Decentralised regulation and systems of control

The previous section engaged in demonstrating that regulation occurs in many different *loci*, as anthropologists have established long ago.[58] To support this position, scholars working on regulation are inspired by various theoretical traditions, such as structuralism and post-structuralism. Regulatory law should then be concerned with how communities and systems interact with their environment, while acknowledging that formal law is only one out of various instruments regulating conduct.

Teubner's normative conceptualisation of law is a prime source of inspiration feeding into the decentred approach. Teubner is concerned with the harms of command and control rules controlling and upsetting the conduct of autonomous social systems in a world characterised by complexity, differentiation and communication.[59] Regulatory failures are attributed to the insensitive intrusion of command and control rules to other social systems, resulting in the problematic communication of the meaning of such rules, a position inspired by Luhmann's social theory.

Understanding how meaning is communicated requires coming to grips with the role of the *binary code* of a system in channelling communication.[60] Codes are like generalised symbols, as money and law are. For such a generalised

---

[58] For anthropological research on regulation see in particular Nader, L. and Nader, C. (1985) 'A wide angle on regulation: An anthropological perspective' in Noll R. (ed) (1985) *Regulatory Policy and the Social Sciences* (Berkeley: University of California Press).

[59] Teubner reminds us that Luhmann, by positioning the act of communication at the heart of a social system, moves away from rules and institutions.

[60] Luhmann, N. (1979) *Trust and Power* (Chichester: Wiley).

symbol to become the binary code of a system, it would have to be capable of processing information, react to internal and external conditions, differentiate from other systems and simultaneously contain the necessary richness and flexibility to communicate with them.[61]

The legal system is a network of legal acts framed by the legal/illegal binary code, and law is understood as in the communication of legislative events taking place inside the system, framed by rules and the binary code. Such events include not only state centred communicative acts, but also private contracts and unwritten codes of conduct.[62]

Teubner makes a parallelism with the game of chess to explain that if it is viewed as an autopoietic system, then the focus of analysis is on the move and the chain of moves being framed by rules, and not on the rules themselves. Therefore, this is an ever-changing process as communicative acts create new structures and vice versa.[63]

As for the processes of communication with other systems, these cannot intrude directly each other's space, yet it is by ongoing processes of *structural coupling* that meaning is re-constructed.[64] Structural coupling is an institutional overlapping created, for example, by events, legislative processes, and systems of

---

[61] Luhmann, N. (1995) *Social Systems* (Stanford, Calif.: Stanford University Press, orig. 1984).

[62] Teubner, G. (1992) 'The two faces of Janus: Rethinking legal pluralism' 13 *Cardozo Law Review* 1443- 1462.

[63] Teubner, G. (ed), (1987) *Autopoietic Law: A New Approach to Law and Society* (Berlin: de Gruyter). For the analogy of chess with law see http://is.lse.ac.uk/complexity/StudyGroups/report97june.htm, (web page visited on 14 May 2003).

[64] Teubner note 62 above; Luhmann, N. (1992) 'Operational closure and structural coupling: The differentiation of the legal system' 13 *Cardozo Law Review* 1419-1441; Teubner, G. (1993) *Law as an Autopoietic System* (Oxford, UK; Cambridge, Mass., USA: Blackwell Publishers); Teubner, G. (1989) 'How the law thinks: Toward a constructivist epistemology of law' 23 *Law and Society Review* 727-757.

negotiation. The existence of such interdependencies creates interrelations leading to evolution.

As for the legal system in particular, it may not be feasible to fully construct the social meaning originally communicated in the course of *legal interpretation*, as a *second order observation*[65] is accompanied by a reduction of complexity. In the light of the required reconstruction of the meaning of communication, any intervention into a different social system should take into account the internal rules regulating its function, as external *'noise'* has to be first interpreted. To engage in such reconstruction, law relies on sub-systems to furnish information, for example by means of risk assessments produced by scientific committees.

Albeit the important contribution of Teubner's theory in understanding regulatory law as a social phenomenon, the problem in this account is that individuality disappears under the weight of the logic of the system, the latter determining communication.[66] Individuals are only understood as psychic systems consisting of a self-referential set of conscious states, caught in interaction with social systems, which is regulated by a binary code and is conducted through observation.

---

[65] Observations of the first order are directly about the object of observation. Observations of the second order are ways of communicating *systematically* about observations of the first order, them being observations of observations. Law is an example of such a second order observation, see Patterson, J. and Teubner, G. (1998) 'Changing maps: Empirical legal autopoiesis' 7 *Social and Legal Studies* 451-486.

[66] Weisberg, R. (1992) 'Autopoiesis and positivism' 13 *Cardozo Law Review* 1693-1728; Wolfe, A. (1992) 'Sociological theory in the absence of people: The limits of Luhmann's systems theory' 13 *Cardozo Law Review* 1729-1743. For a different criticism see Goodrich P. (1999) 'Anti-Teubner: Autopoiesis, paradox, and the theory of law' 13 *Social Epistemology* 197-235.

Still, is it possible that all individuals, judges or regulators, respond in the same way when a system functions and communicates meaning? Is it realistic to assume that all civil servants working for the European administration understand a regulatory problem and respond to it in the same way? Are there competing visions of the binary code?

In other words, is it possible for the true/false code or the legal/illegal code to be interpreted in various ways inside the very same system?[67] If yes, why? Can we, humans challenge the binary code? If yes, why? Under what circumstances? What is the effect of the binary code upon individuals' lives if it is not challenged?

In Teubner's normative conceptualisation of systems theory, law should operate as an *'external constitution'* promoting consensus-building, procedures of negotiation and decision-making. However, can procedures be *neutral*?[68] When procedures communicate information, can *it* be neutral? Is, for example, a scientific assessment *neutral*? Are there competing visions of what a scientific assessment is and what it should contain?

Teubner argues that a move from substantial to more procedural and flexible regulatory instruments should be made, by means of information, participatory rights and the uses of expertise. In this respect, Teubner's position

---

[67] Capps, P. and Olsen, H. P. (2002) 'Legal autonomy and reflexive rationality in modern societies' 11 *Social and Legal Studies* 521-552. Also see Wolfe ibid.
[68] Black, J. (2000) 'Proceduralizing regulation-Part I' 20 *Oxford Journal of Legal Studies* 597-614.

bears resemblances to Braithwaite's and Ayre's position, as they also emphasise

reflexivity to allow for the co-operation of subsystems.[69]

In the same spirit, scholars like Shearing understand law as the

stabilisation of expectations following Luhmann, hence, steering *trust* should be

the concern of regulatory law, in view of the character of markets, themselves

largely relying upon trust and expectations.[70] Therefore, putting in place

objective regulatory rules, in which parties would have confidence, is the

prerequisite of using law to further build trust on institutions such as markets.

This proposition is not unproblematic. Braithwaite and Ayres discuss the

possibility of engaging interested parties in a fruitful conversation. This position

assumes that all parties have equal amounts of power to promote and finally

have their view embraced by regulation. However, are parties in a discussion

forum really equal participants and bearers of equivalent amounts of bargaining

power?

Can we discard the possibility of communication turning out to be

difficult due to totally divergent conceptions of what a regulatory problem *is* and

how it *should* be treated? What if an interested party holds a view deeply

---

[69] This is pointed by Moran, see Moran note 30 above. For a criticism of consensus building, which touches on the problems of power asymmetries and the possibility of the lowest common denominator being agreed in such forums see Rossi, J. (1997) 'Participation run amok: The costs of mass participation for deliberative agency decisionmaking' 9 *Northwestern University Law Review* 173-249; Harrison, K. (1998) 'Talking with the donkey: Cooperative approaches to environmental protection' 2 *Journal of Industrial Ecology* 51-72; Rescher, N. (1993) *Pluralism: Against the Demand for Consensus* (Clarendon Press, Oxford); For a review of problems see Coglianese, C. (1997) 'Assessing consensus: The promise and performance of negotiated rulemaking' 46 *Duke Law Journal* 255-1349; Coglianese, C. (2000) 'Is consensus an appropriate basis for regulatory policy?' in Orts, E. and Deketelaere, K. (eds) (2000) *Environmental Contracts: Comparative Approaches to Regulatory Innovation in the United States and Europe* (Kluwer Law International).
[70] Shearing note 57 above.

challenging embedded and generally accepted views about the social world? Should it be included? Or should it be discarded as outrageous?

Finally, the assumption that regulatory law can be neutral begs more critical thinking. Is the steering of activity *'neutral'*? Requiring agents to reflect over selected considerations and mobilise them to find solutions to an identified regulatory problem is not a neutral exercise. Identifying a regulatory problem is a process loaded with the discursive formation of various disciplines encapsulated in benchmarks and assessments labelled as *'technocratic'* and *'tedious management of everyday affairs.'* For example, harmful material on the web is thought to be a major regulatory concern. Yet, how did we come to accept that this *is* a regulatory problem?

Coming back to Shearing's proposition, even saying that trust matters in the formation of regulatory policies makes important assumptions about our mode of participating in the political milieu and forming consensus, as it requires that we belong in forums and networks. Being an *'insider'* matters more that ever.

By means of discarding the effects of *power* and the role of individuality in sustaining them, there are important implications for the conceptualisation of regulatory law.[71] It may be that procedural law, despite its mandate to empower communities, and decentred regulation, regardless of its good intention to embrace multiple agents and opinions, fail to see the problems inherent in any attempt to separate procedures form norms, unsuccessfully discuss the problem of power being unequally distributed in a forum of discussion and do not question the possibility that agents' action may not always be rational.

---

[71] In Luhmann's framework power is only tied to the political system.

3. Reading Teubner in the light of Foucault

I here seek to look in a critical way at the proposition that regulatory law can be objective, empowering communities and neutrally mediating to steer activity by means of looking at Foucault's understanding of regulation.

Foucault reminds us that the discursive understanding of history opens up the possibility of casting a critical eye on the power relations inherent in the meaning of scientific and legal concepts embraced by regulation, thus helps us think of it as being the product of history, while unveiling the ways power operates in disguise.

In the same spirit, Foucauldian inspired analysis draws attention to that regulation, when understood as governance in the more general sense of ordering and controlling of social relations, should not be linked to the sovereign power of the sovereign ruler, as manifested in the power to extract levies or impose public punishment.

It draws attention to the daily administrative aspect of governing involved in the accumulation of expertise and the implementation of rules. This is why *'sovereign power'* is not considered to play as important a role as *'disciplinary power,'* which may emerge in the course of the everyday management of public affairs and in the discursive practices of knowledge and science. Foucault then views law as being dependent on disciplines to furnish the knowledge claims it incorporates.[72]

---

[72] Foucault, M. (1979) *Discipline and Punish: The Birth of the Prison* (Harmondsworth: Penguin, orig. 1975); Gordon, C. (ed) (1980) *M. Foucault, Power/Knowledge: Selected Interviews and Other Writings, 1972-1977* (Brighton: Harvester Press); Bourdieu, P. 'Social Space and Symbolic Power' in Bourdieu, P. (1990) *In other Words. Essays Towards a Reflexive Sociology* (Oxford: Polity, orig. 1987).

Surveillance, technical/operational assessments and *regulation* are the properties of disciplinary power, resulting in the production of obedient bodies. Hence, the study of government, *'governmentality'* puts emphasis on the historical conditions giving birth to regulatory structures and on regulation as involving the reproduction of social understandings.[73]

Boyle's account of filters, used on the Internet to block harmful material, as technologies of control is clearly inspired by the Foucauldian position. He argues that, although filters are promoted as *'value-neutral'* technological systems, in reality this is a technology that inevitably supports a particular set of ideas and values, and excludes others.[74]

The very decision to treat harmful material as a regulatory problem is an assessment made on the basis of the orthodox way to think about the notion *'harmful.'* Categorising content on TV as harmful in order to monitor children's and teenagers' viewing habits implies that a set of statements as to what is appropriate and inappropriate viewing monitors conduct. And although some interest groups' practice imply the reproduction of the understanding that the web should be a free space of communication, this does not seem to present us with the orthodox way to think about the Internet.

The disciplinary power being embraced by law involves the normalisation of practices of whole populations at an everyday level. A study of such practices can be undertaken by means of looking at *governmentality*, in other words at how *government* has been made possible because of demographic changes resulting in the increase of population and the numerical calculability of subjects with the help of statistics and the emergence of the discipline of criminology, see Graham, B., Gordon, C. and Miller, P. (eds) (1991) *The Foucault Effect: Studies in Governmentality: With two Lectures By and an Interview With Michel Foucault* (London: Harvester Wheatsheaf; Chicago University of Chicago Press).

[73] For a work inspired by Foucault's thinking see Rose's work, Rose, N. S. (1999) *Powers of Freedom: Reframing Political Thought* (Cambridge: Cambridge University Press).

[74] Boyle, J. (1997) 'Foucault in cyberspace: Surveillance, sovereignty, and hard-wired censors' 66 *University of Cincinnati Law Review* 177-193.

If one accepts the above, how neutral are the procedures aiming at steering activity? And how unproblematic is reflexive law? If one decides to employ a genealogical method to uncover the ideas underlying (and excluded in) Teubner's framework, one would be required to look at the construction of notions and practices reproducing the belief in scientific objectivity, in the responsible emancipated rational agent able to regulate itself, in law's impartiality and neutrality, in the potential of consensus building amongst agents with a free will, in the evils inherent in state control and the benefits of community control and regulation by means of tradition and custom.

Looking at all these different statements would result in the formation of procedural justice as a novel object of study by means of uncovering the disciplinary effect of the underlying statements feeding into it. Population is again ordered and managed by means of constructing the responsible individual, who is viewed this time as having to participate in communities and networks, as if there is an ontological demand for this.

Such a management of population is particularly necessary in modern societies where governing becomes more difficult in view of the scientific and technical complexity of issues upon which political decisions have to be made and due to the rationalisation of decision-making processes, as in the EU. Information and its provision is crucial in order to regulate conduct, and while Teubner and Foucault agree on this point, the latter author reminds us that information links to power.[75]

---

[75] Foucault argues that governmental rationality is bounded by its limited capacity to collect information and knowledge, Gordon C. (1991) 'Government rationality: An introduction' in

Acquiring information about a population is fundamental, as it is by means of its rational management that problems are identified, assessed, categorised and then monitored. The important step in the process of normalisation is the identification of *a social problem as a regulatory problem*. This is because, once a problem is identified, for example the need to categorise content on TV as harmful in order to monitor children's and teenagers' viewing habits, then a set of assumptions is reproduced.

Such normalisation need not be *imposed* by a legal measure sanctioning conduct, as there are indirect ways to steer activity. Regulatory instruments mediating amongst communities with the aim of making them act to solve an identified problem may be an example of such indirect ways, as Foucault reminds us that normalisation is exercised in a decentralised manner, and the fact that the normative content of monitoring emerges from the codes of conduct of communities does not mean that they do not have a normalising effect. On the contrary.

To summarise the argument, the role of regulatory law and of the European Commission as a regulator is currently under transformation. There are alternative means to regulate social conduct than state law and the European Commission appears not to be the sole agent active in the process of regulating. However, regulatory law has not evolved to an unproblematic, value neutral instrument. Coming to grips with its nature, function and social impact requires addressing in a critical way various questions.

Burchell, G., Gordon, C. and Miller, P. (eds) (1991) *The Foucault Effect: Studies in Governmentality; with Two Lectures by and an Interview with Michel Foucault* (London: Harvester Wheatsheaf; Chicago: University of Chicago Press).

4. Rethinking decentralised forms of regulation: A disguise of control?

Can we design neutral procedures that would facilitate the participation of interest groups, or is it difficult to actually separate procedures from norms?[76] What is the role of the European Commission? Is it merely an arena for the competition of societal interests, or does it pursue its own interests?[77] If the European Commission pursues its interests, what are they? Can we escape the deterministic understanding of agents as pursuing pre-defined goals? In a nutshell, can we do away with the limits of intentionality, neutrality and objectivity?

If yes, then what are the implications for conceptualising alternative, heterarchical, modes of regulation, where the collection and manipulation of information by the administration is crucial, especially when such *decentred* instruments aim at regulating a *decentralised* medium, such as the Internet, where information, free and proprietary, is at the heart of its operation?

The argument

Bourdieu argues that action can be described in terms of the forms of capital people have access to, use, preserve or maximise in different social fields.[78] To reformulate the above, capital, in other words power, can take several

---

[76] Black and Boyle have already pointed to the difficulty inherent in such a separation. See Black note 68 above and Boyle note 74 and 1 above.

[77] For a similar view see Kohler-Koch note 45 above.

[78] Bourdieu, P. (1986) 'The forms of capital' in Richardson, J. G. (ed) (1986) *Handbook of Theory and Research for the Sociology of Education* (New York: Greenwood Press), at p. 241-258; Bourdieu, P. (1991) *Language and Symbolic Power* (Cambridge: Polity in association with Basil Blackwell, orig. 1977-1984).

forms according to the context it operates. For example, as Bourdieu notes, studying the field of *'bureaucracy'* shows that governments have various forms of capital, such as *'juridical'* capital, *'informational'* capital, *'economic'* capital and above all *'symbolic'* capital.[79]

In simple words, the argument is that the above represent the resources at hand, while the main *'strategy'* deployed by bureaucracies, is to preserve or maximise these very resources. When forming regulatory proposals and implementing laws relating to the regulation of information society, agents, public servants working for a certain Directorate General (DG),[80] try to preserve or maximise capital, maintain or enhance power.

Moreover, capital only presents *potentialities*, which have to be appreciated through minds, through cognitive taxonomies developed in the course of upbringing and interacting in particular settings. These modes of perception and appreciation are termed by Bourdieu as *habitus*. Action then is understood as being both in bodies, (habitus, dispositions) and in institutions (fields, spaces of positions), thus overcoming the dichotomy of action and structure.[81]

In a nutshell, employing Bourdieu's framework seeks to conceptualise the formation of regulatory proposals and implementation of laws as a process in the course of which various DGs of the European Commission strive to maximise their position as a major think tank in a way compatible to institutionalised

---

[79] Bourdieu, P. (1994) 'Rethinking the state: Genesis and structure of the bureaucratic field' 12 *Sociological Theory* 1-18, at p. 5-10.

[80] The DGs mostly relevant to Internet regulation are: DG Competition, Information Society, Research, Internal market, Enterprise, Justice and Home Affairs.

[81] Bourdieu, P. and Wacquant, L. (1992) *An Invitation to Reflexive Sociology* (Chicago: University of Chicago Press), at p. 262.

practices and/or individual cognitive understandings, while caught in interaction with other agents inhabiting different fields of activity.

These agents also strive to influence regulation according to embedded cognitive classifications about the social world. This is the field of struggles, defined as a space of play within which the EU administration and affected groups strive to impose a definition of *'regulation.'*

Against this background, the thesis advanced in the following chapters is that Bourdieu' theory of action provides the theoretical tools allowing for a conceptualisation of regulatory law as being the result of the organisation of social forces ultimately struggling to impose a vision about the role of regulation.

Such an approach implies an analysis that focuses on the *becoming* of the construction of visions of the social world[82] that legitimise change and the role of objective positions and agents' dispositions in this process. Hence, regulatory law can never be neutral, but encapsulates a vision. It can never be static, but is constantly subject to transformation, manifesting a temporary crystallisation of

---

[82] *Becoming* is a term used in philosophy to denote the open-ended understanding of things under observation (assuming that reality makes and unmakes itself all the time) as opposed to the philosophy of *being*, which seeks to discover the eternal essence of things. In ancient Greek philosophy this tension was depicted in the opposition between the *Heracletian* philosophy, which argued that change is the real essence of things and continuity a false impression (a famous aphorism by Heracletus is *'one does not go into the same river twice'*) and *Eleates* who positioned the essence of things in continuity and considered change as a false impression. Grosz situates Nietzsche, Bergson, Deleuze, Heidegger, Merleau-Ponty, Derrida, Foucault Klossowski and Darwin amongst the thinkers who strove to conceptualise the world as open-ended, see Grosz, E. (ed) (1999) *Becomings: Explorations in Time, Memory and Futures* (Ithaca: Cornell University Press), at p. 3. By using the term *becoming* I here argue that Bourdieu is part of the same intellectual tradition with the above-mentioned thinkers. It is important to understand that in Bourdieu's framework *power* is not a property of institutions, is not conceptualised as power in *potentia* as in Hegel, but has to be *manifested*. In this way Bourdieu adopts a Foucauldian and Nietzschean conceptualisation of power, as it is only by means of studying *the effects* of power, *what it does*, that it can be subjected to critique, see Hardt, M. (1993) *G. Deleuze: An Apprenticeship in Philosophy* (Minneapolis: University of Minnesota Press). This is how the Nietzschean, Foucauldian and Bourdieusian perspective of power is, for example, different than Giddens' understanding of power, who views it as a property of agents, and not as a discursive formation.

power relations. It is neither the product of a regulator detached form the social milieu nor the creation of knowledgeable agents rationally pursuing their interests, as most of the time agents reproduce their taken for granted vision of the social world, owing its existence to cognitive schemas making action meaningful.

What is more *natural* for someone with legal training than the belief that the legal system and legal institutions are effective? Or, that solutions to social problems can be effectively, neutrally and objectively formed by referring to legal texts and precedent, hence losing sight of assumptions reproduced in such documents, such as the importance of property or gender roles?

Therefore, regulatory law is assumed to be a challenging and interesting object of study exactly because it encapsulates a set of values characteristic of a certain era in history. It is interesting because it gives us the opportunity to study the instances when such classificatory schemes are challenged by groups, who want to have a say on regulation, have their vision of the world supported by regulatory law.

In other words, its fascinating character emerges as a result of the incorporation of instances of successful shifts of dominant classifications. This is an enquiry that neither focuses on structures nor on agents, but on the process of communication amongst these.

In a nutshell, regulatory law is thought to be the outcome of the conflict and composition of a field of social forces characterised by internal antagonisms. As such, social institutions and value systems are always open to restructuring

and destruction by means of looking at the process of the *actualisation of power relations in a field of possibilities*. The following will explore this theoretical proposition.

B. BOURDIEU'S THEORY OF ACTION FROM A PROCESSUAL

PERSPECTIVE

1. Habitus, field, capital: Some preliminary definitions

Bourdieu's theory of action seeks to resolve problems relating to experience and intention by means of *habitus*. On the one hand, the *objectivist moment* constitutes structural constraints as in potential forms of power, and on the other hand the *subjectivist moment* as in taxonomies crystallised in minds, in Bourdieu's words *habitus*, refers to the process of actualisation of these potentialities. Therefore, these two moments stand in a dialectic relation, the one constantly communicating with the other in order to produce action.[83]

Bourdieu's focus of analysis is *neither on the objectivist nor on the subjectivist* moment. The focus of analysis is on the processes of communication between objective and subjective positions, on the possibility of structures being re-structured, power relations being reshaped, and human minds being open to new experience.

Bourdieu used the concept of habitus in an attempt to '*render obsolete the antinomies presented by finalism and mechanism, explanations by reason, explanations by causes, conscious/unconscious, rational and strategic calculation and mechanical*

---

[83] Bourdieu, P. 'The dialectic of objectification and embodiment' in Bourdieu, P. (1977) *Outline of a Theory of Practice* (Cambridge: Cambridge University Press, orig. 1972); Bourdieu, P. (1993) *The Field of Cultural Production: Essays on Art and Literature* (Cambridge: Polity Press, orig. 1992).

submission to mechanical constraints, etc.'[84] hence, the notion of habitus provides the theoretical tools to bring together both contradictory positions.[85]

Habitus is *'the feel for the game (sens pratique), intentionality without intention, which functions as the principle of strategies devoid of strategic design, without rational computation and without the conscious positing ends.'*[86] In this sense, while recourse to rational pursuit of interests is a possibility, as utilitarian theorists would argue, it is not the rule governing action, as *'we are empirical.'*[87] Hence, *'we have a break with the utilitarian theory, with which the concept of interest is commonly associated'*[88] as *'the human mind is socially bounded, socially structure.'*[89]

To exemplify this, Bourdieu would argue that the civil servants working for the DGs engaging in forming proposals and implementing laws most of the time understand a regulatory problem through the lenses of their *juridico-administrative habitus*. The administration forms legal arguments by means of employing the *right* legal reasoning based on the *right* legal sources and providing expertise by means of *reliable* scientific data.

As for the juridical aspect, its principal characteristic is that legal arguments are constructed as if their rationale is purely internal to law, and the

---

[84] Bourdieu, P. (1990) *In other Words. Essays Towards a Reflexive Sociology* (Oxford: Polity, orig. 1987), at p. 107.
[85] ibid. at p. 125.
[86] ibid. at p.107.
[87] ibid. citing Leibniz.
[88] ibid. The pursuit of the happy utilitarian society is to be achieved through the pursuit of happiness by individuals, while the happiness of individuals is to be achieved in part by their pursuit of general happiness. For more on this see Sen, K. A. (1977) 'Rational fools: A critique of the behavioural foundations of economic theory' 1 *Philosophy and Public Affairs* 317-344, at p. 319. The author rejects the view that action conforming to the interests of the agent who performs it is guided by the conscious and deliberate search for the satisfaction of this interest posited as an end. On the contrary, rational action is understood as being itself constructed. Rationality is bounded not because the available information and the human mind are limited, but because the human mind is socially constructed.
[89] Bourdieu and Wacquant note 81 above, at p. 126.

administrator is forming them by virtue of studying law books, codes and case law, hence disguising *'the violence and destruction of his own actions,'*[90] anchored in the reproduction of a set of assumptions, which go without saying.

Codification, formalisation and systematisation are crucial to create this effect, while agents in the field lose sight of their role in making the social world, as they view their conduct being solely directed by legal doctrine and scientific data. If one accepts that most of the time people do what is normal to do reproducing common practices and taken for granted views of the world, it is not surprising that interest groups in consultation with the European Commission complain that civil servants do not understand their arguments, as they fail to see the socio-economic implications of their proposals, while phrasing arguments in obscure legal language and legal doctrine that makes no sense to them.[91]

However, habitus should not be understood as implying fatalism.[92] It is constantly subjected to experience, and therefore constantly transformed by it. In this context Bourdieu's theory of practice is *'against positivistic materialism, as it furthers the argument that objects of knowledge are constructed, and not passively recorded, against intellectualist idealism, as it reminds us that the principle of this construction is found in the socially constituted system of structured and structuring dispositions acquired in practice and constantly aimed at practical functions.'*[93]

---

[90] Schlag, P. (1995) 'Law and the postmodern mind: Intellectualism' 16 *Cardozo Law Review* 111-1118, referring to his 1995 work, Schlag, P. (1993) 'Clerks in the maze' 91 *Michigan Law Review* 2053-2069, and Cover's work, Cover, R. M. (1983) The Supreme Court, 1982 term - Foreword: Nomos and narrative' 97 *Harvard Law Review* 4-25. In these works Schlag discusses the role of the judge.

[91] http://swpat.ffii.org/players/index.en.html, (web page visited on 14 May 2003).

[92] Bourdieu and Wacquant note 81 above, at p. 133.

[93] ibid, at p. 121.

Additionally, there is not a single pattern of perception for all agents in the European Commission. Structural patterns of thinking about the social world may be derived from the legal habitus, and thus may be concerned with promoting harmonisation, legal certainty and continuity. Alternatively, since the European Commission is staffed with civil servants with diverse professional, national, and educational backgrounds, it may be that agents in the field have various classificatory schemes, various ways of thinking about a regulatory problem.

Moreover, interaction imposes a way of thinking, as in its course conceptions as to who is an *insider* and who is an *outsider*, whose performance is successful and whose acts are celebrated, impose a way of thinking by means of imposing roles which should be performed, as interactionists taught us.[94]

2. Bourdieu and the multiplicity of organisation

Bourdieu's concept of habitus has been criticised as implying rigid determinism, leaving no place to accommodate the notion of social change and collapsing into objectivism, since the rationale behind agents' actions is found in the internalisation of objective structures in the bodies of individuals. In this context, Bourdieu has been attacked for subordinating agents to objective

---

[94] Goffman, E. (1967) *Interaction Ritual: Essays in Face-to-Face Behavior* (London; Chicago: The Penguin Press: Aldine), at p. 4-45; Goffman, E. (1959) *The Presentation of Self in Everyday Life* (New York: Doubleday; London: Mayflower); Mead, G. H. (1967) *Mind, Self and Society: From the Standpoint of a Social Behaviourist* (Chicago: University of Chicago Press, orig. 1934).

structures, since the concept of habitus requires that agents do what is normal to do, without consciously mastering the content of their action.[95]

Nonetheless, other commentators note how Bourdieu's theory of practice[96] presents us with a genuine example of an attempt to bridge the gap between objectivism and subjectivism,[97] while it has also been argued that there are two strands in his social theory, one devoted to a theory of practice, which manages to overcome determinism, and a second that points to the concept of habitus and thus falls back to objectivism.[98]

It is true that in Bourdieu's framework action is trapped in regularities and constraints, yet by describing the circumstances that lead to the genesis of the thing under observation, he provides the tools for looking into structuring and restructuring, as a continuous process of organisation and disorganisation.

Therefore, his critics' mistake is that they separate action from movement in Bourdieu's theoretical framework. They are right in observing the statics that

---

[95] For a review of the various interpretations of Bourdieu's work, see King, A. (2000) 'Thinking Bourdieu against Bourdieu: A practical critique of the habitus' 18 *Sociological Theory* 417-434. For authors who have criticised Bourdieu's concept of habitus see DiMaggio, P. J. (1979) 'A review essay: On Pierre Bourdieu' 84 *American Journal of Sociology* 191-115; Jenkins, R. (1982) 'Pierre Bourdieu and the reproduction of determinism' 16 *Sociology* 270-281; Brubaker, R. (1993) 'Social theory as habitus' in Calhoun, C., LiPuma, E. and Postone M. (eds) (1993) *Bourdieu: Critical Perspectives* (Chicago, Ill: University of Chicago Press); Evans, T. M. S. (1999) 'Bourdieu and the logic of practice: Is all giving Indian-giving or is it "generalised materialism" not enough' 17 *Sociological Theory* 3-31.

[96] Bourdieu note 84 above, at p. 116. Generally see Bourdieu, P. (1990) *The Logic of Practice* (Cambridge: Polity, orig. 1979); Bourdieu note 83 above.

[97] Taylor, C. (1993) 'To follow a rule' in Calhoun, LiPuma, and Postone note 95 above. Also see Potter, G. (2000) 'Bourdieu against Alexander: Reality and reduction' 30 *Journal for the Theory of Social Behaviour* 229-247, where the author argues for incorporating the notion of habitus in the concept of field in order to see the dynamism inherent in Bourdieu's model. Also see Vandenberghe, F. (1999) 'The real is relational: An epistemological analysis of Bourdieu's generative structuralism' 17 *Sociological Theory* 32-68, where the author argues that, rather than criticising the concept of habitus, one should engage in reconstructing Bourdieu's theory by taking into account the relational logic that runs across his oeuvre. For a similar account see Wacquant, L. (1989) ' Towards a reflexive sociology - a workshop with Pierre Bourdieu' 7 *Sociological Theory* 26-63.

[98] King note 95 above.

his theory implies, but are wrong to separate action from the process of its initiation and reorganisation. The following will explore this proposition.

Although Bourdieu presents action and human minds as being bounded by social variables, it nevertheless leaves space for conceptualising the participation of creative forces that could result in changes that are not the simple addition of the new to the old. In this context Bourdieu's sociology *'free [s] us from the illusion of freedom'*[99] by pointing to the institutional constraints that bound human minds. Nonetheless, if one flips this argument, as Bourdieu himself has put it, *'it is the statics of the system that reveal its dynamics, as the statics are always contested and imply ferocious struggles when it comes to redefining them.'*[100]

Therefore, although regulatory law is viewed as encapsulating and reproducing a way to view the social world, in other words, a way to understand the role of property, the role of minorities, the role of parents etc., this may always be subject to challenge. The very emergence of the concept of alternative regulation signifies this, as interest groups demanded their inclusion in the making of laws affecting their affairs, thus challenging the symbolic violence of centralised law making and enforcement.

Also, the hot debate surrounding the way in which the Internet should be regulated is partly because of different conceptualisations of the role of property and information in the emerging information society. In this case, external conditions, such as the continuous technological experimentation currently taking place on the net and the mushrooming of Internet communities, allow for

---

[99] Bourdieu note 84 above, at p. 15.
[100] ibid, at p. 15.

new entrants to enter the field under investigation bringing with them new dispositions, and as such their arrival results in changing the whole of the web of relations inside a field of study.

In view of the above, the statics of the system are only a transitory moment in a perpetual *becoming*, as they are fiercely contested and the possibility is always open that action is initiated aiming at modifying the correspondence between objective positions, and transforming the whole system of relations inside the field. Moreover, struggles are being held at two levels: At a material and at a symbolic level, referring at the same time to practices and to the vision that they encapsulate giving legitimacy to the reality that they encompass.

Alternative regulation may then be viewed as an instance when the dominant way of thinking about regulatory law is challenged by interest groups inhabiting different but open to communication fields of activity, bringing with them new dispositions and new forms of capital, striving to maximise wealth, prestige, status, political participation and various other forms of capital inscribed in the fields they inhabit.

However, there are always taxonomies still left unchallenged or new ones, which although they appear revolutionary, always strive to impose the *'right'* way to view the role of regulatory law, thus exclude other visions. To illustrate this, in the procedural and reflexive regulatory framework, a set of assumptions is reproduced as to the belief in scientific and legal objectivity, in the responsible emancipated rational agent able to regulate itself and engage in consensus building bypassing brutal antagonisms.

Nevertheless, agents are not mere puppets, as a functional model would suggest, but actors may act in accordance to their interests, linked to a specific field and a position in the field. Therefore, the concept of interest points to an infinity of improvisation allowing for an infinity of moves, as the possibility is always left open that the above mentioned assumptions reproduced in the reflexive and procedural model are challenged. It follows that the fallacy of ascribing to human nature qualities such as the ones found in the notion of *'interest'* in economic terms, or in the idea of mechanistic acting as anthropologists would assert, is avoided.

Economic theory wearing the façade of free will ends up seriously curtailing the notion of freedom by injecting finalism in the formation of preferences. The same observation is to be made in the case of action being explained as the understanding of a mechanical series of acts. In this sense, since Bourdieu emphasises that humans would have acted otherwise in different social conditions and under different historical circumstances, this is a conceptualisation that is very far from such finalism or mechanism.

Bourdieu himself attacks as naïve the identification of interests as being solely material. Therefore, the pursuit of symbolic capital is one of the alternative strategies that agents may follow, and presents an example of action that may run counter to what would be seen as being an economically sound decision.

The latter argument makes sense if symbolic capital is understood as credit, and as such its accumulation is highly important when it comes to legitimising contested visions of the world or maintaining the existing ones

inside the field. This is why one of the main *'strategies'* of the European Commission is to maximise its position as a major think tank, and to this effect sustaining the belief in the neutrality and objectivity of regulatory law is crucial for legitimising itself.

Symbolic capital is derived from the role of the European Commission as a manager, as rationally administering mundane procedures on the basis of efficiency and rationality and by means of using scientific tools such as benchmarks, assessments and scientific models.

The European Commission then emerges as a neutral mediator furnishing the truth of science. The *orthodoxy* of scientific reason is not without contest though. The precautionary principle shows that there is disquiet as to the virtues of science. Political and social factors should be taken into account when deciding on risks for example, as reliable scientific hard data may take time to be furnished and it may be too late to avert risks to health or the environment by that time.[101]

Making a decision on the basis of scientific data entails more problems. In a fragmented and specialised world, when decisions rely on information, having access to it becomes crucial. Therefore, including interest groups in the processes of forming proposals and implementing laws is important as only they can provide it.

Interest groups themselves have challenged the symbolic violence of centrally applied law, as this is thought to emanate from a centre insensitive to the needs of everyday people. It should be up to the users to decide for example

---

[101] Vogel, D. (2001) 'The new politics of risk regulation in Europe' *Centre for the Analysis of Risk and Regulation (CARR) Discussion Paper 3/2001.*

whether and how they want to punish an unwanted intruder in a virtual chat room on the USENET system. Regulatory law should facilitate the inclusion of interest groups,[102] help create a thriving civil society,[103] sustain social capital by means of promoting networks and forums for discussion.[104]

In this instance, the European Commission promotes itself as offering the hierarchical assistance required in the monitoring and enforcement stage, by means of assisting the drafting of codes of conduct for example. A culture of discussion based on the ethos of consensus building is emerging and is being supported by neutral mediation and expertise provision. The symbolic capital of the European Commission then consists of sustaining this belief and promoting it as a model of political participation.

3. The becoming of regulatory change

Bourdieu understands creation as something that is experienced and not simply thought, agency being the motor of change. On the other hand, structural constraints are necessary to creative change, or this would have never taken place, they give form to inventive difference, or this would have never been communicated. Classificatory schemes and taxonomies make the world reasonable and assert that most of the time people do what is normal to do, without following a rational plan, being a strategy devoid of strategic calculation as Bourdieu puts it.

---

[102] White Paper on Governance COM (2001) 428 Final.
[103] For the efforts to create a sustainable information society in Europe see http://www.jrc.es/iptsreport/vol32/english/ISS2E326.htm, (web page visited on 14 May 2003).
[104] ibid.

Nevertheless, this is not the only possible strategy to be followed. The line of action habitus suggests may be brought up at the conscious level in times of crisis where routine is disrupted. Hence the challenge in the dominant way to view the role of governments and of the European Commission I previously referred to.

However, the notion of interest is not only defined in the strict economic sense but also involves symbolic struggles. Therefore, actors may act to preserve or increase their capital or to change the existing classificatory systems, but the interests they pursue should be understood not in the usual sense of the word, but as involving everything that defines their own idea of themselves.[105]

Therefore, habitus does not encompass rigid rules but only represents regularities, as it is always subject to experience and is constantly being transformed by it. In the light of the above, habitus points to the existence of objective regularities that channel and delimit action in such directions that it would be made possible to communicate meaning, which can be shared by other actors occupying the same field. Still, when agents act according to their habitus, even then action should be seen *'to be as remote from unconditional creation as from simple mechanical reproduction,* as it is *regulated improvisation.'*[106]

Such an understanding of habitus allows for the formation of fluid concepts, open to change. We depart from rigid made concepts in order to discover the process of formation of varieties of domination, which are always open to restructuring, reform and even destruction, only to return to the

---

[105] Bourdieu, P. (1984) *Distinction: A Social Critique of the Judgment of Taste* (London: Routledge & Kegan Paul, orig. 1979), at p. 477.
[106] ibid.

formation of concepts that would have to be flexible. In this context, the fact that Bourdieu is pointing to regularities governing action is consistent with the need to have concepts that are open, pointing to action.

The study of regulation should then be conducted with a view to understand the social world by means of flexible concepts, as truth is making and unmaking itself all the time on the basis of a continuous reorganisation of power relations. Bourdieu's epistemological claims are far from the belief that rigid concepts can be used to arrive at truth, or that truth is a notion with stable qualities, hence the fierce attack on objective interpretations of the world, on *economism* and mechanism.

Truth for Bourdieu is something lived, experienced, something reproduced and contested, subject to objectified constraints and grounded on different interpretations that result in the making of choices that are not irreversible, encapsulated in regulatory law.

Thus, uncertainty is inserted in a world under constant change. Conceiving regulatory law as such is at odds with both the conceptualisation of it as something that can be pursued by clear criteria and as being positioned in a realm beyond the one of everyday struggles. Bourdieu provided a framework that stood against such an approach to truth claims crystallised in law.

In this way he proposed a path that leads to a dynamic perception of the real, as today's reality is being described as the reconstruction of yesterday's reality, a process that involves perpetual interaction of objective and subjective

forces, with knowledge revealing its plural character, and law being a social construct encapsulating classifications characteristic of a particular era in history.

Bourdieu then pursues an epistemology of becoming that asks not what is truth but, in a Nietzschean way, why, how much, and who wants truth, injecting contingency of a social and historical nature into any relevant enquiry. However, such a conception of the 'truth' of social reality should be distinguished from an understanding of it as being simply a political issue and as such making it impossible, as it is thought to be made by a hegemonic order.

By reading Foucault's understanding of the relation between power and knowledge as the latter collapsing in the former, law is viewed as encapsulating in a functional way social and historical determinations.[107] Hence the truth of social reality is thought to be unattainable, since the true nature of the social world remains positioned in a realm that cannot be entered by our intellect.

Knowledge may be plural, ever changing and dependent on an angle of observation, but it is not impossible.[108] Social reality is an experienced reality, it is fluid, relative and immanent, crystallised in flexible concepts, only under the understanding that these are to change again.[109] Bourdieu's conceptualisation of

---

[107] For an epistemological analysis of this proposition see Alcoff, L. M. (1999) 'Becoming an epistemologist,' in Grosz, E. (ed) (1999) *Becomings: Explorations in Time, Memory and Futures* (Ithaca: Cornell University Press), at p. 60. Alcoff argues that in the case of Allen's realist epistemology, truth is defined as consensus, *'being co-extensive with cultural norms and making no distinction to that which is justified here and now and to that which is true'.*

[108] ibid.

[109] Bergsonian metaphysics advances this view. According to Bergson, the *real* is something that makes itself all the time and that is never made, endlessly changing and being pregnant with a multiplicity of potentialities. Reality is then seen to carry the inherent tendency to individualise, by the fact that it actualises potentialities, as well as associate, by the fact that all potentialities are as real as the actualised one. Such a view of the real cannot be consistent with a view that repudiates metaphysics by means of looking at knowledge as being something impossible, see Bergson, H. (1928) *Creative Evolution* (London: R&R Clark, orig. 1907), at p. 187-188; Bergson, H.

social science constructs the social world and understands agency as taking part

in this process, but also aims at describing the social genesis of the principles of

construction. He conceives the real as being a lived reality, having included in the

object of knowledge the perception of it by agents.

(1961) 'La conscience et la vie' VI *Les études Bergsoniennes* 7-29, at p. 28; Bergson, H. (1936) *Essai sur les Données Immediates de la Conscience* (Paris: F. Alcan).

C. CONCLUSIONS

Bourdieu's theoretical framework invites us to rethink the process of communication between subjectivity and institutions when explaining the genesis of new forms of regulatory law. I propose to understand regulatory law as being the result of the organisation of social forces and of the homologies among various fields of study, conceptualising it as allowing for creative difference, since categories of thought may be subjected to challenge.

Bourdieu's theory of practice provides a powerful theoretical framework capable of accommodating the relationship between different fields, social institutions and various forms of material and symbolic capital, while combining empirical analysis with a very demanding theoretical apparatus. He has applied his framework in the juridical field in order to consider the role of law in the reproduction of social structures.

Law in this framework is conceptualised as carrying a dominant vision of the world, which is thus given universality.[110] Such an approach to law is in sharp contradiction to both formalism and structuralism, since the former views law as absolutely autonomous form the social milieu, while the latter understands it as an instrument of domination.[111]

Bourdieu moves away from structuralism, since he refuses to view law as collapsing into the field of power, and as such attributes to it a relative autonomy. Nonetheless, he attacks the rhetoric of the autonomy, neutrality and

---

[110] Bourdieu, P. (1986) 'La force du droit: Eléments pour une sociologie du champ juridique' (1986) 64 *Actes de la Recherche en Sciences Sociales* 3-19.
[111] ibid, at p. 1. Two of the examples that the author refers to are the pure theory of law by Kelsen and Althusserian structuralism.

universality of law[112] and defines the juridical field as the space of competition for the monopoly of the right to articulate what is right.[113] He reformulates this argument by suggesting that the juridical field implies struggles to articulate what fair distribution, *nomos,* and legitimate order are.

The inhabitants of this particular social space are agents who are competent to interpret a body of texts. In the light of the above, using Bourdieu's theoretical tools can offer useful insights in respect to the ways that power relations, which are unrecognised as such, are embedded in systems of classification taken for granted by members of society, thus law is seen as engulfing not only what is *legal* and *just* but what is *normal.*

Nevertheless, the focus of the analysis of this thesis will be on the role of the European Commission and of law in the process of regulating the information society in Europe. I am particularly interested in the following regulatory techniques: Self-regulation (where communities function according to internal codes of conduct), regulatory instruments that take the form of a mix of self-regulation and hierarchical intervention (with regulatory law intervening in the monitoring and enforcement stage) and regulatory instruments that denote the partnership between the state and private actors (with the aim of achieving public ends).[114]

Since for the purposes of this thesis regulation is understood as in the processes underlying the identification of a problem and its articulation in

---

[112] ibid, at p. 5

[113] ibid, at p. 4: ' *Le champ juridique est le lieu d'une concurrence pour le monopole du droit de dire le droit'.*

[114] These definitions are borrowed from Julia Black's work on regulation, in particular see Black note 68 above, at p. 600-601.

proposals, green papers, consultations and other non-legally binding instruments, and as in the implementation of laws, then looking at decentralised regulatory techniques initiated by the European administration is a task that implies different definitions.

In particular, it implies a different definition of the agents who have an interest to invest in the game, of the specific forms of capital that agents possess and of the logic of the sub-field of information society regulation, being part of the larger field of the EU bureaucracy. Finally, constructing the emergence of information society regulation as a novel object of study should be the first step to understanding the operation of my object of study.

This is undertaken in Chapter II of the thesis, which seeks to look into the emergence of the concept of information society as a new field of enquiry, with a view to uncover the historical conjunction of events and theoretical paradigms producing particular understandings as to the proper role of innovation, law and market integration, feeding into its emergence.

Chapter III will move onto looking into the norms regulating everyday life inside the European Commission. Here, the task is to come to grips with the classificatory systems emerging in the course of interaction and as a result of professional background and nationality, ascribing meaning to the initiation of a proposal and the implementation of a legal measure.

Chapter IV will seek to identify the particularities of the legal *habitus*. This chapter will further question the possibility of introducing neutral procedures to regulate the Internet, by means of looking at dispute resolution under the

auspices of the Internet Corporation of Assigned Names and Numbers (ICANN) and the implementation of the Safer Internet Action Plan aiming at combating illegal and harmful material on the net. The main question addressed concerns the properties of the legal habitus and the kind of assumptions reproduced as to the role of regulatory law, the role of property and the importance of information as a commodity.

Chapter V will take this latter point further to grasp the way in which dominant classificatory schemes about the role of law and property have been challenged by interest groups, by means of looking at the consultation launched by the European Commission following a proposal aiming at introducing patent protection on computer-implemented inventions in the EU. The Open Source Community projected a vision of intellectually property rights as being sensitive to technological experimentation and communication. However, other business interests and DG Internal Market favoured strong protection.

Against this background, the focus of this chapter will be on enquiring on the possibility of engaging in discussion parties with different conceptualisations about the social world and asymmetrical amount of capital available to them, in order to question the prospect of creating a sustainable civil society.

Finally, the conclusions will consolidate the findings of this thesis with regard to the proposition to introduce Bourdieu's framework to better understand the processes underlying the use of flexible regulatory techniques by questioning the notions of neutrality, objectivity and intentionality.

II

Innovation, Economy, Polity and the European Experience

History is more or less bunk. It's tradition.

We don't want tradition.

We want to live in the present and the only history that is worth a tinker's damn,

is the history we made today.

Henry Ford, Interview in Chicago Tribune, 15 May 1916.

Creating the information society in Europe and positioning the Internet at its heart interweaves with opening up markets and promoting innovation. Although the focus of this thesis is on the role of the European Commission in the course of regulation by means of flexible instruments, I will here concentrate on looking broadly at the processes leading to opening up the telecommunication markets in Europe, as it is then that important understandings were shaped as to the role of the European Commission, the nature of regulatory law and the character of interest group participation in the processes.

It may appear that there was some kind of inevitability in liberalising telecommunication markets and promoting the Internet in Europe. Technological changes dictated a novel approach to be taken.[1] Globalisation and new economic

---

[1] Recommendations of the Bangemann Group to the European Council: Europe and the Global Information Society, 26 May 1994, available at http://sirio.deusto.es/abaitua/konzeptu/w3c%5Cbange.htm (web page visited on 15 May 2003); Also see European Commission Green Paper COM (87) final of 30 June 1987 on the Development of a Common Market for Telecommunication Services and Equipment: Towards a Dynamic European Economy, especially see the Introduction. Both papers advocated the need to liberalise the telecommunications sector so as to create incentives for the private sector to invest in the information society. For an account against a technology-driven approach see Flynn, L. (1995) 'Telecommunications and EU integration' 3 *European Community Utilities Law and Policy* 217-235,

conditions required a different line of thinking as to the role of competition in the

relevant markets.[2]

Interest groups lobbied the European Commission and national

governments to open up markets in view of the new opportunities.[3] Institutions

shaped the strategies of agents, who subsequently drove telecommunications

reform towards the direction of liberalisation.[4] Regulatory law and the European

Commission have thus responded to these challenges.

Still, although new technological improvements, such as digitalisation,

were decisive in compelling change, new economic conditions shaped political

decisions and interest groups wanted to exploit new opportunities, there are

questions to be answered. For example, assuming that innovation is a driving

force in the above processes, how is *'innovation'* defined? Why is innovation a

good thing and how much innovation do we need? What are the desirable levels

---

at p. 221. In the same spirit, Gannon argues that although the European Commission argued that Europe had to catch up with the new industrial revolution while avoiding to repeat the mistakes that the European computer industry made in the past, resulting in lagging behind the USA and Japan, the official papers of the Commission do not explain the nature of these mistakes, see Gannon, P. (1997) *Trojan Horses and National Champions* (Apt-amatic books, 1997).

[2] Recommendation of the Bangemann Group to the European Council and Green Paper on the Development of a Common Market for Telecommunication Services and Equipment, ibid.

[3] On this approach see in particular, Sandholtz, W. (1998) 'The emergence of a supranational telecommunications regime' and Sandholtz, W. and Stone Sweet, A. (1998) 'Integration, supranational governance and the institutionalisation of the European polity' in Sandholtz W. and Stone Sweet, A. (eds) (1998) *European Integration and Supranational Governance* (New York: Oxford University Press). According to the authors, the EU initiates new policies when Euro-groups, networks and associations engaging in increased transnational exchange, share an interest in the adoption of new rules, Sandholtz and Stone Sweet at p. 137-138.

[4] In this context, institutions, defined as political, social and legal cultures and Constitutional rules, should be seen as shaping the strategies of players. Strategies are then influenced *'by the complex relationship between the culture and world view of each player and the substantive and procedural contents of the EC Treaty which gives the players their location in terms of roles and powers,'* see Scott, C. (1995) 'Changing patterns of European community utilities law and policy: An institutional hypothesis' in Shaw, J. and More, G. (eds) (1995) *New Legal Dynamics of European Union* (New York: Clarendon Press); Similarly, it has been argued that different national institutions gave rise to different patterns of policy making. In this context, it is very important to take into account the relations of power and the role of formal organisations and formal institutions in shaping change, see Thatcher, M. (1999) *The Politics of Telecommunications* (New York: Oxford University Press), at p. 307.

of governmental intervention and what should be the role of law? Are there competing paradigms as to the above?

There is certainly not one answer to these questions. Moreover, all these questions have posed and continuously pose real problems. As we will see, during the early steps of opening up the telecommunication markets in the EU, some Member States wanted to make standards compulsory, thus extending re-regulation, while others wanted fast and extensive deregulation.[5] Similarly, the role of the European Commission in the process was contested, as a dangerous delegation of powers was thought to be taking place. The industry was for liberalising, while the trade unions opposed it.[6]

Against this background, the aim of this chapter is twofold. First, it seeks to show that definitions are the result of specific socio-economic circumstances. Hence, conducting a historical overview of the diverse experiences and competing theoretical paradigms leading to the genesis of an object of study is an exercise aiming at looking into the set of different statements constructing it.

This is important as, by means of describing the processes behind the emergence and shaping of information society regulation in Europe, we are constantly reminded that things could have been different, since under different

---

[5] Thatcher, M. (2001) 'The EU Commission and national governments as partners: EC regulatory expansion in telecommunications 1979-2000' *Centre for the Analysis of Risk and Regulation (CARR) Discussion Paper 2/2001,* available at http://www.lse.ac.uk/Depts/carr/Publications_folder_web_files/Disspaper2.pdf, at p. 8.

[6] On this point see Braithwaite, J. and Drahos, P. (2000) *Global Business Regulation* (Cambridge: Cambridge University Press).

socio-economic circumstances a different set of statements could have informed the genesis of a new field of study.[7]

Such an analysis is a powerful tool to introduce ruptures, as it does not only bring attention to the discourses, which fed into the emergence of a new object of analysis, but also to the potentialities that were never actualised, in other words to the discarded possibilities.[8] Engaging in such an enquiry requires being able to move between different disciplines and deal with never-ending sources. The problem inherent in such an exercise is that overgeneralisations seem to be unavoidable due to space limits.[9]

Nevertheless, I believe that it is important to concentrate on the experience of the 19th and 20th century and look at the notion of innovation as understood in the history of economic thought, and in particular in the ways that liberalism, economic theory and conceptions as to the virtues of new technologies and competition interweaved and consequently came under radical doubt, as early as in 1760, but also later in the First World War and during the depression of the 1930s.

My choice to look at innovation is premised on the assumption that information acquires particular importance nowadays because it is traded and communicated, and in both these instances innovation and technological experimentation are crucial.

---

[7] Bourdieu, P. (1994) 'Rethinking the state: Genesis and structure of the bureaucratic field' 12 *Sociological Theory* 1-18; Foucault, M. (1972) *The Archaeology of Knowledge* (London: Tavistock Publications, orig. 1969).
[8] Bourdieu ibid, at p. 4.
[9] As this chapter relates to broad themes about which there is extensive literature, I kept footnotes references to a minimum and referred to English language works.

A second focus is on the importance of market integration, expertise and ordoliberalism as offering powerful paradigms influencing the early attempts to integrate markets in Europe. I chose to look at these paradigms, as they had an impact on the way we understand today the role of the European Commission as providing expertise and interest intermediation, and shaped an understanding of regulatory law as being neutral and objective, implementing the mandate of Constitutional principles and indirectly intervening in the economy.

A third focus is on sudden technological advances and globalisation, which gave rise to new understandings as to the merits of co-operation, providing the operating context of all of the above ideas. This is because, for an intellectual framework to successfully become dominant, it has to find its efficacy in this real world and in particular historical circumstances favouring a way of thinking.

Finally, I examine the legal instruments employed to open telecommunications markets in Europe, as this is the physical infrastructure of the information society in Europe. This subsequently led to a series of efforts to promote interconnectivity, interoperability, global markets, privacy, data security, intellectual property rights and R&D co-operation, while positioned the Internet at the heart of the information society in view of its unique technical characteristics and social impact.

A. INNOVATION, ECONOMY AND SOCIETY: THE EARLY DAYS

1. Economic theory and innovation

In 1733, John Kay, a 29-year-old inventor, was awarded a patent for his new machine for opening and dressing wool, *the Flying Shuttle*. His invention turned out to be very successful and its widespread adoption created pressure for the more efficient spinning of yarn, which led to Sir Richard Arkwright's *Cotton Jenny* being patented in 1770.

Soon afterwards, machines to card and comb the wool to feed the new mechanised spinning machines were developed in the 1780s. By the turn of the century all aspects of the production of cloth had been automated. The cottage industry of English textiles was rapidly being replaced by machines, and exports in textile rose sharply.[10]

The process of using machines was being introduced to other industries, a prominent example being the construction of the *Bridgewater Canal* by the Duke of Bridgwater in 1759, which would bring coal by boat from his coalmines at Worsley to Manchester,[11] and James Watt's *Steam Engine* invented in 1765.

The above events brought about the new experience of industrial revolution, which begun in England and spread around Europe. They marked the genesis of the idea that innovation is important for economic growth, whilst linking economic progress with the freedom to trade. Early attempts to

---

[10] Kurzweil, R. (1990) *The Age of Intelligent Machines* (Cambridge, Mass: MIT Press), at p. 2; Landes, D. S. (1960) *The Unbound Prometheus: Technological Change and Industrial Development in Western Europe from 1750 to the Present* (London: Cambridge University Press).
[11] ibid.

conceptualise the relationship amongst these three notions are presented by

Smith, Babbage and Rae.[12]

Back in 1776, Adam Smith did away with the notion of mercantilist

protectionism to argue that prices can be determined by means of competition, as

then they would change responding to market conditions. The classical view of

economics emphasised the role of risk-taking and innovative entrepreneur and

took into account the importance of the technology and organisation of firms

(division of labour) in the process of competition, while assumed that the

division of labour results in technological innovation.[13]

Smith thought that capital accumulation and the wealth of nations go

hand in hand. He argued that savings are accumulated and then invested, due to

the *'uniform, constant, and uninterrupted effort of every man to better his condition,'*

which is thus *'the principle from which public and national, as well as private opulence*

is originally derived.'[14]

Since individuals are assumed to engage in saving and wealth

maximisation, any state intervention will reduce their incentives to save money,

---

[12] The choice of these authors is influenced by Rosenberg's work, see Rosenberg, N. (1994) *Exploring the Black Box. Technology, Economics and History* (Cambridge, [England]; New York: Cambridge University Press), where he analyses the work of thinkers such as Charles Babbage, Karl Marx and Joseph Schumpeter. My choice of John Rae's work was influenced by Brewer, A. (1991) 'Economic growth and technical change: John Rae's critique of Adam Smith' 23 *History of Political Economy* 1-12.Many other thinkers have brought attention to the importance of innovation, but I limit my references to authors whose work is primarily associated with it.

[13] *'This great increase of the quantity of work which, in consequence of the division of labour, the same number of people are capable of performing, is owing to three different circumstances; first, to the increase of dexterity in every particular workman; secondly, to the saving of the time which is commonly lost in passing from one species of work to another; and lastly, to the invention of a great number of machines which facilitate and abridge labour, and enable one man to do the work of many,'* Smith, A. (1776) *The Wealth of Nations* (London: s.n.), Book I, Chapter 1, 'Of the division of labor' available via http://www.bibliomania.com/2/1/65/112/frameset.html, (web page visited on 19 May 2003), at p. 2.

[14] Smith, A. (1991) *The Wealth of Nations* (London: Everyman's Library, orig. 1776), at p. 343.

hence economic growth will slow down, as total saving is the sum of individual saving. Therefore, according to Smith, governmental intervention is not necessary, as the market would regulate itself, the competitive process would pick winners from losers eventually benefiting the society as a whole.[15]

Charles Babbage[16] wrote some 60 years after Smith, when the industrial revolution was a far more mature phenomenon and technological progress was rapidly advancing. Rosenberg argues that Babbage is the first observer calling attention in an explicit way to the causal links between economic forces and inventive activity.

Indeed, Babbage took the idea of the division of labour and twisted it to argue that technical change is a consequence as well as a cause of the division of labour. Hence, he observed that investing in improving machines is important for economic success. This is because, according to Babbage, as the application of the division of labour tends to produce cheaper articles, it increases the demand, and gradually, by the effect of competition, or by the hope of increased gain, results in large capital being invested in big factories, as new machines automating all stages of production are introduced.

Moreover, skilled workers, who can use these machines, are hired, and engineers, who can on the spot fix the machines if at fault, are employed. Finally, the addition of a machine to light the factory at night using gas is built and an

---

[15] ibid.

[16] Babbage was a pioneer mathematician, engineer (sometimes referred to as the father of computing as his Difference Engine No. One was the first successful automatic calculator and remains one of the finest examples of precision engineering of the time) and political economist. For more information see the web page of the Charles Babbage Institute at http://www.cbi.umn.edu/exhibits/cb.html, (web page visited on 15 May 2003).

accountant's department is added. This would have to have clerks to pay the workmen, communicate with the agents who purchase the raw produce and sell the manufactured article.

The division of labour in this instance produces cheaper articles as it

is not merely the precise amount of skill purchased, which is necessary for the execution of each process, but throughout every stage - from that in which the raw material is procured, to that by which the finished produce is conveyed into the hands of the consumer - the same economy of skill prevails. The quantity of work produced by a given number of people is greatly augmented by such an extended arrangement; and the result is necessarily a great reduction in the cost of the article, which is brought to market.[17]

Babbage parallels the function of the division of labour in a factory with mental division of labour:

We have seen, then, that the effect of the division of labour, both in mechanical and in mental operations, is that it enables us to purchase and apply to each process precisely that quantity of skill and knowledge which is required for it: we avoid employing any part of the time of a man who can get eight or ten shillings a day by his skill in tempering needles, in turning a wheel, which can be done for sixpence a day; and we equally avoid the loss arising from the employment of an accomplished mathematician in performing the lowest processes of arithmetic.[18]

---

[17] Babbage, C. (1963) *On the Economy of Machinery and Manufactures,* (Frank Cass & co London, orig. 1835), Chapter 20 'On the Division of Labour,' at point 269; Rosenberg, N. 'Babbage; Pioneer economist' in Rosenberg note 12 above, citing Babbage ibid, at p. 191 and 260.

[18] ibid. The division of labour inside a factory represents its domestic economy. Thus, Babbage argues that there is no point in introducing laws restricting machinery exports to avoid providing foreigners with machinery that will threaten England's competitive advantage. `*It is contended that by admitting the exportation of machinery, foreign manufacturers will be supplied with machines equal to*

However, the relationship between technological innovation and the division of labour is not a one way one but cyclical. This is because, the division of labour results in capital accumulation, capital is used to promote innovation and innovative activity produces more capital. Very importantly, innovation is not only the result of a genius mind, but most of the time is brought about by means of minor improvements accomplished in the workplace.

At the same time though, the Scottish John Rae in his *New Principles* totally reversed Smith's causality that the division of labour results in the invention of machines. In sum, Rae's analysis is centred on the role of invention as the primary and independent factor behind economic growth.

Without denying the importance of capital accumulation, and while accepting that individuals would choose to invest their savings, Rae argued that the motor behind this process is technological progress and argued that invention is the only power on earth that can be said to create. Thus, he made the case for governmental legislation that would promote science, the discovery of new arts and improvements in the arts already practised in the country.[19]

Smith treated the invention of machines as a result, not a cause, of the division of labour,[20] Babbage observed that the one feeds into the other, while

---

our own. But in order to succeed in a manufacture, it is necessary not merely to possess good machinery, but that the domestic economy of the factory should be most carefully regulated.'

[19] Rae, J. (1905) *The Sociological Theory of Capital: A Complete Reprint of the 'New Principles of Political Economy'* (New York: The Macmillan Company; London: Macmillan and Co., ltd, orig. 1834), published under the title *'Statement of Some New Principles on the Subject of Political Economy. Exposing the Fallacies of the System of Free Trade, and of Some Other Doctrines Maintained in the "Wealth of Nations"'*), especially see Book 1, Chapter 1. For an excellent introduction on Rae's thinking see, Brewer note 12 above, at p. 1-5; Ahmad, S. (1996) 'Smith's division of labour and Rae's "invention": A study of the second dichotomy with an evaluation of the first' 28 *History of Political Economy* 95-107.

[20] Brewer ibid.

Rae reversed the causality and attributed to technological innovation a primary role. Albeit the difference of opinion as to the level of importance attributed to machines, innovation was thought to be a factor to be taken into account when discussing economic progress. But, the experience of the early days of industrial revolution was also underlined by the liberal credo with the science of economics and liberalism interweaving.[21]

2. The socio-political context

The freedom to pursue economic conduct became the cornerstone of liberal thinking.[22] Economic freedom was viewed as a right and law was understood as being entrusted with its protection. Therefore, the political and economic component interweaved, as individuals would have the freedom to influence the laws governing their conduct and at the same time possess the necessary freedom of choice as to what to produce and how to produce it.

The bourgeoisie was the prime beneficiary, as it acquired new rights and freedoms against the constraints imposed by the nobility. Nonetheless, the ruling elite in Europe also largely embraced the new ideas. By the mid-1870s many of the objectives of liberalism had been attained, as reforms took place around

---

[21] Gerber, D. J. (1998) *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford: Clarendon Press; New York: Oxford University Press).

[22] ibid, at p. 17. The literature on liberalism is extensive. On the 19th century liberalism see Bramsted, E. K. and Melhuish, K. J. (eds) (1978) *Western Liberalism: A History in Documents from Locke to Croce* (London: Longman), especially see 'General introduction: Major strands of liberalism,' at p. 1-102; Salvadori, M. (1977) *The Liberal Heresy: Origins and Historical Development* (London: Macmillan), at p. 6-35. Ruggiero's account is a good starting point with good bibliographical references, see Ruggiero, G. (1981) *The History of European Liberalism* (Gloucester (Mass.): Peter Smith, orig. 1925), especially see 'What liberalism is,' at p. 347-369.

Europe. Economies flourished and technological and transportation advances were important engines of progress.[23]

At the same time, society was being irreversibly transformed. The modes of production were altered, as factories were created to allow for large-scale production. However, this resulted in the emergence of a new industrial society bearing little resemblance to Smith's understanding of a competitive economy. Factories grew in size, employing hundreds or even thousands of workers and managers were paid to make money for owners.

Artisans were now workers paid at the lowest possible cost, while competition had little to do with the moral values of a community. Finally, funding was important and banks emerged as partners, while trade became increasingly internationalised.[24]

As a result, a new class was created, whose members where people who had to change their traditional way of life and leave their communities.[25] Laws protecting workers arrived late. For example, it was not until the late 19th century

---

[23] Weir, D. R. (1984) 'Life under pressure: France and England, 1670-1870' 42 *Journal of Economic History* 27-47; McCloskey, D. (1985) 'The industrial revolution 1780-1860: A Survey' in Mokyr, J. (1985) *The Economics of the Industrial Revolution* (London: Allen & Unwin); Landes note 10 above, Chapters 1 and 2.

[24] Gerber note 21 above, at p. 20-23. Of course, there were considerable divergences in Europe as to the extent and means of financing businesses. In the UK, up until the third quarter of the 19th century most of the firms were family firms, employed no more than 50 workers and were financed by family finance and loans. On the other hand, in Germany banks played an important role in financing businesses, on the German banking system see Franz, R (1910) 'The statistical history of the German banking system' *Miscellaneous Articles on German Banking*, US Senate Document 508, (Washington DC: GPO).

[25] Landes, note 10 above. According to Landes, in 1912 in England, 12 per cent of people were employed in agriculture, while in 1951, this number dropped to five per cent. In France though, in 1789, around 55 per cent of the population were farmers, and interestingly, in 1866, at the heyday of the first industrial revolution, the same number still applied, while in 1950 it only dropped to one third of the population. Landes argues that one of the reasons for this is the high tariffs introduced to imported goods back in the 19th century. It is beyond the scope of this chapter to engage in a comparative appreciation of the effects of industrialisation in different European countries. The aim is simply to sketch the general characteristics of industrialisation.

that laws were passed in the UK providing for upper limits in working hours for women and children.[26] The faith in the liberal dream was lost by some segments of the society, although standards of living were increased considerably, at least for the bourgeoisie.

However, the aftermath of the great depression in the 1870s, which came as a result of the crash of the Vienna stock market coupled with disastrous harvests and increases in wheat sales from North America,[27] was that in times of crisis business would keenly welcome governmental intervention back. A new government-business alliance emerged, resulting in keeping prices up or increasing taxes in imported products. Moreover, business organised in associations, in order to influence political decisions, and in cartels, so as to increase size and face international challenges.[28]

---

[26] The British state was slow in enacting legislation. In 1847 the Ten Hours Act provided that women and children could work only ten hours a day (but what actually happened was that they were to work two hours on and two hours off while they could not leave the factory). In 1874 a maximum ten hours a day for men was introduced. Reacting to social injustice, several intellectual movements sought to give industrialisation a human face. *Utopian Socialists, Fabian Socialists* and the *French Saint Simonians* were all concerned with this. On these issues see, Taylor, K. (1982) *The Political Ideas of the Utopian Socialists* (London: Cass); Radice, L. (1984) *Beatrice and Sidney Webb: Fabian Socialists* (London: Macmillan); Iggers, G., Enfantin, B. P. and Barrault, E. (second ed 1958) *The Doctrine of Saint-Simon: An Exposition; First Year, 1828-1829* (New York: Schocken Books, orig. 1828). As regards *Utopian Socialists*, Robert Owen was one of the members of this intellectual school. He was a factory owner in Scotland and believed that the modern factory system promoted heartless individualism, thus introduced such improvements as shorter working hours, healthier and safer working conditions, insurance plans financed by payroll deduction, after-hours recreation, schools for children and adults, while refused to employ child labour. Owen tried to establish a utopian community and built settlements, called *'Villages of Cooperation,'* which were self-contained agricultural communities, where the unemployed could find employment, but had little decision-making power. *Saint-Simon* envisaged a society where an elite of philosophers, engineers, scientists and artists would lead industrialisation organised on the basis of *'rational'* Christianity, with scientists as priests. He was particularly concerned with unemployment and while he defended private property as the reward for achievement, did not view it as a sacred or natural right, which can be inherited. Radical followers of his are Blanc and Proudhon. Finally, *Fabian Socialists'* main position was that social reforms would be accomplished through the right to vote. A full discussion on these positions falls outside the scope of this chapter.

[27] Gerber note 21 above, at p. 25.

[28] ibid, at p. 25-27.

As a result of all these, liberalism, economic theory and conceptions as to the virtues of new technologies and competition were all under radical doubt. At the theoretical level, there were various responses to the inadequacies of classical economic theory. The German historical school, neo-classical economics and Marxism, all attempted to suggest novel theoretical paradigms.[29] Neo-classical economics and Marxism in particular took into account the role of technological innovation in the process, albeit the former only positioned it in the periphery of its analytical framework, while the latter attributed to it a prominent role.

3. Casting a critical eye

Alfred Marshall in England established the neo-classical school of thought. Building on the aspect of rivalry, neo-classical economists viewed competition as a state of affairs and used the abstract model of perfect competition to describe rivalry as being dependent on a demand and cost equilibrium determining which firm survives and which fails. Firms are conceived to be profit maximising agents rationally choosing to enter or exit a market according to a set of observed profit opportunities.

Firms then select an output where marginal costs equal the market price. As long as profit opportunities appear to exist, firms will continue to enter the market. Thus, in the long run, firms that remain will produce at the minimum efficient scale. Since a demand and cost equilibrium is the prerequisite of

---

[29] ibid. The previous discussion on liberalism and industrialisation did not touch on the very important issue of imperialism. Imperialism links to industrial revolution, as the colonies provided new markets and cheap raw material, see Ward, J. R. (1994) 'The industrial revolution and British imperialism, 1750-1850' 47 *The Economic History Review* 44-65. Again, due to space limits I cannot possibly elaborate on these issues here.

competition, the neo-classical focus is on the effects of competition and on market structure, and not on the behaviour of firms.[30]

There are two points emerging from the previous discussion: First, there is a circular effect between the notions of market equilibrium and utility maximisation. This is because when individuals maximise their utilities, they bring about the economic condition of equilibrium, and the economic equilibrium itself is the required condition under which the maximisation of the utilities of all individuals can be accomplished. This is why perfect competition is good for entrepreneurs and for the society as a whole.[31]

Second, according to the neo-classical production theory, firms make rational optimisation decisions based on the calculation of profit maximisation. To engage in such calculations, information on prices is crucial, while the development of new technologies is marginally important. Accordingly, technological change is an exogenous dimension in the neoclassical models.

Karl Marx looked at technological innovation in a different way, attributing to it a central role in his analysis of economic phenomena. His position is generally underlined by the assumption that phenomena under observation acquire meaning only under specific socio-economic circumstances.

Hence, terms, such as value, money and profit, do not have meaning outside the context of a capitalist society. Moreover, human history in the capitalist world is the product of struggles, which happen as a result of the

---

[30] Brian, C. (2000) *Shovelling Fuel for a Runaway Train: Errant Economists, Shameful Spenders, and a Plan to Stop Them All* (Berkeley: University of California Press).
[31] The utilitarian discourse as developed by Bentham and Mill would require an extensive analysis beyond the scope of this chapter.

contradiction between the forces of production and the relations in production. The upshot of this is that class struggles are the fundamental force injecting dynamism in the making of history.

At the same time though, Marx attaches great importance to technological factors. Technological advance is central in his analysis, as it is thought to be the motor behind the process of competition amongst firms. This is because, under the force of competition, firms are inexorably driven to adopt new technologies that substitute capital for labour.

This process results in rising productivity, but the flip side of it is unemployment. Nonetheless, the innovative potential of technologies was not always seen as unlimited. Marx hypothesises that in the end decreasing profit rate will stop economic growth. Accordingly, for him the solution was to choose a different economic order, as depressions were endemic to the system.[32]

He analyses two major stages in technology history: The *Manufacturing System*, based on the division of labour, and the *Modern Industry*, based on machines incorporating scientific knowledge and principles. Nonetheless, in his framework, full productive possibilities will be realised when machines are employed in the construction and production of machines themselves.[33]

Marx also argues that businesses were prone to grow in size, as capitalists would accumulate capital and then invest it in new machines, resulting in the production of more capital, thus identifying a cyclical effect between innovation and capital accumulation. Rosenberg mentions that Marx's analysis borrows

---

[32] Rosenberg, N. (1982) 'Marx as a student of technology' in Rosenberg, N. (1982) *Inside the Black Box: Technology and Economics* (Cambridge: Cambridge University Press), at p. 34-51.
[33] ibid.

much from Babbage on this point. Marx himself makes explicit reference to the latter author in volume III of *Capital*.

This is why he draws attention to the fact that the introduction of technological improvements was a central preoccupation to capitalists, which effectively means that a machine had a short life expectancy. As a result of this, a capitalist would have to make a new investment and then would have to recoup it as soon as possible, a process that may prove to be rather difficult.[34]

4. Transitions

Indeed, the late 19th century turned out to be a sluggish time for European economies. Textiles, iron, steel, chemicals, transportation, steam engineering, all slowed down. Marxists gave dire prognosis as to the possible effects of stagnation and conceived it to be the sign of sustained creativity.[35] Nonetheless, at the same time, a new wave of innovations made its appearance. Electrical science and internal combustion power provided new opportunities and marked the beginning of the second industrial revolution and the rise of new industries.[36]

Specifically, inventions, such as the dynamo in the late 19th century, allowed electric power to become the leading generating force of factories. This technological improvement, taking the place of the steam engine, allowed

---

[34] ibid. Rosenberg notes that Babbage quotes a Report of the Committee of the House of Commons on the Wool Trade (1806), which asserts that large factories can afford the risks and experiments to generate technological change that are not feasible for the *'little master manufacturers.'*

[35] Landes note 10 above.

[36] ibid.

factories to work with greater efficiency and at a lower cost, improving the economic growth of the capitalist world.[37]

Initially, this technological improvement was at the cost of thousand of jobs. However, the lower production costs enabled capitalists to invest heavily in the new technology, a process, which was not completed until after the Second World War, as it was not before that time that new jobs were created.

The beginning of the 20th century though was marked by another major event: The First World War. It was then that Europe witnessed the collapse of three empires, Germany, Austro-Hungary and Russia. Moreover, regions and population in Europe were devastated, as it was the first *industrial* war. Weapons of mass destruction, such as chemical gas, were used, while machines guns, aeroplanes and submarines were employed in great numbers. More than ever before, it was made clear that the army possessing technologically advanced weaponry had a huge advantage over others.

The First World War permanently changed the face of European politics. Soldiers who had died in enormous numbers for their country could not be deprived of the vote. This is why the electorate expanded after the war. Moreover, after 1914, women began acquiring voting rights. The result was the rise of Labour Parties. In Britain, for example, where less than half of adult males

---

[37] Rosenberg, N. (1972) *Technology and the American Economic Growth* (New York; London: Harper and Row); David, P. A. (1990) 'The computer and the dynamo: A historical perspective on the productivity paradox' *The American Economic Review Papers and Proceedings* 355-361.

could vote before the First World War, the socialist Labour Party multiplied its vote sevenfold in the election of 1918.[38]

Still adjustment to new realities was difficult. Times were hard for the European economies in the 1920s and 1930s.[39] The Great Depression of the 1930s resulted in great numbers of unemployment around Europe and steelworkers and miners faced despair as factories closed. As a result of the First World War and the crisis of the 1930s, economic theory had to face political and social reality.

Protectionism, strong control of capital movements, fixed exchange rates and optional barriers were introduced to domestic economies. It was then that the foundations were laid for the modern welfare state. Post-war Keynesian economics promised to tame the cyclical tendencies of capitalist economies. Full employment and social rights of citizenship were to be secured. Poverty was to be alleviated and social security to be guaranteed. State interventionism was introduced to national systems of work and welfare.

At the same time though, the western world was witnessing in the 1930s another technologically creative momentum, as new innovations were invented. The application of chemical and electrical science and advances in the generation

---

[38] Eichengreen, B. (1984) 'Innovation and integration: Europe's economy since 1945' in Fulbrook, M. (ed) (2001) *Europe since 1945* (Oxford; Oxford University Press).

[39] The literature on the reasons and consequences of the Great Depression in Europe is vast. For an interesting review see Clavin, P. (2000) *The Great Depression in Europe, 1929-1939* (Basingstoke: Macmillan). For a view on the implications for Britain see Stevenson J. and Cook, C. (1994) *Britain in the Depression* (London; New York: Longman).

and delivery of power were some of the events that gave birth to the third

industrial revolution.[40]

---

[40] Landes note 10 above.

A. MODERN THEORETICAL PARADIGMS

The events described in the previous section had made clear one thing: Technological progress can be a good and an evil at the same time. Joseph Schumpeter lived to see the upheaval emerging from the transition from a technology, which has saturated its possibilities, to a new technological paradigm. By 1930, technology had already arrived in three clusters, all of them defining an era, but transition from the one to the other prove to be difficult.[41]

Schumpeter reconciled both these facets by arguing that although instability is endemic to capitalism, transitory periods are difficult but temporary. He thus offered an alternative model to the orthodox neo-classical paradigm and positioned technological innovation at the heart of economic analysis. As late as in the 1960s, neo-classical economics took the importance of innovation on board arguing that state intervention aiming at promoting science can be justified if understood as a public good. In 1984 Rosenberg and Kline offered a different framework, where innovation is conceived as a learning process.

The previous sections argued that innovation is important to economy and society. I here look at the above mentioned different paradigms with a view to show the diverse options available to law and policy as to the ways innovation may be fostered.

---

[41] The exact phases and what happens within them are subject to debate. I adopt Landes' chronology, ibid.

1. Schumpeter and the technological imperative

Schumpeter was strongly influenced by Marx's analysis.[42] He reiterated that technological change is the *'the fundamental impulse that sets and keeps the capitalist engine in motion.'*[43] He thus understood economic activity as functioning according to a technological teleological imperative. Therefore, for firms to survive they must engage in technological innovation. Unlike Marx, Schumpeter argued that new technologies continuously come into existence, forming a sequence of techno-economic paradigms, it being a process that results in the destruction of the old economic structure incessantly bringing about a new one.

He terms this process *'creative destruction'* and understands it as being an essential component of capitalism.[44] Transitions are not easy, but in times of economic upheaval and in the face of uncertainty entrepreneurs discover new value, engage in new types of investment and bring about new innovations.[45]

Schumpeter reacted to the neo-classical static model of competition to argue that competition should be viewed as a dynamic event and not as a state of affairs, focusing on the behaviour of firms and not on market structure, as

---

[42] Rosenberg, N. (1986) 'Schumpeter and Marx: How common a vision?' in MacLeod, R. M. (ed) (1986) *Technology and the Human Prospect* (London: Pinter), at p. 197-213; Elliott, J. (1980) 'Marx and Schumpeter on capitalism's creative destruction: A comparative restatement' 95 *Quarterly Journal of Economics* 45-68, at p. 45-68; Catephores, G. (1994) 'The imperious Austrian: Schumpeter as bourgeois Marxist' (1994) 205 *New Left Review* 3-30.

[43] Schumpeter, J. A. (seventh ed 1987) *Capitalism, Socialism and Democracy* (London: Unwin Paperbacks, orig. 1942), at p. 83.

[44] ibid.

[45] Schumpeter predicted that capitalism would be replaced by socialism. *'The capitalist process not only destroys its own institutional framework but it also creates the conditions for another.... The outcome of the process is not simply a void that could be filled by whatever might happen to turn up; things and souls are transformed in such a way as to become increasingly amenable to the socialist form of life... In both of these respects Marx's vision was right'* ibid, at p. 162. The argument to this conclusion is found in Chapters 11 –14, but this chapter will not elaborate further on Schumpeter's position on this as it falls outside its scope.

otherwise economic theory would fail to come to grips with reality and in particular with technological innovation.

This is because Schumpeter thought that technological progress is possible in what neo-classical economists describe as an inefficient economic environment, and stressed that competition is a dynamic process, in the course of which entrepreneurs seek new profit opportunities in a world of constant change. Therefore, profits should not necessarily be considered as inefficiencies, but as entrepreneurs' response to changing market, organisational and technological conditions.

It is important to note here that Schumpeter saw innovation as the introduction of *decisively new products*. He defined the innovation process as in *invention*, a process of discovery of new technical principles, *innovation*, a process of development of an invention into a basically commercial form, *diffusion*, or the spread of an innovation into commercial use.[46]

As mentioned, Schumpeter supported the view that price competition is less important than innovative products and processes, which may require significant resources.[47] But, what would then be the role of law in this process? If

---

[46] Smith, K. (2002) 'Measurement of innovation in Europe: Concepts, experience and results' *Observatoire des Sciences et des Technologies (OST, Canda) Working Paper No. 17* (March 2002).

[47] Schumpeter, J. A. (1983) *The Theory of Economic Development: An inquiry into Profits, Capital, Credit, Interest, and the Business Cycle* (New Brunswick; Transaction Books, orig. 1934), at p. 61-67 and 90-94. Schumpeter was influenced by Marx's analysis, as the latter author insisted on the importance of technological advance as being an essential element of competition among firms; Littlechild, S. C. (second ed 1986) *The Fallacy of the Mixed Economy: An 'Austrian' Critique of Recent Economic Thinking and Policy* (London: Institute of Economic Affairs); Hayek, F. A. (1949) *Individualism and Economic Order* (London: Routledge & Kegan Paul), especially see Chapter 5 The meaning of competition, at p. 92-106;

governments intervene to reduce the profits of winners, this may reduce the incentive for existing and prospective firms to innovate.[48]

The fact that he positioned innovation as central to understanding the function of the economy influenced both the neo-classical thinking and the chain linked model of innovation. The following will look into this.

2. Innovation as a process and as a good

In view of the above, neoclassical innovation theories took on board the importance of innovation.[49] However, in this model technology is equated with *'science.'* Therefore the argument is that if a market failure is identified, public financing may be required.[50] This is most likely to be expected in fundamental research, as at this stage the produced knowledge may be conceived as a *public good*.[51]

---

[48] The focus of this approach is nonetheless different from the hands-off approach propagated by the Chicago school. While Schumpeter stressed the importance of giving entrepreneurs the incentive to innovate, the proponents of the Chicago school argue that regulation is not required since market foreclosure and monopoly power may be short lived, as markets behave as if they are competitive and are in long run equilibrium. Nonetheless, both schools of thought stress that innovation may flourish in concentrated markets. Therefore, competition policy should not only base its analysis on the notion of market share, as production efficiency may require large firms, and as such a highly concentrated industry can be efficient. Moreover, monopoly power may be an incentive to engage in innovation, so governments should be careful not to take away this incentive, Audretsch, D. B., Baumol, W. J. and Burke, A. E. (2001) 'Competition policy in dynamic markets' 19 *International Journal of Industrial Organization* 613-634; Posner, R. A. (1979) 'The Chicago school of economic analysis' 127 *University of Pennsylvania Law Journal* 925-952. Posner, R. (fifth ed 1998) *Economic Analysis of Law* (Boston: Aspen Law & Business).

[49] Hofer R. and Polt, W. (1962) 'Evolutionary innovation theory and innovation policy: An overview' in A new economic paradigm? Innovation-based evolutionary systems, *Discussions in Science and Innovation 4, An Occasional Paper in a Series on Australia's Research and Technology and their Utilization* Department of Industry, Science and Resources, Science and Technology Policy Branch, at p. 12, citing Arrow, K. J. (1962) *'Economic Welfare and the Allocation of Resources for Invention'* (National Bureau of Economic Research) and Stiglitz, J. E. (1993) *Information and Economic Analysis* (Oxford: Oxford University Press).

[50] Baldwin, R., Hood, C. and Scott, C. (eds) (1998) *A Reader on Regulation* (Oxford: Oxford University Press).

[51] Hofer and Polt note 49 above.

Yet, the importance of innovation has also been acknowledged by a different theoretical paradigm: The *'chain-linked model of innovation'* as developed by Rosenberg and Kline.[52] This framework of analysis though stands critical to both the understanding of innovation as science and to the separation between innovation and diffusion processes, by emphasising the role of *'tacit'* and *'non-scientific'* knowledge in production.

Following this line of thinking, Rosenberg and Kline argued that innovation is not a linear process, but one involving many interactions and feedbacks, as innovation does not only depend on invention processes (in the sense of discovery of new principles), but stressed the importance of different forms of knowledge, for example production know-how at the level of workforce.[53]

Hence, innovation is not conceived as being an isolated event, but is influenced by the wider environment. Firms then are thought to be active participants in learning, as every firm has its own culture consisting of routines and ideas of best practice, which influence the ways that new scientific ideas are understood and thus affect the direction and quality of innovation. This is why, understanding the importance of the cultural background of a firm as in practices that endure through time, is valuable in order to explain differences in performance and quality in respect to technological innovation amongst countries.

---

[52] Kline, S. J. and Rosenberg, N. (1986) 'An overview of innovation' in Landau, R. and Rosenberg, N. (eds) (1986) *The Positive Sum Strategy: Harnessing Technology for Economic Growth* (Washington, D.C: National Academy Press), at p. 275-305.
[53] ibid.

Therefore, *'the role of institutions, understood as firms, universities, research institutes, standards and technology transfer agencies, is highlighted since they are seen as constituting both the collective memory of past knowledge received and processed and the guardians of routines for handling and processing new information.'*[54]

Hence, the chain linked model of innovation is concerned with providing incentives and putting in place procedures, which would enable the participation of various agents. Thus, policies should not concern themselves with the production of a particular product (for example microelectronics) but should promote education, put in place processes that would aim at establishing consensus as to the development and implementation of technologies, and support *experimental behaviour*, for example in new types of industrial organisation.[55]

---

[54] Peterson, J. and Sharp, M. (1998) *Technology Policy in the European Union* (Basingstoke: Macmillan), at p. 48
[55] Hofer and Polt note 49 above.

B. THE STORY OF THE EUROPEAN UNION: THE OBJECTIVE OF MARKET INTEGRATION AND THE ROLE OF THE EUROPEAN COMMISSION

By the 1960s Europe had experienced two world wars and successive clusters of innovations, the last being marked by the invention and use of the transistor in 1948 and of the electric circuit on a chip. Technological progress had proven to transform the mode of living and thinking about the world.

At the theoretical level, competing economic paradigms lent themselves to understanding its importance in different ways, although the neo-classical model, which represented the orthodoxy in the field, did not embrace its importance in the fundamental way that the Schumpeterian and the chain linked models of innovation did. Moreover, innovation could be conceived as being both the product of scientific research produced in laboratories and the result of minor modifications introduced by skilled workers in the workplace on the basis of tacit knowledge.

All these called attention to two fundamental understandings: First, innovation is good for the economy and for society. Second, there are various ways to promote it. For example, promoting innovation can be done either directly by financing certain sectors of the economy with the aim to support a particular product, or indirectly, by promoting collaboration, education, experimental behaviour and the exchange of knowledge by means of putting in place neutral and objective processes aiming at establishing consensus as to the development and implementation of technologies.

However, understanding how the above perspectives acquired meaning in the context of the European Union, requires looking into its political and legal traditions. To this effect, the following will look at market integration as understood through the lenses of Jean Monnet's *technocracy discourse* promoting expertise, elites and functional intermediation during the early steps of liberalisation.

I here also discuss the influence of *ordoliberalism* in the early days of the European Community, as it presents an alternative model of regulatory law based on the deployment of neutral and objective procedures indirectly intervening in the economy. Finally, I look at the historical conjunction of events leading to efforts to create the common market and the single market in Europe.

1. Ordoliberalism and market integration

The early days of European integration were considerably influenced by *ordoliberalism,* a school of thought established in Germany in the 1930s. According to this school, economic phenomena were thought to be formed through political and legal decision-making. The proponents of this theory, called *ordoliberals,* stood between the Western and Soviet economic models to offer an alternative vision of liberalism, which sought to equally constrain private and public power.[56]

Ordoliberal thinking was elaborated at a time when Germany was witnessing the catastrophic influence of private power during the Weimar

---

[56] Gerber note 21 above, at p. 239.

period, therefore, the neutral and objective character of law was seen as safeguarding against such abuse.[57] Coming to grips with the role of law in this framework requires first looking into the three main notions found at its heart: *'Isolating abstraction,' 'thinking in orders'* and *'economic constitution.'*

Eucken, one of the founders of this school of thought, attacked the historical method, which was prominent in Germany at the time, as *'economic reality compels the economist to formulate his first main problem as a historical one, but it also forces him in quite another direction.'*[58] Therefore, *'the simple direct contemplation of the facts of economic history'*[59] was thought not to be enough.

Economic reality partly reveals itself by means of observing the everyday life of a household or a firm in a given place and at a given time. Yet, such observations should serve as the basis for the deduction of abstract principles, with the aim of building ideal types for a particular society. It is only by virtue of *'isolating abstraction,'* the abstraction of especially *'significant characteristics,'*[60] that economic phenomena can be truly explained. He therefore claimed that any

---

[57] Walter Eucken, Franz Bohm and Hans Grosmann-Doerth are the founding members of the Freiburg school in the 1930s. Gerber notes that the Freiburg school is closely associated with Von Hayek's neo-liberalism and the idea of social market economy, although they present very different theoretical paradigms, for the former sees no role for the state to maintain competition, while the latter lays emphasis on the re-distributional role of the state, see Gerber above note 21, at p. 234, 236-237. But, it was while at Chicago that Hayek wrote what many consider his outstanding work, *The Constitution of Liberty*, published in 1960. In it, he further developed one of his most important themes: Laissez-faire was not enough. Government did have a clear role: Ensuring the development and maintenance of the institutions -- the laws and rules -- that would ensure a competitive economy. However, Hayek also put emphasis on that governments did not have the necessary information to take decisions, see Hayek, F. A. (1960) *The Constitution of Liberty* (London: Routledge & Kegan Paul).
[58] Eucken, W. (1950) *The Foundations of Economics: History and Theory in the Analysis of Economic Reality* (London, Edinburg, Glasgow: William Hodge and Company Limited, orig. 1940), at p. 37.
[59] ibid, at p. 38.
[60] ibid, at p. 326

attempt to formulate independent theories of production, exchange, distribution, and consumption must be abandoned.[61]

'Ordnungstheorie' or *'thinking in orders'* is a concept that interweaves with isolating abstraction. Eucken recognises that there are two fundamental orders: The *transaction economy* characterised by economic freedom and the *centrally administered economy* characterised by organised economic activity.[62] Choosing between one of these fundamental orders requires adopting adequate measures to implement its operating principle.

This is because when elements from the two orders are mixed, then it would fail to fulfil its promises and would result in an economic disaster. This would happen, for example, if governmental intervention were to be introduced to a system of transaction economy, as, at the heart of the *'transaction economy'* order, is the notion of economic competition. In other words, these two orders are thought to be incompatible, and the first step to explain economic failures requires recognising this.[63]

Nevertheless, ordoliberals argued that the economic system could not be left to function without constraints. They claimed that societies need an economic as much as they need a political Constitution, thus linking the legal to the economic system. Therefore, although they supported the idea of a market economy, they did not believe that markets just happen, but presuppose a set of political choices that *make* them happen.[64] Hence, the legal system must create the

---

[61] ibid, at p. 304-320
[62] ibid.
[63] ibid.
[64] Gerber note 21 above, at p. 254 and 264.

conditions to allow the chosen economic order to function effectively, and would

thus *indirectly* intervene in the function of open markets.[65]

If the desired order is a transaction market economy, then an *economic*

Constitution should be put in place to safeguard basic principles such as monetary

stability, open markets, private property, contractual freedom, liability and

policy consistency,[66] while regulatory principles (such as competition law)

flowed from and implemented the above mentioned constitutive principles.

Competition law in particular was central to the ordoliberal vision, as anti-

monopoly policy was thought to be at the heart of the economic system, since

any other policies aiming at fostering competition could not be effective if firms

would raise barriers to entry or fix prices.[67]

The ordoliberal thinking thus endorsed the basic liberal mandate, which

provides that economic freedom is a right and law should put in place

democratic institutions allowing for the participation of citizens in the decision

making process. However, governmental power and private power were viewed

as being equally potentially dangerous. The former could curb the freedoms of

individuals while the latter, in the form of big business, could equally hinder

social integration around the principles of equal participation and fairness.[68]

The law was then seen as safeguarding against abuses of power by both

the sovereign and private forces. Central to this was the assumption that law is

neutral and objective, functioning to put in place the structural conditions that

---

[65] ibid, at p. 247, 248, 264 and 347.
[66] ibid, at p. 248.
[67] ibid, at p. 250, citing Eucken, W., Eucken E. and Hensel, K. P. (1990) *Gründsätze der Wirtschaftspolitik* (Tübingen: Mohr, sixth ed), at p. 251.
[68] ibid, at p. 240-241

would allow the smooth function of the economy, hence its *indirect* character in regulating the economy.[69]

Gerber notes that many Germans associated with or sharing an appreciation of ordoliberalism were influential at the early stages of the formation of EU economic policy.[70] In particular, Hallstein was one of the founders of the EEC Treaties and served as the first President of the European Commission. He had been a law professor in Germany, being deeply influenced by the ideas of Eucken and being closely acquainted with Bohm and Kronstein, two prominent members of the Freiburg school. Gerber argues that Hallstein was clearly pursuing ordoliberal goals during the early attempts to integrate markets in Europe.[71]

Moreover, von der Groeben was one of the two drafters of the Spaak report, upon which the Treaties of Rome were based.[72] Finally, Muller-Armack also exerted important influence in early policy making. He was the founding father of the *social market economy* circle of intellectuals, a movement closely associated with ordoliberals.[73] He was working for the German government, being responsible for Community matters.

---

[69] ibid, at p. 248, citing Böhm, F. (1937) *Die Ordnung der Wirtschaft als geschichtliche Aufgabe und Rechtsschöpferische Leistung* (Stuttgart : [s.n.]), at p. 7-9.

[70] ibid, at p. 263.

[71] ibid, at p. 264, citing Hallstein, W. (1972) *Europe in the Making* (London: Allen and Unwin; New York: Norton, orig. 1969), at p. 28: *'What the Community is integrating is the role of the state in establishing the framework within which economic activity takes place.'*

[72] ibid, at p. 263

[73] ibid. There are differences between Müller-Armack's position and ordoliberals. Müller-Armack thought that social policies (such as co-determination of workers, progressive taxation, social transfers, minimum wages, subsidies for small and medium sized firms, subsidies for housing, or business-cycle stabilisation) should be provided for, while for Eucken social justice would be the consequence of a competitive order, see Wohlgemuth, M. (2002) 'Unification, Integration, Globalisation: The German social market economy facing a threefold challenge' working paper

Although the creation of a common market in Europe has different underpinnings as we will see in the following sections, ordoliberal thought was well suited to accommodate the pursuit of European integration through the creation of a common market based on the idea of a competitive market economy, since such a position was already central to ordoliberalism.[74]

2. The Common Market

The first attempt to integrate markets in Europe was in 1951, when the European Coal and Steel Community (ECSC) was established by France, Germany, Italy and the Benelux countries (Belgium, Netherlands and Luxemburg).[75] This first form of co-operation came as a reaction to the havoc the Second World War inflicted upon Europe. The text of the Treaty was based on a proposal by the French foreign minister, Schumann, was drafted by Monnet, a key figure in French politics,[76] and was underlined by the endeavour to deter disputes over scarce resources such as coal and steel.

The institutions put in place were: The *High Authority*, consisting of nine independent appointees of the six member states (MS). This institution was meant to be the main executive body with decision-making powers and responsibility to implement the Treaty. The *Assembly*, comprising of national Parliament delegates, The *Council*, whose members were representatives of

---

[74] Gerber note 21 above, at p. 264.

[75] Craig, P. and de Búrca, G. (third ed 2003) *EU Law: Text, Cases, and Materials* (New York: Oxford University Press), at p. 7-10.

[76] ibid. Monnet was influential in convincing the Americans to adopt the Marshall Plan to help rebuild Europe. The Monnet Plan was the French implementation of the Marshall Plan.

national governments, and finally, a *Court of Justice* to interpret the provisions of the Treaty.[77]

The Treaties of Rome re-presented a later effort to foster co-operation on a larger scale. They were signed in 1957 and followed very much the institutional pattern introduced to the ECSC. The significance of these Treaties lies on that a new notion, *'common market,'* was for the first time employed. Spaak, the Belgian prime minister, prepared a report, which proposed the European Atomic Energy Community and the European Economic Community. As a result of the Treaties entering in force, a regulated common market was established, which was to function on the basis of purely economic criteria aiming at promoting market integration and eliminating tariffs and barriers to entry.

The common market would share the Assembly and the Court of Justice with the ECSC, but a separate Council of Ministers and a separate executive body, the *Commission,* was put in place. Institutional rebalancing was required though, as the new common market would include economic activity in general, and not only activity emerging from the coal and steel sectors. Therefore, the Council would have to approve all legislative proposals by the European Commission, but the latter body, set at a supranational level, was entrusted with the task of policy initiation, was the 'watchdog' of the Treaties and the negotiator of international agreements on its behalf.[78]

Nonetheless, it would be wrong to consider that the first efforts to integrate markets in Europe were underlined by consensus as to the merits of the

---

[77] ibid, at p. 10-12.
[78] ibid, at p. 12.

liberal mandate to foster economic competition. Many Europeans saw economic

integration as the way to generate economic wealth, since national markets were

too small to support economies of scale. Close to this was the idea that firms

would then have the necessary size to compete internationally.

Thus, economic integration was seen as the necessary prerequisite to

compete with the Americans.[79] In other words, many Europeans back in the

'foundational period'[80] saw economic integration as the means to deal with the

economic and political power of the USA. Therefore, the notion of common

market would encompass more considerations that the ones that purely link to

the competition process *per se.*[81]

An alternative framework, which was particularly influential in the early

days of the Community, can be found in what has been termed as the *'Jean*

Monnet approach.'[82] The following will look into this.

3. Monnet and the *'technocracy discourse'* of the early days of the

Community

Monnet was a key figure in French politics after the Second World War. In

1945 the *Monnet Plan* provided that key sectors of the French economy, such as

---

[79] Gerber note 21 above, at p. 348.

[80] This term has been employed by Gerber, above note 21, at p. 346, who borrowed it from Weiler, see Weiler, J. H. H. (1991) 'The transformation of Europe' 100 *Yale Law Journal* 2403-2483.

[81] ibid.

[82] This idea is loosely based on Joerges' analysis, who acknowledges the importance of the intellectual frameworks provided by ordoliberalism and administrative functionalism in feeding into present models of governance in the EU, see Joerges, C. (2000) 'Conceptualising governance for the European "Großraum' paper presented at 'Perceptions of Europe and Perspectives on a European Order in Legal Scholarship During the Era of Fascism and National Socialism' workshop at the European University Institute, Friday 29 September - Saturday 30 September 2000.

transportation, coal, electricity, steel and agricultural mechanisation, required reconstruction. The plan thus set goals for the French economy to accomplish by 1950.

Later, fuel and fertilisers were added to the list. Under the Monnet Plan, in each key sector the details of the planning were left to the modernisation committees consisting of representatives of the Planning Commission. The key institution was the *Commissariat General du Plan*, which was a small and flexible administration co-ordinating technical studies and organising the consultation of all parties involved. Committees of civil servants, the industry, scientific institutions, all presented opinions and tried to reach consensus incorporated in a *Plan*. However, this was not binding but the government was responsible to adopt and implement it. This process came to be known as *'planification.'*[83]

Featherstone traces the origins of the Monnet Plan back to the French *'dirigiste'* tradition and to new economic thinking.[84] As for the former, it refers to the tradition of central governmental planning in French history, from the reign of Louis XIV to the present day. In its narrower sense, *'dirigisme'* refers to the government's role in *directing* the French economy since 1945.[85] This term interweaves with the notion of a strong, prestigious, cohesive and above all

---

[83] The General Planning Commissariat *(Commissariat Général au Plan, CGP)* was created by Jean Monnet in 1947, as a small permanent body of expert civil servants attached to the Prime Minister's office and responsible for drawing up the Five-Year Plan, see Estrin, S. (1983) *French Planning in Theory and Practice* (London: Allen and Unwin).

[84] Featherstone, K. (1994) 'Jean Monnet and the democratic deficit in the European Union' 32 *Journal of Common Market Studies* 149-170, at p. 155.

[85] Carlberg, R. (2001) 'The persistence of the *dirigiste* model: Wireless spectrum allocation in Europe *à la Francaise'* 54 *Federal Communications Law Journal* 130-163, at p. 134.

autonomous from societal influences bureaucracy, with prestigious schools being

entrusted with the production of the administrative elite.[86]

Indeed, the Monnet Plan both stressed the importance of expertise and

was *'dirigiste,'* in the sense that it favoured specific sectors of the economy. But, it

also exhibited corporatist elements,[87] as it provided that policy-making would be

formed by bringing together interested parties.[88]

Understanding the rationale that underlined the Monnet Plan in France is

important, as it casts light on the ideas influential during the early steps of the

Community. This is because the first attempts to integrate markets in Europe

bear the traces of the *Monnet approach.*[89] As we saw, the ECSC was assisted by an

Assembly, which had little power, mainly advisory and supervisory, while the

High Authority was entrusted with regulating the limited areas of policy falling

within its supranational competences.

---

[86] Gerber note 21 above, at p. 182.

[87] For an introduction to corporatism see Katzenstein, P. J. (1985) 'The historical origins of democratic corporatism' in Katzenstein, P. J. (1985) *Small States in World Markets: Industrial Policy in Europe* (Ithaca, N.Y.: Cornell University Press).

[88] Featherstone note 84 above.

[89] Cini, M. (1996) *The European Commission. Leadership, Organisation and Culture in the EU Administration* (Manchester; New York: Manchester University Press; New York: St. Martin's Press). Jean Monnet's approach is associated with *'functionalist integration,'* see Mazey, S. (2001) 'European integration: Unfinished journey or journey without end?' in Richardson, J. (ed) (second ed 2001) *European Union: Power and Policy-Making* (London: Routledge), at p. 27-50. At p. 28, the author characterises European integration as basically functionalistic, but also as being underlined by ambiguity: *'The "Community method" of functional integration advocated by Jean Monnet was an ingenuous device; crucially it enabled the (federalist inclined) founding fathers of European integration to side-step the politically intractable barrier of national sovereignty. Then, as now, there was no consensus over the precise form that European co-operation should take. The founding Treaties of the European Communities did not resolve this issue; rather they represented an ambiguous compromise between intergovernmentalists and European federalists involved in the post-war debate on European co-operation. The former viewed the European Coal and Steel Community (ECSC), the European Economic Community (EEC) and the European Atomic Energy Community (EURATOM) created by the Treaties, as functional agencies charged only with the coordination of national, economic strategies in designated sectors. However, European federalists hoped that these agencies would, over time, provide the basis for a more comprehensive kind of political integration.'*

This body was structured along the lines of the French administration.[90]

Nevertheless, Monnet preferred small flexible structures. He asserted that the supranational competencies of the High Authority could be best exercised by small teams, *'as a few hundreds of European civil servants would be enough to set thousands of national experts to work.'*[91]

Moreover, the permanent staff would have to be assisted by national experts who would spend small periods in the High Authority. The same rationale was carried over to the new institution, the European Commission, which was put in place to support the creation and regulation of a common market as propagated by the Treaties of Rome.

As Cini argues *'the discourse underpinning the new European Commission was that of the High Authority. This was a discourse that emphasised the importance of efficiency, expertise, elites and functional interest intermediation-one that had little to say on the subject of democratic accountability and democratic representation: One which we might call a 'technocracy discourse.'*[92]

4. The Single European Act

The creation of a European common market encountered great resistance, as member states, such as France, were not ready to give up sovereign control of

---

[90] Featherstone note 84 above.
[91] Page, E. G. (1997) *People Who Run Europe* (Oxford: Clarendon Press), at p. 5
[92] Cini, M. 1996) 'Organisational culture and reform: The case of the European Commission under Jacques Santer' *EUI Working Paper* EC (1996/00/25).

resources to a supranational entity.[93] Despite the above, things changed in the

1980s and the Single European Act (SEA) entered in force in 1987.

Its primary objective was to progressively establish an internal market

within a five years period of time. The SEA presented an opportunity to

overcome the crises, which have accompanied the creation of the *'common market'*

since 1951-57.[94] Yet again, the role of the Parliament was limited. It was not until

the Maastricht Treaty (TEU) that this was challenged. The difficulties that

emerged during the negotiations of this Treaty showed that there was popular

disquiet with the fact that the European Union seemed to be obscure and far from

the peoples of Europe.[95]

Nevertheless, in the 1980s the notion of *common market* and *single market*

were well embedded in the discourse of co-operation at a European level. The

concept of single market, as introduced in the late 1980s, provided that markets

would be opened, while the free movement of people, goods, services and capital

would be the operating principles upon which competitive markets would

function.

All MS then accepted happily the new prospect of economic co-operation.

One reason for this may be that there was a widespread feeling in Europe that

---

[93] The 1960s signified an intergovernmental turn in the history of the European Union. De Gaulle in France supported the *Luxembourg Accords*, which required that unanimity (when required to reach decision) in the Council could be challenged if a national interest was at stake. This in essence meant that qualified majority voting became the norm and unanimity the exception, a development that marked a return to intergovernmentalism, see Craig and de Búrca note 75 above, at p. 13.
[94] ibid, at p. 19-21.
[95] Cini note 92 above, at p. 8.

the global challenge was too big to be taken independently by MS.[96] Another

explanation may be that there were considerable ambiguities as to the main

objectives of the Treaty and as to the means to attain these.[97] Britain for example

conceived the SEA as a liberal charter, whereas some commentators questioned

the feasibility of fulfilling economic objectives without addressing social issues,

as the two necessarily interweave.[98]

Yet, despite differences, consensus was established as to the virtues of

economic co-operation.

---

[96] This line of thinking is repeated in recent documents by the European Commission, see for example the Communication from the Commission to the Council, the European Parliament, the Committee of Regions and the Economic and Social Committee COM (1998) 718 of 20 January 1999 on the Competitiveness of European Enterprises on the Face of Globalisation-How It Can Be Encouraged.
[97] Craig and de Búrca note 75 above, at p. 21.
[98] ibid, citing Weiler note 80 above.

C.   SETTING THE STAGE FOR THE LIBERALISATION OF

TELECOMMUNICATIONS AND PRO-COMPETITIVE

COLLABORATION

Expertise, market integration and ordoliberalism, all fed into conceptions

that underlined the foundational period. Moreover, sudden technological

advances and globalisation,[99] gave rise to new understandings as to the merits of

co-operation, providing the operating context of these ideas.

1. Liberalising Telecommunications: Early steps

In the 1980s the context had become much different with globalisation and

the increasing pace of innovation requiring new approaches to competition. It

has been noted that it was then that for the first time Europe *'attempted to achieve*

with national champions regionally what has been accomplished up to now within nation

states: Using high technology to build competitiveness.'[100]

Yet, at that time, telecommunication companies were public utilities

controlling networks, services and terminals. They were considered as natural

monopolies, the theoretical premises of this position being that only one supplier

---

[99] Globalisation is defined as a set of processes resulting in the interdependence of previously separate national economies due to increased cross border investment, the modernisation of infrastructures in telecommunications and transport, the emergence of information based economies, the number of alliances between firms, and finally the new regional and global projects to free trade, such as the NAFTA and WTO, see Peterson and Sharp note 54 above, at p. 17

[100] On the attempts of Europe at a regional level to catch up with new developments in the high-tech industry see Sandholtz, W. (1992) *High-tech Europe. The Politics of International Cooperation* (Berkeley: University of California Press).

should be left to enter the market, as competition would be disastrous for competitors.

However, the underpinnings of natural monopoly theory were not satisfied anymore, as digitalisation (in the form of digital switches sending and receiving information), fibre optics and satellite transmission, allowed for an enormous increase in the capacity of networks now carrying both voice and data. In this context, both Japan and USA in the 1980s carried out regulatory reforms that allowed telecommunication companies to enter new markets and compete internationally.

In the light of the above, business and users associations, began lobbying for liberalisation. Drahos and Braithwaite argue that one of the most prominent features characterising the conduct of these groups was their ability to organise in networks in order to promote the deregulation agenda. Hence, the International Telecommunications Users Group (INTUG), which was formed in Europe in 1974, had 23 national Telecommunication Users Groups (TUGs) as members, 50 multinationals (MNEs), and about 20 academic and individual members.[101]

When INTUG was established, prominent members of it were American Express and the Bank of America, while two-thirds of its funds came directly form MNE members. Even though INTUG was established in Europe, its leadership was dominated by US companies and ideas. So the European Council

---

[101] Braithwaite and Drahos note 6 above, at p. 342. The authors further argue that MNEs became members of national business organisations in order to support the deregulation agenda. The Bank of America, for instance, became a member of the Telecommunications Managers Association, the British Association and the British National Committee of the International Chamber of Commerce (ICC), which is a world business organisation.

of Telecommunications Users Associations (ECTUA) was founded in order to present its European members' interests in policy debates.[102]

Drahos and Braithwaite capture the strategies employed by telecommunication users organisations during the very early stages of the deregulation movement to push for user-oriented regulation, use of networks on a non-discriminatory basis and freedom of equipment choice. To this effect, they cite an interview with INTUG chairman Ernst Weiss in 1984, who said that

We are working in the corridors of power to gain acceptance for these points and to press their practical interpretation with the appropriate bodies involved with these issues. Specifically on the question of regulatory controls and monopoly authorities we are pressing our views with the OECD on non-discriminatory access to networks. We have a work group to carry out lobbying activity in the EEC. For maximum freedom of user choice of equipment, we have representatives working in a joint committee with the ICC. In addition INTUG is taking an increasingly active role in CCIT study group with our experienced delegation.[103]

Drahos and Braithwaite argue that user pressure was so important that the current degree of deregulation would not have been accomplished without it. Up until the 1980s, telecommunications was not on the supranational agenda of the EC, and cooperation took place in an organisation outside the EC, the Conférence Européenne des Administrations des Postes et des Télécommunications (CEPT). CEPT was the meeting point of ministers responsible for public

---

[102] ibid.
[103] ibid.

telecommunications companies (PTTs) and was highly intergovernmental in nature.[104]

The first moderate steps as regards closer co-operation and liberalisation were taken between 1979 and 1987.

2. Pre-competitive collaboration: Esprit

The first initiatives at a European level to take advantage of the new opportunities presented by information technology, and thus foster innovation and competitiveness, were presented by programmes, such as *Esprit* and *Race*, that urged European companies to collaborate in R&D. Davignon, the Commissioner responsible for the internal market and industrial affairs from 1977 to 1981 and for both industry and science and technology from 1981 to 1985, was the one who envisaged that national governments, the European Commission and the industry could work together in order to foster the computer and telecommunications industry in Europe.

After close collaboration with industrialists, research laboratories and universities, the European Commission proposed a research programme, the Esprit pilot phase, and announced that its main objective is to provide incentives, which would result in the production of technology in micro-electronics, software, office automation and information processing, that would allow competing with the Japanese and the Americans.[105]

---

[104] Thatcher note 5 above.
[105] Peterson and Sharp note 54 above, at p. 166

In particular, in 1980-81 Davignon invited the heads of Europe's leading electronics and Information technology companies the *'Big 12'*[106] to *'Round Table'* meetings to discuss the establishment of a new *'precompetitive'* research program based on collaboration among European companies, as well as with universities and research institutes. The idea behind it was that the Big 12 would be able to exchange views and information. The Community funded 50 per cent of the cost of the research and businesses showed a high level of interest, as collaboration was thought to improve their competitiveness.

Esprit sought to foster pre-competitive technology, thus avoiding the political and legal problem that the initiation of a particular industrial policy from the European Commission would raise. Moreover, pre-competitive technology was defined as R&D that would need five to ten years in order to be commercialised. It was then that the European Commission adopted Regulation 418/85, exempting from article 81 of Community competition law certain kinds of R&D collaboration.

The Regulation imposed a limit in the duration of the agreement and dictated that no exemption could be granted in cases where the combined market share of firms that collaborate exceeded 20 per cent.[107] The pilot programme was accepted with enthusiasm and led to the signing of the main phase of the program in June 1983, and the approval of a second phase in April 1988.

---

[106] The Big 12 were ICL, GEC and Plessey from Britain; AEG, Nixdorf and Siemens from Germany; Thomson, Bull and CGE from France; Olivetti and STET from Italy; Philips from the Netherlands

[107] Peterson and Sharp note 54 above, at p. 167-168.

Following this, the Council asked the European Commission to make legislative proposals. However, up until 1987 legislation did not have a binding character. The proposals drafted in 1980 provided for the harmonisation of standards and the liberalisation of markets for one type of terminal equipment, but the 1984 Recommendation did not have binding effect.[108]

This initiative was followed by a Council Directive on mutual recognition of standards of terminal equipment. Although these were modest steps, they set the stage for liberalisation and positioned the European Commission, national governments, PTTs and the industry as important actors in a supranational arena.[109]

Certain ideas and understandings crystallised at that time. Innovation was conceived as important to economic welfare and Esprit can be viewed in the context of putting in place the right institutions to promote it through collaboration. Digitalisation had changed the scene, while market integration was thought to be crucial in order to compete in the international arena.

Competition law was emerging as a prominent tool of regulation, while national champions had largely failed.[110] Finally, the European Commission

---

[108] ibid.

[109] ibid, at p. 5.

[110] European political leaders in the 1960s attempted to use industrial policies at a national level that would improve their countries' competitiveness in the international arena: This was the time that the term *'national champions'* was coined, see Gannon note 1 above. In France this idea took flesh by means of *'grand projets'* aiming at promoting particular sectors of the economy. Generally, the idea of employing *'grand-projets'* to promote information and communication technologies is associated with *high-tech Colbertism*. This is a term coined to describe interventionist policies, which aimed at influencing the conduct of the so-called industries of the future. The concept of general interest was though to include the shaping of future technologies. On these issues see Cohen, E. (1995) 'France: National champions in search of a mission' in Hayward, J. E. C. (ed) (1995) *Industrial Enterprise and European Integration: From National to International Champions in Western Europe* (Oxford: Oxford University Press), at p. 29; Cohen, E. (1992) *Le Colbertisme 'High-Tech': Economie des Télécom et des Grands Projets* (Paris: Hachette); Ergas, H. (1987) 'The Importance

established itself as a regulator in the field of telecommunications regulation,

bringing all interest together and providing expert knowledge. All these set the

stage for telecommunications liberalisation, which was an industry at the heart of

the information society.

3. Telecommunications Liberalisation: The legal dimension

An Action Program in 1983[111] led to the drafting of a Green Paper in 1987

on the liberalisation of the telecommunications industry, which again stressed

the importance of improving competitiveness and achieve the internal market.[112]

The legal tools employed to open up the relevant markets in Europe were

Articles 81[85], 82 [86] and 86 [90] of the EU Treaty. These Articles are the

fundamental articles of EU competition law. Under Article 81, the EU Treaty

prohibits agreements, undertakings, decisions or practices, which may or in fact

affect trade within the European Common Market.[113]

However, 81[85] (3) provides for the exemption of an activity from the

prohibitions of the article, if the activity *'contributes to the production or distribution*

of goods or to promoting technical or economic progress.' Yet, restrictions to

competition must give consumers a *'fair share of the resulting benefit'* and must be

'indispensable to the attainment of objectives.'

---

of technology policy' in Dasgupta, P. and Stoneman, P. (eds) (1987) *Economic Policy and Technological Performance* (Cambridge: Cambridge University Press).

[111] Communication from the Commission to the Council on Telecommunications: Lines of Action, COM (83) 573 final.

[112] Green Paper COM (87) of 30 June 1987 on the Development of a Common Market for Telecommunication Services and Equipment.

[113] The numbers are those of the Amsterdam Treaty, pre-1999 numbers are in [], for example, 86 [90] (3).

Article 82 [86] prohibits a market actor from abusing a dominant position within the common market *'in so far as it may affect trade between member states.'* Article 86 [90] applies the prohibitions of Articles 81[85] and 82 [86] to *'public undertakings and undertakings to which member states grant special or exclusive rights.'* However, Article 86 [90] (2) provides that market actors *'entrusted with the operation of services of general economic interest,'* shall benefit from a derogation of competition articles if application would obstruct the performance of the particular task assigned to them. Article 86 [90] (3) provides that the European Commission should ensure the application of the provisions of Article 86 [90] and shall, where necessary, address appropriate Directives or Decisions to Member States.[114]

In 1985, in *British Telecommunications,*[115] the European Court of Justice (ECJ) decided that competition applied in the telecommunication sector and that the European Commission had the exclusive right to decide on any derogation to be granted. The court affirmed that that the *'provision of a public network'* could be considered as an activity of general economic interest, thus qualifying exemption under Article 86 [90] (2) derogation, nevertheless recommended that Article 86 [90] (2) should be narrowly interpreted.[116]

As for the power to issue Directives under this Article, the controversial element is that they present an exceptional instance when the European Commission exercises legislative powers. The decision-making process stops at

---

[114] http://europa.eu.int/comm/competition/legislation/treaties/ec/art86_en.html.
[115] OJ L 360/363 (1985).
[116] ibid.

the level of the College of Commissioners, as these Directives do not have to go through the Council.[117]

This is the legal context that underpinned the European Commission's legislative initiative to draft the Terminal Equipment Directive[118] and the Competition in Services Directive in 1988,[119] as provided in Article 86 [90] (3). The European Commission considered a step-by-step liberalisation and maintained exclusive rights for the provision of infrastructure and voice telephony with the prospect of liberalising them eventually after having opened services and equipment to competition first.

The Telecommunication Services Directive was challenged in the European Court of Justice (ECJ) by several member states, but the court confirmed both the legality of the Competition in Services Directive and the European Commission's power to issue such directives and initiate action if MS do not comply.[120]

It has been argued that by issuing the Directive liberalising the terminal equipment supply market and by opening data and value added services to competition under Article 86 [90] of the Treaty of Rome, the European Commission would avoid the possibility of the Council delaying it for years due to disagreement amongst its members on the details.

---

[117] Craig and de Búrca note 75 above; Scott note 4 above.
[118] Commission Directive 88/301/EEC of 16 May 1988 on Competition in the Markets in Telecommunications Terminal Equipment, OJ L 131, 27 May 1988.
[119] Commission Directive 90/388/EEC of 28 June 1990 on Competition in the Markets for Telecommunications Services OJ L 192, 24 July 1990.
[120] Belgium, France, Italy and Spain all challenged the Services Directive. For the special role of the ECJ in the co-initiation of policies with the European Commission, see Flynn note 1 above; Sandholtz and Stone Sweet note 3 above, at p. 154.

Therefore, although the European Commission claimed that it only acted in this way in order to ensure the effective application of Article 86 [90], some commentators argued that it took the initiative to create industrial policy and open the market to liberalisation while there was strong opposition to it.[121]

Thatcher though argues that we should view the liberalisation of telecommunications in Europe as the result of a consensus established over time between the European Commission and national governments. Disquiet emerged as a result of disagreement as to the legal tools employed and as to the timing of liberalisation, not because of the actual decision to open markets in Europe.[122]

There were disagreements between MS from the *South* (for example France and Mediterranean countries) and the *North* (for example Britain and West Germany), the latter favouring a liberal approach while the former exhibited protectionist tendencies.[123] The liberals wanted fast and extensive liberalisation, while the other group wanted re-regulation and compulsory standards.

A compromise was achieved by agreeing to liberalise public voice telephony by 1998, give derogations to countries with underdeveloped infrastructure and allow the 'Southern' countries to impose licence conditions for

---

[121] Sandholtz W. and Zysman J. (1989) '1992: Recasting the European bargain' 42 *World European Politics* 95-128; Schmidt, S. K. (1996) 'Sterile debates and dubious generalisations: European integration theory tested by telecommunications and electricity' 16 *Journal of Public Policy* 233-271, at p. 244; Fuchs, G. (1994) 'Policy-making in a system of multi-level governance. The Commission of the European Community and the restructuring of the telecommunications sector' 1 *Journal European of Public Policy* 177-194.
[122] Thatcher note 104 above.
[123] ibid, at p. 8.

basic data services, while a small community preference was allowed for public

procurement (three per cent).[124]

Moreover, the 'Southern' group of countries wanted to safeguard against

the possibility of competition harming public objectives. To this effect, the 1987

Green Paper acknowledged universal service as providing a legitimate reason to

constrain competition, essential requirements, such as safety and protecting

networks, were laid down, while MS were allowed to regulate in order to ensure

that these were fulfilled.[125]

Thus, while there was consensus as to the basic idea of opening markets,

the extent to which these would be opened was subject to debate. But, above all,

disquiet was raised because of the form of legal instruments used to open

markets. Even the British who favoured liberalisation opposed the employment

of legal tools by the European Commission in order to push it ahead.

The most controversial of Directives was the Services Liberalisation

Directive and the opposition from the Council was unanimous. Nonetheless, the

European Commission further made it clear that it would not tolerate PTTs

blocking the opening of markets when it objected to the formation of a joint

venture among 22 PTTs in order to compete in the data and value-added services

markets with American companies.

In 1989, the European Commission adopted the Services Liberalisation

Directive but delayed its application, while trying to win support for it. Finally,

in 1990, the Directive came in force as well as the Open Network Provision (ONP)

---

[124] ibid.

[125] ibid, at p. 7.

Council Directive,[126] while the latter was regarded as crucial to the liberalisation

process.[127]

However, the ONP Directive and efforts to promote standardisation

signified that de-regulation go hand in hand with re-regulation. This will be the

focus of the next sections.

5. Re-regulation and harmonisation

We saw that considerable efforts were undertaken to introduce

competition and create the single market to services and equipment.[128]

Nonetheless, regulation was seen as playing a very important role. First, the

Green Paper on the Liberalisation of Telecommunications Industry called for

following European or international standards for the sake of interoperability,[129]

something that both Esprit and Race[130] aimed at promoting, by directing research

to broadband communications' technology.[131]

---

[126] Council Directive 90/387/EEC of 28 June 1990 on the Establishment of the Internal Market for Telecommunications Services through the Implementation of Open Network Provision OJ L192, 24 July 1990

[127] ibid.

[128] See above note 118 and 119.

[129] Mutual recognition depended on European standards set by CEPT and then adopted by the EC. This organisation though was dominated by PTTs. The result was that the process of adoption was very slow, Thatcher note 104 above, at p. 5.

[130] The 1983 Communication, note 11 above, focused on the creation of a Community telecommunications market and endeavoured to promote standard setting that would guarantee the development of future networks. It then put in place a working group that planned the introduction of new technologies in the following 20 years, drew attention to the need to provide aid to less favoured regions and finally set a program for the development of future technologies. These were promoted in the mid-1980s by means of supporting information technologies (through the ESPRIT Programme) and subsequently by means of supporting the building of a digital and later a broadband telecommunications infrastructure (through research in Advanced Communications for Europe under RACE), see Communication from the Commission to the Council on Telecommunications: Lines of Action, COM (83) 573 final.

[131] Peterson and Sharp note 54 above.

In view of PTTs' natural monopoly, standard setting[132] was controlled by them at a national level, but any attempt to open the telecommunication market could be jeopardised without common standards. Therefore, the European Commission furthered the policy that these should be promoted in order to bypass the problem of national standards that inhibit trade in the telecommunications market.

The European Commission thus recommended to the Council a Directive on the Mutual Recognition of Type Approvals. MS would have to mutually recognise the standards in the types of terminal equipment approved by the European Commission. The Council approved the Directive in 1986,[133] and thus opened the way for the preparation of a list of priorities for standardisation every year by to the European Commission.

In 1986, the Council drafted a decision on standardisation in the field of information technology and telecommunications[134] acknowledging that standardisation in the field would have to be promoted through competent

---

[132]*'Standard'* is a technical specification approved by a recognised standards body for repeated or continuous application, compliance with which is not compulsory; *'International standard'* is a standard adopted by a recognised international standards body; *'Technical specifications'* are specifications contained in a document which lays down the characteristics required of a product, such as levels of quality, performance, safety or dimensions, including the requirements applicable to the product as regards terminology, symbols, testing and test methods, packaging, marking or labelling; *'Common technical specification'* is a technical specification drawn up with a view to uniform application in all Member States of the Community; For definitions see Council Decision 87/95/EEC of 22 December 1986 on Standardisation in the Field of Information Technology and Telecommunications OJ L 36, 7 February 1987.

[133] Council Directive 91/263/EEC of 29 April 1991 on the Approximation of Laws of Member States concerning Telecommunications Terminal Equipment, including the Mutual Recognition of their Conformity.

[134] Council Decision 87/95/EEC of 22 December 1986 on Standardisation in the Field of Information Technology and Telecommunications OJ L 36, 7 February 1987. *'Information technology'* has been defined in the document as the systems, equipment, components and software required to ensure the retrieval, processing and storage of information in all centres of human activity (home, office, factory, etc), the application of which generally requires the use of electronics or similar technology.

European standards organisations and specialised technical bodies in view of the need to have compatible operating systems, exchange of information and data.

In the annex of the decision,[135] the Council makes it specific that the policy furthered by the Decision aims, among other things, *'at contributing to the integration of the internal Community market in the information technology and telecommunications sector, and improving the international competitiveness of Community manufacturers by allowing for greater market uptake in the Community of equipment manufactured to recognised European and international standards.'*[136]

The Green paper on the Liberalisation of Telecommunication Markets also proposed the creation of an independent European Telecommunications Standards Institute[137] with network operators, telecom users and equipment manufacturers being members of the Institute. The Council approved the creation of ETSI, which was created in 1988 and would work on priorities proposed by the European Commission.

One of the priorities proposed was the Integrated Services Digital Network (ISDN), as ISDN digital networks would be capable of carrying the future multimedia applications due to their capacity. Eventually, the Council approved a non-binding recommendation on the future introduction of ISDN.[138]

---

[135] ibid, Annex: Measures for Standardisation in the Field of Information Technology and Telecommunications.

[136] ibid, at Section 1, setting the aims of the decision.

[137] Another technical body on telecommunication standards set at European level was the European Conference of Postal and Telecommunications Administrations (CEPT), but *'it lacked the permanent, specialised technical expertise and representation from the Telecommunication companies that the proposed ETSI would have,'* see Sandholtz note 114 above, at p. 235

[138] Council Recommendation 86/659/EEC of 22 December 1986 on the Coordinated Introduction of the Integrated Services Digital Network (ISDN) in the European Community OJ L 382, 31 December 1986.

This would be developed in the pre-competitive context of Race, which supported the creation of broadband communication systems.

The recommendation by the Council again raised the issue of international competitiveness and furthered the argument that ISDN could offer the opportunity to adjust existing networks to future challenges that would require them to carry sound, text and picture.

Furthermore, the European Commission argued that a co-ordinated investment in ISDN would allow the creation *'of a European market in telephone and data-processing terminals capable of creating, by virtue of its size, the indispensable development conditions which will enable the European telecommunications industries to maintain and increase their share of world markets.'*[139]

Standard setting is a direct way to influence the ways that technology evolves and it has been part of the competitiveness policy of the European Union. Although the standard setting process was seen as a pre-requisite to the creation of the single market in telecommunications, there are diverse opinions as to whether standardisation really promotes competitiveness, the argument being that no incentives are provided for innovation.

On the other hand, open standards offer cheap products and may be seen as conducive to innovation, while proprietary standards 'lock' the market. Looking back at the time when IBM set the proprietary standard, we will see that

---

[139] ibid.

it was the first to move in the market and thus set the pace for development for the others who followed.[140]

In other words, although standards may seem to encapsulate the objective and uncontested truth of scientific claims, they are not value neutral as they promote a way to understand the role of technological innovation and how it should be diffused, and reflect a particular public policy approach. But, to this point I will return later in the thesis.

6. More re-regulation

The European Commission would have to monitor any abuse of dominant position, cross-subsidisation of services and equipment and discriminatory granting of access to incumbents' networks. Open Network Provision (ONP) regulation was a key concept to achieving the above as it required that service providers would have access to the network anywhere in the EC on the basis of established rules of usage and common tariff principles.

The harmonisation initiative taken by the Council resulted in the adoption of a Framework Directive on the Open Network Provision in 1990,[141] as it

---

[140] The reason why this happened is that the IT industry is characterised by product interoperability. Product interoperability in the computer industry is defined as the fact that a computer must be compatible with the microprocessor and any necessary peripheral hardware (such as printers, keyboards, monitors and modems). The operating system must be compatible with the microprocessor, and the application programs must be compatible with the operating system. Only if these compatibility requirements are fulfilled will the consumer be able to use the computer. Thus, hardware and software developers' choices are driven by compatibility requirements if they want to develop a commercially successful product. As a result, consumers are more likely to buy a Microsoft computer system, since they know that most current and future applications are likely to work on that system, rather than on a competing system. It follows from that point that the effect described is cyclical, and economists refer to this as the *'tipping effect,'* on these issues see Lemley, M. A. (1996) 'Antitrust and the Internet standardisation problem' 28 *Connecticut Law Review* 1041-1094.

acknowledged that competition in services would not have been possible if

incumbents controlling telecommunication infrastructure would not let new

entrants have access to their telecom networks and services.

In view of the above, the proposed legal framework envisioned facilitating

access by means of standardised tariff principles and technical interfaces of

network connections among member states. The implementation of ONP

measures would be realised by setting objective conditions for network use that

were transparent, published appropriately and guaranteeing non-discriminatory

access.[142]

7. Information society in Europe

The Green Paper in 1987 on the Liberalisation of the Telecommunications

Industry stressed the importance of proceeding with liberalisation in order to

improve competitiveness and achieve the internal market,[143] leading to similar

initiatives in the mobile, cable and satellite sectors.[144]

---

[141] Council Directive 90/387 of 28 June 1990 on the Establishment of the Internal Market for the Telecommunications Services through the Implementation of Open Network Provision OJ L192, 24 July 1990.
[142] Boam, C. (1997) 'Giving the phoenix wings: the Deutsche Telecom/FranceTelecom/Sprint alliance' (1997) 50 *Common Law Conspectus* 426-467.
[142] Council Directive on the Establishment of the Internal Market for Telecommunications Services through the Implementation of ONP, note 126 above.
143 European Commission Green Paper COM (87) final: Towards a Dynamic European Economy. Green Paper on the Development of a Common Market for Telecommunication Services and Equipment of 30 June 1987.
[144] European Commission Green Paper on a Common Approach in the Field of Mobile and Personal Communications in the European Community, COM (94) 150 (1994), Green Paper on a Common Approach in the Field of Satellite Communications in the European Community, COM (90) 490 (1990), leading to the adoption of the Liberalisation Directive for Satellite Communications, adopted according to article 90 of EU Treaty in 1994. The same year, again under Article 90 the European Commission adopted a draft Art. 90 Directive for Consultation concerning the Liberalisation of Telecommunications use of cable TV networks. The Directive aimed at liberalising cable TV networks from 1 January 1996 onwards.

In the same spirit, the Delors Paper[145] and the Bangemann Report[146] propagated the need to liberalise in order to take advantage of the *new information economy*. The 1994 European Action Plan[147] positioned telecommunications at the heart of the information society and called for transformation that would allow private forces to effectively participate in the new developments.

To this effect, the European Commission stressed the importance of competition law, as the latter was regarded to play a central role in creating the new regulatory environment in view of its flexibility, adjusting to the needs of new and fast changing industries.

Ordoliberal ideas were brought on the EU plane, as competition law was indeed understood as an important tool to integrate markets.[148] It was viewed not only as essential in setting the conditions for a dynamic competitive environment, but also as a mechanism which would contribute to the creation of trans-European networks, them being one of the aims of the EC Treaty, as provided in Article 129 B.

This was also explicitly mentioned in the XXIV competition policy report at point 65,[149] which also stressed that private power may potentially be as dangerous as public power, thus legitimising indirect regulation by means of re-

---

[145] European Commission White Paper COM (93) 700 of 5 December 1993 on Growth, Competitiveness, and Employment: The challenges and the Ways forward to the Twenty First Century.
[146] Recommendation of the Bangemann Group to the European Council note 1 above.
[147] Communication from the Commission to the Council and the European Parliament and to the Economic and Social Committee and the Committee of Regions COM (94) 347 Europe's Way to the Information Society: An Action Plan.
[148] Bangemann report note 1 above.
[149] Report on Competition Policy note 1 above.

regulation.[150] In a nutshell, the approach adopted aimed at balancing deregulation and liberalisation. It thus took the stand that competition law is of major importance, but sector specific legislation will have to be put in place in order to assure the smooth transition to the new environment and safeguard public service goals.

Therefore, the 1994 Action Plan favoured the creation of a new regulatory environment that would deal with issues such as data security, privacy, data protection, intellectual property rights and open access to media and educational usages of the new technology.

The G7 Ministerial meeting on the information society[151] clearly stated that there are eight principles that underline the concept of information society: a) Promoting dynamic competition b) Encouraging private investment c) Defining an adaptable regulatory framework d) Providing open access to networks e) Ensuring universal provision of open access to citizens f) Promoting equality of opportunity to the citizen g) Promoting diversity of content h) Recognising the necessity of world wide co-operation with particular attention to less developed countries.

These principles were to apply by promoting: a) Interconnectivity and interoperability, b) Developing global markets for networks, services and applications, c) Ensuring privacy and data security d) Protecting intellectual property rights, e) Co-operating in R&D and the development of new

---

[150] ibid.
[151] Conclusions of G7 Summit 'Information society conference,' European Commission Doc. 95/95/2 (1995).

applications, f) Monitoring of the social and societal implications of the information society.

The stage was thus set for the information society in Europe with 1998 being the year of full liberalisation of the telecommunications market, while the following years the Internet emerged as an indispensable component of the information society, in view of new opportunities for participation, deliberation and technological experimentation.

D. CONCLUSIONS

In the 1990s Europe had a new vision, information society. Innovation and its promotion stood at the heart of the project, while re-regulation was thought to be necessary to prevent businesses from abusing their power and to enable citizens to participate in the new information economy.

The idea that innovation is important has been conceptualised through the lenses of diverse theoretical paradigms in political economy. Be it a public good or a dynamic process, it has been understood by authors such as Schumpeter and Marx as being the *modus vivendi* of the capitalist system. Technological progress though acquired particular importance in view of new digital technologies, which seemed to provide huge opportunities for investment.

Nevertheless, innovation in the context of the EU should not be understood solely in terms of promoting innovation *per se*, but as interweaving with a set of different preoccupations, such as market integration and international competitiveness.

Looking at public policies designed at the European level to promote technological innovation shows that in the 1990s the idea was mature that innovation in civilian technologies was the key to wealth and falling unemployment. In the context of increasing globalisation, technological change was accelerated, as markets opened and businesses looked to innovation as a means to compete internationally.[152]

---

[152] This is an argument supported by Peterson and Sharp's work on the political economy of technological innovation in Europe, see Peterson and Sharp note 54 above.

Innovation can be conceived as being both the product of scientific research produced in laboratories and the result of minor modifications introduced by skilled workers in the workplace on the basis of tacit knowledge.

It can also be promoted either directly by financing certain sectors of the economy, or indirectly, by promoting collaboration, education, experimental behaviour and the exchange of knowledge by means of putting in place neutral and objective processes aiming at establishing consensus as to the development and implementation of technologies. The initiation of the Esprit and Race programmes and the adoption of legal measures in the direction of standardisation and open interfaces in software programmes can be understood in this context.

There are further reasons why the EU embraced the opportunity to promote collaboration. A pragmatic reason was that national champions had largely failed and that Europe was lagging behind the USA and Japan, resulting in a widespread feeling in Europe that the global challenge was too big to be undertaken independently by MS.

Integrating markets was viewed as essential to come to grips with the malaise of technological sluggishness and gave birth to new understandings as to the merits of co-operation, providing the operating context of efforts to promote collaboration. Directly influencing technologies, as with the adoption of the ISDN open standards was thought to be another way to achieve the above, although technological standards can never be neutral, but always encapsulated choices.

Nevertheless, ordoliberalism required that law indirectly influences the economy, by means of providing an objective and neutral framework of rules. This vision was significant in shaping conceptions of co-operation in the foundational period of the EU and in later years. We saw that competition law was understood as being an important tool in the course of market integration. It was viewed not only as essential in laying the foundations for a dynamic competitive environment, but also as a mechanism, contributing to the creation of trans-European networks.

Moreover, the idea that a framework is required to allow for the smooth transition to the new liberalised environment echoes the ordoliberal idea that private power may potentially be as dangerous as public power, thus legitimising indirect regulation.

But promoting *fairness*, protecting work and welfare, social security and social rights of citizenship, were the accomplishment of post-war Keynesian economics, which promised to provide the tools to tame the problems endemic to capitalist economies. To this effect, ensuring universal provision of open access to citizens, promoting equality of opportunity to the citizen, supporting diversity of content and recognising the necessity of world wide co-operation with particular attention to less developed countries, are amongst the principles that underline information society regulation in Europe.

Finally, information society was characterised by a discourse that emphasised the importance of efficiency, expertise, elites and functional interest intermediation, a *'technocracy discourse,'* as the European Commission established

itself as a regulator in the field of telecommunications regulation by means of bringing all interests together and providing expert knowledge.

In a nutshell, diverse ideas and understandings underlined the emergence of a new field. Innovation was conceived as important to promoting economic welfare. Digitalisation has changed the scene requiring an adjustment to the exigencies of fast evolving technologies and flexible instruments were thought to be required to regulate them.

The ordoliberal vision of open markets ordered by an economic Constitution was well suited to accommodate the above. At the same time, co-operation at the EU level was viewed as being necessary, as market integration would confer the economies of scale required to compete internationally. Finally, the European Commission established itself as a regulator, with efficiency, expertise, elites and functional interest intermediation being the core characteristics of its role at the initial stages of opening markets, while the legal tools employed to open these were Articles 81[85], 82 [86] and 86 [90] of the EU Treaty.

All these traditions and perceptions made possible the emergence of information society, whose regulation was European in scope.

Figure 1

Information Society in Europe 1992-2002: Timeline of main policy

milestones

1993: White Paper on Growth, Competitiveness and Employment (December 1993)

1994 : - Bangemann Report: "Europe & the Global Information Society" (June 1994)
- Action Plan: "Europe's Way to the Information Society" (July 1994)
- Set up of ISPO (Information Society Project Office, December 1994)

1995: - G7 conference on the Information Society (February 1995)
- Set up of the Information Society Forum (February 1995)

1996: - Green Paper "Living and Working in the Info. Society" (July 1996)
- Communication "Information Society: From Corfu to Dublin - the New Emerging Priorities (July 1996)

1997: - Bonn Ministerial Conference on "Global Information Networks" (July 1997)
- Green Paper on the "Convergence of the Telecommunications, Media and Information Technology" (July 1997)

1999: - Green Paper on "Public Sector Information: a Key Resource for Europe"
- 1999 Communications Review
- eEurope Initiative (December 1999)
- Action Plan on Safer Use of Internet

2000: - Lisbon European Council (March)
- eEurope Action Plan (June)

2002: - eEurope 2005 Action Plan (June)

1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005

1994-1998: 4th Research & Techno. Dev. Framework Programme (FP4)

1998-2002: 5th Research & Techno. Dev. Framework Programme (FP5)

Source:http://www.euractiv.com/cgi-bin/cgint.exe/2024616-25?targ=1&204&OIDN=500446
Last update: 7 June 2002.

III

Habitus: Inside the European Commission

To perceive means to immobilise...
We seize, in the act of perception,
something, which outruns perception itself.
Henri Bergson, *Essai sur les Données Immediates de la Conscience*

The previous chapter looked at the historical conjunction of events and theoretical paradigms giving birth to present understandings as to the qualities of information society, the role of the European Commission, the character of regulatory law, and the importance of innovation.

I here concentrate my analysis on everyday life inside the European Commission, in order to uncover cognitive schemas attributing meaning to everyday working practices. Thus, having injected agency and their interests, I seek to breathe life in the understanding of regulatory law. Uncovering systems of perception and appreciation, or, to use Bourdieu's terminology, *habitus*, serves the purpose of unravelling the ways in which action, for example the adoption of a piece of regulatory law, is framed by limits, which are set by our own minds.

In this instance, sociology frees us from the illusion of freedom[1] by inviting us to think about the taxonomies incorporated and reproduced in practices limiting action, albeit by simultaneously recognising the possibility that these very taxonomies may be challenged by the agents who reproduce them. The latter point will be the subject of the following chapters, while this focus of

---

[1] Bourdieu, P. (1990) *In other Words. Essays Towards a Reflexive Sociology* (Oxford: Polity, orig. 1987), at p. 15.

this present chapter is on the cognitive schemas, which render the social world

meaningful.

'*Habitus*' refers to dispositions acquired from early social experience.

These dispositions are attuned to the structure and divisions of a social field as

experienced by the individual. They are internalised in practices and objects

within this field. Thus, interpersonal relations are never, except in appearance,

limited to individual relationships, and the truth of interaction is never entirely

contained in interaction.[2]

Despite the criticism directed against the notion of habitus,[3] the basic

argument of this chapter is that habitus is a concept, which can provide the

theoretical tools to overcome the limitations of the neo-institutionalist,[4] neo-

functionalist,[5] and transactionalist[6] approach to understand the parameters

---

[2] Bourdieu, P. (1977) *Outline of a Theory of Practice* (Cambridge: Cambridge University Press, orig. 1972), at p. 81.

[3] Having elaborated on this point in Chapter I of this thesis, I will not take this up further here.

[4] See for example Abéles, M. et Béliers, I. (1996) ' La Commission Européenne: Du compromis culturel à la culture du compromis' 46 *Revue Française des Sciences Sociales* 431-455. For a general review of neo-institutionalism see Powel, W. and DiMaggio, P. J. (1991) *The New Institutionalism in Organisational Analysis* (Chicago: University of Chicago Press); Koeble, J. (1995) 'The new institutionalism in political science and sociology' 27 *Comparative Politics* 231-244; Immergut, E. M. (1998) 'The theoretical core of new institutionalism' 26 *Politics and Society* 5-34; Grendstad, G. and Selle, P. (1995) 'Cultural theory and the new institutionalism' (1995) 7 *Journal of Theoretical Politics* 5-27. For an overview and criticism of this theoretical position see Chapter I of this thesis.

5 See for example, Shore, C. (2000) *Building Europe, The Cultural Politics of European Integration* (London: Routledge); For the sociological underpinnings of functionalism and neo-functionalism see Parsons, T. (second ed 1991) *The Social System* (London: Routledge, orig. 1951). In European integration studies, *neo-functionalism* underlined the idea that expert solutions can be provided to political problems, see Haas, B. E. (1958) *The Uniting of Europe: Political, Economic and Social Forces, 1950 – 1957* (London: Stevens). Haas' analysis focused on how loyalties shift as '*integrative habits*' are developed as a result of prior cooperation. Therefore, experts share a professional consensus, which, by means of becoming a system of thought, assumes the role of a force in its own right. For a criticism of this approach see for example Cram, L. (2001) 'Imagining the Union: A case of banal Europeanism?' in Wallace, H. (ed) (2001) *Whose Europe? Interlocking Dimensions of Integration* (London: Macmillan, 2001), at p. 343-362. A more elaborate discussion on these issues falls outside the scope of this chapter.

[6] See for example McDonald, M. (2000) 'Identities in the European Commission ' in Nugent, N. (ed) (second ed 2000) *At the Heart of the Union: Studies of the European Commission* (Macmillan; St Martins).

underpinning the action of the European Commission. This is because on the basis of this notion I can argue that regulators are not (*only*) efficiently pursuing the public good (in the name of a '*European common market*' ideology), and public administration is not (*only*) about reasoned choices and rational action, which follows the logic of preferences and national loyalties.

In addition, formal structures do not *dictate* the course that action may take, but offer a set of potentialities, which have to be appreciated through the classificatory lenses of habitus, thus structures *frame* action. Finally, habitus is a concept that invites us to think more about the taxonomies we take for granted, often reproduced in legal texts and reflecting power relations.

On the basis of the above, the assumption underlining this chapter is that most of the time people routinely reproduce practices, based on acculturation into certain social groups such as social classes, a particular gender, family, and nationality. Moreover, cognitive schemas may be developed *after* socialisation in a group, (group habitus), as a result of the meaning attached by a community to *communality* itself.

Therefore, the action of agents, '*fonctionnaires*'[7] or Directorates Generals (DGs), is framed by diverse cognitive schemas active at different levels. This is because modes of perception may become institutionalised *across* DGs, alternatively may operate at the level of *individual* DGs and Units, or finally may exist at the level of individuals. The intuition behind recognising *multiple habitus* is that in this way it is possible to overcome the rigidity of the notion by *leaving*

---

[7] Throughout this chapter I am using the French word for *civil servants* as this is commonly employed in the European Commission.

space for improvisation. The theoretical underpinnings of this proposition will be elaborated in the first main section of this chapter.

Then, the focus of the second main section of this chapter is on uncovering practices, which underline the meaning attached to *community* by the officials working for the European Commission in order to look into shared understandings as to modes of cooperating in working parties and shared files, promotion procedures and mobility, while reputation, how it is valued and acquired, is a theme that runs across all relevant sections.

Subsequently, the third section seeks to uncover cognitive schemas at the level of individuals (based for example on sex) and at the level of DGs, based on modes of perception and appreciation institutionalised in Units or even whole DGs, as a result of common experience deriving its properties from nationality and professional background. Having uncovered these, the last section offers some concluding remarks.

A. HABITUS AND MULTIPLE HABITUS: ALLOWING FOR IMPROVISATION

1. The notion of habitus

Habitus makes the social world seem objective and common sense, by means of us reproducing it through *taken for granted* practices. It structures actions and perceptions, which results in its *embodiment*, in it becoming a *'bodily hexis'* being expressed in the manner in which individuals physically express themselves. As Bourdieu puts it, habitus is *'realised, embodied, turned into a permanent disposition, a durable manner of standing, speaking, and thereby of feeling and thinking,'*[8] which we misunderstand as a form of natural affinity.

Habitus is a notion, which does not only link to individuals' bodies, but also to groups. In particular, Bourdieu argues that the *'objective homogenising of group or class habitus, which results from the homogeneity of the conditions of existence, is what enables practices to be objectively harmonised without any intentional calculation or conscious reference to a norm.'*[9] This homogenising is produced by collective dispositions, which are *'internalisations of the same objective structures.'*[10]

It follows from the above that in order to understand membership in a social class or group, the researcher has to come to grips with the common system of dispositions premised on the common experience bringing the members of a social class or a group together by means of providing a common cognitive lens through which the world makes sense.

---

[8] Bourdieu, P. (1990) *The Logic of Practice* (Cambridge: Polity, orig. 1979), at p. 53.
[9] Bourdieu note 2 above, at p. 80.
[10] ibid, at p. 81.

For this reason, class or group habitus is *'a subjective but not individual system of internalised structures, schemes of perception, conception and action common to all members of the same group or class and constituting the precondition for all objectification and apperception.'*[11]

This does not mean that individuals have identical experiences, but that they share *homologous* ones,[12] which implies that individual differences arise, as individuals socialise in particular settings such as families, schools and work. Nevertheless, group habitus unites these individual experiences into a coherent position, while allowing for difference, by means of group habitus co-existing with an individual habitus.

In simple words, people belong in the same group because they share common experiences allowing them to experience the social world in more or less the same way, nevertheless, there are always differences in perception, exactly because group habitus co-exists with individual habitus.

2. The possibility of introducing multiple habitus

Bourdieu's analysis is in certain ways close to Goffman's symbolic interactionism. I thus here seek to identify both linkages and diversions between the two positions, in order to substantiate the claim that capturing the unfolding of social reality in the environment of a complex organisation such as the

---

[11] ibid, at p. 86.
[12] ibid.

European Commission requires the incorporation of observations as to patterns of praxis regulating membership and interaction in a group. The following will seek to elucidate the theoretical underpinnings of this proposition.

Goffman argued that dignity, honour and pride are important variables regulating everyday interaction and therefore the observation of sentiments such as being ashamed or full of pride, should be an integral part of an analysis seeking to explain encounters.[13]

Discussing the importance of maintaining social face,[14] Goffman draws attention to that individuals attribute meaning to social life by means of the *'social code of any social circle,'*[15] as individuals are expected to live up to it. Therefore, during interaction, the actor sustains the images conveyed by this social code through expression, an act that may be undertaken at a conscious or unconscious level, as it may be intended or not.

He also argues that the self may be grasped not only in the context of constant efforts to sustain a social face by living up to expectations derived from a social code, but may also be constructed during playing in a game consisting of rituals, which the agent has to observe. [16]

Goffman notes that different social groupings (according to age, sex or class for example) express themselves in distinctive ways reflecting what is thought to

---

[13] Goffman, E. (1967) *Interaction Ritual: Essays in Face-to-Face Behavior* (London; Chicago: The Penguin Press: Aldine), at p. 4-45.

[14] ibid, at p 9-10, where Goffman describes the process behind the creation of *social face*.

[15] ibid, at p. 9.

[16] Goffman, E. (1959) *The Presentation of Self in Everyday Life* (New York: Doubleday; London: Mayflower), at p. 22-30 and 70-76, particular see the *'Social Self,'* at p. 44-45. On the importance of symbols also see Mead, G. H. (1967) *Mind, Self and Society: From the Standpoint of a Social Behaviourist* (Chicago: University of Chicago Press, orig. 1934). However, note that Mead denies structural constraints and views action as providing for unlimited improvisation.

be a *proper* way of expression according to a particular cultural configuration. Therefore, to *be* a given kind of person, is not merely to possess the required attributes, *'but also to sustain the standards of conduct and appearance that one's social grouping attaches thereto.'* This is why acculturation in a group implies the existence of coherent patterns of appropriate conduct, which should be performed, *'consciously or not.'* [17]

Interestingly, he further argues that individual actors have a variety of roles available to them and therefore may choose amongst them in the course of interaction. This variety of roles exists as the individual carries with it a continuity of lines and faces, which owe their existence to events and situations outside the immediate interaction order.[18]

Therefore, although the focus of his analysis is on the micro level of interaction, his work also engages in exploring the ways in which social order is sustained, as it accepts that there are structural limits to individuals' action. The agent does have choice concerning the lines and faces, but within limits imposed by a particular order.

Coming back to Bourdieu, symbols and rituals are central in his theoretical framework, particularly in his notion of symbolic capital, on which I will extensively touch in the following chapter. As regards the notion of habitus, by insisting on the importance of identifying bodily hexis and unspoken patterns

---

[17] ibid.
[18] Goffman note 13 above, at p. 7.

of action, as for example in his study on the *'Kabylie'* house in Algeria,[19] he saw pride as regulating interaction and symbolic representations reproducing distinctions (man/woman, cold/warm, light/dark, outward/inward) as being encapsulated in symbols, rituals, bodily gestures and objects.

In this respect, Bourdieu certainly comes close to Goffman's position, to which he explicitly refers in various passages throughout his work. Nevertheless, he attacks symbolic interactionism for failing to take into account the effects of power, as it focuses on the communication of meaning while neglecting to study structural relations of power reproduced therein.

This is because he thinks that enquiring on unspoken cognitive patterns of thought should be able to address the question of whether these are challenged or not. Nonetheless, a deeper analysis of this point will be undertaken in the following chapter, which endorses Bourdieu's position that the notion of power should be central to the analysis of social phenomena.

Coming back to Goffman, he makes two very interesting points, which will be taken on board for the purposes of the present analysis. First, as we saw in the previous paragraphs, he argues that to *be* a given kind of person, it is not enough to have the necessary characteristics, but also to *sustain the social code of the social group you belong to.* Moreover, he casts light on the possibility of multiple roles co-existing and guiding conduct, thus allowing for improvisation from the part of the agent involved in an interaction, a point which is nevertheless made

---

[19] Bourdieu, P. (1979) *Algeria 1960: Essays* (Cambridge [Eng.]; New York: Cambridge University Press).

by Bourdieu himself, as already noted. Both these points will be taken up in the following section.

3. From observing interaction and identifying structures to enquiring on the conditions of their emergence

In this chapter I seek to identify multiple habitus, cognitive schemas, which give meaning to social practices. I thus look at the notion of habitus, understood as being constructed on the basis of common experience *prior to* joining the European Commission *and* on the basis of common experience *after* joining it.

The latter approach understands habitus as being the result of a process of crystallisation of common understandings underlying recognition, respect and communality. The former seeks to come to grips with cognitive schemas emerging as a result of, for example, a particular nationality or professional background. I thus focus my analysis on both levels, in an attempt to accommodate the complexity of lived experience.

By identifying multiple roles, *habitus*, and employing ethnographic data (primary and secondary) I seek to overcome the difficulties inherent in the notion of habitus, that is its rigidity, by means of allowing space for improvisation in the multifaceted environment of a modern organisation such as the European Commission. It is by stressing the possibility of people engaging in multiple roles

(and the possibility of identifying multiple habitus) and by employing ethnographic data that I propose to look inside the European Commission.[20]

Nevertheless, both Bourdieu and Goffman leave one question without adequate answer. Why do people *remain* members of a community, despite differences in individual classificatory systems? We saw that Bourdieu emphasises the importance of common experience bringing individuals together in a group.[21] Goffman maintains that abiding by the social code of a group by means of conforming to other people's expectations is regulating interaction to an important extent.

This does not answer what *sustains the existence of a community per se*. This logically precedes Goffman's question addressing the quality of interaction, and follows Bourdieu's question addressing the genesis of a group, as without *community* there is no *interaction* and without *interaction* there is no need to *fulfil expectations*.

To reformulate the above, a community may be a village, a non-governmental organisation or the European Commission. Respect and recognition are powerful regulators of the life inside these *'villages.'* Nonetheless it seems that there must be more than respect and recognition regulating life inside them, as by means of these we cannot explain why individuals actually

---

[20] This will be done by means of adopting an ethnomethodological approach, as proposed by *Garfinkel*, distinguishing the interpretation used in the construction of *'common sense'* against scientific rationalities, on these issues see the Methodological Appendix of this thesis.

[21] Bourdieu, P. (1987) 'What makes a social class?: On the theoretical and practical existence of groups' XXXII *Berkeley Journal of Sociology* 1-18.

sacrifice individuality to stand up to other people's expectations in the name of communality.

One answer may be that individuals routinely reproduce their habitus before joining a community. However, this does not explain why common experience may not be enough to keep them in the same group, in other words to establish the bonds necessary to inspire membership despite differences. In some groups initial differences may converge, bending in the passage of time, while never totally disappearing, while in other groups differences would result in them breaking up.

As regards the latter situation, Bourdieu would say that in this instance individuals challenge power relations. Alternatively, Goffman would think that there is a clash amongst habitus, so an individual chooses a different role.

I have a different explanation to propose: Individuals stay in a group because they are dependent on each other. Shared experience brings people together, but it is *necessity* that *keeps* them together, albeit differences. *Dependency* gives birth to the need to live up to expectations, regulating *whether* an individual would choose a different role. *The need to compromise* underlines whether power relations will be challenged or not.

Durkheim and Weber,[22] for example, stressed the voluntary aspect of membership in a community, emphasising obligations and beliefs. Nonetheless,

---

[22] See for example Durkheim, E. (2001) *The Elementary Forms of the Religious Life* (Oxford: Oxford University Press, orig. 1912) and Weber, M. (second ed 1992) *The Protestant Ethic and the Spirit of Capitalism* (London: Routledge, orig. 1904); Also see Simmel, G. 'Group expansion and the development of individuality,' in Levine D. N. (ed) (1971) *Georg Simmel: On Individuality and Social*

my proposition goes to the opposite direction, as by stressing the importance of identifying whether the bonds bringing together members of a community are underlined by dependency and compromise, I imply that agents, no matter whether they know it or not, reproduce power relations.

Therefore the proposition that dependency and compromise are powerful regulators of life in a community stays within the intellectual tradition understanding social patterns as reflecting power relations, while stressing that these patterns may be tacitly reproduced, as the notion of habitus requires.

This is because the habitus of *dependency and compromise* reflects the powerful insider/outsider division, and therefore embodies power relations crystallised in dominant understanding of most valuable forms of *'social capital.'* Enquiring on the properties of social capital will be the subject of Chapter V.

For the purposes of this chapter, it is enough to say at this point that social capital embodies exogenous resources that agents have in order to build permanent networks of people consisting of more or less institutionalised relations of mutual acquaintance and recognition.[23] Therefore, this form of capital has a multiplication effect on other resources, as by having a large network of people it is easier, for example, to maximise economic wealth, political re-election or succeed in putting on a theatrical play.

Social capital then stresses the importance of relations of mutual acquaintance and recognition. Still, such relations can only exist in a group or a

---

Forms: Selected writings of Georg Simmel (Chicago, Ill; London: University of Chicago Press, orig. 1908)..

[23] Bourdieu, P. (1986) 'The forms of capital' in Richardson, J. G. (ed) (1986) *Handbook of Theory and Research for the Sociology of Education* (New York: Greenwood Press).

network, which exhibits *cohesion*. And for cohesion to be established, neither a common purpose nor the need to maintain social face are enough, but ties of dependency have to be identified.

This proposition comes relatively close to recent developments in network theory. Many network theorists study the degree of cohesion in groups and the formation of subgoups by means of looking at patterns of interaction. Therefore, in a spirit similar to interactionists, network theorists look beyond the attributes of individuals (class, blood ties, kinship etc) to consider relations and exchanges among social actors. This, for example, may be measured according to the number of ties an agent has with other agents in a community.

Gulati and Garguilo in particular model the emergence of alliance networks as a process driven not only by exogenous interdependencies forcing organisations to pool resources with others but also by the memory of organisations which consists of embedded, institutionalised, understandings on competencies and reliability of prospective partners.

Gulati and Garguilo refer to this as *'relational embeddedness,'* and argue that in studying embeddedness the important question to ask is whether a network is closed and thus may be seen as a subculture or counterculture. One way to see this is to observe face-to-face interaction and indirect ties in order to assess the degree to which actors are involved in cliques with other actors inside the same network.[24]

---

[24] Gulati, R. and Garguilo, M. (1999) 'Where do interorganisational networks come from?' 104 *American Journal of Sociology* 1439-1493; Freeman, L. C. (1979) 'Centrality in social networks: Conceptual clarification' 1 *Social Networks* 215-239: Gulati, R. and Singh, H. (1998) 'The architecture of cooperation: Managing coordination uncertainty and interdependence in strategic

However, the habitus of dependency and compromise implies that agents are not rational. They do not rationally pursue membership in networks or groups in order to attain certain goals, but, no mater whether they know it or not, they *have* to co-exist, *have* to take others into account, a process which entails no cost-benefit analysis, but appears to be a *'normal'* routine. Such ties underline cohesion and reproduce understandings, which most of the time are taken for granted, unless such routine is disrupted and thus the taxonomies it encompasses emerge at the conscious level, potentially resulting in their challenge.

The reasons why individuals may depend on others vary. For example, ship owners in the Greek islands have crews on their ships, with which they have family ties and with whom they tend to work together for life. Moreover, ship owners set up an informal *'social security'* system, so, if an accident happens, if anything goes wrong, they would take care of the family of their employee.

However, in return, *whatever* they ask has to be done the way they want it, when they want it. Therefore, the meaning attached to words such as *reputation, co-operation* or *favours* will be totally different from the one attached to the same notions by a group of people who work together for a short period of time and, once their contract is over, will never see each other again.[25]

---

alliances' 43 *Administrative Science Quarterly* 781-814; Borgatti, S., Hesterly, W. S. and Jones, C. (1997) 'Exchange conditions and social mechanism' 22 *Academy of Management Review* 911-945; Gargiulo, M. (1993) 'Two-step leverage: Managing constraint in organizational politics' 38 *Administrative Science Quarterly* 1-19. On embeddedness see Granovetter, M. (1985) 'Economic action and social structure: A theory of embeddedness' 91 *American Journal of Sociology* 481-510.

[25] This will be distinguished from the notion of trust in Chapter V of this thesis. On trust see, Gambetta, D. (ed) (1998) *Trust: Making and Breaking Cooperative Relations* (Oxford: Basil Blackwell). There is an electronic edition of this book available on the website of the Department of Sociology, University of Oxford, at http://www.sociology.ox.ac.uk/papers/trustbook.html, (web page visited on 14 May 2003). Especially see the contribution by Luhmann, N. (1998) *Familiarity,*

Moreover, agents most of the time reproduce such practices without questioning them as they are simply taken for granted, being the 'normal' way to settle things, reflecting dominant understandings as to the role of family, community, social face and pride.

What the above is meant to show is that social face, respect, recognition and its qualities, emerge as a result of institutionalised or less institutionalised relations of dependency amongst the members of a community. Looking into practices showing whether there is such a bond amongst members is thus important in order to establish cohesion. Whether there is cohesion in a group, is to be understood by means of uncovering practices which 'tie' members of a group together, by means of creating relations where the one needs the other, in order to do a job, create a good reputation etc.

This, I term the habitus of dependency and compromise, which consists of cognitive schemas regulating how things are done inside a community, as it is only if bonds of dependency are strong, when group ties are strong, that individuals' subjective feelings, such as recognition and respect or creating and maintaining a social face, would regulate life. In cases where such bonds are weak, such subjective feelings will play a weak role.

Thus, enquiring on the effects of structures and interaction in different settings would lead to different results as to the levels of cohesion and as to how strong is the meaning attached to the insider/outsider taxonomy. The following will further look into this last point.

Confidence, Trust: Problems and Alternatives, at p. 94-107, also available at http://www.sociology.ox.ac.uk/papers/luhmann94-107.doc

4. Inside the European Commission

If one accepts the above, then understanding the regulating principles underlying relationships inside the European Commission, requires moving beyond the compelling power of everyday routine, to look into the cognitive schemas through which everyday working practices acquire meaning. To this effect, the focus of analysis shifts from observing practices to understanding the principles giving meaning to the reproduction of these practices.

The argument then is that the classificatory scheme attributing meaning to many of the practices inside the European Commission is the one reproducing the *insider/outsider* duality. Being in a group, in other words being an *'insider,'* requires sustaining a self-image expected by the other members of the group, as Goffman taught us. Being an *'insider'* matters and reflects power relations as it implies who is to be a successful case handler for example. In other words, being an insider means that one would have to accept tacit understandings about the qualities of *'success'* and *'prestige.'*

The degree to which such understandings will be accepted depend on whether people working for the European Commission *have to* take others into account, further building cohesion, a view that challenges the proposition that this comes as a result of serving common ideals.

In my empirical research, the approach of this chapter is close to Heclo and Wildawsky's analysis, since, in their study on the British Treasury, they consider that socialisation and cohesion should be established by looking at who matters most, how people are related, who owes to whom, how obligations are

repaid and how reputation is valued. To this effect, they observe practices underlying promotion, mobility and working in shared files.[26]

The first main section of this chapter will concentrate on these, with the relevant analysis being based on primary and secondary data. The focus of the analysis will be on showing whether the European Commission exhibits cohesion, by means of looking into the above practices with the aim to uncover relations of dependency and compromise, and then show how subjective feelings regulate life inside this *'community.'*

The thesis advanced in the following sections is that the European Commission is a coherent group and the tacit understandings reproduced in the course of everyday interaction as to the properties of *'success'* include belonging in networks, as this is promoted as a virtue and as such the unspoken dominant definition of *'successful'* interweaves with the insider/outsider taxonomy, further bypassing other competing understandings of what professional success is, such as the one reproduced in the image of isolated, detached from external influences but well educated fonctionnaire with a good drafting hand.

This is not to say that, for example, the national/professional background of civil servants is not important. On the contrary. There is evidence that management styles may differ because of the above-mentioned criteria. For example, DG Competition presents an interesting example of a Directorate General, which is overpopulated by lawyers and had many German Director

---

[26] Heclo, H. and Wildavsky, A. (second ed 1981) *The Private Government of Public Money: Community and Policy inside British Politics* (London: Macmillan).

Generals, a fact that shows the interest taken by the German Government in competition law.[27]

Moreover, DG Information Society is considered to be one of the most collusive with private interests DG. One explanation for this may be that most of the fonctionnaires working for it had been trained as scientists and had worked for the industry before joining the European Commission, thus have certain sympathy for the demands of the industry by virtue of them speaking the same 'scientific language' with national groups affected by the Research and Development policies of the European Commission.[28]

I therefore here look into the ways individual schemas may become institutionalised in whole Units or even DGs. To this effect, nationality and professional background is important to look at, as the work of various author has revealed.[29]

All these points will be taken in turn in the following sections.

---

[27] Cini, M., McGowan, L., Nugent, N. W., Paterson E. and Wright, V. (1998) *Competition Policy in the European Union* (London: Macmillan).

[28] Jourdain, L. (1996) 'La Commission Européenne et la construction d'un nouveau modèle d'intervention publique' 43 *Revue Française des Sciences Sociales* 59-82.

[29] For example see, Shore note 5 above; McDonald in Nugent note 6 above; Page, E. G. (1997) *People Who Run Europe* (Oxford: Clarendon Press).

B. LIFE INSIDE THE COMMISSION

1. Spatio-numerical concentration

Men on a ship have to co-operate despite differences and personal disagreements. They *have to* co-exist, as mistakes are fatal. Nevertheless, co-existing on a ship means being part of a team, which may in turn result in coming closer with all these people who you initially may have even disliked, for the simple reason that alone you are nothing, you need others to do almost everything.

Does this model apply to an administration such as the European Commission? I here seek to answer this question.

a The spatial context

The gripping effect of spatial concentration is the starting point to uncover the conditions underlining working relations. Men on a ship are surrounded by water, with heavy seas reminding them of their isolation and distant smells of the existence of safe harbours. In this instance, the effect of the spatial setting has a gripping effect on them, imposing its logic by dictating rules of co-existence.[30] Looking at the spatial setting of the European Commission will similarly serve to explore the influence of surroundings upon people working for the European Commission.

---

[30] Symbolic interactionists stressed the importance of observing the spatial setting, see for example Goffman note 13 above at p. 22-30. Heclo and Wildavsky note 26 above, at p. 1. Generally, an enquiry on the spatial setting is commonly undertaken by anthropologists and ethnomethodologists. For such an approach, amongst myriads others see Shore note 5 above, at p. 3; Latour, B. (1996) *Aramis or the Love of Technology* (Cambridge, Mass.: Harvard University Press).

Brussels is really a small place, having one million inhabitants. It is commonly referred to as the capital of Europe, although it is not the true home to all of the European Union's main institutions. The European Parliament is located both in Brussels and Strasbourg. The European Central Bank is located in Frankfurt, the Court sits in Luxembourg and the European Council moves around the Member States, while the European Commission, is located in Brussels, with the exception of only a few Units located in Luxembourg.

Interview excerpt:

Being far from Brussels feels like being far from real life.[31]

Nevertheless, Brussels is not only home to European Union institutions. It also attracts international institutions, agencies, lobbyists and firms, which have moved their headquarters there to be close to where decisions are taken. From the point of view of aesthetics, the result of this is a paradoxical co-existence of ugly modern office blocks built in the 1960s, along with beautiful early 1900s *art-nouveau* buildings and medieval churches.

Nonetheless, it is undeniably a city with truly an international character, and the presence of innumerable European Union flags hanging from steel and glass buildings at the city centre reinforces this feeling. I was surprised to find out that the Flemish and Vallon bilingual residents are ready to answer to a question addressed to them in English, as if it is the most natural thing, while at

---

[31] Interview with a Head of Unit at DG Information Society, conducted on 22 January 2002.

the very popular Kitty O'Shea's Irish pub, next to Berlaymont where the European Commission used to be located, the staff only speak English, as this is commonly used by customers coming from various national backgrounds.

The demography of the city has changed because of the presence of the institutions of the European Union: 28 per cent of the population are non-Belgians, and half of this percentage comes from non-European Union countries, especially from Zaire and North Africa,[32] making it a vibrant multi-lingual and multi-ethnic society. Nevertheless, central Brussels is divided into two main areas, the Lower and Upper Towns.

The Lower Town comprises the medieval city centre, built around Grand Place and its beautiful narrow streets, while the Upper Town, to the southeast, is the traditional base of Brussels' French-speaking elite, home to museums and shopping areas.

The European Commission is situated in a small area within a small city, which, after eight o'clock in the evening, gives you the feeling of a haunted place. The one DG from the other is usually within walking distance. Undeniably, the worst-case scenario would be to have to take the metro for a short 15-minute journey.[33] Spatial concentration and how it links to cohesion has recently been given explicit recognition in Prodi's proposal to locate Commissioners and their

---

[32] Shore note 5 above, at p. 161.
[33] See the map in Appendix One of this chapter.

cabinets in the same buildings with their DGs, as up to now, the Commissioners

occupied the Breydel building at the centre of Brussels.[34]

Overall, it is mainly in the Schumann and Leopold area where the

European Commission is concentrated.[35] There, the visitor is struck when

confronted with the bare truth of steel, glass, and concrete purpose-built

buildings. I agree with commentators, who, with a touch of cynicism, noted that

the European Union buildings in Brussels *'do not reflect a new Euro-nationalism, but*

attempt instead to project a type of conservative managerialism. All of the main EU

offices could easily be mistaken for the glass and steel headquarters of any major

corporation, which lack human touch and scale.'[36]

Up until 1991, the European Commission was geographically concentrated

in one building, Berlaymont, which then had to be evacuated due to leaking

asbestos. It was designed by the architect De Vestel, in association with Jean

Gilson, Jean and André Polak, and was drawn in the shape of a cross with a

central core and four wings of various dimensions.

It had three floors, meeting rooms and a complex system for vertical

circulation, while the four underground levels housed 1600 parking spaces,

conference rooms, a TV studio, a cafeteria and restaurant, shops and warehouses.

It was more than 200000 square metres. The technical design was bold, but was

---

[34] Whitman, T. (2000), Building a better mousetrap: Romano Prodi's plans for the European Commission' *Harvard Focus Europe,* available at http://hcs.harvard.edu/~focus/TobieWhitman.html, (web page visited on 10 May 2002).

[35] For a visual aid to better understand the concentration element of this analysis, see the map in Appendix One of this chapter, where the exact location of the Breydel building and the other buildings of the European Commission is provided.

[36] Geyer, R. 'Europe needs a capital city with a difference' story published in May 2002 in the *European Voice,* available at http://www.european-voice.com/, (web page visited on 15 May 2002).

considered as a fine example of Belgian modernist architecture and a symbol of European unity.[37]

The first European officials entered the building in 1967, but by 1991 the European Commission's services had expanded with the extension of the European Community from six to nine, and then twelve members. Therefore, Berlaymont only housed a part of the European Commission's services, essentially the Commissioners, their cabinets and the services with whom they are closely linked. Other services had moved to nearby buildings, nevertheless 33000 civil servants used to work there.[38]

Interview excerpt:

When the Berlaymont was still in use when I joined the Commission in 1985, we would all meet for lunch at the same place, in the self-service under the Berlaymont. But these days are gone. Now the DGs are too far away and there is no 'big' self-service anymore. In the meantime, the Commission has grown and the offices are now spread over Brussels. In addition, at that time the only means of communication we had were our personal phone, four fax machines for the whole of DG Competition, and copy machines, where you had to copy page per page. In such circumstances, personal contact was more important than today, where email exchange is the main means of communication.[39]

---

[37] http://www.berlaymont2000.com/index-3.htm, (web page visited on 10 May 2003).
[38] ibid.
[39] Interview with a Head of Sector at DG Competition, conducted on 23 January 2002.

Figure 1

Berlaymont and Breydel

Aerial view of the Berlaymont

7 January 1985

Renovating the Berlaymont

17 September 2001

Breydel, headquarters of the Commission

19 October 2002

Source: http://europa.eu.int/comm/mediatheque/photo/select/aerial_en.htm

b Socialising

Brussels is a small place and there is not much to do, the Grand Place and the Bourse area presenting a compact central area where you meet your colleagues and have dinner or a beer in one of the many elegant restaurants and bars, possibly among the best in Europe, covering the need of officials and employees to entertain quests and clients. Bars, restaurants and museums are situated within the city centre, enclosed within the *petit ring*, which follows the path of the 14th century city walls.

Irish pubs are very popular with junior *fonctionnaires* and *stagiaires*[40] for example. There, we talked about the things that everybody talks about, mainly about the internal politics of the Unit, the DG or the European Commission in general. We gossiped about colleagues, warned about people, discussed business. There are always common problems to talk about, for example, relations with superiors, promotion, or the different kinds of recruitment, the latter being an issue on which you never touch on when an *'outsider'* is present.

After sometime at the European Commission you copy your colleagues and they copy you. You find yourself talking about the same things that everybody talks about, although you would have not thought so at the beginning. This osmosis of differences happens as a result of the simple need to co-exist. The example of a meta-language, to which Abélès and Béliers[41] refer, is typical of the above tendencies, as words have been inserted in the French and

---

[40] I am using the French words for the English word *trainee,* as this is commonly used in the European Commission.

[41] Abélès et Béliers note 4 above, at p. 440.

English vocabulary having no meaning outside the context of the European Commission.

Examples of the latter trend include the words *'égalité des chances,' 'agenda,'* and *'speaking brief.'* Moreover, it comes as no surprise when a German speaks French to a Dutchman in the European Commission. Similarly, it is commonplace to see a German/Englishman replying in French, although the question addressed to her was in German or English respectively.[42]

On the basis of the above, Shore's ethnographic research has found that various factors contribute to the formation of a *'self-recognising ethos.'*[43] The author observes that there is *'ghettoisation'* of EU staff in certain neighbourhoods in Brussels. As a result of this, EU officials tend to socialise amongst themselves and do not mingle with the local population. Therefore, officials in Brussels tend to occupy a position similar to diplomats and colonial administrators, *'they are in Brussels, but not of it.'*[44]

This ethos is further reinforced by high salaries and free education for officials' children in the prestigious European Schools, and by the fact that officials tend to be recruited for life. Shore then concludes that there is an *'esprit de corps,'* which is developed as a result of intermingling in the same

---

[42] ibid.

[43] Shore, C. (1996) European Union and the politics of culture *Bruges Group Occasional Paper no 42,* at http://www.brugesgroup.com/mediacentre/index.live?article=13, (web page visited on 15 May 2003). The ethnographic research upon which this paper was based, was carried out in Brussels between 1995 and 1996.

[44] ibid.

environment, resulting in the formation of a sense of mission to serve European

ideals even among new recruits.[45]

c The numerical context

Spatial concentration presents another important factor to make an

assessment as to cohesion, as the small size of the European Commission (around

20000 employees) may further contribute to the amalgamation of practices.[46]

The size of the European Commission is smaller than many national

administrations. In reference to the DGs relevant to my analysis, DG Internal

Market's staff on active duty (permanent and temporary) is 289 employees, at DG

Competition the number is 384 employees, at DG Research 815, at DG Enterprise

709, and finally at DG Information Society 593.[47]

The following charts show the breakdown of DGs by size and the

percentage of officials with specialised degrees. In figure three, this is done by

reference to intramural staff, (this is staff covered by staff regulations such as

permanent officials, temporary officials, and locally engaged staff), while the

ABCD grades in figure four are categories reflecting the type of qualification.

---

[45] ibid, noting that his opinion is in accordance with Edwards and Spence, see Edwards, G. and Spence, D. (eds) (1994) *The European Commission* (Harlow, UK: Longman Current Affairs).

[46] One could argue that it is the *'Jean Monet approach'* of organising the High Authority (the predecessor of the European Commission) around small and flexible teams that has left its mark in the current structure, see Chapter II Section C of this thesis.

[47] Report by the Inspectorate-General of 7 July 1999 'Designing Tomorrow's Commission - A Review of the Commission's Organisation and Operation,' available at http://europa.eu.int/comm/reform/decode/screening_en.pdf, annex 6, (web page visited on 15 May 2002). Since the report is based in data collected in 1998, there is no information on DG Justice and Home Affairs.

Figure 2

Size of DGs in the European Commission

SIZE OF DGs

	DG Enterp.	DG Comp.	DG Personnel	DG Research	DG Info. Soc.	DG Int. Market
SIZE OF DGs	988	503	2932	1268	818	388
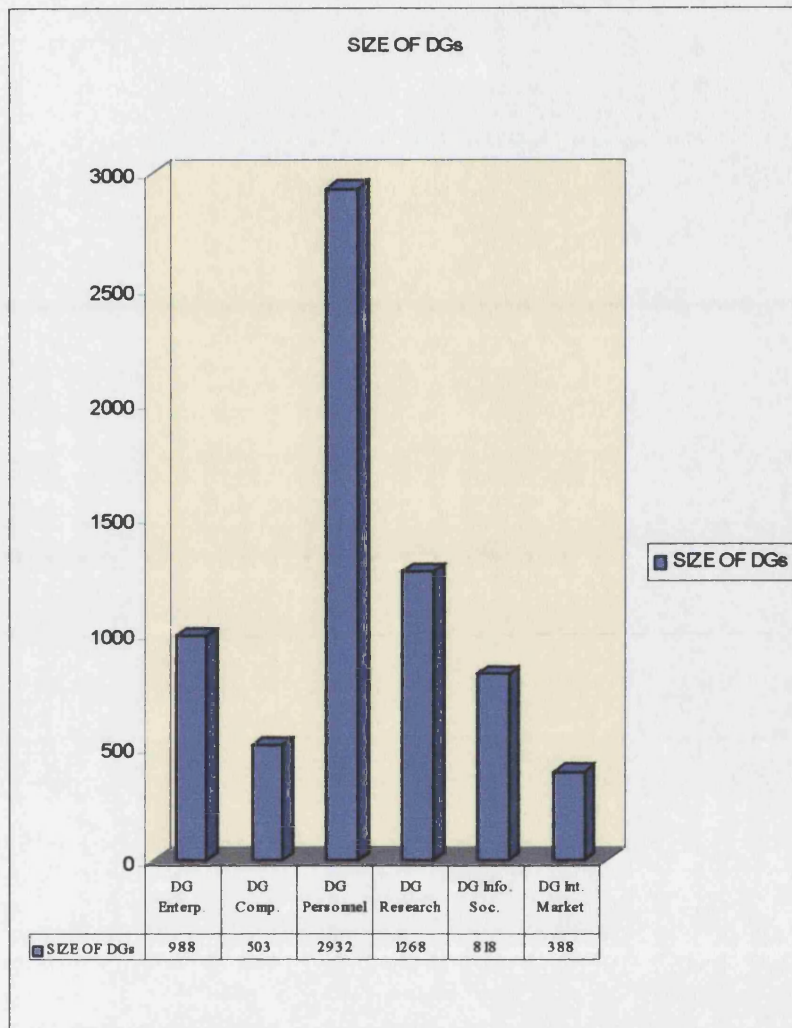
Note: For the purposes of comparison I have included DG Personnel, as it is the largest DG of the European Commission

Source: Report by the Inspectorate-General of 7 July 1999 'Designing Tomorrow's Commission - A Review of the Commission's Organisation and Operation,' available at http://europa.eu.int/comm/reform/decode/screening_en.pdf

Figure 3

Percentage of A, B, C, and D officials
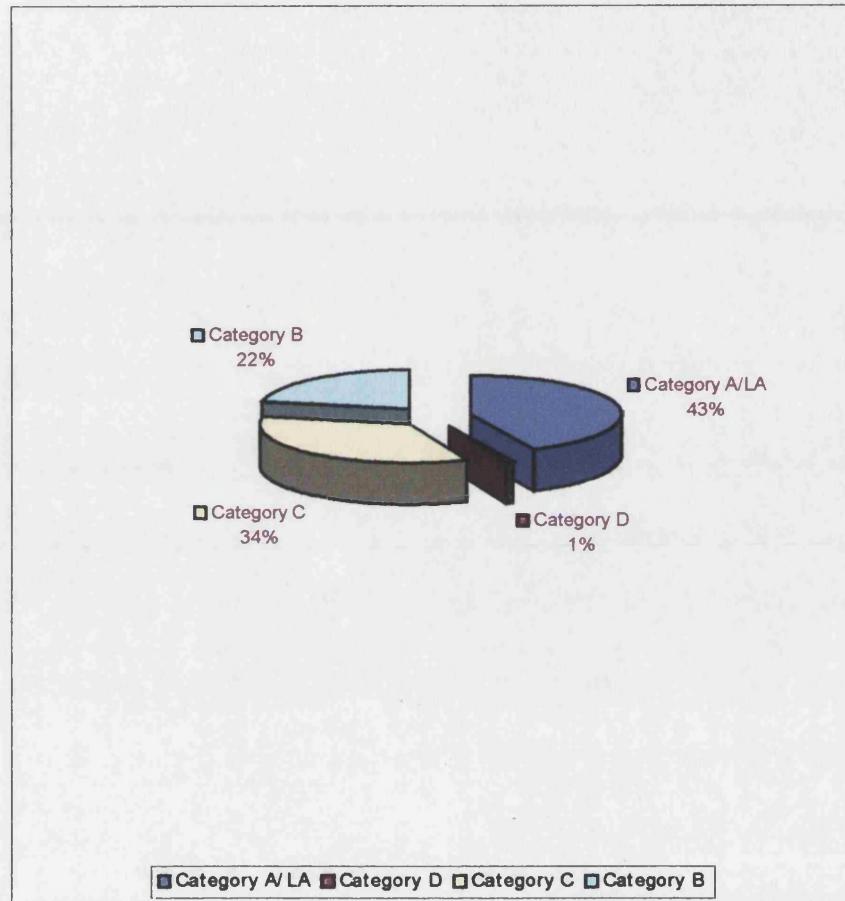
Note: A grade entrants can join the European Commission either without professional experience (at A8 level) or with a minimum of two years' experience (A7/A6level). In order to sit some A7/A6 competitions, candidates may need a specialised degree in law, economics, accounting or statistics and relevant professional experience. Note that a *Head of Unit* is an A3, a *Director* is an A2 and a *Director General* is an A1. Candidates for B grade posts must have successfully completed a course of advanced secondary education and obtained a final certificate or diploma. They must also have had at least two years' experience in a field related to the activity being applied for. Staff in category B is mainly responsible for executive tasks and participates in every area of EU activity. Staff in category C is mainly responsible for secretarial and clerical work, while Category D staff is engaged in manual or service duties.

Source: Report by the Inspectorate-General of 7 July 1999 'Designing Tomorrow's Commission - A Review of the Commission's Organisation and Operation,' available at http://europa.eu.int/comm/reform/decode/screening_en.pdf

2. Cohesion and *phronesis*: Uncovering relations of dependence

The previous section presented us with selective information as to the spatial and numerical context of working for the European Commission in Brussels and how they may affect cohesion. Nevertheless, I here argue that it is not simply because people, for example, eat together that they acquire common bonds.

It is that the practice of eating together has a common meaning in the light of their habitus, which is developed as a result of a socialisation process. This idea discards the assumption that, once officials are appointed, they will tend to acquire a loyalty to the EU institutions rather than to their respective nation states, an argument supported by integration theorists.

This section's proposition is that, even if you do not initially feel part of a group such as the European Commission, you will end up being, because you need others. If one accepts this, the argument is then simple: People working for the European Commission have to take others into account, and this is why they are a distinctive group, not because they serve some common ideals. The following will explore this proposition.

a The formal organisational characteristics of the European Commission

Before considering the norms that regulate everyday exchanges, I will here comment on the formal organisational characteristics of the European Commission.

Indeed, formalism and hierarchy are omnipresent, denoting the Franco/German influence on the institution.[48] The terminology used is similar to the one employed in a French Ministry. The organisational divisions of a DG, (*'directions générales,' 'direction'* and *'sous direction'*), follow the French tradition. Moreover, the institutions of the *cabinet, body of advisers* and *aides to the Commissioner* and the ranks (*'conseiller,' 'directeur,' 'chef de cabinet'*), all reflect French ministerial organisation, which has also been adopted by many Southern European countries.[49]

Passing the *'concours,'* (competitive entry examinations) is required in order to be employed by the EU Commission. This is similar to the one in France, which was introduced in this country a century ago. Finally, the *ABCD*[50] grading of civil servants, again follows the French system, which was introduced across the whole French civil service in 1948.[51]

Hierarchies are rigid when it comes to the approval of the drafts and proposals prepared by a fonctionnaire. An *A academic level* official needs the approval of about five persons for her drafts, as these will have to go through *the Head of Unit*, or sometimes *the Head of Sector, the Director, the (deputy or) Director General*, before him *the assistant of the Director General*, the person in *the cabinet of the Commissioner* responsible for a fonctionnaire's file and *the Commissioner*.[52]

Moreover, as an official you are always dependent on the Legal Service and the Secretariat General. This is because formal approval of procedures is

---

[48] Page note 29 above, at p. 7.
[49] ibid.
[50] See figure three.
[51] Page note 29 above, at p. 7.
[52] On the ABCD system see figure three, at p. 29.

required from the Legal Service, while both the Secretariat General and the Legal Service report directly to the President of the European Commission.[53]

The *'life of a file'* inside the European Commission is also strictly prescribed by formal rules. File allocation is done by the Head of Unit, while this is only decided at the level of the cabinet of the President of the European Commission in the event more than one DG considers that a particular file falls within its competence. Once a file is within the responsibility of a DG (or the joint responsibility of more DGs), it then sends a questionnaire to Member States (MS) and on the basis of the information it collects, it sets a working party, whose members are representatives from MS, the industry, and other interested parties.[54]

Parallel to this, DGs and Services are consulted, but case handlers do not themselves have to decide when and who to consult on their drafts. Inter-service consultations are formalised, as there is a special informatics instrument (CISNET) for it. The relevant *'dossier'* moves around DGs with an attached note on it, which sets the requirement of comments being given within certain time limits. Meetings with lobbyists are managed at an informal basis. Finally, once a draft proposal is finalised, it is transmitted to the cabinets and then to the College of Commissioners for approval.[55]

---

[53] Since the Legal Service and the Secretariat General report directly to the President of the European Commission, it is through these services that he can potentially keep an eye on European Commission's activities. Nonetheless, as Cini notes, the old days of the active and at times interventionist Secretariat General are over, on these issues see Cini, M. (1996) *The European Commission. Leadership, Organisation and Culture in the EU Administration* (Manchester; New York: Manchester University Press; New York: St. Martin's Press).

[54] Interview with a Head of Unit at DG Information Society, conducted on 22 January 2002.

[55] ibid, at p. 152 and 154.

Figure 4

Decision-making process in the EU
Example 1: Proposal for a Council Framework Decision on Attacks against Information System

Private Com (2002) 173	2002/0086/CNS
Proposal for a council framework decision on attacks against information systems	
Private Fields Of Activity:	
Justice and Home Affairs	
Legal basis:	
Commission:	Traité/UE/art 29, 30 par 1, 31, 34 par 2
Procedures:	
Commission:	Consultation procedure
Type of file:	
Commission:	Proposal for a Decision
Comments:	
This proposal does not relate only to acts directed at Member States. It also applies to conduct on the territory of the European Union, which is directed against information systems on the territory of third countries. This reflects the Commission's commitment to tackle attacks against information systems at a global as well as European Union level.	
Private 19-04-2002	Adoption By Commission
Primarily responsible	DG Justice and Home Affairs
Jointly responsible	DG Information Society
Optional consultation	European Parliament
Addressee for formal act	Council
Responsible	Erkki Liikanen; Antonio Vitorino
Documents:	COM/2002/173/FINAL IP/2002/601/
Procedures:	Consultation procedure
Type of file:	Proposal for a Decision
Legal basis:	Traité/UE/art 29, 30 par 1, 31, 34 par 2
Numero Celex	52002PC0173

Source: COM (2000) 385, 2000/0189/COD
http://europa.eu.int/prelex/detail_dossier_real.cfm?CL=fr&DosId=158278

Example 2: Proposal for a Directive of the Parliament and the Council concerning Personal Information and the Protection of Privacy in the Context of Electronic Media.

Private COM (2000) 385,	2000/0189/COD
Proposition de directive du parlement Europeen et du conseil concernant le traitement des données personnelles et à la protection de la vie privée dans le domaine des communications électroniques	
Private Domains	
Diffusion de l'information	
Questions Generales	
Base(s) juridique(s) :	
Commission :	Traité/CE/art 95
Procédures :	
Commission :	Procédure de codécision
Type de dossier	
Commission :	Proposition de Directive
Commentaires :	
La directive proposée est destinée à remplacer la directive 97/66/CE concernant le traitement des données à caractère personnel et la protection de la vie privée dans le secteur des télécommunications qui devait être transposée pour le 24 octobre 1998. Cette proposition ne vise pas à modifier profondément le contenu de la directive existante, mais simplement à adapter et à actualiser ses dispositions pour tenir compte des évolutions récentes et prévisibles dans le domaine des services et des technologies des communications électroniques.	

Private 12-07-2000	Adoption Par Commission
Responsable	DG Société de l'information
Associé	Centre commun de recherche; DG Affaires économiques,finan.; DG Agriculture; DG Commerce; DG Concurrence; DG Développement; DG Education et culture; DG Elargissement; DG Emploi et affaires sociales; DG Energie et transports; DG Entreprises; DG Environnement; DG Fiscalité Union douanière; DG Justice, Aff. intérieures; DG Marché intérieur; DG Politique régionale; DG Recherche; DG Relations extérieures; DG Santé, protection consomm.; Secrétariat Général
Consultation obligatoire	Comité économ. et social
Consultation facultative	Comité des régions
Dest. acte formel	Conseil; Parlement européen
Responsable	Erkki Liikanen
Documents :	JO C E/2000/365/ 223
Procédures :	Procédure de codécision
Type de dossier	Proposition de Directive
Base(s) juridique(s):	Traité/CE/art 95

Source: **COM (2000) 385, 2000/0189/COD**
http://europa.eu.int/prelex/detail_dossier_real.cfm?CL=fr&DosId=158278

Figure 5

Chart of a DG
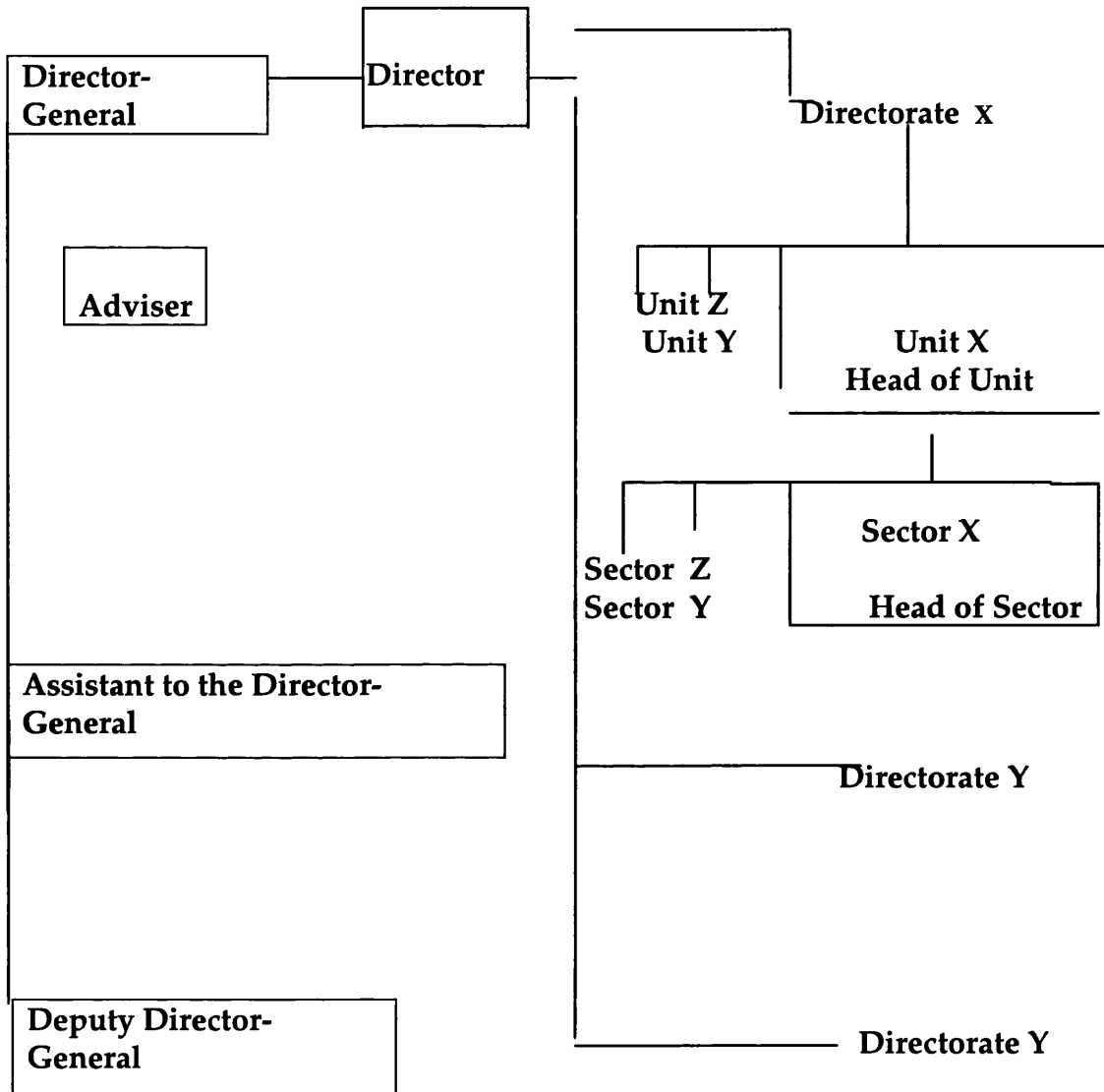
b Blurring hierarchical relations: Negotiating and co-operating in a microcosm of unclear hierarchies

If one chooses to move beyond formal structures in order to understand how people are really related, how obligations are repaid, how reputation is built and what the norms regulating the above are,[56] a different set of observations would be valuable.

Therefore, understanding decision-making[57] as being the ordered orchestration of formal procedures giving birth to a proposal or a draft, simply misses the point. I think there is a more complicated reality underlining the process through which a piece of legislation is initiated. I therefore here engage in illustrating the reasons why hierarchical relations may get blurry.

As a civil servant working for the European Commission you are called to negotiate and co-operate with various other persons in a microcosm of unclear hierarchies. Good personal relationships with the hierarchy and in particular with the colleagues in the cabinet of the Commissioner can prove to be extremely useful in the event a proposal is blocked at the level of the cabinet of the Commissioners, or resistance emerges at lower levels of the hierarchy.

Interview excerpt:

It can be very stressful for young fonctionnaires.... We have agreed in November on the Framework Decision and begun working since April, and then

---

[56] Heclo and Wildavsky note 26 above.

[57] Decision-making rests within the European Commission, while decision taking is the responsibility of the College of Commissioners. My focus is on the former. For this distinction see Cini note 53 above, at p. 154.

> *somebody destroyed everything for no good reason. Now, I have to talk to one*
>
> *member of the cabinet and try to get him to speak to the Commissioner.*[58]

In other words, good relations with the cabinet can prove to be crucial, as there are times that a fonctionnaire would need to mobilise them to 'sell' a proposal directly to the Commissioner, circumventing opposition from lower in the hierarchy. Many informal discussions were focused on how somebody would speak to a member of a cabinet, to convince him to speak to the Commissioner, who then might want to speak to the Director General.

However, informal chats are significant for the colleagues in the cabinet of the Commissioner too. This is because a fonctionnaire can provide direct background information, not 'censored' by the Director General. Moreover, good relations with the Director General are important for the same reason.

Interview excerpt:

> *Good relations with the Director General are also useful as, in the event the*
>
> *Director or Head of Unit are aware of this, they will not easily take the risk of*
>
> *blocking your proposal. Therefore very important meetings are these in which*
>
> *your Director General participates and for whom you have prepared the*
>
> *briefings.*[59]

---

[58] Interview with a Head of Unit at DG Information Society, conducted on 22 January 2002.
[59] Interview with an A5 official at DG Competition, conducted on 24 January 2002.

c Mobility

The previous excerpt shows that negotiating renders hierarchies blurry. Mobility though is another variable to be taken into account to make a relevant assessment.

Page's analysis is important to this respect, as he concludes that there is considerable mobility in senior posts. His data indicate that 61 per cent of his sample had previously worked in another Directorate General.[60] In a Communication from Vice-President Kinnock to the European Commission,[61] the above figures seem to hold true for today's situation.

According to the data in this communication, about 1000 officials of all grades change DG or department each year. The figure for 1999 is 1058 out of approximately 20000 officials working for it. For the period between 1990 and 1999, the number of officials who changed posts in the context of interdepartmental mobility amounted to 8669. Nevertheless, this number excludes mobility within a DG, as accurate numbers do not exist. Finally, as regards officials in top management posts, such as grade A 1 and A 2 officials, they *have to* regularly move.[62]

Mobility is considerable, and the Kinnock communication seeks to formalise this trend by means of setting benchmark periods: As a rule, officials

---

[60] Page note 29 above, at p. 35. His observations are based on biographical data of 207 senior officials, compiled from biographical entries in the (1992, 1993) *European Companion* (London: TSO).

[61] Communication from Vice-President Kinnock to the Commission of *Guidelines on Mobility*, adopted by the Commission under SEC (2002) 146 on 12 February 2002, at p. 3. It is important to note that mobility is voluntary, with one exception: The case of sensitive posts, where officials have special expertise or handle sensitive information. Otherwise, officials stay in their posts for a fixed period.

[62] This has been recently confirmed by the Commission Communication SEC (2000) 2305/5 of 21 December 2000 on the Appraisal, Selection and Appointment of Senior Commission Officials.

should consider changing jobs once they have spent at least two, but not more

than five years in the same post. The Communication further asserts that newly

recruited officials should acquire broad experience at the beginning of their

career.

A reasonable period for a new official to remain in her first post would be

three years. Nonetheless, individuals aged 55 and above, who wish to remain in

their post, may do so.[63] In reference to mobility, I was told that:

Interview excerpt:

Mobility is in principle not related to promotion. When you move to another

DG or another Unit in the same DG you keep your grade. The exceptions are

the designation of Directors and Director Generals: Such designation is a

promotion because the title corresponds to a specific grade and salary.

As regards mobility the system functions as follows: Vacant positions are

advertised on the intranet describing the grade/profile expected. All colleagues

can apply. Of course informal contacts can prove valuable in this case. But, you

should note that for someone to be transferred to another Unit, the Head of

Unit has to give her consent. The only case of transfer without consent happens

in case of restructuring parts of Units (for example when a Unit merges with

others), so, since files 'move' officials have to move with them.[64]

---

[63] Communication from Vice-President Kinnock to the Commission note 61 above, at p. 6
[64] Interview with an A5 official at DG Research, conducted on 29 May 2002.

The above is meant to elucidate the importance of preparatory stages. My view is that much is done at an informal level by means of an informal chat. Hierarchies of course, are never fully skipped, as the dossiers concerned have to be signed. Nevertheless, they may be less involved in the initial stages.

Mobility further reinforces this, as a fonctionnaire does not know with whom she will be working tomorrow. Good contacts with other people from other Units and DGs may prove crucial then. One would be tempted to ask though: Why are national networks not enough? The answer is simple: One cannot choose the people she works with and moreover, because of the working arrangements of the European Commission one is called to co-operate with various people.

This is not to say that such national networks do not exist. French nationals for example are thought to be very well networked, although the people who have graduated from the elite French Universities, the *Grandes Ecoles,* present an interesting example of a network within a network, not to mention the hierarchies inside this sub-network (Ecole Supérieur, Ecole Normale and Ecole Polytechnique).

d Promotion

Relations of dependency may further be formed as a result of the particular rules and practices governing promotion procedures. When Jacques Delors was President of the European Commission (1985–95), a reform of rules took place: To become a Head of Unit (A3 level) one would no longer have to

gradually go up all the levels in the hierarchy (From A7 to A3). Now, even an A7

can become a Head of Unit on the basis of merit.[65]

Interview excerpt:

The reform was undertaken in the name of flexibility, as it would allow the capable

to go up in the hierarchy faster than the others. However, in reality the reform aimed

at controlling the people who occupy the A3 post (Heads of Unit) so as to ensure

their willingness to respect and serve the ideals that underline the political mandate

of the Commissioner. Having the right contacts and ideas is important in order to

become a Head of Unit now, as such an appointment requires the approval of the

Commissioner.

But, before the reform, A level fonctionnaires would inevitably one day become

Heads of Unit, as going up the hierarchy was prescribed in administrative rules,

with no active involvement of political figures, such as the Commissioner. This

actually resulted in some Head of Units not always being receptive to some of the

Commissioner's ideas.[66]

Hence, new types of networks were created, as once again having the right

contacts may prove to be crucial when it comes to promotion. In this instance,

promotion and reputation become intertwined.

---

[65] Edwards, G. and Spence, D. (eds) (second ed 1997) *The European Commission* (Harlow, UK: Longman Current Affairs).

[66] Interview with a Head of Sector at DG Competition, conducted on 23 January 2002.

Interview excerpt:

> *Reputation is measured in terms of education, past experience, influence, and*
>
> *reputation.*[67]

'*Influence and reputation,*' mean that, for example, knowing people from the cabinet is important. There are various ways to build it, as a fonctionnaire with a good reputation is:

Interview excerpts:

> *Somebody who has sufficient knowledge, motivation, political judgement,*
>
> *negotiating skills and realism.*[68]

> *A specialist who nonetheless can play by the rules and play so good that he gets*
>
> *promotions/appointments.*[69]

The above denote that personal achievements and specialisation are important, but not enough. Reputation can be built by participating in meetings like the ones organised on specific files (these are called *ad hoc inter-service meetings*), on horizontal issues (one example are the meetings organised at DG Competition on *collective dominance* and *access to networks*), as well as by means of internal notes copied to a large number of colleagues.[70]

At these instances, a fonctionnaire can prove her professional skills and her negotiating qualities. Weekly meetings are also significant in this respect.

---

[67] Interview with an A5 official at DG Enterprise, conducted on 22 January 2002.
[68] Interview with an A4 official at DG Internal Market, conducted on 24 January 2002.
[69] Interview with a Head of Sector at DG Competition, conducted on 22 January 2002.
[70] Interview with a Head of Sector at DG Competition, conducted on 23 January 2002.

These are organised by the Head of Unit and serve the purposes of co-ordination and of keeping everybody informed about the work carried out in the Unit. During these meetings, everybody has to report about the tasks performed in the previous week and the ones that would be performed in the following. After all, the principal duty of a Head of Unit is task allocation and co-ordination.

Hence, bringing fame to one's Unit by taking risky initiatives may be considered not to be good enough, as this person would create lots of enemies. Moreover, if somebody does a bad job, the Unit or the DG is exposed. If somebody makes a public comment everybody is exposed. You have to be cautious.

Interview excerpt:

> *X took initiatives. He was the first to organise XXXX... It was during his time that the Unit became famous. But then he became dangerous for some people. People begun talking behind his back...*[71]

e Transdepartmental dialogue

The above imply that cohesion does not build up simply because fonctionnaires frequently socialise with each other. It is not the result of them being *'trained'* to co-exist by working together despite their differences. It is exactly that all of the above acts acquire meaning in the light of shared understandings as to how relations are built and reputation is valued. These understandings underline and produce practices such as, for example, eating

---

[71] Interview with a Head of Sector DG Competition, conducted on 23 January 2002.

together or setting up an ad hoc meeting or a forum, as we will see in the following paragraphs.

The strategy of networking described earlier builds cohesion as it is underlined by practices, which tie members of a group together, as structural conditions make people in a group dependent on each other in order to do a job. Moreover, such dependency produces shared understandings as to who is *'successful.'*

To illustrate this, being educated and having a good drafting hand does not seem to be enough. Belonging in networks is promoted as a virtue and as such the unspoken dominant definition of *'successful'* interweaves with the insider/outsider taxonomy, sidestepping other understandings of what professional success is, such as the one reproduced in the image of isolated, but well educated fonctionnaire.

In the light of the above, inter-service meetings and collaboration, as in the case of dossiers shared by more than one DGs, present another instance, which may reinforce the finding of dependency. The DGs of the European Commission are caught in constant communication and collaboration especially in the field of information society regulation. This is because, due to its nature, information society regulation falls within the competence of various DGs.

Following this intuition, the following paragraphs will make the point that committees contribute to the habitus of dependency, although it is not within my purposes to chart the different committees relevant to information society regulation.

The degree of officials' active participation may depend on the type of group concerned and, of course, on the subject matter. There are numerous and of many types. There are formal internal committees like the Open Networks Provision Committee (ONP), the National Regulators Advisory Group (NARA); Groups run but not controlled by the European Commission (e.g. the EU Cybercrime Forum); Internal task forces consisting of various services representatives.

Moreover, committees can be formal or ad-hoc ones, with ad hoc ones having the advantage that one is not obliged to spend time with persons she does not choose, with an agenda she does not set. In principle, the agenda is defined before the meeting takes place (as meetings are usually problem solving ones).

There is self-selection by those initiating the meeting and selection by the Director or Director General as regards the *'passive'* participants. A small inter-service task force may have five participants; Committees of MS have approximately 15-25 members.

Nevertheless, opinions vary as to the extent to which interdepartmental dialogue may bring about true co-operation.

Interview excerpt:

In essence one is inclined to discover that you have to compromise to ensure daily efficiency and avoid problems/-losing time. This is especially the case since not all DGs/persons have the same high degree of collaborative 'transdepartmental' attitude and sometimes this does not change despite long

> *'training' in such routines.*[72]

Co-ordination may prove to be difficult, but in other instances meetings would run smoothly, resulting in a fruitful exchange. Conflicts can be for two main reasons: Personal conflicts, and policy conflicts, as some issues are more contentious than others. This depends on the controversial nature of the file concerned.

A very technical, politically neutral file would not normally be problematic. A politically sensitive file may be changed considerably and in some cases be completely blocked. Different DGs may approach and understand an issue from a totally different angle, as it was the case with the debate surrounding the issue of data retention.

Interview excerpt:

> *Criminal law represents an interesting conflict of principles, as the law enforcement people of DG Justice and Home affairs profoundly disagree with the civil liberties people. But, it is not only the DG Justice and Home affairs involved in the Data Retention File.*
>
> *The DGs involved are: DG Justice and Home Affairs, DG Internal Market, and DG Information Society. We (DG Information Society) are 'the sausage,' trying to compromise things in respect to issues that relate to privacy and the Internet...*[73]

---

[72] Interview with a Head of Unit at DG Information Society, conducted on 22 January 2002.

[73] Interview with a Head of Unit at DG Information Society, conducted on 22 January 2002. In May 2002, The Parliament passed the Communications Data Protection Directive (EU

> *What happens is that, on the one hand you have the 'law enforcement' people and on the other hand Internet service providers and telecom operators in a strange position, as although they do not want laws to impose on them obligations, while telecom operators used to retain data themselves, since they are often victims of fraud, (but of course nobody knew that, as it is an illegal act). Then you have the civil rights people who claim that this is a surveillance situation. I want to find a compromise solution, maybe accept that providers need some data to be retained, what data depends on the business model. If this practice [data retention] is legitimised by law, then the law should not impose heavy obligations on them.[74]*

Again, reputation is important in the course of negotiations in the event of conflicts, and it is a matter of pride to have your opinion taken into account. I have seen various internal notes proving this point. At the level of Heads of Units, conflicts, as depicted in such notes, can be very intense and most of the time the message is *'you did not take me into account,'* while at the level of Directors Generals the tone changes and is far softer. After all, having won a battle will increase one's bargaining power in the next conflict.

2002/58/EC) 351 to 133, despite an aggressive campaign by civil liberties groups. The Directive provides that 'Unsolicited email, better known as spam, has been outlawed by the European Union. Internet-fed identification programs, better known as cookies, will be tolerated if people are informed of them, And EU governments can order the retention of customer data beyond useful billing purposes' for the history of the Communication Data Protection Directive see http://www.theregister.co.uk/content/6/23268.html, www.theregister.co.uk/content/6/25483.html, (web pages visited on 14 May 2003).
[74] ibid.

The fact that, although transdepartmental dialogue is an important component of decision-making, it may prove problematic, has been recognised by the European Commission in its recent report with the title *'Designing Tomorrow's Commission.'*[75] The report states that European Commission departments currently devote 5.7 per cent of intramural human resources to the internal consultations closely associated with it. This comes to something like 1280 men per year, with 880 men per year being in category A.

However, the report recognises that coordination is not as effective as it could be, *'due to a lack of clarity as regards the split of responsibilities between departments, the over-assertiveness by departments in some cases, and authoritarianism on the part of certain team leaders in others – which has the effect of distorting interdepartmental consultations and creating certain organisational problems which slow down response times.'*[76]

Therefore, the report further proposes that there should be a clear separation of responsibilities, and that the *'lead'* department and the other departments consulted should be given autonomy and responsibility. To this effect, the Secretariat-General should be given a greater part to play.

f File keeping

An issue relevant to the above is file keeping. In cases when transdepartmental dialogue is required, mundane administrative practices

---

[75] 'Designing Tomorrow's Commission - A Review of the Commission's Organisation and Operation,' note 47 above.

[76] ibid. Interestingly enough, the report further mentions that some DGs have expressed their concern in reference to their relations with Member States' private offices, as they considered that there is excessive interference by them in the internal management of DGs.

relating to where files are kept may be very important. This is because such 'details' can be quite contentious since they imply who *controls* the file.[77] The following (long) interview extract will elucidate how power is exercised in the event a file is shared or inter-service consultation consultation takes place.

Interview excerpt:

When a DG has principal responsibility of a file, while the other DGs are consulted, the influence of the latter comes from the fact that the Commission is a collegial body. All Commission decisions have to be submitted to the College of Commissioners with an attachment of the opinions of the other DGs consulted. A 'casehandler' can therefore 'block' other DGs proposals, but then he takes the risk that the cabinet of the Commissioner in charge of the consulted DG would raise the issue and try to block the decision at the level of the College of Commissioners.

It is therefore always better to try to convince your colleagues or at least to minimise the points of disagreement. A way to do this is to organise bilateral meetings to try to find a compromise....

The case-handler has the file in his office and set the agenda of meetings with other DGs. However, inter-service consultations must be launched via the Head of Unit and be signed by the Director. A case-handler's reputation and his good relation with the Head of Unit and/or Director can thus prove crucial. Then, for example, because of strong criticism by other DGs, a Director

---

[77] Cini, McGowan, Nugent, Paterson and Wright note 27 above, at p. 154.

> *may decide to stop initiatives of his officials, to avoid starting a 'war' on that subject. On the other hand, if it is the case of a 'turf battle,' a Director may try to protect the competences of his DG.*

> *Although inter-service consultation is very often, shared files are not the rule, but the exception - you were involved in one when you worked on the XXXX report-. Even in this case, the control is not really shared, since one of the two DGs has the 'master copy' and the other will have to make comments.*
>
> *However, since we can only go the Commissioner with a cover 'fiche' signed by both Director Generals, cooperation is required up to a certain extent (e.g. to reach agreement on substantive issues - since each side can convince its Director General that the issue is sufficiently important and that he should push the Director General of the other DG to take into account the comment). On the contrary, on technical and drafting issues it is not possible to block the colleague holding the 'master copy.' In order to avoid this unbalance, in the initial XXXX reports, we had divided the chapters amongst us to avoid one DG having the whole master copy.[78]*

In reference to the exact location of keeping files inside a DG, the system varies strongly. At DG Competition, in the Unit I worked for, the case-handlers kept their files in their office, a practice which, I believe, reflects the fact that that *rapporteurs* have important independence in this particular DG.

---

[78] Interview with a Head of Sector at DG Competition, conducted on 30 May 2002.

However, the files regarding infringement procedures were kept by the secretary, possibly because access to files and appeals procedures against the European Commission were relatively frequent, and the European Commission would then have to transmit the file to the court. In the Merger Task Force, I was told that the secretaries make copies of all documents for the case handlers. In other DGs again practices vary considerably.

This brings me to my next point: Although the previous presented examples showing how *dependency* and *compromise* regulate life inside the European Commission, the following will touch on the characteristics of the file system, in order to show that, although relationships of *dependency* result in the establishment of a certain degree of *cohesion*, personal management styles may exhibit *difference.*

For example, at DG Competition, each file gets a *'case number.'* A-grade officials are known as *'case-handlers,'* because everybody is allocated a case, for which she is responsible. There is a database, ELIE, which she has to update after each step, and productivity can thus be measured and compared. One should not forget that DG Competition is a DG with considerable workload, processing large numbers of cases or dossiers, and therefore such working practices are meant to ensure efficient planning.

This is why a *'priority number'* is assigned to a case as soon as it arrives. Simultaneously, at DG Competition, they apply a set of workload indicators. In this way, the amount of time required to process a case can be estimated, and the work allocated to officials. In the research field, some programme management

departments have also developed workload indicators, which enable the Head of Unit to anticipate resource requirements and distribute the workload.[79]

In other DGs the system can be different. In DG Information Society for example, there are no *'case numbers'* but lists of tasks of each officials in the Unit. Often, the *'tasks'* are not related to specific files, but rather a *'specialisation.'* It is important to note though that, in any event, files cannot be moved from one official to another without protest (officials have administrative *'property rights'* over their files). So, what happens when a Directorate is restructured is that officials and their files move from one Unit to another.

The fact that officials have a nearly *'property right'* in their files implies that they try to specialise so that they are considered as experts in certain domains, although for linguistic reasons another official can be asked to work on a specific issue. Whatever the case, specialisation is extremely important, as it plays a role for promotions.

Nonetheless, the responsibility of the casehandler varies strongly across DGs. DG Competition officials have considerable responsibility on their files. Rank-and-file officials sign their own notes and are expected to present their dossiers before the Commissioners. In other DGs, I was told that this is seldom the case.[80]

The Merger Task Force at DG Competition presents an interesting and unique example of organisational flexibility. Although the normal situation in the

---

[79] The above has also been recognised in the 1999 report by the Inspectorate-General, which listed good and innovative working practices applied within the Commission, see 'Designing Tomorrow's Commission - A Review of the Commission's Organisation and Operation,' report by the Inspectorate-General note 47 above, at p. 16.

[80] Interview note 78 above.

European Commission is that work is performed within Units with clearly defined responsibilities, in the Merger Task Force there are no Units: The whole Directorate (about 40 rapporteurs) acts as one Unit, and the Heads of Unit act as case-managers. This model implies that the competence of the rapporteur mainly depends on knowledge of methodology, procedure and approach (i.e. how to conduct an investigation) and less on specialisation in a particular sector. Therefore, workload can be managed more efficiently.[81]

Moreover, differences, which may reflect one's nationality or professional background, are apparent in practices relevant to everyday practical management of particular files. Good file keeping requires that correspondence and papers are organised in chronological sequence and that it contains all formal correspondence (not personal notes) and notes to the file (e.g. after a telephone conversation), but of course this is not always the case.

Case handlers are chosen by the Head of Unit, but, again, the criteria for this vary depending on each Head of Unit. Some follow *'organigrammes,'* others are more pragmatic and take into account language skills and availability of the relevant official. DG Internal Market uses work programmes for example, to set out in detail the activities to be carried out at Unit level. This way, the provision of funds for activities in the budget can be done more effectively.[82]

Finally, in reference to the use of intranets, teleworking and videoconferencing, practices also vary. For example, DGs Enterprise has promoted transparency in the provision of information using the Intranet to

---

[81] 'Designing Tomorrow's Commission - A Review of the Commission's Organisation and Operation,' report by the Inspectorate-General note 47 above.
[82] ibid.

disseminate and update information (e.g. by putting the minutes of Directors'

meetings on the intranet within 24 hours) .[83]

---

[83] ibid.

C. INTRODUCING RUPTURES

The previous section was meant to introduce the reader to the possibility of looking at divergences in the practices of different DGs and Units. Here I seek to identify how officials may have multiple roles stemming from different management styles, different nationality and language, different gender or professional background. This is an enquiry, which concentrates on identifying schemas owing their existence to the socialisation process of officials *prior* to joining the European Commission.

1. Nationality and professional background

a Nationality

Nationality and how it may affect decision-making has been a contentious issue. The very concept of *Commissioner* is a good starting point to discuss the above. This is because, although they are appointed by major parties in their Member States, their role is to both serve the European interest and provide a channel of communication between the Government in their country and the European Commission.

Then, there is the difference between cabinets and DGs. McDonald's anthropological analysis shed light onto how cabinets are perceived by fonctionnaires as being the ones with power and prestige, since they have the final say in drafts and proposals produced by the officials. And they are also most certainly the place where national affiliations and national loyalties would

be found, as they have regular contacts with national lobbyists, national administrations and the permanent representations of MS in Brussels.[84]

On the individual level, I think that it would be wrong to forget that most European Commission officials come from a national educational, administrative and political system. As Christiansen notes, officials, who have a European educational formation as a result of being educated at the College of Europe, the European Institute of Public Administration or the European University Institute, are *a 'small albeit growing minority.'*[85]

Generally, the link with national administrative systems has been the subject of a number of recent studies.[86] The following sections will argue that nationality may matter, as there are occasions where individual identifications may become institutionalised in Units, and even whole DGs. Moreover, we will see that not only nationality, but also professional background may have the same effect.

DG Competition presents us with an interesting example that may help elucidate the above, as its Directors Generals so far have all been German,

---

[84] McDonald, M. (2000) ' Identities in the European Commission' in Nugent note 6 above, at p. 52-53. According to McGowan, at the level of Commissioners' cabinets, there is a specialist, for example a competition specialist, who may try to protect the national interests of the Commissioner's home country. The specialists meet twice a week, and these meetings are called special chefs meetings. The recommendations from these meetings are referred to the weekly meetings of the chefs de cabinets. If agreement is reached among the chefs de cabinet, then the College of Commissioners usually accepts their recommendation. In this way decision-making is linked to the overall framework of EU economic policy, see McGowan, L. (2000) 'Safeguarding the economic constitution: The Commission and competition policy' in Nugent note 6 above, at p. 154-155.

[85] Christiansen, T. (1997) 'Tensions of European governance; Politicised bureaucracy and multiple accountability in the European Commission' 4 *Journal of European Public Policy* 73-90.

[86] For example see, Egeberg, M. (1996) 'Organisation and nationality in the European Commission services' (1996) 3 *Public Administration* 235-248; Trondal, J. (2001) 'The parallel administration of the European Commission: National officials in European clothes?' *Arena Working Papers 01/25*; Bellier, I. (1994) ' La Commission Européenne: Hauts fonctionnaires et culture du management' (1994) 70 *Revue Française d'Administration Publique* 253-262.

a fact, which reveals the interest taken by Bonn in competition policy matters.
DGCOMP, which is structured along the lines of the German Federal Cartel Office,
comprises eight directorates....It has total of over 400 staff, of whom around half A (area)
grade officials (including 25 or so national experts on secondment in Brussels). Some
44% are allocated to work under Articles 85 and 86 [81 and 82 under the Amsterdam
Treaty, which came into effect in May 1999), 12% to the Merger regulation, 3% to work
under Article 90 [86], 21% state aids, 9% international regulations and the final 11%
are clerical officers.[87]

Moreover, the majority of officials have a legal background, with lawyers outnumbering the economists by a ratio of seven to one.[88] This last point is particularly important if understood in the light of Mc Donald's finding that there is a tacit rank between lawyers, economists and officials with a natural science background. Lawyers are highly valued and viewed as having the *'right'* kind of training and use the *'right'* kind of language to deal with proposals and drafts.

After all, the juridical element is central to the organisation of an administration, as we will see in the following chapters on *capital*. This is because, if one accepts that the principal function of law is to put social phenomena into categories and classify actions as right or wrong, it is important to already possess this mode of thinking as a fonctionnaire.

In the mid-1990s, the conflict between the *'horizontal'* ethos of DG Enterprise (then under the German Commissioner, Bangemann), which favoured

---

[87] McGowan note 84 above, at p. 154-155
[88] ibid.

the application of competition rules, and the *'dirigiste'* approach of DG Research

(its Commissioner being the French Edith Cresson), which supported targeted

projects favouring specific industries, is well documented and shows the

possibility of different DGs possessing divergent views on the same issue.[89]

This was recognised by Romano Prodi, who, after the 1999 events that

forced the European Commission to resign over allegations of fraud, nepotism

and mismanagement, proposed reforms concerning the rotation of senior

Commission officials among Directorates Generals, which have long been

'colonised' by nationals from certain members states, France, being one example of

a state being over-represented in DG Agriculture.[90]

Indeed, the European Commission decided to introduce fixed terms for

Directors Generals, which resulted in the removal of large numbers of senior

officials all in one go, (although many of them occupied new posts at similar

levels).[91]

---

[89] Bomberg, B. and Peterson, J. (1999) 'The development of RTD policy: Making history and setting budgets' in Bomberg, E. and Peterson, J. (1999) *Decision Making in the European Union* (New York: St. Martin's Press). DG Enterprise was DG II (Industry) at the time. It became DG Enterprise in 2000.

[90] Whitman note 34 above.

[91] As one of my interviewees told me 'The Parliament approves every year the percentage of fonctionnaires to serve at each grade. For example, at the A4 grade there is normally the allocation of 10-15 per cent of fonctionnaires.' Interview with a Head of Sector at DG Competition, conducted on 30 May 2002.

Interview excerpt:

Prodi's line is that fonctionnaires should serve five years in one post and then move.

Prodi promised to take away the link between the post and nationality, which is an

unspoken operating principle.

But then again national percentage has to be observed which means that a certain

percentage of civil servants who would join the Commission is allocated to every

Member State.[92]

To better understand these tensions it is important to look at statistics.

Page argues that by studying the statistical tables he produced, we see that,

although there is no evidence of a single MS occupying top positions in the

different DGs, (DG Personnel's position is that they make every effort to avoid

having two top posts in the hierarchy being occupied by more than two officials

of the same nationality),[93] we cannot avoid noticing that Germany, for example,

is omnipresent at DG Competition and DG Enterprise.

---

[92] Interview with a Head of Unit at DG Information Society, conducted on 22 January 2002.

[93] Page refers to this as a practice not publicly accepted by the Commission. As Page mentions the practice of *reserve posts* (certain posts are thought to belong to certain Member States) has been outlawed by the Court of First Instance in March 1993. The case involved the challenge of the appointment of a director at DGIX (Fisheries) who was an Italian candidate and had no experience of fisheries policy, although he has been working for the Commission since 1970 and was an Economist. The other candidates were a German, a Dutchman and an Englishman, who challenged the decision on the basis of their application being turned down as a result of them not having the right nationality for the post (their argument was based on the fact that the three Directors who left the posts were a French an Italian and a Spanish and the committee which turned down the plaintiffs' application, itself proposed the names of three people, a French, an Italian and a Spanish). Nonetheless, the Court did not reject the argument that the Commission should be sensible to the need to maintain a national representation balance but disagreed with the way that the balance was achieved, see Page note 29 above, at p. 56.

Table 1
Number of top officials according to nationality based on data compiled in 1992 and 1993 [94]

	B	Dk	Nl	F	D	Gr	Irl	I	L	P	E	UK	Total
DG Enter	6		1	8	13*	2	1	9	3	1	4	6	54
DG Comp	3	1	1	4	9*	2	1	3	1	2	1	3	31
DG Res	7	1	4	1	12*			16		1		5	56
DG InfSoc	2	2	3	1	5	4	1	8	1		6	11*	55
DG Int.M	1		1	2	2	1		1	1			1	10

Updating the above based on data compiled in 1995 and 1996[95] I find that

	B	DK	NL	F	D	GR	IRL	I	L	P	E	UK	Total
DG Enter	3		3	10	9	4	3	7	2	2	3	8	54
DG Comp	4	2	2	5	8	2	1	4		1	4	6	39
DG Res	7	1	3	11	10	1		7			2	11	55
DG InfSoc	3	1	3		5	4	1	8			5	11	41
DG Int M.	2	1	2	5	7	1	1	4	1	1	3	2	35

Key: B=Belgium, Dk=Denmark, Nl=Netherlands, F=France, D=Germany, Gr=Greece, I=Italy, L=Luxemburg, P=Portugal, E=Spain, UK= United Kingdom.

Note: Since 2000, the European Commission has been restructured and DGs were renamed. Before the reform, *DG Competition* was DG IV (Competition), *DG Information Society* was DG XIII (Telecommunications), *DG Enterprise* was DG III (Industry), *DG Internal Market* was DG XV (Internal Market) and *DG Research* was DG XII (Research). Moreover, DG Enterprise now consists of the former DG for Small and Medium-Sized Enterprises (SMEs), DG Industry and the Innovation Directorate.

Source: The update is based on the *Interinsitutional Directories of the European Union* (Luxembourg: Office for Official Publications of the European Communities, 1995 and 1996) and *Euro Who's Who: Who is Who in the Institutions of the European Union and in the Other European Organisations* (Brussels: Editions Delta, 1996).

---

[94] These figures are based on Page's statistics, ibid. His data is compiled from the (1992, 1993) *European Companion* (London: TSO) and (1991) *Euro Who's Who: Who is Who in the Institutions of the European Union and in the other European Organisations* (Brussels: Editions Delta). The asterisks denote three more top officials than it would be expected if all different nationalities were evenly spread throughout the EU, ibid, at p. 57.

[95] Note that unfortunately there is not bibliographical data for all top officials.

Moreover, France, UK and Italy are dominant at DG Information Society, while at DG Research, Italians, Germans and French are the majority in top posts, a fact that can be explained in view of the strong research tradition in these countries. Page in particular notes that the dominance of Germans and Italians at DG Research is likely to be the result of the fact that significant numbers of senior officials are employed in German and Italian research institutes.[96]

DG Competition and DG Enterprise are considered to be the most liberal DGs.[97] As for DG Internal Market, Mc Donald argued that it views itself as the *'real Europe,'*[98] as it was instrumental in the creation of the Single European Market. Contrary to this, DG Information society is considered to be the most interventionist and the most collusive with big business.[99] One way to explain this is by looking at the professional background of officials in this DG.

b Professional background

As Jourdain notes, a big number of the officials of DG Information Society has a scientific background, having been trained as electronic or telecommunication engineers. Moreover, many of them have worked both in the industry and in national administrative systems. On the basis of the above, they are close to lobbyists, in the sense that they have certain sympathy for them by virtue of speaking the same *'scientific language'* with national groups affected by

---

[96] Page note 29 above, at p. 58.
[97] Lawton, T. C. (2000) 'Uniting European industrial policy' in Nugent note 6 above, at p. 42.
[98] McDonald ' Identities in the European Commission' in Nugent note 6 above, at p. 52-53.
[99] Lawton note 96 above, at p. 141-142. The author argues that these ideological divisions (liberal/interventionist) were emphasised to him by officials themselves during interviews, see p. 146 note 14.

the Research and Development policies of the European Commission.[100]

Therefore, these officials regard themselves as mediators. One of Jourdain's

interviewees argued that:

'I feel above all French and a specialist in my domain; this is why I feel at ease here

at DG XIII (Telecommunications), as I do not have to work for the Eurocrats of DGIV

(Competition).. We come from the sector in reference to which we create policies and this

why, to a certain degree, we also represent the actors of this sector.'[101]

Jourdain further argues that this specific set of dispositions is

characteristic of both DG Information Society and DG Research, which results in

being more open to establishing a dialogue with affected parties. To exemplify

the above, the author further notes that DG Research engaged in creating a

network, which was active in producing scientific papers and collecting

information. To this effect, DG Research put in place a *'reflection forum,'* which

worked on the relationship between science, technology and society and had

contacts with various national research centres.

Le Monde Diplomatique and various journals published the articles of this

network. The result of this practice was that the European Commission was

considered to be one of the leading producers of knowledge in the area,

publishing proposals and analysis on the sector of Research and Development.

---

[100] Jourdain, L. (1996) 'La Commission Européenne et la construction d'un nouveau modèle d'intervention publique' 43 *Revue Française des Sciences Sociales* 492-527, at p. 500. DG Information Society was initially set up in as a Task Force by Davignon (Commissioner of DG Research) whose responsibility was the management of the research programme ESPRIT. This Task Force was transformed in DGXIII (Telecommunications) in 1986. DG XIII (Telecommunications) was renamed DG Information Society in 2000.
[101] ibid, at p. 500, the translation being mine.

Examples of tensions (1): The 'Attacks against Information Systems' file

If one accepts the above, there is no wonder why currently DG Information Society finds it difficult to speak the same language with the *'law enforcement people'* of DG Justice and Home affairs.[102] The latter has the *'Attacks against information systems'* file with the former being consulted, and the European Commission has adopted a proposal for a Council Framework Decision on this issue.

The *'law enforcement people'* of DG Justice and Home affairs understand the *legal/illegal* and *right/wrong* taxonomies in a way, which clashes with the more pragmatic and interest group-oriented mind set of officials working for DG Information Society.[103]

The Framework Decision addresses new most significant forms of criminal activity against information systems, such as hacking. Thus, it sought to approximate criminal laws across the European Union to co-ordinate action against this new form of crime.

Nonetheless, the two DGs disagreed on the extent of criminalisation, as DG Information society was more sensitive to privacy issues, which prove to be controversial, since the question is raised as to whether there should be a limit in the dissemination of software that contains encryption, a technique allowing people to scramble their communications and files to prevent others from reading them.

---

[102] The Treaty of Amsterdam, which came into force on 1 May 1999, assigned new powers to the European Union by allowing the European Commission to convert its Justice and Home Affairs Task Force into a DG, whose Commissioner is Vitorino Antonio, (nationality: Portuguese, profession: lawyer).

[103] Interview with a Head of Unit at DG Information Society, conducted on 22 January 2002.

Examples of tensions (2): Competition law enforcement

With the merger regulation in place since 1990, a Merger Task Force (MTF) was created in DG Competition to deal with merger investigations. In 1995, this became the new directorate B, which is divided into four Units although there is no functional specialisation among them. Its officials are in constant collaboration with other Directorates, as the prohibition or clearance of a merger raises questions as to a number of policies of the Union.[104]

The European Commission blocked in 1994 a proposed joint venture (JV), the MSG Media Services GmbH.[105] The proposed JV would be the result of a merger between Bertelsmann, which is a book and sound recording group, Kirch, which is a film and TV programme producer in the pay TV market, and Deutsche Telecom, the national telecom operator. The JV would develop decoders and technological services for pay TV.

The MTF in DG Competition opposed the merger, because it would control the entire German language market, while Deutsche Telecom would be in a position to control the EU market for the supply of cable network services. The same concerns were raised about the market for the provision of technological services and generally about the future of pay TV in Germany.

This decision proved to be particularly controversial, since DG Information Society favoured the merger, as it would create a player capable of competing internationally. A similar *'dirigiste'* approach was taken by DG

---

[104] Cini and L. McGowan, Competition policy in the European Union (London: Macmillan, 1998), at p. 120.
[105] Media Services Group, M. 649 (1994) OJ L 364.

Enterprise. Finally, the Competition Commissioner Karel Van Miert managed to

win the support of the College of Commissioners and the merger was prohibited.

The decision was heavily criticised as the issue was raised, as to whether

regulatory intervention would impede the growth of the multimedia sector.

Despite the objections raised, the MTF followed the same line and prohibited the

Nordic Satellite Distribution (NSD) JV[106] and the Dutch

RTL/Veronique/Endemol (Holland Media Group-HMG) merger,[107] the main

concern being the possibility of restricting access to television networks.[108]

Recently, the MTF followed the same line of argumentation in the

proposed AOL/Time Warner merger, as it was finally decided that the

concentration would be compatible with the European economic area only under

certain conditions.[109]

2. Gender and national stereotypes

The above elucidated differences in perception that may emerge as a result

of different nationality and professional background/education. However, Mc

Donald argues that differences may also arise because of different gender and

national stereotypes. She makes reference to classificatory schemes found in

dualities such as *rational/irrational, reasons/emotions, realism/idealism, work/leisure,*

work/family.[110]

---

[106] Nordic Satellite Distribution, M 490 (1996) OJ L053/20.
[107] Holland Media Group-HMG, M 420 (1996) OJ L134/32.
[108] Cini, M. '(1999) 'Discretion and politicisation in the EU competition policy: The case of merger control' (1999) 12 *Governance* 175-200, at p. 189.
[109] AOL / Time Warner, M.1845 (2000) OJ C130, especially see recital 95, point (a).
[110] McDonald ' Identities in the European Commission' in Nugent note 6 above, at p. 52-53, and 65-66.

These schemas mainly reflect differences between Southern and Northern Europe, but they can also sometimes assert differences between individual countries such as France and England for example.

The author then further argues that her ethnographic research reveals how differences in gender, nationality and language between an English boss and a French female working in his team, resulted in the confirmation and reproduction of the rational/emotional duality.

Therefore, when she had problems at home, her boss would say that *'she seems to get emotional about everything anyway.'* Cultural misunderstandings were further stressed when the Englishman asked her to stop calling him *'Monsieur'* and instead call him *'Jim.'*

McDonald further gives many examples of how the British view the continent as *'all emotion and no rationality.'* In the same spirit, she argues that the British and Danes view hierarchies as linking to honour and reputation, with management having little to do with formal structures. The British for example have a civil service tradition where everyone is part of a team, and all available information is shared because of this. The rigid hierarchical system providing for constant checks on one's drafts, (with French origins as I explained earlier), can be difficult to be understood for some people from the *'North.'*[111]

---

[111] ibid, at p. 67. Also see McDonald, M. (2000) 'Accountability, anthropology and the European Commission' in Strathern, M. (2000) *Audit Cultures: Anthropological Studies in Accountability, Ethics and the Academy* (London: Routledge). Here the author argues that civil servants from the *'North'* understand in a different way the lack of hierarchical structure of everyday work inside the European Commission resulting in networking, as they see uncertainly and corruption in such practices, while people from the *'South'* may see pride, support and loyalty (as when debts are repaid). While I accept that classificatory schemes relating to nationality are important, the argument in the previous sections was that interaction result in the building up of relationships of dependency amongst civil servants, despite nationality and professional background.

3. Recruitment

Disparities may also exist because of another factor: The different types of recruitment, as these may reveal the existence of differences even within an individual DG. In the early days of the European Commission, the Jean Monnet approach was that the permanent staff would have to be assisted by national specialists who spent small periods in the High Authority. Today's structure of the European Union seem to establish that the same approach is followed, as the various recruitment practices suggest.[112]

Recruitment practices include *comitology*, which requires bringing in national experts in the event powers are delegated to the European Commission, and *secondment*, which gives the right to national civil servants to work for the European Commission for a short time. In particular, as regards the latter mode of recruitment, the idea behind bringing national administrative expertise into the European Commission was that a link would be created with home administrations, enabling the exchange of expertise.

Seconded officials tend to be in A grade jobs and are approximately 12 per cent of the workforce between grade A4 to A8 level.[113] Page though draws attention to the fact that the European Parliament and the European civil service staff unions have both been critical to the practice of secondment, as it was thought that the independence of the European Commission is at stake.

---

[112] On the Monnet approach see Chapter II of this thesis.
[113] Page note 29 above, at p. 60.

Therefore, they claimed that the European Commission *'should not renationalise the management of certain sectors.'* [114]

Parachuting is a different type of recruitment equally, or maybe even more, contested than secondment. Parachuting relates to the *'political'* promotion of officials, as these are appointed directly to a senior EU position from outside.'[115] Nevertheless, this type of appointment should not be thought as being related to the clientelistic political systems of Southern Europe, as evidence shows that countries such as Netherlands for example tend to have more *'parachutists'* than Italy or Greece. [116]

Most of the time countries which have just joined the European Union, employ this method of recruitment. However, people who are recruited in this way are different than the average fonctionnaire in that they are much older and have already had a career in their countries.

Finally, the European Commission extensively use specialists under contract. These are termed *'external resources'* and are employed outside the normal operating budget of the European Commission.[117] In some DGs, such as DG Research and DG Information Society, auxiliaries, interim staff and service providers account for 20 per cent of the employees.[118]

---

[114] ibid.
[115] ibid, at p. 80.
[116] ibid, at p. 82.
[117] ibid, at p. 61.
[118] 'Designing Tomorrow's Commission - A Review of the Commission's Organisation and Operation,' report by the Inspectorate-General, note 47 above, at p. 17.

Figure 6

Percentage of 'intramurals,' 'other intramurals' and 'extra intramurals'
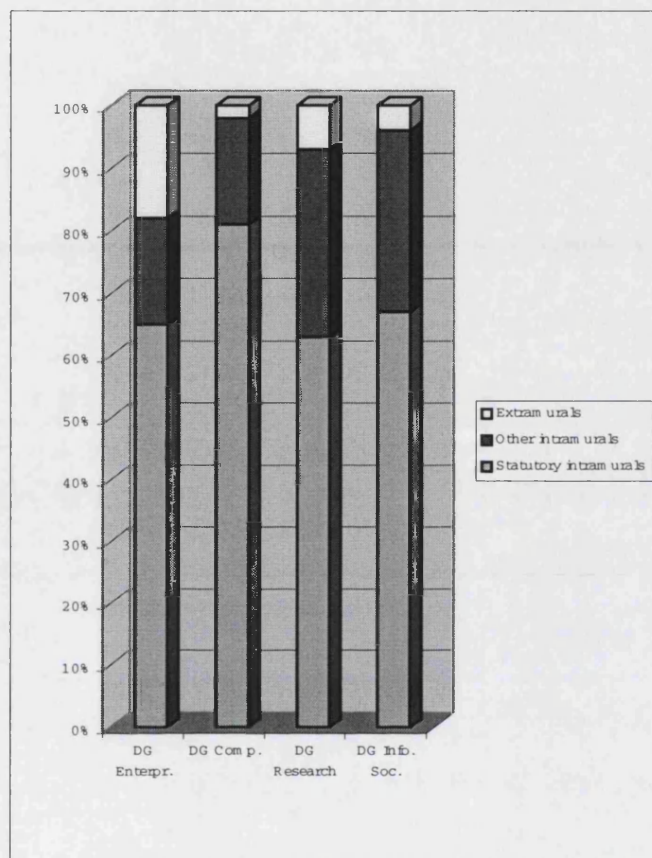
Note: This chart shows the percentage of 'intramurals,' 'other intramurals' and 'extra intramurals.' 'Intramurals,' are employees covered by the staff regulations (such as permanent officials, temporary officials, locally engaged staff), 'other intramurals' are employees such as auxiliaries, interim staff and service providers while 'extramurals' can be persons employed by the Commission as consultants for example.

Source: 'Designing Tomorrow's Commission - A Review of the Commission's Organisation and Operation,' report by the Inspectorate-General, 7 July 1999, http://europa.eu.int/comm/reform/decode/screening_en.pdf

189

D. CONCLUSIONS

Coming to grips with cognitive schemas regulating life inside the DGs responsible for information society regulation requires looking at socialisation *prior to* and *after* joining the European Commission. With reference to the latter, understanding the habitus of the European Commission entails coming to grips with *'dependency'* and *'compromise'* as framing action. As regards the former, the relevant analysis focused on dispositions which agents carry with them prior to joining the European Commission and which may become institutionalised in Units or whole DGs.

Cognitive schemas may be developed *after* socialisation in a group, (group habitus), as a result of the meaning attached by a community to *communality* itself. Hence, the focus of my analysis was on uncovering practices, which underline the meaning attached to *community* by the officials working for the European Commission.

To this effect, I sought to unravel shared understandings regulating life inside the European Commission by looking at modes of working in working parties and shared files, promotion procedures and mobility, and finally by examining how reputation is valued and acquired.

To substantiate this argument, I first looked at the spatial and numerical context of the European Commission in Brussels. Cohesion is indeed inscribed in objects and modes of living, which feeds into the feeling that fonctionnaires, while live in Brussels, they are not *'of it,'* having developed a distinctive self-recognisable ethos.

Nevertheless, this ethos is not the result of the compelling power of routine and objects imposing their logic upon individuals. It is the *ethos* itself, the particular *bond* that brings together fonctionnaires, which renders meaningful routine and objects. Identifying the quality of this bond then is crucial in order to understand the particular meaning attached to practices such as the initiation of a draft proposal.

To map the properties of this bond, I first engaged in illustrating the ways in which hierarchical relations may get blurry, as a civil servant working for the European Commission is continuously called to negotiate and co-operate with various other persons. For example, good personal relationships with the hierarchy and in particular with the colleagues in the cabinet of the Commissioner can prove to be extremely useful in the event a proposal is blocked at the level of the cabinet of the Commissioners, or resistance emerges at lower levels of the hierarchy.

This is because informal chats with a member of a cabinet, to convince him to speak to the Commissioner, who then might want to speak to the Director General, may prove to be invaluable. The flip side of this of course is that informal chats are significant for the colleagues in the cabinet of the Commissioner too, as a fonctionnaire can provide direct information.

Bonds are further built as a result of the fact that there is considerable mobility of fonctionnaires around DGs and Units, as this means that one does not know with whom she will be working tomorrow. Promotion rules and practices further require building up reputation and contacts. Finally, working in shared

files additionally reinforces relations of dependency, as one is inclined to discover that compromise is necessary to ensure daily efficiency and avoid problems.

In a nutshell, the argument of the first main section of this chapter was that you soon discover that alone you are nothing at the European Commission, as you need others to do almost everything. This becomes a powerful cognitive lens regulating life inside the Commission, which I termed the *habitus of dependency and compromise*.

This is not to say that agents do not carry systems of classification that owe their existence to socialisation prior to them joining the European Commission. On the contrary, in my analysis such parameters, such as nationality, disciplinary background and methods of recruitment, are omnipresent, as they result in differences in style management, as Germans for example would give a different meaning to *state intervention* than Italians.

Nationality and professional background may even become institutionalised in Units, and even whole DGs. DG Competition, for example, whose Directors Generals so far have all been German, is thought to be a *'liberal'* or even *'ordoliberal'* DG[119] adopting a hostile approach to both state action aiming at directly intervening in the economy and private power.

Contrary to this, DG Information Society is viewed as collusive to private forces and views itself as having to present the interests of the sector in reference to which it creates policies. This may be explained by the fact that fonctionnaires

---

[119] On ordoliberalism see Chapter I Section C of this thesis.

in this DG have a scientific background and have previously worked for both national administrations and the industry, thus feel close to private interests.

However, gender and national stereotypes may also operate as a cognitive lens at the level of individuals. Therefore, different classificatory schemes, as the ones found in the *rational/irrational, reasons/emotions, realism/idealism, work/leisure, work/family* dualities, may result in different approaches as to working styles.

In a nutshell, by identifying multiple classificatory systems I sought to overpass the rigidities inherent in the notion of habitus. Cognitive schemas may operate at the level of groups, but still perceptions amongst members may show divergence, as individuals carry classificatory systems owing their existence to socialisation before joining the group. Finally, although most of the time fonctionnaires do what is normal to do, these cognitive schemas may emerge at the conscious level, as chapter V will seek to show.

An enquiry on agents' classificatory systems should also address questions relevant to the possibility of them being altered, as they are constantly subject to experience. This latter point is to be taken up in the next chapter, whose focus is on showing that the possibilities inscribed in formal structures acquire meaning only when appreciated by means of agents' habitus.

The argument will be that the concept of habitus acts as a catalyst in order to understand change in the field as being randomly distributed in a formal structure, as it reminds us that there is always the possibility of the taken for granted taxonomies encapsulated in structures being disputed.

IV

The *Doxic* Element: Internet Regulation

Not necessity, not desire --no, the love of power is the demon of men.

Let them have everything

--health, food, a place to live, entertainment –

they are and remain unhappy and low-spirited:

for the demon waits and waits and will be satisfied.

Friedrich Nietzsche, *(Daybreak: Thoughts on the Prejudices of Morality).*

The previous chapter engaged in identifying cognitive schemas, structural patters of perception giving meaning to everyday life inside the European Commission. To this effect the argument supported was that observing interaction serves the purpose of identifying the properties of the *insider/outsider* taxonomy, as encapsulated in the habitus of dependency and compromise, while enquiring on the professional and national background of fonctionnaires serves the purpose of pinpointing other multiple roles available to agents.

Cognitive schemas, *habitus*, encapsulate power relations as they embrace views, which often go without saying, excluding alternative visions. For example, training in law results in the appreciation of a legal problem from a different perspective than the one an engineer working as a civil servant would adopt. It

further results in the reproduction of certain assumptions as to how a legal document should look like and what kind of arguments should be used.

Moreover, acting in order to be a *'successful'* insider requires belonging in networks, further reproducing tacit understandings of how a successful fonctionnaire should behave, which operates as a powerful cognitive lens regulating the initiation of a legal document.

This chapter will engage in showing how habitus interweaves with the notion of capital. This is because, a Bourdieusian perspective on understanding the formation of regulatory law requires coming to grips with it as being the product of agents maximising *capital,* in other words the resources at hand available in a particular field of study, such as wealth, prestige or their position as a think tank. However, when a DG maximises its position as a major think tank, the *appreciation* of possible ways to perform this is done through classificatory schemes of cognition attributing meaning to what a *'think tank'* is and what it should do.

There are two points emerging from the previous discussion. First, action is underpinned by the reproduction of power. Second, forms of power available to agents, for example *organisational capital,* are reproduced according to tacit understandings about, for example, what regulatory law should entail.

Against this background, Bourdieu's notion of capital offers a view radically different to understanding regulatory law as objective and neutral and to conceiving action as being initiated to achieve certain policy outcomes, as in the latter case the

question still left without answer is why, after all, does the European Commission pursue certain policy outcomes?

The argument here is that the European Commission seeks to preserve or maximise *juridical, informational/technocratic, social* and most importantly *symbolic capital.* Based on the assumption that power is at the heart of action, the thesis advanced is that it is predominantly engaged in struggles in order to remain a crucial locus of governance.

To this effect, the European Commission seeks to enhance its position as a major think tank and the best way to do this is by sustaining the belief in the neutrality and objectivity of law by virtue of its juridical capital, which gives legitimacy and universality to the point of view that regulatory law encapsulates, a process disguising the effects of power.

To illustrate this, I here give examples drawn from different areas of Internet regulation. I will begin with architectural solutions as developed by the industry, to turn to scarce resources in the Internet, with special emphasis on the domain names allocation system, and conclude with a reference to the Safer Internet Action Plan.

In the above instances, the dominant view is that the role of law should be *procedural,* confined to putting in place the correct procedures to enable the participation of communities in the making of rules that affect them. This view inextricably links to the general discussion about what the proper role of law is in a highly perplex social world, but also draws attention to the decentralised character

of the Internet, which is uniquely positioned to accommodate the demand for free speech and information flows.

Therefore, neutral procedures entailing no normative content and understood in the context of flexible regulatory instruments, are conceived to be the way to escape the gripping effect of command and control rules, which intrude and upset the lives of social systems and individuals.[1]

Yet, procedural law is the model for the way the neutralisation and objectification effect operates. Therefore, the focus of this chapter is on studying the extent to which decentralised forms of regulation have been effective in weakening mechanisms of control. I will follow this intuition by looking into whether power may be exercised in novel and less visible ways and thus be misrecognised or re-configured. The thesis advanced is that neutral procedures can never be neutral, as regulatory law always encapsulates taxonomies reproduced when agents maximise capital, albeit the often unintentional character of this process.

---

[1] For a general theoretical and empirical articulation of the position that moves away from the command and control approach to law and regulation, see for example, Teubner, G. (1993) *Law as an Autopoietic System* (Oxford, UK; Cambridge, Mass., USA: Blackwell Publishers); Beck, U. (1992) *The Risk Society: Towards a New Modernity* (London: Sage Publications); Ayres, I. and Braithwaite, J. (1992) *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, New York); Craig, P. (1998) 'Democracy and law making in the EU' in Craig, P. and Harlow, C. (eds) (1998) *Lawmaking in the European Union* (London, Boston: Kluwer Law International); Scott, C. (1998) 'The proceduralisation of telecommunications Law Adapting to Convergence' (1997) *Journal of Information Law and Technology* 1-16.

A. PROCEDURALISATION, DECENTRALISATION AND INTERNET REGULATION

Proceduralisation implies shifting into a new paradigm challenging the command and control approach to regulation. The reason for performing such a shift is partly because rule-formation becomes decentralised under the pressure of globalisation, and partly because it is becoming dependent on specialised knowledge, Internet regulation being an example uniquely positioned to endorse both of the above justifications.

Proceduralisation though is a term that encompasses many different approaches: It can take the form of relocation of governmental functions, for example, to the market or the civil society. It may also denote the partnership between the state and private actors with the aim to achieving public ends. It can indicate the shift from state regulation to community self-regulation, with state law retaining the role to establish the general conditions of negotiation.

Finally, it may point to the inclusion by governments of interest groups in the decision making process.[2] In all these cases, regulatory law is called to provide the procedures and structures that would enable the participation of affected groups. The position that understands proceduralisation as self-regulation is theoretically articulated in Teubner's understanding of law as an autopoietic system.[3]

---

[2] This categorisation of forms of proceduralisation was developed by Black, see Black, J. (2000) 'Proceduralizing regulation-Part I' 20 *Oxford Journal of Legal Studies* 597-614, at p. 600-601.

[3] Teubner, G. (1993) *Law as an Autopoietic System* (Oxford, UK; Cambridge, Mass., USA: Blackwell Publishers); Teubner, G. (1989) 'How the law thinks: Toward a constructivist epistemology of law' 23 *Law and Society Review* 727-757; Teubner, G. (ed) (1987) *Autopoietic Law: A New Approach to Law and*

The author furthers the argument that rule-formation becomes decentralised under the pressure of globalisation. This means that society becomes highly fragmented resulting in the developing of global law, which is being generated by the proto-law of various communities, global networks of economic, cultural, academic, or technological nature.

The internal codes of private interests, labour law, human rights and environmental law are, according to the writer, paradigms of this process of global law creation, as these systems show a tendency towards world-wide self-regulation, producing the new living law of the world.

According to Teubner, *'we find parallel to political legislation -many forms of rule-making by "private governments" on a global scale which in reality, have a high "public character".'*[4] Therefore, Teubner agues that law should be *'reflexive law,'* as it should take the form of mechanisms that would help communities and networks internalise imperatives, which were previously externally imposed. The role of law is to encourage communities to reflect over selected considerations, by providing information on them,[5] while being sensitive to the mode these will be internalised, as this will be shaped by the internal codes of conduct of communities.

Society (Berlin: de Gruyter); Teubner, G. (ed) (1997) *Global Law Without a State* (Aldershot: Dartmouth Publishing). For a more elaborate analysis of Teubner's position see Chapter I Section A. 2 and A. 3 of this thesis.

[4] Teubner, G. (1997) 'Global Bukowina: Legal pluralism in the world society' in Teubner (ed) *Global Law Without a State* ibid.

[5] G. Teubner 'Substantive and reflexive elements of modern law' (1983) *17 Law and Society Review 239*; G. Teubner 'After legal instrumentalism? Strategic models for post-regulatory law' in G. Teubner (ed), Dilemmas of law in the welfare state (Berlin; New York: Walter de Gruyter, 1986, 1985); G.

The same of argument is supported by the highly contestable theory of international *lex mercatoria*. According to the proponents of this theory, its source is found in contractual standardisation, which is either imposed by the industry leader or is the result of collective consent, as it is the case with the standard terms developed under the auspices of the International Chamber of Commerce.[6]

How is the above relevant to Internet regulation? Teubner himself recognises how the Internet presents a new paradigm of regulation based on the living law of communities, as, due to its decentralised character, it has escaped the grip of state control and presents an example of decentralised regulation offering the potential for democratisation and for the creation of a global civil society able to oppose globalised markets. The Internet then is viewed as opening up new chances for re-politicisation and re-individualisation.[7]

Teubner 'Juridification-Concepts, aspects, limits, solutions' in G. Teubner (ed), Juridification of the social spheres (Berlin: De Gruyter, 1987).

[6] For a criticism of this approach see Muchlinski, P. T. (1997) 'Global Bukowina examined: Viewing the multinational enterprise as a transnational law making corporation' in Teubner *Global Law Without a State* note 3 above. Muchlinski refers to Sornarajah's work, who argues that one of the most contested aspects of international lex mercatoria links to the question of whether business interests can generate law when they sign investment agreements with foreign governments. Sornarajah's arguments are in line with Teubner's concept of 'living law' as he argues that in this instance firms generate rules. Yet, he points out that in the case of foreign direct investment in the 19th century, since there was no legal frame in place, private interests created the applicable legal rules by means of contracts with states and by using international commercial arbitration, which in turn favoured the application of international minimum standards. The debate from the part of less developed countries (LDCs), in respect to whether these minimum standards indeed form international custom, is a well-known one. At the heart of the debate one finds the argument that minimum standards are the evolution of principles, which were generated by the practices of European colonial powers. Nonetheless, the host state had to comply with such standards, Sornarajah, M. (1994) *The International Law on Foreign Investment* (Cambridge; New York, NY, USA: Cambridge University Press).

[7] Teubner, G. (2000) 'Global private regimes: Neo-spontaneous law and dual constitution of autonomous sectors in world society?' in Ladeur, K. H. (ed) (2003) *Globalization and Public Governance* (Cambridge; Cambridge University Press), citing Menzel, U. (1998) *Globalisierung Versus*

Nonetheless, the literature on Internet regulation as developed in the USA, has different theoretical underpinnings. It is premised on the understanding that information should be free for all and that the technical infrastructure is in itself a means of regulating cyberspace technology. In both cases, the argument is made that the state should abstain from regulating, with various commentators adopting a decentralised understanding of law, emphasising the effectiveness of markets and social norms as regulators of individual behaviour.

In 1996, this led Barlow, co-founder of the Electronic Frontier Foundation, to argue that the Government should adopt a hands-off approach, as legal concepts of, for example, property, expression and identity, may be effective in the real world but do not apply in the Internet.[8] In the light of the above, Barlow argued that *'we believe that from ethics, enlightened self-interest, and the commonweal, our governance will emerge.'*[9] In the same spirit, Reidenberg adopted the term *'Lex Informatica'*[10] to argue that technology offers a set of potentialities, which frame policy makers' choices. Similarly, Johnson and Post argue for a decentralised, emergent law.[11]

Fragmentierung (Frankfurt; Suhrkamp), available at http://www.uni-frankfurt.de/fb01/teubner/spontaneus.pdf, (web page visited on 16 May 2003).

[8]Barlow, P. (1996) 'A declaration of the independence of cyberspace,' at http://www.eff.org/~barlow/Declar ation-Final.html, (web page visited on 14 May 2003).

[9] ibid.

[10] Reidenberg, J. (1998) 'The formulation of information policy rules through technology' 76 *Texas Law Review* 553-594.

[11] Johnson, D. R. and Post, D. (1996) 'Law and borders: The rise of law in cyberspace' 48 *Stanford Law Review* 1367-1402; Johnson, D. R. and Post, D. (1996) 'And how shall the net be governed? A meditation on the relative virtues of decentralized, emergent law' (1996) *Cyberspace Law Institute Paper* 9/5/96, available at http://www.cli.org/emdraft.html, (web page visited on 16 May 2003).

The authors' claim is that Internet technology provides the possibility to create a self-regulated community, whose function should be premised on the notions of collective conversation and responsible participation. Consequently, Internet regulation has to be formed by virtue of voluntary observance of basic rules by network administrators with a dispute resolution system in place to adjudicate disputes.

Finally, Lessig's argument is that cyberspace is regulated by laws, social norms, markets and *'code'* (software), with law seeking to influence the other forms of regulation (social norms, markets and codes).[12] Lessig lays emphasis on the role of code in regulating the cyberspace, but accepts that it may be altered by law, thus attributing to the latter two modalities of regulation a significant role in regulating the net. Based on this understanding, Lessig embraces a pessimistic vision, as he argues that copyright and patent protections can be expanded to the point of impeding the development of new ideas on the Internet.[13]

The common thread that runs across all these approaches is that the Internet, due to its decentralised character, appears to be the model for a new form of governance. The vast network at issue owes its distinctive character to that there is no real time transmission. This is happening since the information is not transmitted

---

[12] Lessig, L (1999) *Code and Other Laws in Cyberspace* (New York, N.Y.: Basic Books); Lessig, L. (1997) 'What cyberlaw might teach' *Technology Law Review Working Papers*, available at http://stlr.stanford.edu/STLR/Working_Papers/97_Lessig_1/index.htm, (web page visited on 16 May 2002).
[13] Lessig, L. (2001) *The Future of Ideas: The Fate of the Commons in a Connected World* (New York: Random House).

as a whole, but is broken into packets of bits, which are routed from computer to computer to find their final destination through the most efficient path, according to the carrying capacity and the traffic.

The above process is underlined by autonomous and independent actions of each computer, which solely co-ordinates its actions. It is because of this autonomous function that when we speak of the Internet, we always stress the decentralised character of it and the absence of any form of central regulatory authority.[14]

Having concluded a review of arguments that support the proceduralisation of Internet regulation, and having touched on the particular characteristics of the Internet that makes it susceptible to a decentralised view of regulation, attention should be brought to the criticism by two commentators: First is a criticism that generally addresses the problems that may surround the issue of technisising regulation.

In this respect, Black[15] reminds us that, as regulatory literature becomes technisised by virtue of focusing on implementation issues with the debate on values being left to welfare economists, then we fail to address questions relevant to what the content of procedures should be and who should determine it.

---

14 Cerf, V. G., Clark, D. D., Leiner, B. M., Lynch, D. C., Kahn, R. E., Kleinrock, L., Postel, J., Roberts, L. G. and Wolff, S., 'A Brief History of the Internet by those who made the history, including Barry M. Leiner, Vinton G. Cerf, David D. Clark, Robert E. Kahn, Leonard Kleinrock, Daniel C. Lynch, Jon Postel, Lawrence G. Roberts, Stephen Wolff' available at http://www.isoc.org/internet/history/, (web page visited on 14 May 2003).

The implications of the above is that we tend to forget that it may be quite difficult to actually separate rules from norms. The second criticism is particularly concerned with Internet regulation. Boyle[16] adopts a Foucauldian perspective to dismiss the claim that proceduralisation of Internet regulation will be a panacea to all its problems, as such an approach misses the point that the state uses new techniques to re-invent itself, and as such may adopt new forms of control.

It is indeed difficult to separate procedures from norms, as the following section will seek to show. But why? The institutionalist argument is that agents intentionally seek particular profits and engage in a problem solving exercise picking one out of available solutions. A Foucauldian perspective points to the ways power and normalisation operate in disguise. Bourdieu takes this last point further to look at agents and the ways they unintentionally reproduce or challenge the effects of normalisation. Therefore, procedural law cannot fulfil its promise to provide neutral and objective structures, as it tacitly reproduces dominant classifications.

The following will elaborate on the theoretical properties of this last point by looking at the characteristics of the following species of capital available to the European Commission: *Juridical, technocratic/informational* and *symbolic. As social*

---

[15] Black note 2 above, at p. 598. For a similar approach see Black, J. (1996) 'Constitutionalising self-regulation' 59 *Modern Law Review* 24-56; Prosser, T. (1999) 'Theorising utility regulation' 62 *Modern Law Review* 196-217.

[16] Boyle, J. (1996) *Shamans, Software, and Spleens. Law and the Construction of Information Society* (Cambridge, Mass: Harvard University Press); Boyle, J. (1997) 'Foucault in cyberspace: Surveillance, sovereignty, and hard-wired censors' 66 *University of Cincinnati Law Review* 177-193.

capital will be the focus of the following chapter I abstain from elaborating here its

function.

B. DOXA, ORTHODOXY, HETERODOXY: A THEORETICAL

DISCUSSION

1. Enquiring on the properties of juridical capital

In reference to juridical capital, Bourdieu argues that its attributes imply that every decision is based on a precedent, and that a rational approach is applied that guarantees the continuity, certainty and objectivity of decisions. Moreover, the constitution of a field with a juridical element is inseparable from the monopoly of professionals over the production of a particular category of products called *'legal products.'* The legal competence determines the conflicts and the specific form that these should have in order to be proper legal battles.[17]

According to Bourdieu, the juridical field is the space of competition for the monopoly of the right to articulate what is right, that is for the fair distribution (*nomos*) or the right order. This field is occupied by agents, who have the competence and social technique to interpret a body of texts.[18] Therefore, the legal rule is like the reservoir of authority, which guarantees, in the way that a central bank would, the authority of juridical acts, although there is arbitrary violence in the exercise of such authority.

The judicial situation functions like a neutral place, which operates a neutralisation by means of the de-realisation implicated in the transformation of the

direct confrontation of interested parties in one amongst mediators.[19] In this way, a

direct conflict between the parties who have a direct interest in the legal action, has

to be regulated by professionals, who have in common the knowledge of *the law of*

the legal game, that is of the laws, written or not, of the field.[20]

2. The sub-field of Internet regulation in Europe: Challenging the

habitus of dependency and compromise

However, the monopoly to impose symbolic violence is not always left

unchallenged. The field of struggles is inhabited by agents who, although they

occupy other autonomous fields, nonetheless strive to influence the content of

regulation.[21] Internet regulation is a good example to study the effects and extent of

such struggles, due to its decentralised character.[22] This is because, it presents an

instance when the properties of the juridical capital of the European Commission are

being challenged, as both NGOs and private interests support the self-regulation

model challenging the legitimacy of centralised command and control rules imposed

by a body of professionals.

---

[17] Bourdieu, P. (1986) 'La force du droit: Eléments pour une sociologie du champ juridique' 64 *Actes de la Recherche en Sciences Sociales* 3-19, at p. 9. For a translation of this article see Bourdieu P. (1987) 'Force of law' 38 *Hastings Law Journal* 805- 853, translator's introduction by Richard Terdiman.
[18] ibid, at p. 4 of the French version (the translation being mine).
[19] ibid, at p. 9.
[20] ibid, at p. 10.
[21] I have elaborated on the notion of the field of struggles in Chapter I Section A 4 of this thesis.
[22] On these issues see Cerf, Clark, Leiner, Lynch, Kahn, Kleinrock, Postel, Roberts and Wolff note 14 above. Also see Sassen, S. (2000) 'Digital networks and the state: Some governance questions' (2000) 17 *Culture, Theory and Society* 19-32.

What has been disputed and thus entered the realm of orthodoxy/heterodoxy is what I have termed in the previous chapter as the *habitus of dependency and compromise*, as affected groups demanded their inclusion in the process of information collection and policy debates, thus broadening the circle of *dependent* parties in the process of decision-making.

The above require further explanation though: Dependency and compromise, the fact that people working for the European Commission have to co-exist, occurs as a result of the need to collect information, identify problems, categorise findings. This is what underlines the workings of every administration and manifests itself as a basic operating practice. However, it acquires particular meaning in the context of dependency and compromise and this is why there is a *'European administration'* or a *'European way of doing things,'* in other words a European way of identifying problems, collecting information, and categorising.

It is well documented how the European Commission has been directly approaching affected groups. Meetings between Commissioners, Commission officials and pressure groups, trade unions, governments, lobbyists, political parties, are a routine. The European Round Table of Industrialists is a good example of the above trend, as the European Commission formally institutionalised its contacts with it. This is why commentators have noted that, the European Commission acts as a *'broker'* seeking access to specialised knowledge. [23]

---

[23] Mazey, S. and Richardson, J. (eds) (1993) *Lobbying in the European Union* (Oxford; New York: Oxford University Press). Also see Christiansen, T. (1997) 'Tensions of European governance: Politicized

The role of the European Commission in regulating the information society has been transformed in view of these new understandings, as it is now understood in terms of setting in place the required legal framework to enable the smooth transition to the new environment.

3. Symbolic capital, informational capital and doxa

The previous section argued that the habitus of dependency and compromise has been challenged, as new entrants demanded their inclusion in the circle of dependent parties. I here seek to identify the deeply embedded perceptions, which go without saying (the *doxic* element), and to this effect a discussion of the properties of symbolic and informational capital is first required.

Bourdieu argues that juridical capital is an objectified and codified form of symbolic capital, which consists of the power to shape mainstream understandings. In particular, symbolic capital designates the symbolic power of a group or an individual,[24] while authority, knowledge, prestige, reputation and academic degrees are its possible forms.

---

bureaucracy and multiple accountability in the European Commission' 4 *Journal of European Public Policy* 73-90.

[24] As Weber noted *'those privileged through existing political, social, and economic orders'* never wield their power naked. They *'wish to see their positions transformed from purely factual power relations into a cosmos of acquired rights and to know that they are thus sanctified.'* Weber, M. 'The meaning of discipline,' in Gerth, H. and Mills, C. W. (eds) (1991) *From Max Weber: Essays in Sociology* (London: Routledge).

Therefore, the granting of an *élite* degree is a rite of institution,[25] since it differentiates those destined to occupy eminent social positions from those who will not. Symbolic capital though is a notion that may better reveal its properties if understood as interweaving with the concept of *symbolic violence* and *principles of division*.

If the administrative function is conceived as an important form of the *symbolic violence* of the state, (or, in our case, of the sum of institutions of the EU political system), then the notion of symbolic capital acquires considerable importance, as it implies the imposition on recipients of principles of division based on symbolic representations. Bourdieu elaborated on the notion of *'principles of division'* in *Distinction*.[26] In a nutshell, these are principles on which different social groups base their perception of what constitutes an *'insider'* and an *'outsider,'* a *'well-educated'* and *'ill-educated'* person, an *'expert'* and a *'layman.'*

Moreover, the notion of *symbolic violence* is meant to intertwine with the concept of *'misrecognition.'* The latter notion implies the process by which power relations come to be perceived by individuals by rendering the world reasonable and thus legitimising the existing power relations to those subject to power. This approach reveals the potential of power being exercised in less visible ways, being encapsulated in what is thought to be *'normal'* and *'appropriate,'* therefore

---

[25] Bourdieu, P. (1991) 'Rites of institution,' in Bourdieu, P. (1991) *Language and Symbolic Power* (Cambridge: Polity in association with Basil Blackwell, orig. 1977-1984), at p. 117-127.
[26] Bourdieu, P. (1984) *Distinction: A Social Critique of the Judgement of Taste* (London: Routledge & Kegan Paul, orig. 1979).

misrecognised power allows for the reproduction of the social order by setting the framework of action.

Thus symbolic capital operates through misrecognition as authority and the power to shape mainstream understandings is often premised on taken for granted perceptions of the social world. To illustrate this, the symbolic capital of a judge for example, rests on the assumption that she objectively and neutrally applies the law.

To employ the latter reflections in the context of Internet regulation in Europe, it is important to note that Bourdieu, in *'Force de droit,'* insists that the inhabitants of a juridical field seek to establish the legitimacy of interpretations favourable to maintaining order. One of the most important strategies employed to do this is by means of linguistic strategies, which result in imposing the illusion of objectivity, as it is from this that law derives its authority.

Based on this reflection, the following sections will argue that when regulatory law becomes a rationalist endeavour, we are trapped in observing the final product of a process. The effects of power remain disguised, and similarly, the fact that the symbolic violence of the state can still be exercised in invisible ways by the administration remains unnoticed.

In *'Force de droit,'* Bourdieu attacks Austin's argument that law has the inherent capacity to *do things with words*, an effect that Bourdieu terms the *'law's power of form'* understood as the formalisation and codification capacity of the legal text. Bourdieu attacks the argument that law derives its authority by virtue of rules

inherent in language as, according to him, authority interweaves with the symbolic power of the state delegated to a particular individual.

Nonetheless, Bourdieu accepts the importance of the written formalisation of legal texts in creating the tacit faith in the basic principle of the juridical order, law's impartiality and neutrality.[27] The implications of the above are conceptualisations that link to the notions of *'pubic good'* and *'neutral regulator'* who works in the name of efficiency, intervening to correct market failures. I would like to add to this that, *'procedural rationality'* or *'risk management'* for example, are underlined by the same presumptions in the sense that they promise neutrality.

Regulation then is viewed as providing an impartial management of practical matters. As such, it reveals the potential of constituting one of the main strategies to sustain juridical order, as then the argument is that the European Commission pursues its *'interests'* by giving neutral value to them. The logical question then is: What are the *'interests'* of the European administration?

The most fundamental interest consists of accumulating and preserving symbolic capital, which implies the power to shape mainstream understandings by supporting an authoritative opinion and thus sustain its position as a major think tank. Sustaining the belief in the neutrality and objectivity of regulatory law is crucial to achieve the above.

---

[27] On these points see Bourdieu note 18 above, and in the translated version see the excellent introduction by Richard Terdiman.

Accumulating or preserving technocratic/informational capital is also important for this purpose. According to Bourdieu, the main quality of this form of capital consists in the ability of authorities to collect information and treat it through classification systems (for example according to sex and age) inscribed in law, and through bureaucratic procedures.

I would think that the concentration of this form of capital is crucial so that the juridical capital performs one of its main tasks: Fitting the social world in legal categories, which ultimately implies imposing common forms of visions and division, forms of thinking and forms of classification.[28]

4. The doxic element

So far I identified the interests of the European Commission. However, maximising these is subject to minds, cognitive schemas. There are times though that minds coincide with structures, and it is then that we are presented with the *doxic* element of the analysis. Structure exists outside the individual as a set of pressures. It is created, reproduced and altered, by agents. Yet, *doxa* reminds us that agents can lose perspective of that structures are their own creation.

This is the hegemonic/doxic strength of structure: The lack of awareness of subjective influence on what appears as objective reality, which is further encompassed by habitus, as there is a quasi-perfect correspondence between the

objective order and the subjective principles of organisation. In this instance, the natural and social world appears self-evident and is uncontested.

For example, when *'bureaucracies create social problems by recognising them and providing information and advice,'*[29] they set the agenda, as certain problems are included while others are excluded, and as such they impose a certain vocabulary framing the debate, *'present(ing) us with an ought by merely stating an is.'*[30]

However, when a bureaucracy itself engages in the production of proposals and regulatory measures by applying a rational analysis while undertaking the impartial management of practical issues, it tacitly accepts and reproduces the belief in the objectivity and impartiality of regulatory law, while failing to see that its decisions is the product of specific socio-historical circumstances.

To this point I will come back later, but first the following will anchor the discussion in the context of Internet regulation.

---

[28] Bourdieu, P. (1994) 'Rethinking the state: Genesis and structure of the bureaucratic field,' 12 *Sociological Theory* 1-18, at p. 5-10.
[29] ibid.
[30] ibid.

C. INTERNET REGULATION: REINVENTING THE WAYS IN WHICH POWER MAY BE EXERCISED

1. Law, code and Internet regulation

Regulating the Internet is not an easy task. As it grows more and more popular, there is a widespread impression that it is a virtual Wild West where opportunists would jump at any chance. There are various reasons for this. One of the problems concerns practices viewed as anti-competitive conduct, as it is the case when search engine providers favour particular sites.[31]

A different problem emerges as, since the Internet is a transnational communication medium, there is little that can be done to prevent users from arranging their illegal actions, so that they evade domestic regulations by taking advantage of foreign regulatory regimes. Even the effectiveness of European data protection laws is reduced when personal information can be stored in offshore data havens.[32] Moreover, intellectual property rights are threatened by peer-to-peer communication systems such as Kazaa, and Morpheus.

---

[31] Love, J. and Nader, R. (1998) 'Microsoft's ambitions and antitrust policy' Remarks at the Cato Institution Policy Forum on Antitrust and Microsoft, April 20, available at http://www.essential.org/antitrust/ms/catoapril20.html, (web page visited on 16 May 2003). The authors argue that when Microsoft bought Web TV, '*it changed the travel menu so that Expedia, the Microsoft travel service, appeared first in the travel menu. Travelocity web site lost is prominent menu location, and was moved to page six, next to Tom's Travel, in an alphabetical listing. How many people in the audience ever look at page 6 when they use an Internet search engine? What if Microsoft could determine what information appears on page one when a person searches for information about a certain MP or about legislation concerning digital copyright?*

[32] Froomkin, M. (1999) 'The Internet as a source of regulatory arbitrage' in Kahin, B. and Nesson, C. (eds) (1997) *Borders in Cyberspace, Information Policy and the Global Information Infrastructure* (Cambridge, Mass: MIT Press); Grewlich, K. W. (1999) 'Good governance in the age of cyberspace' 1 *Info* 264-270; Loader, B.D. (ed) (1997) *The Governance of Cyberspace* (London; New York: Routledge); Murray, A. and Scott, C. (2002) 'Controlling the new media: Hybrid responses to new forms of

The above link to the problem of anonymity. This does not concern the www, where a host service has the means to know the content provider. Anonymity allows users to send e-mail to a USENET newsgroup without the recipient knowing their e-mail address, because an intermediary (the anonymous remailer) has removed this information by means of a technique called encryption.[33]

Nonetheless, NGOs, business and the European Commission seem to react in diverse ways as to what the right way to approach the particular problems emerging in the context of the new media is. For example, with reference to the problem of anonymity, the European Commission, and in particular DG Justice and Home Affairs, argues that other key areas of public policy, such as the fight against illegal content, financial fraud or copyright infringements, may stand in conflict with the right to freedom of expression, privacy and data protection, which support anonymity.

Therefore, the right to anonymity may be restricted since, according to the European Convention of Human Rights, fundamental rights may be subject to certain limitations for specified reasons including the prevention of crime, with the

---

power' 65 *Modern Law Review* 491-516, at p. 494-495; Post, G. (1997) 'Governing cyberspace' 43 *Wayne Law Review* 155-171.

[33] For the problem of encryption techniques see Castells, M. (2001) *The Internet Galaxy: Reflections on the Internet, Business and Society* (Oxford; New York: Oxford University Press), at p. 181-183. Disappearing Inc. and ZipLip created self-deleting email, which encrypts users' information. Zero-knowledge Systems created a software package, which aims at providing the user with five pseudonyms, while the company itself does not have the means to know the real identity of users. Freedom encrypts e-mail and web browsing by sending them through intermediary routers. Similar techniques are employed by Anonymizer.com and Idzap.com, see Castells, at p. 182.

principle of proportionality being the crucial test that any restrictive measure should pass in order to be applied.

Yet, Internet communities believe that since the Internet reveals on the one hand, the potential of free expression and exchange of ideas and on the other hand, the possibility of greater involvement in politics, then its regulation should be left in the hands of the various communities that inhabit this virtual global city. The argument further suggests that it should be up to the users to decide for example whether and how they want to punish an unwanted intruder in a virtual chat room on the USENET system.

Business groups also support self-regulation, The efforts of the International Chamber of Commerce (ICC)[34] present an example of this. Most recent efforts point towards the direction of establishing a global action plan on e-commerce and an ICC working party is currently working on this issue,[35] with global self-regulation being the central aim. ICC has been successful so far in having its standard on privacy marks prevail to the one developed under the auspices of the International Organisation for Standardisation (ISO).[36] ,[37]

---

[34] ICC is the world business organisation representing enterprises from all sectors in every part of the world, http://www.iccwbo.org/index.asp, (web page visited on 16 May 2002).

[35] For more information on these issues see www.iccwbo.org/home /menu electronic commerce.asp, (web page visited on 16 May 2003).

[36] The ISO is a network of national standards institutes from 140 countries working in partnership with international organisations, governments, industry, business and consumer representatives, http://www.iso.ch/iso/en/ISOOnline.frontpage, (web page visited on 16 May 2003).

[37] Braithwaite, J. and Drahos, P. (2000) *Global Business Regulation* (Cambridge: Cambridge University Press).

Nevertheless, the possibility of users' self-regulation is considered as an anathema by business actors, since it may imply the potential of their patents and copyright being infringed, and generally delaying the development of the conditions that would guarantee the flourishing of e-commerce.

It is in this context that the industry strived to develop architectural solutions, as it was the case with codes placed inside software, which aimed at rendering the copying of DVDs more difficult. The problem was that the architectural solution introduced also resulted in only *certain* players and discs being capable of decrypting the necessary files to play a DVD.

This is why, in December 1999, a 15 year old Norwegian, Jon Johansen, who participated in the open source development of the Linux operating system, '*reverse-engineered*' the Content Scrambling System (CSS) encryption code on DVDs and e-mailed the decoder, called DeCSS, to the Internet. The alleged reason was that '*reverse engineering*' was used to create a new software for a DVD player for Linux-based machines,[38] so that it would be compatible with the existing ones. As such, the argument was that it was conducted for the purpose of interoperability. The DeCSS code spread among Linux developers on the Internet, as 2600 Magazine and other publishers had it on their website, with an article on its importance and links to

---

[38] Reverse engineering involves taking apart the features of a programme in order to see how it works and how its performance can be improved. In the EU, reverse engineering is allowed for legitimate purposes (interoperability and the correction of errors). In the USA the right of users to reverse engineer has been recognised in 1992 in Sega Enterprises Ltd v Accolade Inc., and Atari Games Corp. v Nintendo of America Inc. The Linux operating system (OS) is competing with Microsoft's OS.

other locations publishing it, but the problem is that it was also used to *'break'* the

code of DVDs to illegally copy them on CDs.[39]

Lessig's position is well known as regards the above developments.[40] In

particular, he argued that the various constraints built into software by their

---

Linux is an open source system, which means that everybody has access to its code to modify it, as opposed to the proprietary standards of Microsoft's OS.

[39] Johan Johansen was prosecuted in Norway and eight major motion picture studios sued among others 2600 Magazine in the US under the Digital Millennium Copyright Act, see Universal Studios Inc. v Reimerdes et al., 00 Civ. 0277 (LAK). In August 1991, the court held that DeCSS violates DMCA Section 1201(a)(2), which prohibits the unauthorised offering of products that circumvent technological measures controlling access to copyrighted works. In November 1991, the trial court rejected the defendants' fair use defence to providing a circumvention measure. Then an *amicus curiae* brief was filed in the US Court of Appeals for the Second Circuit in January 2001, addressing fair use and First Amendment issues. Again the 2600 magazine was not successful. Nonetheless, in November 2001, in *DVDCCA v. Bunner* (H021153, Super. Ct. No. CV786804), the court upheld an order issued from a lower court that prohibits publishing or linking to DeCSS code. The DVD Copy Control Association (DVDCCA) had brought an action for injunctive relief under the Uniform Trade Secrets Act, Civil Code section 3426.1, against defendant Andrew Bunner and numerous other Internet website operators to prevent future disclosure or use of the code. The above is meant to show the debate that surrounds the relevant issues in the other side of the Atlantic. For more information and legal filings in the 2600 case, it is worth visiting the Electronic Frontier Foundation's web page, the well-known civil liberties organisation defending the 2600 magazine, http://www.eff.org/IP/Video/MPAA_DVD_cases/. It is interesting to note that on 7 January 2003, in Norway, the court ruled that Jon Johansen, known in Norway as *'DVD Jon,'* had not violated the law when he reversed engineered the (CSS) encryption code. Nevertheless, prosecutors are expected to file an appeal, Reuters 'Norway teen cleared in DVD piracy case' 7 January 2003, available at http://www.reuters.com/newsArticle.jhtml?type=topNews&storyID=2006337, (web page visited on 16 May 2003).

[40] Lessig *Code and Other Laws* note 12 above, at p. 190. It is beyond the scope of this chapter to fully comment on Lessig's work, which gives a rich account of the various forms of regulation on the net, but a brief reference is required. Markets, law, architecture and norms all constrain action and thus form distinctive forms of regulation. Moreover, hybrid forms of regulation can exist, being the result of two or more of the *'pure'* forms of regulation. For example, law and architecture can co-exist, when the building of a particular type of software is supported by law in pursuit of public regulatory objectives. For a criticism of Lessig's work, particularly on the issue of whether law is an important regulatory mechanism in cyberspace, see for example Post, G. 'What Larry doesn't get: Code, law and liberty in cyberspace' (2000) 52 *Stanford Law Review* 1439. In the first lines of the introduction the author argues that: *'Some suggest that this [cyberspace] is all too important to be "left to the market," that the choices cyberspace forces upon us involve fundamental, even "constitutional" values that commerce will ignore or even destroy. Lawrence Lessig's Code and Other Laws of Cyberspace is surely the most elegant articulation of this view: Politics and collective decisionmaking, not the invisible hand, will give us a cyberspace where these values are protected. I want to try here to articulate a different vision of the space. Fundamental values are indeed at stake in the construction of cyberspace, but those values can best be protected by allowing the widest possible scope for uncoordinated and uncoerced individual choice among different values and among different*

---

designers may be conceptualised as a form of regulation. Nevertheless, the

aftermath of the above was that in cyberspace nothing is ever impossible. Systems

such as CSS make illegal copying more difficult, maybe even impractical but not

impossible. In other words, design or code[41] proves not to be enough to regulate

conduct.

As such, the above example presents us with an instance when hierarchical

controls may be required to be enacted to create a hybrid of regulatory control of the

kind Murray and Scott call the *'design/hierarchy'* hybrid.[42] This hybrid illustrates the

symbiotic relationship of law and code in regulation. As the weakness of code is that

it may always be decrypted or engineered, it needs an element of legal/hierarchical

regulatory assistance to add strength to the design regulation.

In the light of the above, Murray and Scott remind us[43] that architectural

controls are supported not only by the industry, but also by the World Intellectual

Property Organisation (WIPO) Treaties as enacted within the European Union by

the Directive on Certain Aspects of Copyright and Related Rights in the Information

---

embodiments of those values. We don't need "a plan" but a multitude of plans from among which individuals can choose, and "the market," and not action by the global collective, is most likely to bring that plenitude to us.'

[41] Lessig *Code and Other Laws* note 12 above.

[42] Murray and Scott note 32 above, at p. 502, 506, 513. Murray and Scott build upon Lessig's work to argue that the emphasis should be placed on the variety of regulatory hybrids, which may come into existence as a result of a combination of individual forms such as law, norms, markets and architecture, because novel configurations of power are better grasped through the study of hybrids.

[43] ibid, at p. 513.

Society (Information Society Directive),[44] and in the United States through the

Digital Millennium Copyright Act 1998.[45]

In particular, Article 11 of the WIPO treaties urges parties 'to *provide adequate*

legal protection and effective legal remedies against the circumvention of effective

technological measures that are used by authors in connection with their exercise of rights

under this Treaty or the Berne Convention and that restrict acts, in respect of their works,

which are not authorised by the authors concerned or permitted by law.' Against this

background, the Information Society Directive may be viewed as supporting

architectural solutions creating a hybrid regulatory structure.

However, the DeCSS decoder *is* available on the net and *has* made it possible

for DVD material to be put directly onto the web. Currently there are many web

pages that give precise instructions as to how codes can be broken and DVDs be

copied in users' hardware.[46] Companies updated the encryption technology but the

Internet community produced more advanced decryption codes. Nonetheless, if one

takes into account the thriving number of websites specialising in distributing

decoding technology, it seems that architectural solutions and hybrid

hierarchy/design based regulatory structures are not always successful.[47]

---

[44] Directive 2001/29/EC, Article 6.
[45] Digital Millennium Copyright Act 1998 Section 1201(a)(1) and 1201(a)(2).
[46] www.divx-digest.com/index.html, www.divx.com are two examples that may help elucidate the point made. www.digital-digest.com/nickyquides/flaskmpeg.htm seems to be the perfect web page for beginners! (Web pages visited on 16 May 2003).
[47] Murray and Scott note 32 above.

The previous aimed at showing the problems surrounding self-regulation. Self-regulation is not the norm but an element of hierarchical control is required to strengthen the application of design. Moreover, the above allows us not only to identify an instance when communities active in cyber-world push for decentralised regulation, but also to come to grips with the ways in which different self-regulatory codes of conduct may oppose each other (for example the free speech on the web position v. the intellectual property rights position), in other words, two different codes of conduct of two communities are in conflict.

In such a situation, we should not forget that, when a hierarchical element is introduced (as in the Information Society Directive) to strengthen architectural controls when these fail to regulate conduct, then the Directive inevitably would have to make a normative choice by means of endorsing *one* of the two positions.

The above expose the problems inherent in any attempt to design neutral procedures. However, they imply an understanding of regulatory law in particular and norms regulating conduct in general as being mechanically reproduced by agents seeking specific gains. The European Commission and private interests make choices according to calculations as to potential costs and benefits.

I think that such an understanding of regulatory law and norms misses the following point: Action in general most of the time outruns our intentions, and regulatory law in particular outruns regulators' plans. The practical outcome of intentional thought encapsulated in action outruns intention, as the latter, be it in

neutral procedures or efficient market integration, most of the time reproduces tacit understandings. This is the juridico-administrative habitus.

2. The juridico-administrative habitus: The effect of universality and objectivity

The administration, when drafting legal proposals and implementing laws, forms legal arguments by means of employing the *right* legal reasoning based on the *right* legal sources and providing expertise by means of *reliable* scientific data. As for the juridical aspect, its principal characteristic is that legal arguments are constructed as if their rationale is purely internal to law, and the administrator is forming them by virtue of studying law books, codes and case law. Codification, formalisation and systematisation are crucial to create the effect of neutralisation.[48]

This is because the administrator, in the course of producing a legal document, views herself as disinterested and neutrally interpreting the law, failing to acknowledge assumptions about the social world reproduced therein. In this way, notions such as property and competition, for example, are conceived to be unproblematic. Another characteristic of legal thinking is the belief in that law is an effective tool to successfully order social relations.[49]

Everyone who studied in a law school recalls the particular way law is taught. A legal exam is an exercise testing a student's ability to construct coherent

---

[48] Bourdieu note 17 above.

argumentation based on continuous reference to legal texts and cases in order to substantiate every single word of the argument if possible. A sophisticated exposition of arguments is further desired in order to denote mastery of the national language employed.

This last point is important in order to understand how training in law directs students to think of words as cult objects, in a self-referential self-fertilising aesthetic of legal thinking deriving meaning only from the existing legal corpus. Such a cult of words explains how legal arguments further derive authority not only from the sources they use, but also from the *form* the argument takes, from the *way* words are used, to make an argument that *looks* the way it should look.

Thus, a person trained in law believes in the efficacy of law because he believes in the power of words inscribed in books, cases and legal texts, and in their ability to help society evolve. Bourdieu, in his discussion of the *neutralisation effect* of the juridical language, also draws attention to the grammatical persistence of passive and impersonal constructions in legal texts.[50]

As for the technocratic element in the juridico-administrative habitus, it further contributes to the effect of universality. Bureaucracies create social problems by collecting and treating information, but expertise and the categorisation of

---

[49] ibid.
[50] ibid.

findings can never be *'neutral'* as assessments, benchmarks and instruments aiming at managing everyday affairs only formalise truth *claims.*

Bourdieu then comes close to Foucault, who reminds us that law has the power to formalise disciplinary power claims, which are historically contingent, but are nonetheless universalised, as the *'truth'* of science is conditioned upon historically contingent constructs as to what *'property'* and *'legality'* are for example.[51] The management of mundane everyday affairs always entails choices, which have been discarded, possibilities, which failed to be actualised, as knowledge is contingent, context dependent.

Therefore, self-regulation is not a panacea to all problems surrounding control, as a mix of self-regulation and hierarchical intervention is often required. And be it hierachical or heterarchical, as in command and control rules or procedures, regulation always entails one vision and excludes others. The following will take this point further by looking at a different instance when a mix of hierarchical control and self-regulation was employed, *domain names allocation.*

The aim is to question the nature of the hierarchical element in hybrid forms of regulation, to identify the role of the European Commission in the process and to finally address the question of how easy (or difficult) it is to actually separate

---

[51] Foucault, M. (1979) *Discipline and Punish: The Birth of the Prison* (Harmondsworth: Penguin, orig. 1975); Gordon, C. (ed) (1980) *M. Foucault, Power/Knowledge: Selected Interviews and Other Writings, 1972-1977* (Brighton: Harvester Press); Bourdieu, P. 'Social space and symbolic power' in Bourdieu, P. (1990) *In other Words. Essays Towards a Reflexive Sociology* (Oxford: Polity, orig. 1987).

procedural rules from norms and how Bourdieu's framework may cast light on coming to grips with this question.

3. Scarce resources: Domain names allocation

With reference to the role of the European Commission in the above mentioned processes, both DG Competition and DG Information Society argue that, although the decentralised character of the Internet epitomises the argument for self-regulation, scarce resources and bottlenecks present a case where a mix of self-regulation and hierarchical intervention is proposed.[52]

A particular scarce resource on the Internet is the domain names allocation system. The Internet Corporation for Assigned Names and Numbers (ICANN)[53] controls the allocation in a non-hierarchical fashion, according to the demands of the community. The problem with domain names is that although they can consist of up to 61 characters, usable domain names are almost entirely the .com top level ones.[54]

---

[52] Murray and Scott note 32 above, at p. 506 and 511.

[53] ICANN is a non-governmental not for profit agency. In June 1998 the US Department of Commerce released a White Paper on the administration of internet names and numbers, which aimed at transferring the administration of internet domain names and IP addresses from the US Federal Government into the hands of a private non-profit, internationally representative organisation, which would be self regulated. Governments would not intervene in its powers and structure. Instead, the private sector would form an organisation based on consensus among the industry. ICANN works together with WIPO, which provides the expertise required for the development of effective procedures. On these issues see Mueller, M. (1999) 'ICCAN and Internet governance: Sorting through the debris of self-regulation' 1 *Info* 497-520.

[54] Murray and Scott note 32 above, at p. 497.

Hierarchical solutions were employed by ICANN and its predecessors, Network Solutions,[55] in the form of domain name related dispute resolution. The need for dispute resolution was persistent in view of *'cybersquatting.'* This emerges when individuals register popular domains to subsequently sell them to the holder of the trademark.

Nonetheless, the Internet community failed to impose sanctions on these persons. Although courts could intervene in cases where *'cybersquatters'* had misappropriated another's trademark, enforcement could prove problematic due to regulatory arbitrage. Therefore, a regulatory regime was put in place, which would apply no matter what the jurisdiction of the parties is. In this context, ICANN treated the domain name space as a separate jurisdiction, and all domain name holders have the obligation to submit themselves to its arbitration procedure, which is conducted online and is characterised by low costs.[56]

In particular, in October 1999, ICANN adopted its Uniform Domain Name Dispute Resolution Policy (UDRP).[57] Part of the registration process for getting a domain name includes acceptance of the UDRP, while a domain name owner can lose its rights to the domain name if it violates it.[58] Section 4 of the UDRP explains

---

[55] Network Solutions Inc. is a private for profit company.

[56] Murray and Scott note 32 above, at p. 506-507. The authors also note that: *'The previous Network Solutions Domain-Name Dispute-Resolution Policy required the complainer to obtain a court order. This meant it was in many cases cheaper to buy the disputed domain name from the defender than to pursue an action to recover the name, especially if the dispute had an international element.'*

[57] http://www.icann.org/udrp/udrp-policy-24oct99.htm, (web page visited on 19 May 2003).

[58] UDRP § 3.

the mandatory administrative proceeding that any domain name owner would be subject to.

This proceeding occurs when a third party complainant asserts that the domain name owner has used a domain name that is identical or confusingly similar to the complainant's mark, that the domain name owner does not have rights or legitimate interests in the name, and that the domain name has been registered and used in bad faith.[59] The UDRP lists four non-exclusive factors to be considered in determining bad faith.[60] If *all* of the above conditions are met, the remedies sought in UDRP proceedings are the cancellation of the domain name or the transfer of the domain name to the complainant owner of the mark.[61]

Nonetheless, there is strong criticism of the role of ICANN as commentators have noted that it *'favours trade mark holders over domain name holders who fail, for whatever reason to comply with US trademark law.'*[62] The so-called *'sucks'* cases prove to

---

[59] UDRP § 4(a), available at http://www.icann.org/udrp/udrp-policy-24oct99.htm, (web page visited on 23 May 2003).

[60] UDRP § 4(b)(i)-(iv) *For the purposes of Paragraph 4(a)(iii): the following circumstances, in particular but without limitation, if found by the Panel to be present, shall be evidence of the registration and use of a domain name in bad faith: (i) circumstances indicating that you have registered or you have acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that complainant, for valuable consideration in excess of your documented out-of-pocket costs directly related to the domain name; or(ii) you have registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that you have engaged in a pattern of such conduct; or(iii) you have registered the domain name primarily for the purpose of disrupting the business of a competitor; or(iv) by using the domain name, you have intentionally attempted to attract, for commercial gain, Internet users to your web site or other on-line location, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of your web site or location or of a product or service on your web site or location.*

[61] UDRP § 4(i).

[62] Murray and Scott note 32 above, at p. 507, citing Froomkin, M. (2000) 'Wrong turn in cyberspace: Using ICANN to route around the APA and the Constitution' 50 *Duke Law Journal* 17, at p. 96-101;

be quite controversial. It has been argued that free speech on the web was seriously

curtailed, after domain names were transferred to trademark holders following

arbitration.[63]

A different problem occurred with establishing the criteria, which should

underline the *confusion* test. For example, in Wal-Mart Stores Inc. v. Walsucks and

Walmarket Puerto Rico,[64] one of the arguments supporting the transfer of the

domain names to Wal-Mart, was that *walmartcanadasucks.com, wal-*

martcanadasucks.com, walmartuksucks.com, walmartpuertorico.com and

walmartpuertoricosucks.com, are *'confusingly similar'* to its trademark. In particular in

section (6) of the decision the panellist found that

> *Respondent has registered the domain names 'walmartcanadasucks.com,' 'wal-*
>
> *martcanadasucks.com,''walmartuksucks.com'and walmartpuertoricosucks.com.' These*
>
> *domain names share common characteristics. In each case, Complainant's 'Wal-Mart'*

Perry, D. (2000) 'Trademarks as commodities: The famous roadblock to applying trademark dilution law in cyberspace' 32 *Connecticut Law Review* 1127-1161, at p. 1127, 1155-1157.

[63] On these issues see Murray, A. (2003) 'Regulation and rights in networked place' forthcoming in *Journal of Law and Society*. The author argues that normally a purely non-commercial use of the trademark for the purpose of criticism should be an absolute defence, as in this instance the arbitrator has to strike a fair balance between property rights and the right to free speech. Nevertheless, the UDRP provides a poor understanding of what constitutes a fair defence. This is because the non-commercial use defence can only be used if a trademark has not been *tarnished* (associated with obscenity) and if consumers have not been *misleadingly diverted from the trademark holder's business.* Murray argues that these two conditions substantially impoverish the fair use defence, as arbitrators found that search engines were likely to identify the *'sucks.com'* sites in response to, for example, a *'Wal-Mart'* query. Internet users might then visit these sites, a process diverting potential customers from Wal-Mart. Thus, arbitrators pointed to the particularities of search engines, which, if taken into account, should lead to a different analysis than the one conducted in the physical world, see Dixons Group Plc v Mr. Abu Abdullaah, D2000-1406, (WIPO January 18, 2001). For the tarnishment doctrine see Bently, L. and Sherman, B. (2001) *Intellectual Property Law* (Oxford: Oxford University Press); Strasser, M. (2000) 'The Rational basis of trademark protection revisited: Putting the dilution doctrine into context' 10 *Fordham Media & Entertainment Law Journal* 375-425.

trademark is followed with an indication of place (Canada, Canada, UK and Puerto Rico,

respectively). In Wal-Mart v. Walmarket Canada, it was determined that

'walmartcanada.com' and 'Wal-Mart' are confusingly similar. The Panel accepts this

determination. The addition of a hyphen to form 'wal-martcanada.com' does not affect this

finding. ....

Respondent has appended the term '-sucks' to domain names that are, in the absence

of that term, confusingly similar to Complainant's mark. The addition of the pejorative verb

'sucks' is tantamount to creating the phrase 'Wal-Mart Canada sucks' (and comparable

phrases with Respondent's other '-sucks' formative domain names). The elimination of the

spacing between the terms of the phrase is dictated by technical factors, and by the common

practice of domain name registrants. The addition of a common or generic term following a

trademark does not create a new or different mark in which Respondent has rights.[65]

Very importantly, the arbitrator held there was strong evidence of bad faith

since the respondent registered the disputed domain names for registered the web

pages for a commercial purpose, thus he canot invoke fair use or legitimate

noncommercial use permitted by paragraph 4 (c)(iii) of the Policy. Similarly, some

other sucks cases decided (freeservesucks.com, natwestsucks.com,

directlinesucks.com, dixonssucks.com and standardcharteredsucks.com) were all

---

[64] Wal-mart Stores, Inc. v. Walsucks and Walmarket Puerto Rico, D2000-0477 (WIPO July 20, 2000), available at http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0477.html.
[65] ibid at section six.

registered by the same respondent who had asked for money for return of the name.[66]

Nevertheless, for natwestsucks.com, for example, to pass the confusion threshold, in section five of the decision the panel concluded that *'Some will treat the additional 'sucks' as a pejorative exclamation and therefore dissociate it after all from the Complainant; but equally others may be unable to give it any very definite meaning and will be confused about the potential association with the Complainant.'[67]*

In the light of the above, arbitrators seem to have stretched the UDRP criteria in order to meet the test of trademark confusion. In a different case, disquiet was raised as a result of the arbitrator's finding that *'guiness-really-sucks'* is *'identical or confusingly similar'* to the Guinness trademark.[68]

Interestingly enough, in this case the element of bad faith was established as the respondent was thought to have registered the disputed domain names for retaliatory purposes because he was angered by the complainant's registration of the

---

[66] Case No. D2000 - 0636 (Natwestsucks), Case No. D2000-0583 (Directlinesucks.com), Case No. D2000-0584 (Dixonssucks.com), Case No. D2000-0585 (Freeservesucks.com) and Case No.D2000-0681 (Standardcharteredsucks.com) available at http://arbiter.wipo.int/domains/index.html.

[67]Case No. D2000 - 0636 (Natwestsucks) available at http://arbiter.wipo.int/domains/index.html

[68] Case No.D2000–0996 available at http://arbiter.wipo.int/domains/index.html. In this case, the respondent has registered the domain names guinness-really-sucks.com; guinness-really-really-sucks.com; guinness-beer-really-sucks.com; guinness-beer-really-really-sucks.com; guinness-sucks.com; guinessreallysucks.com; guinessreallyreallysucks.com; guinessbeerreallysucks.com; guiness-beer-sucks.com; guinessbeersucks.com With specific reference to Paragraphs 4 (i) of the UCRP, the administrative panel decided that they are confusingly similar to a trademark or service mark in which the complainant has rights. Therefore, the respondent has no rights or legitimate interest in respect of said domain names or any of them and he has registered and is using said domain names in bad faith. Accordingly, the said domain names should be transferred to the Complainant. As regards the conditions of 'bad faith' and 'legitimate interest' the panellist followed the line of argumentation exposed in Wal-Mart. As for the test of similarity, the panellist went on to

domain name, *guinnessucks.com*. Therefore, the panellist accepted that the complainant has made out a *prima facie* case that the respondent registered the domain names with the intention of harassing the complainant to enforce its trademark rights and to tarnish the Guiness trademark.[69]

Criticising the legal basis of the decisions is not enough to reveal the problems inherent in the process of arbitration.[70] Questioning who participates in the panel is crucially important for this purpose. According to Froomkin the problem with arbitration is that ICANN allows the complainants, who most of the time are trademark holders, to engage in *'forum shopping,'* in other words choose the arbitration provider.[71]

The vast majority of disputes are being adjudicated by arbitrators from WIPO (with most of its members practising lawyers) and from the National Arbitration Forum (based in Minnesota[72] with most of its members being retired judges).[73]

---

point out that there may be some non-English-speaking readers who may not be familiar with the word 'sucks.'

[69] Case No.D2000–0996 available at http://arbiter.wipo.int/domains/index.html. *'In support of its argument that the said domain names were registered by the Respondent as a result of the earlier administrative proceedings, the Complainant has submitted a print-out of a page on the Respondent's said www site and alleges the following statement was posted on that www site during the period from June 1 through July 14, 2000:*

'I went to register the domain name, GUINNESSSUCKS.COM, but guess what, that domain name is already owned by someone. Guess who. That's right. Guinness beer owns it themselves. I'm glad I'm not the only one who thinks they suck. THEY THINK THEY SUCK THEMSELVES!! . . . So anyway I did go and register a few names about Guinness beer and Pillsbury. Tell me what you think....Coming Soon to a website near you!!"

[70] See for example Murray note 63 above; For statistical data and a very useful categorisation of the problems see a study by Mueller available at http://dcc.syr.edu/markle/markle-report-final.pdf, (web page visited on 16 May 2003). A discussion on the interpretation of legal taxonomies such as *'bad faith'* falls outside the scope of this chapter due to space limits.

[71] McWilliams, B. 'Domain arbitration already drawing critics' story published on 8 March 2002, including an interview with M. Froomkin, Professor of law, University of Miami available at http://www.internetnews.com/bus-news/article.php/3_317461, (web page visited on 16 May 2003).

[72] www.arbforum.com/domains, (web page visited on 19 May 2003).

Another provider is eResolution,[74] based in Montreal, while the CPR Institute for Dispute Resolution is the fourth provider available to parties.

Froomkin believes that accredited registrars should select which forum will handle cases involving their domain customers. This is because, while *'on paper this process should be fair, I foresee a serious danger. Since plaintiffs get to choose the arbitration provider, this creates an economic incentive for companies to compete on being pro-plaintiff if they want business.'*[75]

The purpose of the previous analysis was to draw attention to that trivial decisions as to who is the arbitrator may be crucial. This latter point will be further taken up in the following section.

4. Analysis of the problems

a *Establishing the difference between the joint partnership model and the self-regulation model.*

Let me summarise the issues conveyed so far. Pure forms of self-regulation, as in the case of having to abide by codes of conduct, are not the norm. Most of the time, some form of hierarchical assistance is required in the monitoring and enforcement stage. The value of this point is proven by examples such as the dispute

---

[73] Empirical research on the composition of arbitration panels has been carried out by Murray note 63 above.

[74] www.eresolution.ca/, (web page visited on 19 May 2003).

[75] Froomkin, M. (2002) 'ICANN'S Uniform Dispute Resolution Policy: Causes and (partial) cures' 67 *Brooklyn Law Review* 608-718, at p. 671 and 689. Also see the interview Froomkin gave to

resolution mechanism introduced by ICANN and the architectural solutions developed for DVDs.[76]

Nonetheless it would be wrong to consider that private interests solely support such a decentralised form of governance. For example, the European Commission plays a major role in the co-ordination of Internet management and in initiating consultations between itself, the private sector and civil society.

To this effect, the European Commission *'should develop, in conjunction with ICANN, effective codes of conduct (supported by legislation as appropriate), to cover the allocation and protection of domain names, action to combat fraud and cybersquatting, and access to personal data and the security and protection thereof.'*[77]

Furthermore it is expected to promote effective alternative dispute resolution procedures to reinforce the domain name registry codes of conduct; Conduct calls for a periodical evaluation of whether legislative action and self-regulatory

---

internetnews.com note 71 above; Weinberg, J. (1997) 'Rating the net' 19 *Hastings Communication & Entertainment Law Journal* 453-482.

[76] Encouragement by the state for industry self-regulation initiatives is sometimes labelled 'co-regulation.' As the term is being used in the current EU debate it refers to the setting of standards or norms being carried out by non-state actors while monitoring and enforcement is conducted by regulatory authorities. On these issues see Murray and Scott note 32 above; Liikanen, E. (2000) 'Co-regulation: A modern approach to regulation' *SPEECH/00/162*, speech of the Commissioner E. Liikanen at the Meeting of the Association of the European Mechanical, Electrical, Electronic and Metalworking Industries (Orgalime) Council, at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/00/162|0|RA PID&lg=EN, (web page visited on 16 May 2003).

[77] http://wipo2.wipo.int/process2/rfc/rfc3/annexes/annex14.html. Also see http://europa.eu.int/ISPO/eif/InternetPoliciesSite/InternetGovernance/EPResolution15March2001 .html, (web pages visited on 14 April 2002). During ICANN's first steps, to temper disquiet from the part of the EU as to the affinity between the US Commerce Department and ICANN, the US promised the Europeans that they would have three of the nine seats on the corporation's Interim Board.

measures have actually achieved the desired effect; Aim at making the European

regulatory strategies in the above areas best practice across the world Internet.

To what extent though is the development of joint codes of conduct, for

example, a sign that the European Commission has a real influence in the way these

will be developed? Various commentators have noted that ICANN has failed to

fulfil its promise to provide a forum for self-regulation. The White Paper produced

by the US government called upon ICANN to open up the .com, .net, and .org TLDs

to competing registrars and put in place a dispute resolution system together with

WIPO.[78]

However, by having WIPO provide the necessary expertise to develop the rules

of conduct in order to make the Internet a safer place in view of the problem of

cybersquatting, simultaneously meant that a maximalist definition of intellectual

property rights entered the vocabulary of ICANN.[79]

As for ICANN's board, it is true that 9 out of its 18 members were to be elected

by virtue of an election where the Internet community at large could participate. The

rest were appointed by supporting organisations, such as the Address Supporting

Organisation, the Protocol Supporting Organisation and the Domain Name

Supporting Organisation.

---

[78] Mueller note 53 above.
[79] The Europeans always complain that the US government heavily influences ICANN through the Commerce Department. On these issues see Froomkin, M. 'A commentary on the WIPO's management of Internet names and addresses: Intellectual property issues,' 19 May 1999, available at http://personal.law.miami.edu/~amf/commentary.htm, (web page visited on 16 May 2003); also see Mueller ibid. The author describes how the US Commerce Department, EU officials and various big

Castells argues that the romantic vision of Internet community regulating itself according to its needs was tempered by the reality of powerful lobbyists and networks influencing the election of particular candidates in ICANN's board. This is why government representatives who sit in ICANN's board expressed their disquiet when Andy Mueller was elected, as he was member of the (in) famous Chaos computer club in Berlin, representing Internet communities' interests.[80]

Nevertheless, in 2002 ICANN suggested that there should be no more at large elections, as it considered that the experiment in global online democracy is noble, but deeply unrealistic, and currently the issue is under discussion.

As for the dispute resolution in particular, Froomkin argues that ICANN has completely failed: *'ICANN has so far demonstrated a complete failure to monitor the activities of the dispute providers, and has taken no action when they write rules that are biased for plaintiffs. The most likely reason for that disinterest is that ICANN, which heavily represents trademark and other business interests, is not troubled by those rules, just as it was not troubled by the UDRP. The lobbies that dominate ICANN would be much quicker to demand action if the bias ran the other way, and were a rogue provider to materialize, one can reasonably expect that ICANN would be quick to take action against it.'*[81]

The basic point emerging from the previous discussion is that one may encounter difficulties in establishing what the difference between the joint

---

corporations like IBM were influential in selecting the initial Board Members of ISOC, ICANN's predecessor.

[80] Castells note 33 above, at p. 32.
[81] Froomkin note 75 above, at p. 671, 689, 692.

partnership model and the self-regulation approach is. The former position understands the state as retaining bigger powers that extend beyond monitoring and enforcement, and as such is one among the many actors that directly intervene in the shaping of regulation. Self-regulation may require the state to put the framework necessary to enable monitor and enforcement, which implies that regulatory authorities retain responsibility for ensuring that controls are effective and intervene where controls fail.[82]

However, although regulatory authorities argue that their role in the latter case is limited, in reality there is more than that. ICANN and the problem that emerged in relation to domain name alocation is one example that may help illustrate the latter point, as mundane decisions in reference to who is the judge in the arbitration procedure may be crucial and it seems that national governments and the EU do have a say on these issues as they are influential as to what course such decisions will take.

b A Bourdieusian perspective

Why is the above happening? Is it because interest groups capture legislators or regulatory agencies? Or, because regulatory law collapses in the realm of politics? Contrary to these approaches, the argument of this chapter is that regulatory law is doomed not to live up to its promises, as it is impossible not to bear the traces of the

---

[82] Governance and regulation for the digital age: Issues and choices for Europe, Preliminary Consultation Document from the EIF 'Soft Law' Working Group, rapporteur Scott, C., at p. 6.

operational logic of a field of study with a juridical element: *Telling right from wrong by way of fitting social problems in legal categories.*[83] Law, be it *'procedural'* or *'substantive'* always entails normative choices.

This is why, Bourdieu's theoretical framework offers a view radically different to understanding regulatory law as objective and neutral and to conceiving action as being initiated to achieve certain policy outcomes,[84] as the question still requiring an answer is: Why, after all, does the European Commission pursue certain policy outcomes?

The main argument of this chapter is that the European Commission seeks to preserve or maximise juridical and most importantly symbolic capital. Based on the assumption that power is at the heart of action, the argument is that the European Commission is predominantly engaged in struggles in order to *remain a crucial locus of governance.*

To this effect, the European Commission seeks to enhance its position as a major think tank and the best way to do this is by sustaining the belief in the neutrality and objectivity of law by virtue of its juridical capital, which gives legitimacy and universality to the point of view that regulatory law is to encapsulate.

Thus, we break away with notions such as utility maximisation and procedural neutrality. And, we cast a radical doubt on the notion of rational agency,

---

[83] Bourdieu note 17 above.
[84] For this approach see for example the *policy networks* analysis. On this see Chapter I. A.

as maximising power is not an exercise undertaken always at a conscious level, but, most of the time, is performed by means of practices who reproduce *taken for granted* assumptions.

If one accepts that maximising continuity, power and status is the motor behind action, then the aim of the European administration is to harmonise, integrate markets, objectively put notions such as *economy* and *property* in legal categories. The tools to achieve these are, codification and objectification of practices by means of textual analysis, reliance on precedence, invention of new legal categories, trust in legal institutions. The operating parameters of the above are, formality, rule of law, and an increase in legal certainty by means of providing the tools for rational predictions of outcomes.[85]

However, by virtue of providing for certainty, objectivity, rationality and continuity, a set of assumptions are simultaneously reproduced, which are taken for granted such as the ones reproducing the centrality of intellectual property rights, or, as the following section will show, particular understandings underlying the categorisation of material as harmful.

The above logic has also the effect of giving such subjective structural patterns universality. Thus, the basic characteristic of a field with a juridical element

---

[85] Note that a full discussion on Bourdieu's theory of action would have to engage the role of structural patterns of cognition (*habitus*) in appreciating the potentialities inscribed in formal structures (*capital*). This discussion is the subject of the following chapter. I here concentrate on the identification of the operation of the doxic element of the field, an instance when structures coincide with patterns of cognition.

is to give universality to claims encapsulated in legal procedures, although we tend to forget that these very claims are reproduced because agents reproduce them.

Monitoring and enforcement present an instance when structural patterns of thinking are encapsulated in tedious procedural rules, which may in reality be loaded with options influencing future developments. This is because, although choices were *'naturally'* made by the European Commission for example, as they presented at the time the orthodox way of doing things, this does not mean that they did not preclude the possibility of other, different, *'heretic'* ways existing alongside.

These choices are encapsulated in legal rules, and, if one accepts the above argument, then there can be no *'neutral'* legal rules merely confined in monitoring and enforcement or facilitating the participation of communities, as a problem is never *a* problem. It usually is a multifaceted problem and it is only one of its facets that will eventually be actualised by means of entering the monitoring stage. An example of this is the ICANN arbitration procedure.

As we saw, the European Commission thinks that supporting effective alternative dispute resolution procedures to reinforce the domain name registry codes of conduct is necessary. What does *'effective'* mean? Should an accredited panel choose the arbitrators or should the solution be found in allowing competition among alternative arbitration fora? The answer in the future will be one of the two alternatives, it cannot be both, and this means that one is excluded.

The choice is premised not on the basis of pursuing the public good or individual preferences, but on patterns of praxis characterised by the juridical element of the field, demanding a rational approach safeguarding certainty and continuity by means of objective procedures, which, despite their objective character, reproduce assumptions about the role of intellectual property rights in protecting investment in view of the new global challenges.

All of these points will be followed through in the next section by virtue of another case study: The Safer Internet Action Plan, which seeks to tackle the problem of illegal and harmful content on the net. Why is *'harmful material'* a problem and what is the process behind identifying a problem? Moreover, how is *'harmful'* defined in the preparatory and implementation stage? The following section will seek to answer these questions, with a view to identify the *'taken for granted'* element in the answers furnished.

D. THE INTERNET ACTION PLAN: THE DIFFICULTY IN

SEPARATING PROCEDURES FROM NORMS

1. The Safer Internet Action Plan

In January 1999 the European Parliament and the Council of the European

Union adopted a multiannual Action Plan on promoting safer use of the Internet by

combating illegal and harmful content on global networks.[86] The Safer Internet

Action Plan[87] (the Plan) is managed by DG Information Society and is part of the

European Union's Fifth Research and Technological Development (RTD)

Framework Programme (1998-2002)[88]

It covers the period 1999-2002, aims at promoting safety on the Internet and

presents us with the European Union's response to the problem of illegal, harmful

and racist content on the Internet. In March 2002 the European Commission decided

---

[86] Council Recommendation of 24 September 1998 on the Development of the Competitiveness of the European Audiovisual and Information Services Industry by Promoting National Frameworks aimed at Achieving a Comparable and Effective Level of Protection of Minors and Human Dignity O J L 270, 24 September 1998, at p. 48. The Recommendation followed the Communication on Illegal and Harmful Content COM (96) 487, available at http://europa.eu.int/ISPO/legal/en/internet/communic.html and the European Commission Green Paper COM (96) final on the Protection of Minors and Human Dignity in Information and Audiovisual Services COM (96) 483 available at http://europa.eu.int/comm/avpolicy/regul/new_srv/gp_re_en.htm, (web pages visited on 19 May 2003).
[87] Decision No 276/1999/EC of the European Parliament and of the Council of 25 January 1999 adopting a Multiannual Community Action Plan on Promoting Safer Use of the Internet by Combating Illegal and Harmful Content on Global Networks O J L 33, 06 February 1999, at p. 1. Also see the Internet Action Plan web page at http://www2.echo.lu/iap, (web page visited on 19 May 2003).
[88] For the details of this plan see http://www.saferinternet.org/, (web page visited on 19 May 2003).

to fund the Plan with an additional budget of 13.3 million for two more years covering the period 2002-04.[89]

The Plan is developed along three basic lines: It propagates the need to create a safe environment by means of self-regulation (particular by creating a European network of hot-lines and encouraging self-regulation based on codes of conduct), it supports the development of filtering and rating systems and the adoption of international agreements on rating systems, and finally it seeks to inform parents, teachers and children of the potentials and drawbacks of the Internet.[90]

The Plan is closely related to the activities and priorities of the Multimedia Content and Tools Key Action (KA3) of the Fifth Framework Programme.[91] Therefore, it presents a good example of the complex consultation process, which aims at collecting expert knowledge.[92] The following section will map the committees engaged in the process of information collection.

2. Committees and the importance of collecting information

The European Commission is surrounded by myriads of committees providing advice on both the development of legislation and on its

---

[89] http://www.welcomeurope.com/news_info.asp?idnews=378, (web page visited on 16 May 2003). The proposal of the European Commission has been adopted by the EP and the Council, IP/03/774 EU Moves Against Illegal and Harmful Content Online.
[90] ibid.
[91] http://www.cordis.lu/ist/ka3/iap.html, (web page visited on 19 May 2003).
[92] The scope of the following section is limited in charting the committees that are an internal part of the EU system. The collection of information vie informal channels of networks falls outside the scope of this chapter due to the space limits.

implementation.[93] As regards the former, independent experts who are drawn from throughout the European Union, but do not represent the interests of any Member State or scientific institution, sit in *'expert'* or *'scientific'* committees.

The Comité Scientifique et Technique (CREST) and the European Research Advisory Board (EURAB) are examples of such committees. Moreover, the same consultative role can be played by *Task Forces*, (whose members come from various DGs, but can draw upon external advice), and think tanks established by the European Commission such as the Joint Research Centre.

The European Commission also convenes special *'Reflection Groups'* or *'Independent Expert Panels'* whose members are high-level European personalities to advise on particular issues such as the future macro-organisation of the Framework Programme. Moreover, the Research Group of the Committee of Permanent Representatives (COREPER) also provides *upstream* consultation (on the development of legislation), and is a high-level committee set up by the Council of Ministers, representing the interests of Member States.

The above was meant to map the formal consultation through which a problem is identified, an idea emerges in the first place and finally finds its way to a European Commission proposal. In other words, the aim was to trace the formal channels leading to the emergence of the idea that multimedia in general and the

---

[93] Technological Options Assessment (STOA) Programme of the European Parliament, PE 167 327/Fin.St., October, 1998 (PE 167 327/ Fin. St.).

usage of filters in particular should be dealt with in the context of the Fifth Framework Programme.

The European Commission has considerable power to effectively engage in the identification of problems, as it possesses a powerful internal mechanism structured along the lines of a major think tank. Nonetheless, the implementation stage reveals more ways in which the European Commission can be influential. This point will be taken up in the following section.

3. Implementing the Plan

a Self-regulation and the development of codes of conduct

As regards the distribution of illegal content on the Internet, it is up to Member States (MS) to enforce the law, since what is illegal offline remains illegal online. The industry is viewed as playing an important role in helping reducing the circulation of illegal content (especially content such as child pornography, racism and anti-Semitism) through self-regulation (such as codes of conduct and establishment of hotlines) in compliance with and supported by the legal system.[94]

Under this action line, the European Commission should develop guidelines for codes of conduct at a European level, build consensus for their application, support their implementation and monitor progress. Parallel to the establishment of codes of conduct, a system of visible *'Quality-Site Labels'* for Internet Service

---

[94] Green Paper on the Protection of Minors and Human Dignity in Information and Audiovisual Services of 16 October 1996 COM (96) 483.

246

Providers (ISPs) will be developed, aiming at assisting users in identifying providers

abiding to these codes of conduct.[95]

ISPs will have to remove material from their servers upon request.[96]

Clarifying the rules that determine what kind of material should be removed will be

subject to an independent national consortium of service providers, where

membership will probably be voluntary. An example of relevant organisations that

work at the EC level is the Internet Content Rating For Europe (INCORE), whose

members include broadcasters and people such as the head of the Internet Watch

Foundation.[97] This group, registered in England, reviews complaints from the public

and takes action by requesting Internet service providers to remove the allegedly

illegal material from their servers.[98]

---

[95] Intermediate evaluation of the Safer Internet Action Plan Volume 1, Final report, 31 May 2001, conducted for the European Commission by Business development research consultants, at p. 18-22. The report is available at http://europa.eu.int/information_society/programmes/evaluation/pdf/report1iap_en.pdf, (web page visited on 19 May 2003).

[96] As for liabilities and obligations of Internet Service providers (ISPs), according to the 1997 Bonn Ministerial Declaration intermediaries like network operators and access providers should, in general, not be responsible for content. Otherwise intermediaries would be made subject to unreasonable, disproportionate or discriminatory rules. Therefore, third party content hosting services should not be expected to exercise prior control on content if there is no reason to believe it is illegal. The Electronic Commerce Directive (2000/31/EC) endorsed this approach. Nonetheless, although the exemptions provided for may protect the ISPs from liability, they may still be made subject to a court injunction to terminate or prevent access to infringing material. Furthermore, MS may establish procedures governing the removal or disabling of access to information.

[97] www.internetwatch.co.uk, (web page visited on 16 May 2003).

[98] The issue of *Comitology* falls outside the scope of this section, due to space limits but a short reference is required. When the administration implements legislation exercising executive power then comitology committees, (where national representatives sit, chaired by a European Commission official who does not vote), keep an eye on the process. These comitology committees are also called '*downstream committees*. Generally on the debate that surrounds the issue of Comitology see Joerges, C. (2001) 'Law science and the management of risks to health at the national, European and international level-stories on baby dummies, mad cows and hormones in beef' *7 Columbia Journal of European Law* 1-19; Joerges, C. 2001) 'Deliberative supranationalism: A defence' *European Integration*

b Developing filtering and rating systems

As for harmful content on the Internet,[99] the main objective of the Plan is to make content easier to identify. This can be done through a rating system, which describes the content in accordance with a generally recognised scheme (for instance, where items such as sex or violence are rated on a scale) and by filtering systems, which empower the user to select the content she wishes to receive. The European Commission funds various projects that aim at encouraging the establishment of European rating systems and familiarising users with their use. Nonetheless, there are various problems that surround the issue of filters.

c Analysis: Problems with using filters to block harmful material

There are three different kinds of filters used to block harmful content. One of the techniques is called *blacklisting*. It works on the basis of twelve categories (*violence/profanity, nudity, sexual acts, gross depictions, racism/ethnic impropriety, satanic/cult, drugs, militant/extremist, gambling, questionable/illegal, alcohol/tobacco*).

Online Papers (EIoP) No 8, Florence, European University Institute; Bignami, M. (1999) 'The administrative state in a separation of powers Constitution: Lessons for European community rule making from the US' *Harvard Jean Monnet Working Paper 5/1999;* Lenaerts, K. and Verhoevenm A. (2000) 'Towards a new framework for executive rule-making in the EU? The contribution of the new comitology decision' (2000) 37 *Common Market Law Review* 645–686; Neyer, N. (2000) 'The regulation of risks and the power of people: Lessons from the BSE crises' *European Integration Online Papers (EIoP) No 4*, Florence: European University Institute; Dogan, N. (1997) 'Little procedures with big implications' 20 *West European Politics* 31-60.

[99] Harmful content is both content which is allowed but whose distribution is restricted (adults only, for instance) and content, which may offend certain users. This is provided in section three of the Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions on Illegal and Harmful Content on the Internet COM (96) 487 and in the Green Paper on the Protection of Minors and Human Dignity in Audiovisual and Information Services note 86 above.

Parents can selectively block access to any or all 12 categories by checking boxes in the programme manager. However, *whitelisting* software works on the reverse principle, as it blocks out all Internet content, except expressly authorised sites.

Figure 1

European Community S&T Policy "Trialogue"
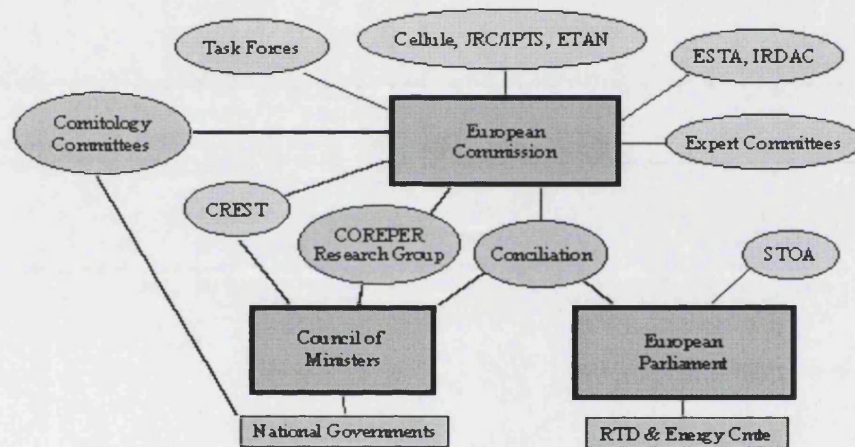
Key		
	Cellule	[Cellule de Prospective (Forward Studies Unit), European Commission]
	COREPER	[Committee of Permanent Representatives]
	CREST	[Comité Scientifique et Technique]
	ESTA	European Science and Technology Assembly
	ETAN	European Technology Assessment Network
	IPTS	Institute for Prospective Technological Studies
	IRDAC	Industrial R&D Advisory Committee
	JRC	Joint Research Centres
	RTD	Research and Technological Development
	STOA	Science and Technology Options Assessment, European Parliament

Source: Technological Options Assessment (STOA) Programme of the European Parliament, PE 167 327/Fin.St., October, 1998 (PE 167 327/ Fin. St.).

Neutral labelling is a new industry-wide standard, the Platform for Internet Content Selection (PICS). All sites with an Internet address must carry a PICS label, which 'tags' sites with a 'neutral' label that supports different types of information: Ratings (for instance, generally evaluating language, nudity, sexual content, violence), or pointers (identifying contents according to their relevance or interest for various constituencies of users). To be viewed, the site must both carry a PICS label and be within the parameters set by parents on the home computer.

Ratings can be established by content providers themselves (such as entertainment companies operating family-oriented web sites) or by third parties (such as religious groups or parents' associations). Each family decides which rating systems it wishes to use and then decide what kind of material is acceptable and what is not by setting the parameters.[100]

Nonetheless, when the individuals who participated in the evaluation report of the European Commission[101] were asked about what they believe the current scope of the Plan is, they agreed that it does cover, and should cover, child pornography, chat rooms, violence, racist and xenophobic ideas, hate speech, and adult pornography.

However, the Plan is not so strongly seen as covering satanic and cult ideas, drugs, medical information and advertising. Yet, participants said that these areas should be included, with the possible exception of advertising. In reviewing the

---

[100] Evaluation Report note 95 above, at p. 69.

250

current scope, participants identified a number of areas, which it was felt that the

Plan had a remit to include (but none were especially strongly supported across all

respondents): Computer crime, financial scams in relation to the consumer,

hooliganism, terrorism, incitement to law-break, gambling, security and hacking,

email, newsgroups.[102]

The above point to the particular problems in reference to producing

adequate lists of categories, which would encapsulate consensus as to definitions

such as *'harmful material.'* A relevant question may concern whether it should be

given a wide definition and include advertising in general for example.

The problem linking to this concerns the difficulty inherent in any effort to fit

content in suitable categories. Rating system designers have to devise rules-based

systems, which would be sensitive to the complexity of content. Still, how rate a

reportage on the Holocaust, which contains descriptions of sexual violence in

concentration camps?[103]

Moreover, as Boyle argues, although the PICS is a *'system touted as "value-*

neutral", in practice we might believe that the PICs technology would be disproportionately

used to favour a particular set of ideas and values and exclude others.'[104] In the light of this

position, one could argue that similarly the Plan is not sensitive to other

worldviews, such as the one supporting free speech on the web.

---

[101] These are people who participated or who would be interested in participating in the future in projects funded by the European Commission, Evaluation Report ibid.
[102] ibid, at p. 35-36.
[103] http://libertus.net/liberty/censorware.html, (web page visited on 16 May 2003).

This is because, if for example there is a law regulating the use of the web at schools and libraries, filters may be employed as technologies of control, as the choice of filtering categories may result in blocking web sites presenting information known to be of concern to people with conservative religious or political values.[105]

Against this background, I argue that the Plan may set the framework of future developments as we should not underestimate how important it is to identify a problem, set the vocabulary of the debate by collecting information on it and set general directions according to which agents will be mobilised to find solutions to the identified problem This is a fine example of the ways informational/technocratic capital is reproduced.

Furthermore, there is still scope for important decisions to be taken at the stage of implementation, as, for example, the term *'harmful material'* can be given various definitions. For this reason, it may be very difficult to actually separate procedures from norms, as in reality procedures may frame choices and frame the subject matter of the discussion in such a way that it could be argued that they entail normative content. This is because they encapsulate unspoken patterns of thinking about for example, the qualities of harmful material and the role of regulatory law.

In the case of the Plan, regulation is viewed as providing an impartial management of practical matters. The position of this chapter is that the European

---

[104] Boyle 'Foucault in cyberspace' note 16 above.
[105]This is an argument supported in the US see http://responsiblenetizen.org (web page visited on 16 May 2003).

Commission pursues its *'interests'* and sustains juridical order by giving neutral value to them.

Based on the assumption that power is at the heart of action, the most fundamental interest consists of accumulating and preserving symbolic capital, which consists of the power to shape mainstream understandings and thus sustain its position as a major think tank. Preserving the belief in the neutrality and objectivity of regulatory law is crucial to this effect, but now, influencing future developments is done in indirect ways.

E. CONCLUSIONS

The main question addressed in this chapter concerned the role of law in regulating the Internet in Europe, while the focus was on the role of the European Commission in the process. I sought to identify the forms of capital available to agents, discuss the challenges to the dominant conceptualisation of centralised law formation and implementation, and finally come to grips with *'doxa'* by drawing attention to the ability of law to *universalise* and *objectify*.

The main thesis advanced was that the European Commission seeks to preserve or maximise juridical, technocratic and most importantly symbolic capital, as the European Commission strives to remain a crucial locus of governance.

As for the deeply embedded perceptions presented by doxa, the argument was that the taken for granted assumption is the belief in the neutrality and objectivity of regulatory law, which is reproduce by the agents who inhabit my field of study (the European Commission). In this instance agents view themselves as engaging in the rational management of practical issues, while failing to see that regulatory law and the views it encapsulates can only be the product of history.

To illustrate this, I first I looked at intellectual property rights, focusing on architectural solutions introduced in software by the industry. I chose this case study as it is thought to present an example of a new form of decentralised regulation challenging the command and control approach. In particular, the argument was that what has entered the field of discussion was *the habitus of*

dependency. The challengers were new entrants, such as private forces, who envisaged a more active role for themselves in the course of enacting laws affecting their interests.

However, hierarchical intervention is required in the monitoring and enforcement stage. The problem of scarce resources in general, and domain names allocation by ICANN in particular, prove this point.

The focus of this section was on studying the extent to which decentralised regulatory techniques have been effective in weakening mechanisms of central control. The view supported was that power may be exercised in novel and less visible ways, and thus be misrecognised, as procedural rules may in reality be loaded with options, which may influence future developments.

A third case study on the regulation of harmful and illegal content on the Internet took this last point further by arguing that preparatory stages are important as it is then that *a regulatory problem* is identified and the vocabulary of the debate is set by collecting information on it and set general directions for interest groups to follow in order to find solutions to the identified problem Moreover, important decisions may be taken at the stage of implementation, as, for example, definitions can be given a wide or narrow interpretation.

Regulation is then conceptualised as manifesting the freezing of power relations, with a certain point of view having been given precedence over others and as such, feeds back to the operation of categorisation. In the light of the above, it

may be difficult to actually separate procedures from norms, as in reality procedures may frame choices and frame the subject matter of the discussion in such a way that it could be argued that they entail normative content.

However, this is an exercise inseparable from the construction of the field of struggles. In this instance, regulation is conceived as involving various agents who, although they inhabit different fields of activity, try to have their view of the world injected in regulation. This process implies that any categories encapsulated in it, are subject to redefinition. Regulatory law is then viewed as posing a temporary limit to conflicts.

The following chapter will thus seek to shed light on the ways in which interest groups strive to influence the content of regulation, while engaging in discussing the role of structural patterns of cognition in appreciating the potentialities inscribed in formal structures.

V

Social Capital: The Construction of Intellectual Property Protection

Never trust a person who does not like wine.

K. Marx (written on the wall of a restaurant in South Italy).

Moral behaviour can be achieved as a result of habit.

We become just by doing just acts,

self-controlled by doing controlled acts,

fearless by doing courageous acts.

Aristotle, Nicomachean Ethics.

While the previous chapter concentrated on the ways juridical, informational and symbolic capital may be maximised, I here seek to focus on social capital. To begin with a short definition, by maximising this form of capital one exploits its power by virtue of building a network of people to achieve common goals. Hence, the notion of social capital is at the heart of efforts to create a sustainable information society by means of promoting forums of discussion engaging various interest groups in decision-making.

However, not all efforts to create a civil society were informed by genuine attempts to build consensus on the basis of relations of trust. Various theorists would explain this in diverse ways. Some would say that rational agents do not realise that it is to their benefit to co-operate. Others would think that our values are

in crisis. Yet, a Bourdieusian perspective to the problem may offer a different explanation.

Distrust may emerge as a result of first, structural asymmetries in networks and second, because of different patterns of perception and appreciation of a social problem, in other words different *habitus*, amongst alliances of agents forming part of the civil society. Usually such different patterns reflect differences between the orthodox way of understanding social problems and new ones challenging mainstream modes of conception.

As for the problem of structural asymmetries, problems occur as not all agents have the same amount of social capital. Moreover, other forms of capital, such as economic or organisational capital, may be converted to social capital and vice versa, which in practice denotes that agents with big resources are better situated to advance their position.

Against this background, this chapter will first look at various different conceptualisations of social capital with a view to explain how Bourdieu's understanding is different. Then, I will move onto examining how networks have been influential in shaping the information society in Europe with emphasis on one specific case study: The proposal to introduce patents in software-implemented inventions in the EU. The focus will be on analysing the reasons why the *libre software* community and the European Commission/big businesses/patent lawyers alliance failed to reach agreement in this case. Finally, the conclusions will consolidate the findings of this chapter.

A. SOCIAL CAPITAL

In very simple terms, social capital denotes that *'people do better when they are somehow connected,'*[1] because of *'information, trust and norms of reciprocity inherent in social networks.'*[2] This broad definition encompasses the fundamental assumptions made by the many theorists who have chosen to engage the notion of social capital in their analysis.

Nevertheless, as different intellectual traditions feed into the articulation of its theoretical properties, when it comes to laying down the details, the definitions employed diverge depending on the theoretical angle one chooses to view the problem of information, trust and norms of reciprocity. In the light of the above, the following will engage in reviewing the main social capital theorists with a view to cast light on the focal assumptions made and on the differences with Bourdieu's claims.[3]

Nevertheless, the following does not intend to provide exhaustive reference to the various authors whose work focused on the notion of social capital.[4] The choice of authors is premised on the need to discuss the theoretical traditions feeding into the various conceptualisations of social capital and as such, I only chose authors who I consider as being representative for this purpose.

---

[1] Woolcock, M. (1998) 'Social capital and economic development: Toward a theoretical synthesis and policy framework' 27 *Theory and Society* 151-208, at p. 161.
[2] ibid, at p. 153.
[3] ibid, at p. 156.
[4] For such an exhaustive analysis see Woolcock ibid.

1. Coleman, Hirschman, Putnam and Fukuyama

Coleman's understanding of social capital[5] is underlined by the assumptions encapsulated in the notion of *instrumental action*. Hence, social networks are formed after a cost-benefit analysis takes place. In other words, rational agents realise that it is to their advantage to forge them to collectively pursue their individual interests, and such a decision implies the calculation of possible returns being derived from collective action.

Moreover, social capital is considered to be a public good, since it tends to be undervalued by agents and as such not produced. This is because, when there is no incentive to generate its production, the usual *free-rider* problem occurs and then it has to be supplied when private initiative fails.[6]

However, the logical question then is: Why does the supply of social capital fail to reach desired levels? Coleman argues that in primordial societies social structure was based on family and relationships between persons. Social relations were regulated by social norms, reputation and moral force, in other words social

---

[5] Coleman draws from Granovetter, while making explicit reference to him. Granovetter argued that economic action can best reveal its properties if understood not as markets or hierarchies but as social relationships, see Granovetter, M. (1973) 'The strength of weak ties' 78 *American Journal of Sociology* 1360-1380. In this framework, the analysis is on personal ties or networks. Such an approach is reminiscent of Mead's and Goffman's interactionism, see Chapter III Section A of this thesis. It should also be noted that it is Simmel who first positioned at the heart of sociological analysis the problem of interaction. According to Simmel society exists because individuals enter into interaction, which emerges as a result of the need to attain common purposes, see for example Simmel, G. 'Group expansion and the development of individuality,' in Levine D. N. (ed) (1971) *Georg Simmel: On Individuality and Social Forms: Selected writings of Georg Simmel* (Chicago, Ill; London: University of Chicago Press, orig. 1908). Generally, these ideas are embraced by network theory, on this see chapter III Section A. A full discussion on network theory falls outside the scope of this chapter, as the focus is on *social theorists* who elaborated on the notion of social capital.

[6] Coleman, J. (1993) 'The rational reconstruction of society' 58 *American Sociological Review* 1-15.

capital. In modern societies though, laws and formalised instruments in general result in the loss of social capital.

For example, in reference to raising children, as it has moved increasingly out of the household and parents no longer depend on children to care for them, ties inside families have broken. However, such loss of social capital is not desired by policy makers, as the costs of undeveloped *human capital* accrue to the state.

Coleman explains that *'just as physical capital is created by changes in materials to form tools that facilitate production, human capital is created by changes in persons that bring about skills and capabilities that make them able to act in new ways. Social capital however comes about through changes in the relations among persons that facilitate action.'*[7]

He then sees all three forms of capital (physical, human, social) as facilitating productive activity, and most importantly, he argues that social capital in the family and the community plays an important role in the creation of human capital in the rising generation, as parents care for their children's education, thus minimising the chance of them dropping out of school.[8]

However, due to the loosening up of social structures with a memory of strong relationships amongst individuals, agents nowadays capture only a small part of its benefit, so when conducting a cost-benefit analysis, they often under-invest in social capital. In view of the state's interest in maximising a child's value, it

---

[7] Coleman, J. (1988) Social capital in the creation of human capital' 94 *American Journal of Sociology* (Supplement), at p. 100. Also see Coleman, J. (1990) *Foundations of Social Theory* (Cambridge, Mass.: Harvard University Press, 1990).
[8] Coleman Social capital in the creation of human capital ibid, at p. 109 and 119.

should be engaged in putting in place the right institutional framework, which would forge its creation.[9]

Coleman understands social capital from a rational actor perspective, as possessing three different forms: Expectations and obligations depending on *trust relations*, social norms accompanied by *effective sanctions*, and finally a social structure, which enables *information flows*. It is then that individuals may discover that it is in their joint interest to cooperate.

More fundamentally, for all three conditions for co-operation to emerge one pre-condition must be established: Social relationships must exhibit *closure*. Coleman argues that *networks with closure* (networks who tie their members together) are a source of social capital as then, for example, access to information is made easier.

To exemplify this he refers to the diamonds wholesale market in New York, where Jewish traders (with strong family ties) would hand diamonds for inspection to the potential buyer with no formal insurance required, as an example of a case where a norm constitutes an effective regulator, as sanctions are guaranteed.

Against this background, social capital is a concept concerned with the quality and structure of social relations. The quality element of relations (closure)

---

[9] For a different view, see Fukuyama who argues that it is wrong to consider social capital as a public good. Since cooperation is necessary to all individuals as a means of achieving their selfish ends, there is no reason why they should not produce it as a private good. Therefore, social capital is clearly spontaneously generated all the time. Furthermore, Fukuyama (as Coleman does) points to that social capital is a private good that is nonetheless pervaded by externalities, both positive and negative. An example of a negative externality is to treat *only* members of the family, for example, morally, Fukuyama, F. (1995) *Trust: The Social Virtues and the Creation of Prosperity* (London: Hamish Hamilton); Fukuyama, F. (1999) *The Great Disruption. Human Nature and the Reconstitution of Social Order* (London: Profile Books).

reminds us that when it does not exist, neither reputation nor effective sanctions can arise.

A second strand of writing on social capital embraces the Durkheimian vision of values and moral imperatives as prevailing over utilitarian instrumental action. For example, a gift to a child is not given to attain a certain benefit, but is a gesture underlined by values such as love or friendship. Norms of this kind underpin the choice of goals and how and whether people seek to attain them. In other words, norms are not exogenously given, but are internalised.

Hirschman's work echoes this position, as for him moral resources underline non-instrumental action on behalf of values, entailing no cost-benefit analysis. Striving for values entails a person's feelings of belonging to a group, and group ties are sustained for this reason.[10]

Robert Putnam's work on social capital borrows from Coleman to explain social capital as a public good, stressing that it tends to be undervalued and undersupplied by private agents.[11] However, Putnam's work is also anchored in the

---

[10] Hirschman, A. O. (1984) *Getting Ahead Collectively: Grass-Roots Organizations in Latin America* (New York: Pergamon Press); Hirschman, A. O. (1986) *Rival Views of Market Society and Other Recent Essays* (New York: Viking Penguin); Hirschman, A. O. (1984) 'Against parsimony: Three ways of complicating some categories of economic discourse' 74 *Journal of Political Economy* 89-95.

[11] Putnam, R. D. (2000) *Bowling Alone. The Collapse and Revival of American Community* (New York: Simon and Schuster); Leonardi, R., Putnam, R. D. (ed) (2002) *Democracies in Flux: The Evolution of Social Capital in Contemporary Society* (New York: Oxford University Press); Leonardi, R., Nanetti, P. and Putnam, R. (1993) *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton, N.J: Princeton University Press); Putnam, R. D. (1993) 'The prosperous community: Social capital and public life' 4 *American Prospect* 13-19; Putnam, R. D. (1996) 'The strange disappearance of civic America' 7 *American Prospect* 24-38.

intellectual tradition shared by American communitarians and functionalist conceptions of social integration from the 1950s and early 1960s.[12]

Putnam's thesis is that high stocks of social capital result in successful political and economic systems, while many social problems may occur due to the decline of social capital. In particular, he observes that the American society is suffering exactly because social capital has been reduced.

This is because this form of capital nurtures not only relations of reciprocity and trust in the micro level, but also, as a non-intended consequence, trust on the political and economic system. In this way individuals integrate in society, as social consensus is created.

This is built around networks of trust created, for example, in families or voluntary organisations.[13] What is more, it is by means of these organisations that a shared value system is developed. Therefore, in Putnam's framework, on the one hand, trust creates reciprocity and voluntary associations, and on the other hand, reciprocity and associations produce trust.[14]

---

[12] This proposition is supported by Siisiainen, see Siisiäinen, M. (2000) 'Two concepts of social capital: Bourdieu vs. Putnam' Paper presented at the *Information Society for Third Sector Research (ISTR) Fourth International Conference 'The Third Sector: For What and for Whom?'* Trinity College, Dublin, Ireland. In this perspective, Putnam's approach is also influenced by Jacob's famous work on the role of communities in big American cities in driving economic development, see Jacob, J. (1963) *The Death and Life of Great American Cities* (New York: Random House). Her main argument was that it is communities and not world markets that the science of economics should study, as truly entrepreneurial spirit is developed in flexible urban networks. Jacob adopted a hostile view to central planning, which was seen as a parasite exploiting the fruits of labour generated in small regions, potentially destroying the self-organisation ability of neighbourhoods and regions, see Jacobs, J. (1984) *Cities and the Wealth of Nations* (New York: Random House).
[13] Leonardi, Nanetti and Putnam note 11 above.
[14] ibid, at p. 163-185.

In simple words, individuals pursue membership in voluntary associations because they *trust* that it is better to try to achieve individual goals through collective action. Hence, by virtue of generalised trust in the effectiveness of collective action, the institution of voluntary association, for example, is strengthened.

2. Bourdieu and social capital

In Coleman's framework, social capital is a public good and the pursuit of rational agents who realise that they stand stronger chances of achieving individual goals through collective action. According to Hirschman social capital presents the moral resources of the society. Finally, Putnam thinks that social capital is the cement of society in view of the integrationist operation it performs by means of producing generalised trust in the political and economic institutions.

Similar to all of these approaches, Bourdieu's line of thinking is that social capital represents a resource available to agents. But, contrary to them, for one thing, social capital has to be appreciated through individual schemas of perception and appreciation (habitus) being, most of the time, maximised or preserved by means of non-strategic action. For another, it always encapsulates power relations. I will here consider these two propositions.

In Bourdieu's framework social capital does not emerge after a cost benefit calculation by rational actors base their calculations upon the opportunities offered in an environment exhibiting closure. Social capital is not a resource exogenously

given, but has to be appreciated through minds, as these are socially constructed, bearing a social memory structured in cognitive schemas attributing meaning to the social milieu.

Still, these cognitive schemas of perception and appreciation are not possessed by rational agents acting in the name of a normative claim, as in Hirschman.[15] Contrary to this, Bourdieu argues that social capital is crystallised in taken for granted practices making the social world seem so evident that agents think it has always been functioning this way, forgetting that they themselves reproduce it.

To illustrate this, if we take Coleman's example of the Jewish diamond wholesale community to view it from a Bourdieusian perspective, then social capital is meant to emerge by means of being maximised by agents, neither because they consciously engage in a cost-benefit analysis, nor because they rationally embrace a value system organising relationships in a community, but because agents do what they have always been doing without questioning the belief system underlying the formation of practices reproducing the existence of such networks.

Therefore, understanding the formation of these requires looking at cognitive schemas *allowing* the reproduction of the particular social relations, as nurtured in hierarchical relations in families structuring sentiments, such as respect and obedience, or at structural patterns owing their existence to religiosity. The above are reproduced in everyday practices, which are so *'normal'* that are beyond question

---

[15] Hirschman *Getting Ahead Collectively* note 10 above.

or rational computation, as people act like a *'fish in the water'* to use Bourdieu's words.

Having said this, I totally agree with Coleman on one very basic point: For social capital to emerge, *social closure* has to exist and I think that this is a point not developed by Bourdieu himself. I nonetheless wish to depart from Coleman's position that agents rationally make calculations on the basis of information they receive once in an environment exhibiting closure, as what this view does not take into account is that the environment *itself* is a powerful regulator.

It does not only form the basis for calculations favouring the maximisation of social capital, but the process of communication inside a particular environment becomes a powerful cognitive lens regulating life inside a network. And, what is more, the ways life is regulated in a particular setting, is crystallised in cognitive schemas such as the insider/outside one, which has further effect on how individuality/collectivity, personality, uniqueness, distinctiveness and reputation are constructed beyond the conscious level being reproduced in practices, as Chapter III of this thesis sought to show.

Despite the above, the relevant patterns of praxis may emerge at the conscious level, as Bourdieu asserts that, in times of crises, habitus and the taxonomies it encapsulates are challenged. We saw in chapter IV that the challengers were groups who demanded their inclusion in the decision-making process, challenging the powerful insider/outsider taxonomy. Once habitus is challenged

then, from being a strategy devoid of strategic calculation, it becomes a conscious strategy on the part of the European Commission: *Accumulate social capital.*

According to Bourdieu, social capital involves power relations and the strategy of maximising it points to the possession of a durable network of relationships of collegiality and recognition. Therefore, it is a resource that points to group membership with the aim to create and sustain social networks, while '*the volume of social capital possessed by a given agent, depends on the size of the network of connections that he can effectively mobilise.*'[16]

This implies that membership in groups may result in improving the social position of actors in many different fields. Moreover, differences in the control of social capital may lead to the same amount of economic and cultural capital giving different degrees of profit and power of influence to actors.

This is because group membership has a '*multiplication effect*' on other forms of capital.[17] Therefore, differences in the control of social capital may explain why the same amount of economic and cultural capital can be more or less effectively maximised.

From this perspective, the formation of a voluntary association can (also) be seen as a strategy of investment aimed at the creation of permanent networks of

---

[16] Bourdieu, P. (1986) 'The forms of capital' in Richardson, J. G. (ed) (1986) *Handbook of Theory and Research for the Sociology of Education* (New York: Greenwood Press), at p. 241-258; Bourdieu, P. (1972) *Esquisse d'une Théorie de la Pratique. Precédé de Trois Etudes d'Ethnologie Kabyle* (Geneve: Droz); Bourdieu, P. (1984) *Distinction: A Social Critique of the Judgment of Taste* (London: Routledge & Kegan Paul, orig. 1979); Bourdieu, P. (1980) 'Le capital social' 32 *Actes de la Recherche en Sciences Sociales* 2-21.
[17] The forms of capital, ibid.

relations that will make possible the accumulation of social capital.[18] The creation of

a forum or a working party by the European Commission and the participation in

committees may also aim at doing this.

I will come back to the notion of social capital as developed by Bourdieu later

in this chapter. But, first it is important to anchor the discussion in the context of

empirical studies on European governance.

---

[18] ibid.

B. SOCIAL CAPITAL AND NETWORKS IN EUROPEAN GOVERNANCE

1. The European Union as a new system of governance

At the empirical level, studies on European governance have used the notion of policy networks to offer an alternative explanation to the state-centred and market-driven model.[19]

In this framework the European system is often described as governance without government. This is because it is understood as organised around the interaction of various levels of the formal institutions of the EU and interest groups,[20] moving away from an understanding of governance around national governments[21] and European institutions such as the European Commission.[22]

Such non-hierarchical co-ordination results in the formation of policy networks, which are comprised of a number of actors who share common interests and therefore exchange resources to pursue these, acknowledging that co-operation

---

[19] A view strongly reminiscent of Granovetter, for more on networks see note 5 above.

[20] Ruggie, J. G. (1993) 'Territoriality and beyond: Problematising modernity in international relations' 47 *International Organization* 139-174; Jachtenfuchs, M. (1995) 'Theoretical perspectives on European governance' 1 *European Law Journal* 115-133; Kohler-Kock, B. (1996) 'Catching up with change: The transformation of governance in the European Union' 3 *Journal of European Public Policy* 359-380 (Supplement).

[21] This is an argument supported by intergovernmentalists, see for example Moravcsik, A. (1991) 'Negotiating the Single European Act: National interests and conventional statecraft in the European Community' 45 *International Organization* 19-56; Moravcsik, A. (1993) 'Preferences and power in the European Community' 31 *Journal of Common Market Studies* 473-524.

[22] For an argument supporting the centrality of formal institutions see for example Sandholtz, W. and Zysman, J. (1989) '1992: Recasting the European bargain' 42 *World European Politics* 95-128.

is the best way to achieve common goals,[23] a position strongly reminiscent of Coleman's thesis.

There are many empirical works whose assumptions are based on the above understandings. In the field of telecommunications for example, Dang-Nguyen, Schneider and Werle found that policy formation and implementation processes at the European level demonstrate the important role of transnational policy networks.

According to the authors, in these networks the European Commission should be seen as actively promoting its self-interests trying to strengthen EC policies as a whole, and not being *'just another actor.'*[24] To this effect, the European Commission explicitly sought the formation of such networks, mainly due to the way political power is dispersed in the European political system resulting in rendering difficult hierarchical intervention.[25]

---

[23] Putnam, R. (1988) 'Diplomacy and domestic politics: The logic of two-level-games' 42 *International Organisation* 427-460; Knoke, D. (1990) *Political Networks. The Structural Perspective* (Cambridge: Cambridge University Press); Rosenau, J. N. and Czempiel E. O. (eds) (1992) *Governance Without Government: Order and Change in World Politics* (Cambridge: Cambridge University Press); Kenis, P. and Schneider, V. (1991) 'Policy networks and policy analysis: Scrutinising a new analytical toolbox' in Marin, B. and Mayntz, R. (eds) (1991) *Policy Networks - Empirical Evidence and Theoretical Considerations* (Frankfurt/M.: Campus); Haas, P. M. (1992) 'Introduction: Epistemic communities and international policy co-ordination' 46 *International Organisation* 1-35; Marsh, D. and Rhodes, R.A.W. (eds) (1992) *Policy Networks in British Government* (Oxford: Clarendon Press); Ruggie, J. G. (1993) 'Territoriality and beyond: Problematizing modernity in international relations' 47 *International Organisation* 139-174; Mazey, S. and Richardson, J. (eds) (1993) *Lobbying in the European Union* (Oxford: Oxford University Press); Kassim, H. (1994) 'Policy networks, networks and European Union policy-making: A sceptical view' 17 *West European Politics* 15-27; Héritier, A., Knill, C. and Mingers, S. (1996) *Ringing the Changes in Europe: Regulatory Competition and the Redefining of the State: Britain, France, Germany* (Berlin, New York: de Gruyter); Börzel, T. A. (1997) 'What's so special about policy networks? - An exploration of the concept and its usefulness in studying European governance' *European Integration Online Papers (EIoP) No 16*, Florence: European University Institute.
[24] Dang-Nguyen, G., Schneider, V. and Werle, R. (1993) 'Corporate actor networks in European policy making: Harmonizing telecommunications policy' *Max-Planck-Institut für Gesellschaftsforschung (MPIFG) Discussion Paper 93/4*.
[25] This is the institutional argument, which draws attention to that power is dispersed in the EU. Therefore, it should be seen as bearing affinities to a *'separation of powers'* political system (like the US

As for the actors who participate in these networks, the authors' research shows that in the early liberalisation days actors such as the Social Democrats (SPD), the Green Party (Grüne) or the Postal Workers' Unions (DPG, DPV), were in strong opposition to liberalisation, whereas actors such as the Association of German Machinery Manufacturers (VDMA), the Association of (large) Telecommunications Users (DTeV), the liberal Free Democratic Party (FDP) or the Federation of German Industry (BDI), strongly demanded more liberalisation.[26]

To mobilise a policy network the European Commission set up a special task force active between 1983 and 1986. The DGs involved were DG Telecommunications, DG Competition, DG Industry and DG Research, which launched a series of studies undertaken by external consultants. The results of these studies were that Europe was well behind America and Japan and thus action at the EU level was required. These studies were presented in open fora, where representatives of industry and users participated.

For example, the International Telecommunications Users group (INTUG) and the Union of Industrial and Employers Confederations (UNICE) were active in

---

system) and not to a parliamentary democracy. In a nutshell the argument is that, since in the EU the Council and the European Commission are separate powers, then for one thing, questions as regards accountability emerge, and for another, the political constituencies lobbying the Council may be overridden in the implementation stage. Therefore, the system should be more open to interest groups due to structural reasons, see Bignami, M. (1999) 'The administrative state in a separation of powers Constitution: Lessons for European community rule making from the US' *Harvard Jean Monnet Working Paper 5/1999*. Moreover, commentators argue that that although the EC legal order is superior to national Constitutions, MS have some degree of discretion as to how a Directive will be implemented, and even though the European Commission can take a Member State to the Court of Justice for failure to implement, national legislators often delay or hinder implementation.

[26] Dang-Nguyen, Schneider and Werle note 24 above.

such fora. At the same time, several committees were created with the aim to bring together the industry, MS and the European Commission.

To this effect, the Senior Official Group for Telecommunications (SOGT) was established by the Council as an advisory body to the European Commission in telecommunications issues in November 1983, where high-ranking civil servants from MS and PTTs would sit. The result was the development of action lines for the promotion of a telecommunications policy.[27]

Then, the European Commission launched a consultation and invited telecom operators, producers and users. This way it would get direct feedback from, for example, PTTs, which had already been consulted in the national political arena, and from privatised operators such as the BT and Swedish Televert. Furthermore, the Roundtable of European Industrialists served as a direct link with the industry.[28] The conclusions of the consultation were published, leading to an implementation plan, then to a Council Resolution in 1988, which in turn led to the Liberalisation Directives.[29]

---

[27] Dang-Nguyen, G., Schneider, V. and Werle, R. '(1994) 'Corporate network actors in European policy-making: Harmonising telecommunications policy' 32 *Journal of Common Market Studies* 473-498, at p. 485; Braithwaite, J. and Drahos, P. (2000) *Global Business Regulation* (Cambridge: Cambridge University Press).

[28] Lawton, T. C. (2000) 'Uniting European industrial policy: A Commission agenda for integration' in Nugent, N. (ed) (second ed 2000) *At the Heart of the Union: Studies of the European Commission* (Macmillan; St Martins). The corporate members were: ICL, GEC, Plessey, AEG, Nixdorf, Siemens, Thomson, Bull, CGE, Olivetti, STET and Philips

[29] Schneider, Goderfou and Werle note 27 above. The authors also argue that alliances between the European Commission and telecommunication users were built by means of putting in place the Roundtable on Open Network Provision (ONP) under the auspices of the European Council of Telecommunication User's Association (ECTUA), and the creation of the Open Network Provision (ONP) Forum as a further consultative body. The European Commission used these bodies as a reverse lobbying mechanism for the dissemination of ideas in national arenas in view of the possibility that ONP related issues would be hotly debated in the Council, ibid, at p. 490.

In a nutshell, potential conflicts in the implementation phase are prevented by means of early bargaining and interest accommodation. To this effect, after a problem is identified, a task force is put in place, then studies are launched, which are meant to bring in external expertise and subsequently an open forum for discussion is created.

Finally, a draft proposal is prepared, which is followed by consultation to lead to the drafting of a Green Paper. We see that the process of crystallisation of intentions is a long one, but it is only after this takes place that an Action Plan and a proposal for a Directive are drafted.[30] Networks are also created by means of participation in institutionalised committees. The following will further elaborate on this point.

2. An example of social capital nurtured in committees

In many cases, actors' position in networks is based upon membership into advisory committees or expert groups.[31] The previous chapter looked at the different committees feeding into the collection of expert knowledge required to the identification of a regulatory problem and the implementation of a legal measure in

---

[30] Interview with an A4 official at DG Internal Market, conducted on 24 January 2002. The same argument is made by Cini, see Cini, M. (1996) *The European Commission: Leadership, Organisation, and Culture in the EU Administration* (Manchester; New York: Manchester University Press; New York: st Martins Press).

[31] Peterson, J. and Sharp, M. (1998) *Technology Policy in the European Union* (Basingstoke: Macmillan); Peterson, J. (1991) 'Technology policy in Europe: Explaining the Framework program and Eureka in theory and practice' XXIX *Journal of Common Market Studies* 269-290; Van Schendelen, M. P. C. M (ed) (1998) *EU Committees as Influential Policy Makers* (Brookfield, Vt.: Ashgate).

the context of the Framework Programme, which aims at providing funding for research at the EU level.

We then saw that the expertise is remarkable and the number of committees proves this. I here concentrate on identifying who the members of such committees are, by looking at the Information Society Technologies Programme (IST) in particular.

The IST is one of the main themes covered by the European Union's Fifth Research and Technological Development (RTD) Framework Programme (1998-2002) funding European projects. IST is a research programme aiming at fostering the convergence of information processing, communications and media technologies in Europe and has a budget of 3600 million Euro. It is managed by DG Information Society of the European Commission.[32]

---

[32] The budgetary politics of RTD are quite complicated. The Maastricht Treaty requires that the Framework Programme's budget is subject to a unanimous vote on the Council. Then the broad outline of programmes and decision-making on multi-annual budgets would be subject to qualified majority voting (QMV) and co-decision, with the European Parliament (EP) involved in the decision process. Moreover, a double legislative procedure was retained, making certain programmes subject to Council adoption by QMV with the EP only consulted. This implies an extremely time-consuming process. For example, the key actions of the IST programme, agreed after EP's second reading, include:(I) Systems and services for the citizen, ii) New methods of work and electronic commerce iii)Multimedia content and tools (iv) Essential technologies and infrastructures v)Cross-programme themes.

The negotiations of the Fourth Framework Programme (1994-98) prove that the existing framework was problematic. They took one year and finally the broad content of the Programme changed marginally from what the European Commission initially proposed, proving the minor impact of the EP. The major problem was getting the Council to agree on the budget, since some research ministers tried to promote national interests. Similarly, the Fifth Framework (1998-2002) took a long time to agree with the Research Council endorsing a budget of 14 billion Euro on its common position, which was less than in the Fourth Framework. What characterised the process was fierce intergovernmental rivalries in the Council as again research ministers were keen on pushing programmes that touched upon national priorities, resulting in huge delays until reaching agreement. For these issues see, Bomberg, E and Peterson, J. (1999) 'The development of RTD policy. Making history and setting budgets' in Peterson J. and Bomberg, E. (1999) *Decision Making in the European Union* (New York: St. Martin's Press), at p 213.

Programme Committees operating under the comitology procedures[33] assist

the European Commission with its implementation powers. Members of these

committees are representatives of MS. For the whole of the Fifth Framework

Programme, there are nine programme committees and one committee on the rules

for participation and dissemination of results. They met more than 40 times in 2000

and were consulted approximately 100 times, principally on the draft decisions on

the selection of proposals and the update of the work.

All the opinions given were favourable to the proposals of the European

Commission. The European Commission also consulted the Programme Committees

informally on 300 or so occasions for exchanges of views or for information. The

result of all these consultations was the adoption by the European Commission of

over 200 acts to implement the specific programmes.[34]

The implementation of the programme[35] is done by means of periodic calls of

proposals. Proposals are invited for submission within a defined timeframe, with

certain specific activities being subject to a continuous submission procedure

without fixed deadlines.

As for the IST Programme in particular, the IST action line is implemented by

annual work-programmes. Advice for these is provided by the IST Advisory Group

---

[33] For a discussion on the types of committees and procedures operating in the EU system in general see http://wwwdb.europarl.eu.int/dors/oeil/en/inter51.htm, (web page visited on 19 May 2003). For a list with the names of the members of the IST Programme Committee see Appendix Three of this chapter.
[34] http://europa.eu.int/comm/research/pdf/annualreport2001_en.pdf, (web page visited on 19 May 2003).
[35] http://www.cordis.lu/ist/overv-1.htm#objective, (web page visited on 19 May 2003).

and the Programme Committee,[36] defining priorities, which, with further specifications and consultations, result in the Action Lines described in the annual work-programme. The consultation for the 2002 work-programme comprised also meetings and workshops that involved more than 400 IST experts from the industry and academia.[37]

Members of the IST Programme Committee are representatives of Member and Associated States, while the 25 members of the IST Advisory Group are considered to be experts in the field and provide independent advice concerning the content of the IST work-programme. The following from the IST website explains their role and membership:

On 20 November 1998, the Commission appointed 278 experts to provide independent advice on the Fifth Framework Programme for Research and Technological Development, whose budget for 1999-2002 was agreed last week at ECU 14960 million. Selected from nearly 5000 candidates, they will serve for two years on 17 advisory groups.

Despite the fact that only around 10% of candidates were women, their high level of expertise enabled the Commission to increase the overall percentage in the advisory groups to 27%, with nearly half the groups (7 out of 17) being chaired by women. Half the group members have a research background; this expertise is complemented by a strong industrial component

---

[36] For this procedures see note 33 above.
[37] See the 2002 work programme in http://www.cordis.lu/ist/bwp_en.htm, (web page visited on 19 May 2003). Reports of these meetings are in www.cordis.lu, (web page visited on 19 May 2003).

(32%), and a significant proportion of research users and regulators (18%). Each group will

hold several meetings to review the draft work programmes over the next few weeks.[38]

External Advisory Groups are also important as they provide the European

Commission with independent advice concerning the content and direction of

research work to be carried out under the key actions of the Fifth Framework

Programme. This involves proposing guidelines for work-programmes, including

the timetable of calls for proposals, criteria to be used for evaluating project

proposals and verifiable objectives for achieving the aims of the key actions.

The groups also comment on the strategic nature and exploitation of the work

to be carried out and on the analysis of results, with a view to a possible revision or

reorientation of the work-programmes.[39]

Each group has about 16 members chosen from the MS of the European

Union. Members from countries associated with the Framework Programme –

Iceland, Israel, Liechtenstein and Norway – will be added soon, and the groups will

later be enlarged to include members from other countries such as countries that are

candidates for accession to the EU. Members of the External Advisory Groups are

appointed for a period of two years, and in a personal capacity, meaning they are

independent of their organisation or country.[40]

Moreover, since the 15 of June 2000, following a Council Resolution on the

Future of European Research, MS can have their voice heard through more channels,

---

[38] http://europa.eu.int/comm/research/fp5/eag.html, (web page visited on 19 May 2003).
[39] http://europa.eu.int/comm/research/press/1998/pr2411en.html, press release Brussels, 24 November 1998, (web page visited on 19 May 2003).
[40] ibid.

since Busquin, (Research Commissioner) set up two High-Level Groups made up of

representatives of the MS appointed by the Research Ministers.

Figure 1

Fifth Framework Programme
External Advisory Groups / Ad Hoc Expert Groups

Chairperson			
AIRAGHI	ANGELO	Italian	FINMECCANICA
Members			
BOYANOV	KIRIL	Bulgarian	BULGARIAN ACADEMY OF SCIENCES
BRAVO	ALAIN	French	ALCATEL
COCHRANE	PETER	British	BT LABORATORIES
CRONBERG	TARJA	Finnish	UNIVERSITY OSLO
DE KEMP	ARNOUD	Dutch	SPRINGER-VERLAG GMBH & CO KG
FENEYROL	MICHEL	French	FRANCE TELECOM
GALUZZI	PAOLO	Italian	FLORENCE SCIENCE MUSEUM
HALKIAS	CHRISTOS	Greek	INTRASOFT S.A.
HEALY	MICHAEL	Irish	ASHLING MICROSYSTEMS LTD
HORWOOD	ROSEMARY	British	BARCLAYCARD
KUUSI	JUHANI	Finnish	NOKIA
LAGASSE	PAUL	Belgian	UNIVERSITY OF GENT
LARROUTUROU	BERNARD	French	ERCIM - EUROPEAN RESEARCH CONSORTIUM FOR INFORMATICS AND MATHEMATICS
MERKER	WOLFGANG	German	DAIMLER BENZ A.G.
MOGENSEN	GREGERS	Danish	IT UNIVERSITY
MOSSOTTO	CESARE	Italian	CSELT S.P.A.
NILSSON	ANN-MARIE	Swedish	THE SWEDISH IT COMPANIES ORGANISATION
PACHL	URSULA	Austrian	BEUC
PURVES	IAN	British	NEWCASTLE GENERAL HOSPITAL
SCHUURMANS	MARTIN	Dutch	PHILIPS
UCEDA	JAVIER	Spanish	UNIVERSITY OF MADRID
VORTMAN	JACOB	Israeli	ELBIT MEDICAL LTD
WAGNER	LUC	Luxem-bourgish	CLT-UFA S.A. LUXEMBOURG
WERTHNER	HANNES	Austrian	UNIVERSITY OF VIENNA
WIERZBICKI	ANDRZEJ PIOTR	Polish	WARSAW UNIVERSITY OF TECHNOLOGY

Source: http://europa.eu.int/comm/research/fp5/eag.html *Last update:* 5 June 2000.

Finally, the European Research Advisory Board (EURAB) also provides

advice to the European Commission. It is made up of senior representatives from

industry and science, who met for the first time on 26 September 2001. URAB has 45

members, 20 of which have been proposed by the European Science Foundation

(ESF), to represent the world of science and academia, and 20 proposed by the

Union of Industrial and Employers' Confederations of Europe (UNICE),

representing business and the industry. Five members have been appointed directly

by the European Commission.[41]

3. The feasibility of strengthening the civil society by reinforcing trust and achieving consensus

We have seen how the industry, NGOs and MS participate in networks in the

process of forming policies and implementing laws. Is Putnam's perspective of civil

society embraced by the European Commission and realised in the context of

forming regulatory laws in the EU? To answer this, the following will take the

example of initiatives undertaken by the European Commission to create a

sustainable information society in Europe.

The European Commission understands its role in this process as in putting

in place relatively neutral rules to create a global information society in the form of a

sustainable society adequately balancing economic, social and cultural concerns.[42]

---

[41] For the names of its members see Appendix One of this chapter.
[42] Van Dijk, J. A. G. M., Pestel, R. and Rademacher, F. J. (2003) 'A European way into the global information society' paper for the Information Society Forum (ISF). The ISF is the key advisory body to the European Commission concerning all questions of Europe's transition into a *Worldwide Information and Knowledge Society*, http://www1.faw.uni-ulm.de/asis/html/f-background.html, (web page visited on 19 May 2003). Also see the Progress Report on Information Society For All COM (2000) 130 final, prepared for the Special European Council on Employment, Economic reforms and

Thus, the European vision of promoting fairness, protecting work and welfare is incorporated in the European way of promoting it.

To this effect, the European way towards an information society

may require intervention to correct, if required the 'design' of the Information Society and to maintain network interconnection and open standards. Moreover, the notion of social sustainability requires that the European Commission prevents the exclusion of a large part of the population from participation in the Information Society, and the gradual deterioration of social cohesion of our societies by increasing gaps of development between social classes, sexes, ages, countries and regions and by a complete fragmentation and privatization of information and communication.

This is because,

A continuation of this process would jeopardize democracy and many of our social and cultural values. Europe, with its old tradition of a social welfare state, a social market economy and consensus building society is in a good position to build a socially sustainable Information Society, as long as world market forces do not undermine its efforts. Overall, the European approach is based upon public-private co-operation and consensus building. In practice it means great attention of the EC, the national governments and the social partnerships on 1. New job opportunities. 2. Education, training and lifelong learning. 3. Public services in information supply. ... [43]

Social Cohesion – Towards a Europe based on Innovation and Knowledge Lisbon, 23 and 24 March 2000.
[43] ibid.

One example of relevant efforts is the Alliance for a Sustainable Information Society (ASIS), an initiative financed by the European Commission, which aims at bringing together members of industry, business, governments, NGOs, research institutions, citizen/consumer organisations, and individual citizens. They are expected to work together towards achieving worldwide sustainability, both by setting the agenda for action and providing the critical mass needed to achieve consensus building.[44]

The Strategic Alliance is divided in a number of Action Groups on sustainable communities, dematerialisation of industrial and business processes, social inclusion, homes and workplaces of the future, mobility and transport, and climate change. Members of these Action Groups contribute to the creation of specific Memoranda of Understanding (MoU), benchmarks and guidelines within their specific areas of expertise.[45]

Another example of a successful engagement of the civil society in discussion is presented by the consultation concerning issues emerging from the Safer Internet Action Plan, on which the previous chapter touched. A Cyber Crime Forum[46] has been established, and one of the issues discussed concerned data retention.

---

[44] http://www.jrc.es/iptsreport/vol32/english/ISS2E326.htm, (web page visited on 19 May 2003).
[45] ibid. It is important to note that the objective of sustainable development is supported by the Fifth Framework Programme, and in particular by the key activities of the Programme concerning social well being, economic competitiveness in Europe and reduced consumption of natural resources.
[46] European Commission Communication to the Council the European Parliament the Economic and Social Committee and the Committee of the Regions COM (2000) 890 Final of 1 January 1998, Creating a Safer Information Society by Improving the Security of Information Infrastructures and Combating Computer-Related Crime.

There were two meetings so far, one at the level of experts and a second open meeting where 400 people joined. Law enforcement agencies, ISPs, telecommunications operators, civil liberties organisations, consumer representatives, data protection authorities and other interested parties took part in the discussions launched.

The aim of the discussions was to .'. *seek to raise public awareness of the risks posed by criminals on the Internet, to promote best practice for security, to identify effective counter-crime tools... and to encourage further development of early warning and crisis management mechanisms. It also encourages the sharing of knowledge, the creation of networks, and co-operation between interested parties.'*[47]

4. A Bourdieusian perspective: Criticism and shortcomings

As the previous chapter sought to show, developing software filters to combat illegal and harmful content in the Internet, as promoted in the context of the Safer Internet Action Plan, is a good example of happy co-operation amongst different levels of society. This is also a good example of an instance when the European Commission successfully engages in the maximisation of its social capital, as it needs the industry to furnish information to combat illegal content on the Internet.[48]

---

[47] http://cybercrime-forum.jrc.it/default/page.gx?_app.page=about.html.
[48] http://europa.eu.int/information_society/programmes/iap/index_en.htm, (web page visited on 19 May 2003). On similar issues see Castells, M. (2001) *The Internet Galaxy: Reflections on the Internet, Business and Society* (Oxford; New York: Oxford University Press), at p. 181.

Having said this, not all attempts to build consensus are successful, as it was the case with the proposal by the European Commission to introduce patent protection in software-implemented inventions. This proved to be quite controversial despite the consultation launched. The question then is, why does co-operation fail in such instances?

Rational actor based theories would say that since rational agents conduct a cost-benefit analysis, if they see that it is for their benefit to co-operate, they will do so, if not they will choose to loosen or cut ties. Alternatively, Durkheimians would address the problem in the language of cultural conflicts inherent in diverse value systems.

A Bourdieusian approach would come to grips with the problem in a different way. Social capital has a multiplication effect on other forms of capital. Hence, for the European Commission forging social networks is meant to assist the maximisation of informational capital and juridical capital, as to form laws information is required, in order to come up with concrete proposals in highly perplex matters, and this can only be furnished by interested parties.

Moreover, since the stock of juridical capital of the European Commission is not high due to the new forms of decentralised regulation and due to the structural organisation of the EU political system, which is characterised by the dispersion of political power amongst many institutions and agents,[49] the European Commission can avoid potential conflicts in the implementation phase by means of early

---

[49] Bignami note 25 above.

bargaining and dialogue. In this way, social capital is converted into juridical and informational capital.

Nevertheless, not all interests have the same resources. Commentators noted that in the process of liberalising telecommunication markets in Europe, small equipment manufacturers and installers had little influence in the debate during the early days of deregulation, especially in the early stages before the Green Paper.[50]

Against this background, the thesis advanced in this chapter is that theories of social capital concentrate on the underpinnings of co-operation and fail to discuss conflicts. These conflicts are amongst the interest groups active in a forum of discussion, and most of the time are best depicted in cases when groups support views thought to be radical, challenging the established system of thought or practice.[51]

Such a view stands in sharp contrast with the very underpinnings of the notion of trust. Trust is the precondition of social capital, but it appears that in issues relating to Internet regulation it is distrust that leads the way. Castells put it nicely when he argued that recent developments such as the Convention against Cybercrime show that governments do not trust their people and this is why they spy on them and people do not trust their governments this is why they develop encryption technologies.[52]

---

[50] Dang-Nguyen Schneider and Werle note 24 above. Especially see the conclusions, discussing the problem of structural asymmetries due to the fact that business interests tend to be better organised and have great economic resources.

[51] Similar thoughts are expressed by Siisiäinen note 12 above.

[52] Castells note 49 above, at p. 185.

In this case, the important thing to understand is that most of the time, difference of opinion occurs not as a result of rational choices but as a result of reproducing the common way of doing things, the taken for granted views of the world. And when conflicts emerge because of this, which *common way of doing things'* prevails is subject to the resources asymmetrically distributed to agents inhabiting a forum of discussion. The following will follow this intuition in the context of the debate, which surrounded the proposal to introduce patents protection in computer-implemented inventions in the EU.

C. SOFTWARE PATENTS

1. Basics of software copyright and patent protection in the EU

Generally, copyright is protected in the EU by a Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society adopted in May 2001.[53] The EU Directive implements a number of obligations imposed by international treaties, such as the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. In the EU, software has traditionally been protected under copyright law,[54] but this is not the case in the US and Japan where it can also be protected under patent law.[55]

Nevertheless, the European Commission adopted a Proposal for a Directive on the Protection by Patents of Computer-Implemented Inventions in February 2002, at present read by the Council and the European Parliament, in view of the fact that inventions using software can already be patented through the European Patent Office (EPO) or national patent offices, which has resulted in considerable legal

---

[53] Directive of European Parliament and the Council of the European Union 2001/29/EC of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society OJ L167/10, 22 May 2001. The law relating to copyright, as it applies to computer programs, was first harmonised at Community level with the introduction of Council Directive 91/250/EEC of 14 May 1991 on the Legal Protection of Computer Programs OJ L 122, 14 May 1991, at p. 42. Also see Commission Report on the Implementation and Effects of Directive 91/250/EEC, COM (2000) 199 final of 10 April 2000.

[54] As copyright covers the expression of an idea, it is thought to be suitable to cover software, Bently, L. and Sherman, B. (2001) *Intellectual Property Law* (Oxford: Oxford University Press); Generally see Sherman, B. (1991) 'Patentability of computer-related inventions' 13 *European intellectual Property Review* 85-112; Arnold, G. R. and Carr, H. (second ed 1992) *Computer Software: Legal Protection in the United Kingdom* (London: Sweet & Maxwell); Beresford K. (2000) *Patenting Software Under the European Patent Convention* (London: Sweet & Maxwell).

[55] Article 27.1 of the TRIPS Agreement provides that patents shall be available *'for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application,'* http://ecommerce.wipo.int/survey/html/#_ftn366, (web page visited on 19 May 2003).

uncertainty. The EPO is the executive body of the European Patent Organisation established by the European Patent Convention (EPC), which is a non-EU agreement signed by all MS and other countries. Against this background, the Directive is meant to harmonise the way in which national patent laws deal with software inventions.

However, the proposal has generated considerable disquiet amongst interest groups. Looking at the legal background of patent protection in the EU will serve as a starting point to discuss the reasons underpinning the debate. Patents are protected by the Paris Convention and the Trade Related Intellectual Property (TRIPs) agreement. For a patent to be granted, an invention must be new, involve an inventive step and be capable of industrial application.[56]

Moreover, TRIPS article 27 (1) provides that patent protection can be granted to products and processes as long as they belong to a *'field of technology,'* and in the same spirit Art. 52(1) of the EPC provides that patents can only be granted for inventions, which have *a technical character*. Technical character can be interpreted as requiring, first, that an invention belongs *to a field of technology* and that, second, the invention makes a *technical contribution* to the technological state of the art.[57]

Therefore in Art. 52(2) and (3) of the European Patent Convention (EPC) computer programs *'as such'* are defined as not being *inventions* and thus fall outside

---

[56] ibid.
[57] Commission of the European Communities, DG Internal Market, 'The Patentability of Computer Implemented Inventions' Consultation Paper by the Services of the Directorate General for the Internal Market of 19 October 2000 available at http://europa.eu.int/comm/internal_market/en/indprop/comp/softpaten.htm, at p. 14 (Annex II).

patentable subject matter. This is because a computer programme is considered as being a solution to a mathematical problem, not having a technical character. For the same reasons, *'methods for doing business,' 'presentations of information,'* or *'aesthetic creations'* are not patentable.

This is where problems begin as definitions as to what constitutes *a technical contribution* and *a field of technology* diverge, while at the heart of the debate is whether *computer-implemented inventions* should be treated differently than computer programs as such, and thus be patentable.

The approach endorsed by the Boards of Appeal of the European Patent Office (EPO)[58] is that, although Art. 52(2) of the EPC provides that computer programs *'as such'* are excluded from patentability,[59] *'computer-implemented inventions'* are intended to be covered.

According to the recent case law of the EPO Boards of Appeal, a technical contribution is performed when an invention *'solve[s] an objective technical problem'* For example, *'ensuring optimum exposure with sufficient protection against overloading of the X-ray tube by an X-ray apparatus incorporating a data processing unit'* can be patented. Moreover, *'the co-ordination and control by software of the internal communication between programs and data files held at different processors in a data processing system'* has also been patented.[60]

---

[58] http://www.european-patent-office.org/, (web page visited on 16 may 2003).
[59] Consultation Paper note 57 above.
[60] Consultation paper note 57 above, citing EPO Board of Appeal T6/83, [1990] OJ EPO 5.

This approach has been criticised heavily, as commentators have noted that there is hardly a computer program, which cannot be patented, thus in practice this interpretation brings Europe close to the US position, which allows software patents, as the rather simple test of *'usefulness'* is applied.[61] Business methods, algorithms, methods for doing business, can be patented as long as they have a *'useful, concrete and tangible result.'*

In particular, Aigrain argues that *'as of now, there remain some microscopic differences in scope of patentability, mostly linked to the difference between "usefulness" in the US patentability framework and "susceptibility of industrial application" in the European one. But the practical implementation of these differences does not give rise to any real disagreement on technicity.'*[62]

---

[61] Aigrain P. (2001) '11 questions on software patentability in Europe and the US' paper prepared for the Software and Business Method Patents: Policy Development in the US and Europe Meeting, organised by The Center for Information Policy, University of Maryland on 10 December 2001, available at http://cip.umd.edu/Aigrain.htm, (web page visited on 19 May 2003), citing Dr. Roland Grossenbacher's statement after the representatives of governments in the Munich Diplomatic Conference decided to postpone revision of article 52(2), declared on 29 November 2000. Dr. Roland Grossenbacher's statement is available at http://www.european-patent-office.org/news/pressrel/2000_11_29_e.htm, (web page visited on 19 May 2003). Dr Philippe Aigrain is Head of Sector 'Software Technologies' in the Unit 'Technologies and Engineering for Software, Systems and Services' of the European Commission DG Information Society. He is in charge of actions in support to free/open source software and related innovation. He was trained as a mathematician and theoretical computer scientist. From 1972 to 1981, he worked in software engineering research groups of software companies and as a research fellow at Berkeley in 1982. He joined the European Commission in 1996; Also see Aigrain, P. (2002) 'Domaine et espace publics' in Le Pré aux Cercs (ed) (2002) *Dictionnaire Critique de la Mondialisation* (Le Pré aux Clercs).

[62] ibid. Aigrain notes that in 1998 the EPO started allowing direct patent claims to information objects i.e. claims such as *'computer program on disk characterised by that ... upon loading into computer memory a "further technical effect" X is achieved.'*

2. Problems: What *is* a technical problem?

The EPO seems to suggest that ideas can be patented, provided that they are repeatable independently of participating persons and achieve a determined effect in the material world. Therefore, purely mathematical solutions are acceptable if the claims are tied to practical applications.

Nevertheless, this is not the only definition, which can potentially be given to what constitutes a technical problem. Others argue that this should be conceptualised according to a particular *'technical field.'* The technical field at issue is the field of engineering and applied natural science. However, as an invention must teach a new way of using natural forces to directly achieve a tangible result, *'computational or organisational rules'* designed to solve problems posed by mathematical models are not technical in this sense, no matter whether the model in question can be mapped onto a physical structure or not.[63]

This approach is endorsed by interest groups opposing the draft Directive. This is why, according to the proponents of this argument, the dichotomy between computer programs per se, which are *never* patentable, and computer-implemented

---

[63] This approach is supported by NGOs against the introduction of patent protection in computer implemented inventions, see the Consultation Paper note 57 above and the FFII web page http://swpat.ffii.org/stidi/korcu/index.en.html, (web page visited on 19 May 2003). The FFII is a non-profit association established under German law with the aim to promote a sustainable development of public information goods based on copyright, free competition and open standards. This doctrine was developed mainly by German courts up to the 1980s, and it can be found in law commentaries, examination guidelines and court decisions up to the year 2000, see Bernhardt, V. and Kraßer, R. (1986) *Lehrbuch des Patentrechts Recht der Bundesrepublik Deutschland, Europäisches und Internationales Patentrecht* (München, Beck); Kolle, G. (1977) 'Technik, Datenverarbeitung und Patentrecht. Bemerkungen zur Dispositionsprogramm- Entscheidung des Bundesgerichtshofs *GRUR* S58 ff. A similar approach is endorsed by Aigrain note 61 above.

inventions, which *are* patentable, is vague enough to allow almost anything to be patented, with the help of a smart lawyer basing the patent claim on some technical considerations.[64]

In the light of the above, an alliance of software developers opposing software patents in Europe, the EuroLinux Alliance, proposed to the European Commission that publishing original computer software on a physical media and using computer software on a generic multimedia computer environment should never be considered as patent infringement.[65]

This is because, an invention should provide for the non-obvious *'technical solution of a technical problem,'* with the problem being *'how to cause a transformation of matter'* and the solution consisting in *'a teaching on how to use natural forces to solve the problem.'* For example, chemical processes controlled by computer programs can be inventions, as long as they are distinguishable from the computer program not only at a conceptual but also at a practical level, as then the solution of the problem lies in a field of technology and interferes with *'the use of natural forces to directly cause a transformation of matter without intervening operations of mental deliberation.'*[66]

The argument then is that computer programs are not inventions. Computer programs are *'a plan and an instruction, a literary work and a virtual machine, an interface*

---

[64] http://www.esr-pollmeier.de/swpat/statement_en.html, (web page visited on 19 May 2003).
[65] PbT Consultants, 'The Results of the European Commission Exercise on the Patentability of Computer Implemented Inventions' (2000) available at http://europa.eu.int/comm/internal_market/en/indprop/comp/softanalyse.pdf, in particular see section 2.3.2, which contains the EuroLinux Alliance submission.
[66] ibid.

and an implementation, a problem and a solution, a process and a product, all in one.'[67] This

is why a *'computer program with a further technical effect'* in a general computer

multimedia environment cannot be distinguished from a *'computer program as such.'*

Moving beyond the exposed contest of definitions, what is *really* the problem

with software patents? Why do interest groups strongly oppose them? Copyright

protection allows using features of a computer program in order to come up with an

original work. This is because software is classified as a literary work, where what is

protected is the meaningful combination of ideas expressed in a particular way in

software, and not the ideas themselves. Copyright holders are then protected against

acts restricted by copyright in a work in relation to the whole or a substantial part of

it.

However, under patent law, a patent protects the ideas and functions

implemented by a program and to use the claims of a patent, one will have to obtain

a licence. The problem in this case is that *'in software a patent covers many dissimilar*

programs and even an innovative program is likely to infringe many patents. That's because

a substantial program must combine a large number of different techniques, and implement

many features. Even if a few are new inventions, that still leaves plenty, which are not. Each

technique or feature less than two decades old is likely to be patented already by someone else.

Whether it is actually patented is a matter of luck.'[68]

---

[67] ibid.
[68] Richard Stallman's Testimony to the US Patent and Trademark Office (USPTO) Hearings 1994. Richard Stallman is a leading activist based in the US, and the inventor of the GNU free software. For more information, see his personal web page at http://www.stallman.org/.

However, legal taxonomies and definitions doe not do justice to the issue of software patents. Different conceptions of innovation, competition and property underline the debate. The following will take up this point.

3. The Consultation

The European Commission launched an independent study on the scope of harmonisation.[69] I here seek to show the divergent views of the groups, which participated in the consultation.

a Groups' propositions

Following the European Commission's Green Paper on the Community Patent and the Patent System in Europe and the subsequent Communication,[70] considerable debate took place in Europe in respect to the possibility of allowing patents in computer-implemented inventions.

Organisations representing European businesses, lawyers, established industry players and government agencies asked the European Commission to take a legislative initiative on the issue of software patents in view of the ambiguity and legal uncertainty surrounding the patentability of software related inventions.

The arguments exposed supported such an initiative in view of concerns with regard to that European competitiveness would be seriously under threat if rapid

---

[69] Analysis of the consultation note 65 above.

[70] The need for a European Commission initiative came after the Green Paper COM (97) 688 final of 24 June 1997 on the Community Patent and the Patent System in Europe.

action was not undertaken, as the respective market would be dominated by Europe's main trading partners, in particular Japan and the USA. Moreover, other arguments included the need to protect investment, promote legal certainty (for example by a one-stop European Patent Office) and open up global markets.[71]

Amongst the major players who supported this view is the Association Internationale pour la Protection de la Propriété Intellectuelle (AIPPI). AIPPI is an association of patent lawyers, patent owners and other users of the institutions of industrial property.[72]

Other business associations in favour of software patents include, but are not restricted to, the Fédération Internationale des Conseillers en Propriété Industrielle, the European Union of Industrial Property Professionals, the Deutsche Patentanwaltskammer and the UK Patent Family and Software Patents.[73] As for the European Institutions, DG Internal Market supported the patentability of computer-implemented inventions, with the aim to harmonise markets and create a Community Patent.

The same view was supported by the national delegations of the Council of the European Union (where national patent office representatives sit), with the exception of the French and the Belgian delegation. As for the European Parliament,

---

[71] Analysis of the consultation note 65 above, at p. 12

[72] http://swpat.ffii.org/players/index.en.html, (web page visited on 19 May 2003). According to FFII, in Vienna in 1997 the AIPPI passed a resolution demanding the legalisation of software patents in Europe. In 2001 in Melbourne there was an AIPPI resolution proposal for worldwide patentability of business methods. In 2002 an AIPPI paper submitted to WIPO demands worldwide patentability of software and business methods.

[73] The FFII considers that this group was amongst the most influential ones in supporting software patents.

the Legal Affairs Committee (JURI) is in charge of the file, and the rapporteur is

Arlene McCarthy, a British labour MEP, strongly in support of the EPO's

approach.[74]

Nevertheless, both EuroLinux and the Economic and Social Council of the

European Community (ESC) have expressed concerns that software patents might

impede the progress of innovation in the software field.[75] The latter produced in

2002 a report criticising software patentability and proposed taking into

consideration the interests of small and medium enterprises (SMEs) and free

software companies.

As for the EuroLinux Alliance for a Free Information Infrastructure, this is an

'open coalition of commercial companies (over 200) *and non-profit associations united to*

promote a European software culture based on copyright, open standards, open competition

and open source software such as Linux. Corporate members or sponsors of EuroLinux

develop or sell software under free, semi-free and non-free licenses for operating systems such

as GNU/Linux, MacOS or MS Windows.'[76]

To this effect the Eurolinux Alliance organised a petition against software

patents in Europe, which had an overwhelming response, as 1161 valid responses

---

[74] Some delegations, such as the French and Belgians, have been critical of software patentability, see http://swpat.ffii.org/players/index.en.html, (web page visited on 19 May 2003).

[75] The ESC is a consultative organ, which unites experts and scientists from various fields and drafts working papers or opinions for the co-deciding organs of the European Union, like the European Parliament and the Council of the European Union.

[76] http://www.eurolinux.org/about/index.en.html, (web page visited on 19 May 2003). Open source software is open to modification but its re-distribution may be subject to a licence and a fee.

were forwarded to DG Internal market. Eurolinux argued that interoperability[77] is

the prerequisite of competition in fast evolving markets and drew attention to the

fact that software patents have caused a lot of problems, as developers find it

difficult to create an innovative product without infringing some patent, due to the

number of features required to be implemented.

Hence, the argument is that due to the peculiarities of software, it is as if the

letters of the English language have been patented.[78] This results in more and more

software patent litigation cases and many software companies and software

developers being threatened outside courts to informally settle, as they cannot

afford litigation costs.[79]

Moreover, start-up costs increase, as new firms have to take into account that

they need an in house lawyer or constant co-ordination with a lawyer/law firm,

---

[77] Interoperability was supported as a fair defence in the Council Directive 91/250/EEC of 14 May 1991 on the Legal Protection of Computer Programs OJ L 122, 14 May 1991. Commentators have noted that in the 1990s the European Commission was oriented towards an approach incorporating the dual cultural and economic nature of copyright and related rights, emphasising the need for a harmonisation of laws, to help open the way to creativity and development and to a proper balance between the information society and the European culture, see Dutilh, P., Ide, N. and Strowel, B. (1997) 'What really happened in Geneva: An inside look at the WIPO treaties' paper presented in the *World Computer Law Congress and 1997 Computer and Telecommunications Law Update*. To this effect, the Software Directive classified computer programmes as literary works, did not offer a definition of *'computer program,'* and set criteria along which to determine whether or not a computer program will be protected. To qualify as a literary work, the only requirement to be satisfied is that the program must be the author's own original intellectual creation.

[78] http://www.esr-pollmeier.de/swpat/statement_en.html, (web page visited on 19 May 2003).

[79] The problem of litigation costs is acknowledged by the European Commission in DG Enterprise (2003) *Enforcing Small Firms' Patent Rights. A Publication from the Innovation/SMEs Programme Part of the Fifth Research Programme* (Luxemburg: Office for Official Publications of the European Union). Analysis of the consultation note 65 above; For a view from the other side of the Atlantic see Gallini, N. (2001) 'How well is the US patent system working? *Working Paper University of Toronto* 3/2001.

who would be able to find out whether a computer program with a technical effect is already patented.[80]

Commentators have also argued that big companies build large portfolios of software patents, which in fact serve the purposes of maximising their bargaining power when striking deals.[81] Finally, the findings of economic studies suggest that the impact of patents for computer-implemented inventions on the economy is ambiguous,[82] while Konqueror and iCab (which are shareware companies) and Opera (which is an open source company) are the only competitors of Microsoft in the market for browsers.[83]

b Some statistics

The consultation showed that the group opposing software patents (91 per cent) was numerically dominant. Nevertheless, the report prepared for the European Commission analysing the results of the consultation referred to the nine per cent, who supported software patents, as *an economic majority*.[84]

---

[80] ibid.

[81] Shapiro, C. (2001) 'Navigating the patent thicket: Cross licences, patent tools and standard setting' in Jaffe, A., Lerner, J. and Stern, S. (2001) *Innovation Policy and the Economy* (National Bureau of Economic Research); Bessen, J. (2002) 'Patent thickets: Strategic patenting of complex technologies' *Research on Innovation Working Paper 8*, available at http://www.researchoninnovation.org/, (web page visited on 19 May 2003).

[82] Bessen, J. and Maskin, E. (2000) 'Sequential innovation, patents and imitation' *MIT and Harvard Working Paper Series 00-01*, available at http://www.researchoninnovation.org/patent.pdf, which is considered to be the leading analysis on the effects of patents; Analysis of the consultation note 65 above.

[83] ibid, at section 3.2.2.

[84] ibid, at p. 14

In particular, the report refers to the European Information and Communications Technology Industry Association (EICTA), whose members are 23 national ICT associations and 31 large ICT corporations, the Union of Industrial and Employer's Confederations of Europe (UNICE), whose members are the 34 principal business federations from 27 European countries, the International Federation of Intellectual Property Attorneys (FICPI), representative of the legal profession in private practice in more than 70 countries and the European IT Services Association, representing the computing services and software sector.

Figure 2

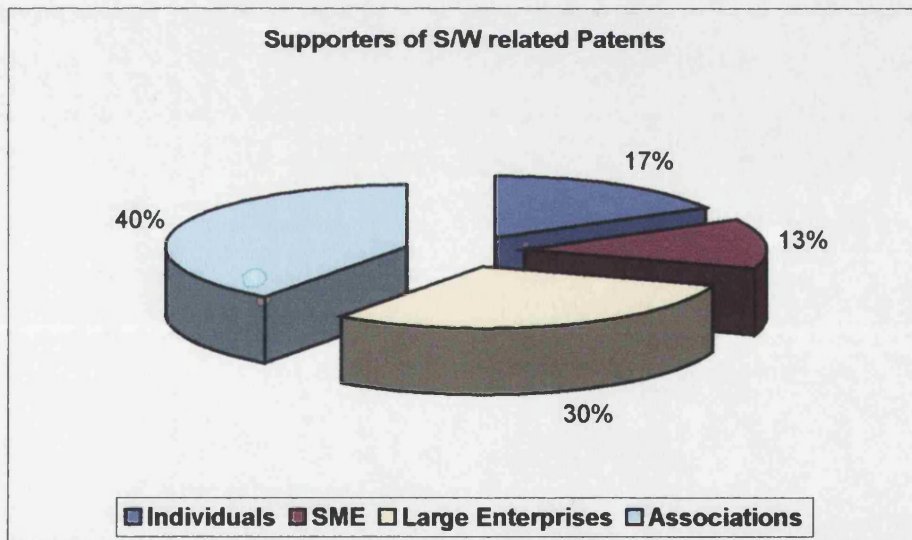**Opponents and supporters of software patents: Some statistics**
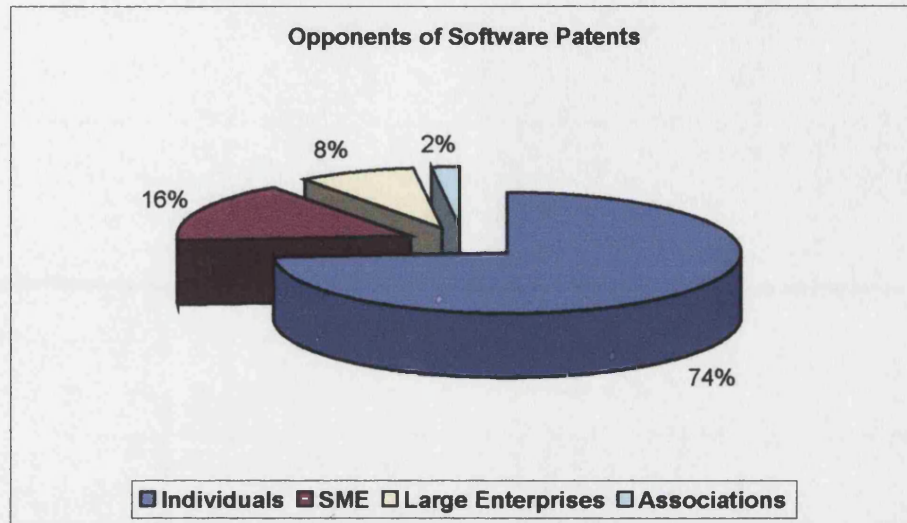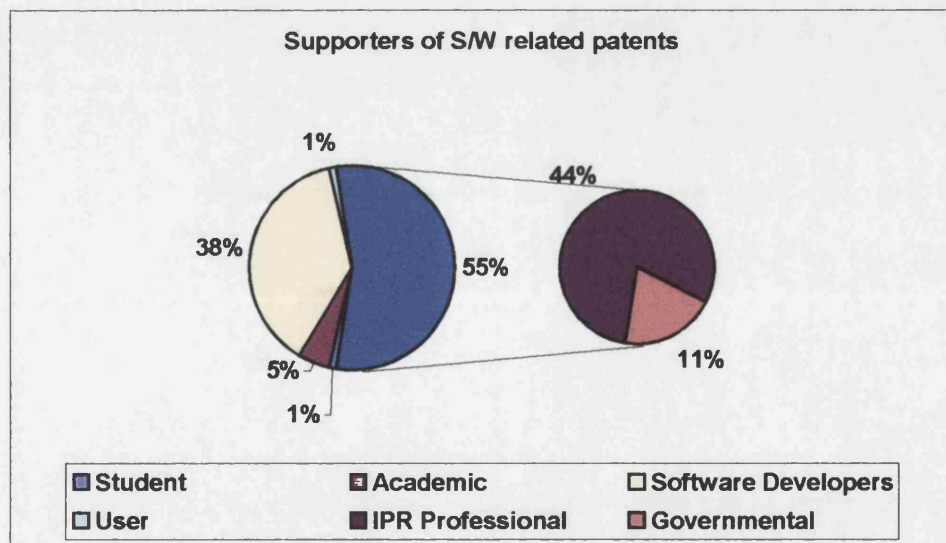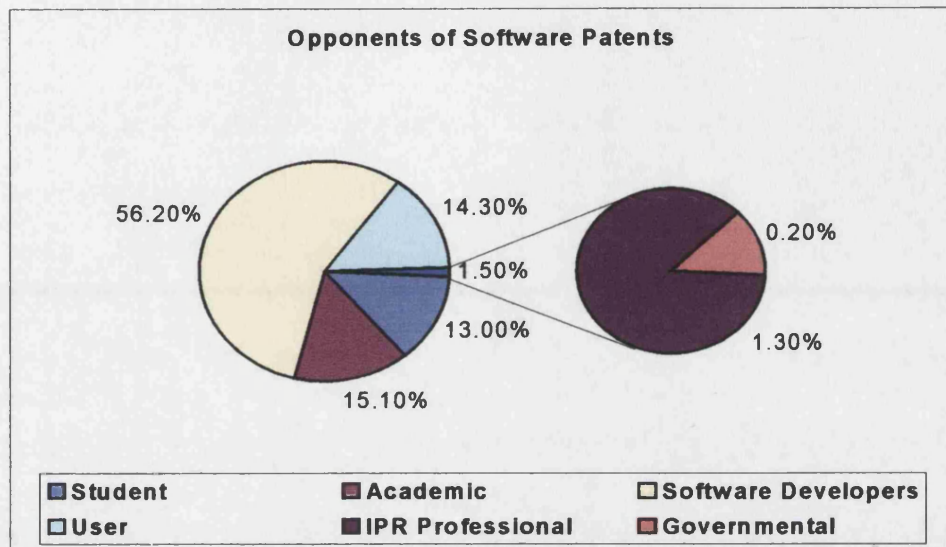
Opponents of Software Patents

8% 2%

16%

74%

☐ Individuals ☐ SME ☐ Large Enterprises ☐ Associations

Supporters of S/W related Patents

17%

40%

13%

30%

☐ Individuals ☐ SME ☐ Large Enterprises ☐ Associations

300

Figure 3 (cont.)

Opponents of Software Patents

56.20%   14.30%   0.20%
1.50%
13.00%   1.30%
15.10%

Student   Academic   Software Developers
User   IPR Professional Governmental

Supporters of S/W related patents

1%   44%
38%   55%
5%   11%
1%

Student   Academic   Software Developers
User   IPR Professional Governmental

Source: **PbT Consultants, 'The Results of the European Commission Exercise on the Patentability of Computer Implemented Inventions' (2000) available at <u>http://europa.eu.int/comm/internal_market/en/indprop/comp/softanalyse.pdf</u>, section 4, particularly see section 4. 1 at p. 35.**

301

3. Different cognitive schemas and power asymmetries

Distrust is a notion running against happy co-operation and civil engagement, as it implies that there is not always trust in governments to provide the objective framework or scientific feedback to facilitate the inclusion of interest groups and create the conditions for consensus to emerge.

If one accepts that open source software developers have a different way of understanding authorship and innovation than the conventional definitions employed in legal texts, then a network of relations (social capital) is maximised not to achieve happy co-operation, but to succeed in having definitions pushed forward. Thus, Bourdieu reminds us that power relations are at the heart of any relevant analysis, as a contest of definitions may take place.

Moreover, maximising capital is subject to cognitive schemas. In other words, the concept of capital reminds us that there is no universal principle according to which people act following calculations as to their self-interest. And habitus, as in cognitive schemas, reminds us that *'interests'* are inscribed in structures in a given society in a certain socio-historical conjunction.

This means that the European Commission does not simply engage in struggles to maximise its juridical capital, but maximises its capital by virtue of attaching certain meaning as to how a legal text is to be interpreted. Interest groups do not just try to maximise their power to have a say in policy formation and implementation of legal rules, but such efforts acquire meaning in the light of

assumptions taken for granted, which attach meaning to concepts such as public

domain, property and innovation.

Minds are socially constructed and they (we) tend to reproduce ideas we

have not thought about so often or deeply, because we comfortably accepted them

as being so obvious to the extent of being trivial, forgetting that these are the

product of history.

Against this background, it is due to structural patterns of thinking about

intellectual property, innovation and information that there are such differences in

views between interest parties and the European Commission,[85] feeding into the

emergence of distrust, a view that implies that most of the time people reproduce

practices and as such their action goes beyond the conscious level, beyond

preferences and beyond the attainment of public good.

a Patterns of thinking about intellectual property: The European Commission

Hobbes and Locke in the 17th century asserted that people have a *'natural*

right' to own their creation. In the same spirit, intellectual property rights are

premised on the romantic notion of inventor and author, who has a moral right on

her works. Alternatively, economic theory offers a utilitarian perspective by

drawing attention to the economic incentives that should be provided to inventors.[86]

---

[85] This view is close to Boyle's position, see Boyle, J. (1996) *Shamans, Software, and Spleens. Law and the Construction of Information Society* (Cambridge, Mass: Harvard University Press); Boyle, J. (1997) 'A politics of intellectual property: Environmentalism for the net' 47 *Duke Law Journal* 87-106.
[86] Landes, W. M. and Posner, R. A. (1989) 'An economic analysis of copyright law' 18 *Journal of Legal Studies* 325-363; Palmer, T. G. (1989) 'Intellectual property: A non-Posnerian law and economics

I here do not seek to engage in a discussion of the contingent character of notions such as *author* and *creator*. I am concerned with the ways in which cultural understandings about the role of information, innovation and regulatory law influence action.[87]

In the European context, intellectual property rights and innovation are understood through the lenses of harmonisation and market integration. Experts, the DG Internal Market in our case, focus on the *'knowledge-based'* aspects of the economy in Europe, and is concerned with

traditional instruments regulating the market, such as harmonising the laws of the Member States relating to industrial property rights to avoid barriers to trade. The aim is also to create unitary systems for the protection of such rights with Community-wide effect through the filing of one single application for protection (Community trade marks, designs and patents). The Internal Market DG is also increasingly concerned with ensuring that the

---

approach' *Hamline Law Review* 261-304; Netanel, N. W. (1996) 'Copyright and a democratic civil society' 106 *Yale Law Journal* 308-324; Hettingerm E. C. (1989) 'Justifying intellectual property' 18 *Philosophy and Public Affairs* 31-52; Croskery, P. (1993) 'Institutional utilitarianism and intellectual property' 68 *Chicago-Kent Law Review* 631-664; Bettig, R. V. (1996) *Copyrighting Culture: The Political Economy of Intellectual Property* (Westview Press), Chapter 4. Drahos, P. (ed) (1999) *Intellectual Property* (Aldershot: Dartmouth/Ashgate); Boyle Shamans, Software, and Spleens ibid, especially see Chapters 1-6. For the notion of authorship in general see Foucault, M. (1986) 'What is an author?' in Rabinow, P. (ed) (1986) *The Foucault Reader* (Harmondsworth: Penguin). For anthropological work on the construction of IP rights see Born, G. (1996) '(Im) materiality and sociality: The dynamics of intellectual property in a computer software research culture' (1996) 4 *Social Anthropology* 101-115. The author conducted fieldwork in the Institut de Recherche et de Coordination Acoustique/Musique, a prestigious computer music research institute in Paris, France to argue that the informal ethos regulating life in the institute was collaboration, knowledge sharing and free exchange of information, which was nevertheless restricted by security imperatives, informal rivalries and researchers' desire for privacy.

[87] For works studying the contingency of intellectual property law, for example see Lury, C. (1993) *Cultural Rights: Technology, Legality Personality* (London; New York: Routledge); Rose, M. (1993) *Authors and Owners. The invention of Copyright* (Cambridge: Harvard University Press); Sherman, B. and Strowel, A. (eds) (1994) *Of Authors and Origins: Essays on Copyright Law* (Oxford: Clarendon Press); Frow, J. (1998) 'Repetition and limitation: Computer software and copyright law' 29 *Screen* 4-20.

Single Market functions properly in the Information Society and the fight against counterfeiting.[88]

This is a discourse characterised by the assumption that neutral legal expertise is required to put the market to work by harmonising national laws, codify and objectify practices by means of textual analysis and reliance on a precedent with a view to promote legal certainty and the rational prediction of outcomes.

Then a set of assumptions is reproduced, which is taken for granted. Not only the concept of romantic inventor, not only the utilitarian logic of economic analysis, but also other basic assumptions such as, *'innovation is a good thing,'*[89] *'in high evolving markets, firms invest heavily and need to have a return as they undertake considerable risks,' 'size matters to make investments.' 'Multinationals, need uniform standards, as otherwise the return made to their investment is threatened.'*[90] *'The system has become increasingly international and firms have to exploit their rights in a global scale.'*[91]

All these statements are underlined by one basic understanding: The commodification of information. As Boyle puts it, *'consciously and unconsciously we*

---

[88] http://europa.eu.int/comm/internal_market/en/indprop/overview.htm, (web page visited on 19 May 2003).

[89] Between 1987 and 1997 the American copyright and patent industries increased their output at the rate of 5.8 per cent a year compared to 2.8 per cent a year for other industries, and increased the number of jobs at 4.0 per cent a year compared to 1.6 per cent in the ordinary economy. Through the 1990s knowledge-based industry grew twice as fast as service industries overall and four times as fast as manufacturing, see Maskus, K. E. (2000) *Intellectual Property Rights in the Global Economy* (Washington, DC: Institute for International Economics), especially see the Introduction 'The issue is bigger than American movies'; Bettig note 86 above.

[90] For the role of the firm in modern economies see Hayward, J. E. C. (ed) (1995) *Industrial Enterprise and European Integration: From National to International Champions in Western Europe* (Oxford: Oxford University Press).

[91] ibid.

are already developing the language of entitlement for a world in which information--genetic,

electronic, proprietary--is one of the main sources and forms of wealth.'[92]

It is interesting to note that interest groups against software patents complained that officials at DG Internal Market do not understand their views, as they are ill informed with regard to technical matters and tend to substantiate their counter-arguments by dwelling onto legal texts while failing to see the political implications of what they propose.[93] Conversely, one official from DG Internal Market complained to me that interest groups do not understand legal texts, and thus came up with poor proposals.[94]

Yet, not all services embrace the same assumptions underlying intellectual property. In DG Information Society for example, the mission of Unit E2 is to *'foster the deployment of Open Source software aiming at improving competition and providing flexibility in the choice of software tools.'*[95] To this effect, a working group on *libre software*[96] was created in 1998.[97] Moreover, fostering the development and use of

---

[92] Boyle *Shamans, Software, and Spleens* note 85 above, Preface. Generally, for the commodification of information see Chapters 11-13; Castells, M. (first ed 1996) *The Rise of the Network Society* (Oxford: Blackwell), especially see Chapter 2 'The Informational economy and globalisation.'

[93] http://www.ffii.org/index.en.html, (web page visited on 19 May 2003).

[94] Interview with an A5 official DG Internal Market, conducted on 25 January 2002. The same view is echoed in the report note 65 above.

[95] http://www.cordis.lu/ist/ka4/tesss/home.html, (web page visited on 10 May 2003). As mentioned, note 61 above, Aigrain is the Head of Sector.

[96] *Libre software* or *free software* refers to the freedom to *'redistribute copies, either with or without modifications, either gratis or charging a fee for distribution, to anyone anywhere. Being free to do these things means (among other things) that you do not have to ask or pay for permission,'* http://www.gnu.org/philosophy/free-sw.html, http://www.gnu.org/philosophy/free-software-for-freedom.html (web pages visited on 19 May 2003). With open source software, although the source code is open it may be that it includes programmes that one can redistribute and copy only for non-profit purposes (semi-free software) or can even be prohibited is prohibited from doing so without permission (proprietary).

[97] http://eu.conecta.it/, (web page visited on 10 May 2003).

open source software may attract funding under the Information Society

Technologies Programme (IST).

Research and technology development projects aiming at free/open source

software can be submitted to any action line of the IST programme. In Chapter III

we saw that DG Information Society is predominantly staffed with people who

worked for the industry. Hence, it appears that this is an interesting example of an

instance when different patterns of cognition owing their existence to professional

training prior to joining the European Commission, result in a different appreciation

of a legal problem.[98]

It seems that different assumptions underline the approach supporting *libre*

software. Innovation is build on top of past innovations. Knowledge is built on top of

past knowledge. Hence, by means of promoting the *creator/inventor* dominant

conceptualisation we may undervalue the public domain. And by giving monopoly

rights to established powerful firms, we do not necessarily benefit innovation,

especially in fast evolving industries.[99]

---

[98] For the professional *persona* of DG Information Society, which leads to a different understanding of the same legal problem, see Chapter III Section C of this thesis.

[99] For this argument see, Boyle Shamans, Software, and Spleens note 85 above. For the problem of striking the right balance between access to information and private property see, Netanel, N. W. (1996) 'Copyright and a democratic civil society' 106 *Yale Law Journal* 283-387; Koren, N. E. (1996) 'Cyberlaw and social change: A democratic approach to copyright' 215 *Cardozo Arts & Entertainment Law Journal* 272-293. A very interesting conference on Public Domain was held by the Duke Law School resulting in a series of sceptical articles being published in (2003) 66 *Law and Contemporary Problems* Volumes 1 and 2.

b EuroLinux alliance

Understanding why interest groups support non-proprietary standards entails coming to grips with the history of the development of the Internet. This is because one should not forget that the Internet was created by public funds,[100] as was the first operating system, UNIX, which was made available for the cost of distribution, having no proprietary settings.

The new technology was acknowledged as providing vast opportunities for research and not only the Defence Department but also the National Science Foundation, research universities and technological think tanks were all fascinated by the new technology.[101]

However, it would be a mistake to believe that the Internet solely grew out of the concerted efforts of the above-mentioned institutions. In the US, there were groups of individuals who were equally fascinated by the new medium and therefore worked towards its improvement.

They were called 'hackers' and were to represent a counter-culture, since they explored new technologies, shared information and considered the new medium as a public space that everybody should have access to it. An example of the latter is the invention of the modem, created by two Chicago students, Christensen and

---

[100] For an account of the origins of the Internet see Castells, M. (second ed 2000) *The Rise of the Network Society* (Oxford: Blackwell), at p. 351-4; Also see Castells note 49 above. Here the author gives an account of the military and scientific underpinnings of the project called APRANET. A network was formed that would be decentralised, which in essence meant that in the event of one computer being destroyed, data could be still processed by the others.

[101] Castells note 49 above, at p. 353.

Suess, who wanted to find a way to transfer microcomputer programs directly through their computers so that they would not travel long distances.

In 1979, the technology was in use and available to everybody at no cost since the purpose was to communicate with as many people as possible. The modem presented a window of opportunity to the computer networks excluded from the APRANET, since the latter was only reserved for a few universities.

This was the beginning of the Internet as we know it today, as in 1979, three students created a new version of the UNIX protocol, which allowed linking computers over the telephone line. USENET was then created, and became the first online chat system.

Internet communities were formed and were self-regulated since the *'bad electronic citizen'* would be punished by the community by sending for example hostile messages or bringing his system in standstill. Equally, commercialisation was considered unacceptable as the Internet was conceived as a forum for discussion. Finally, the modified Linux operating system software was freely circulated to users, since the new software was understood to enhance communication and formed the basis for further innovation.[102]

In the above instances, innovation is not only conceived as being the product of scientific research produced in laboratories, but also as the result of minor modifications introduced in the course of everyday activity, with collaboration, exchange and experimentation being crucial to this effect.

---

[102] ibid, at p. 353-354.

Openness and communication are the foundations of the Internet, which inherited the rationale that underlined the efforts by the military to create a decentralised network, the ethos of academic research and the counter-culture of hackers that view it as a unique medium of expression and technological innovation.[103]

Claiming that understanding hackers' habitus is important for the purposes of the present chapter may seem to exaggerate their role in today's mainstream Internet culture. Answering this requires looking at ICANN's open elections. This is because the person who received the biggest number of votes was Andy Mueller-Maguhn from Berlin's famed Chaos Computer Club.

In an interview he gave to the Wired Magazine,[104] when asked why he thought he gathered so many votes, he replied that he believes that it is simply because his ideas appeal to Internet communities. According to these, the Internet should be conceived as a public space representing a diversity of cultures, since the Internet *is* all about presenting different viewpoints. In the light of the above, points to be raised for discussion during ICANN's meetings concerned freedom of speech, trademarks, governmental registries such as the *.fr* name, and freedom of information.

Mueller-Maguhn defended hackers, as he claimed that a hacker is *'someone who is driven by the motivation to learn and support freedom of information'* and as such

---

[103] ibid.
[104] Ketmann, S. (2000) 'Proud to represent hackers' *Wired News* available at www.wired.com, (web page visited on 19 May 2003), story published on 19 October 2000.

should be distinguished from someone who uses technology to engage in actions violating law, as for example in the case of online theft. He thus argued that

In Germany, the Chaos Computer Club has quite a long history of exploring technologies and showing the risks and possibilities of these technologies to the public. Our main emphasis really is freedom of information. After that our main goal is to look at how technology affects society, and how the development of technology changes society. We are concerned about issues like security, electronic networks, and the promotion and provision of free flows of information.[105]

4. Regulatory law and the promotion of a culture of discussion

The previous engaged in showing that regulatory law initiated by the European Commission should be conceived as a discipline and as a profession, as in the conceptions that professionals have of their own activity and as the in ways in which these conceptions are reproduced. To this effect, it is important to take into account the possibility that there may be various different patterns of perception operating inside the same field, and that these may be challenged by agents outside the field, who, although they inhabit different fields of activity, seek to influence the content of regulation.

However, how deep does the challenge go? The European Commission emerges as a neutral mediator furnishing the truth of science. Regulatory law and policy should be decentralised, procedural and respectful of difference, it should

---

[105] ibid.

facilitate the inclusion of interest groups, help create a thriving civil society, sustain social capital by means of promoting networks and forums for discussion. A culture of discussion based on the ethos of consensus building is emerging and is being assisted by neutral mediation and expertise provision.

Yet, why is it normal to require the building of consensus? Even interest groups complaining about their voice not being heard or not even being included and denying the possibility of procedures and expertise being neutral, do not question the merits of *discussion and consensus building.*[106]

The belief that seems to go unchallenged is the one that sustains confidence in the idea that regulatory law produced by the European administration should be concerned with efficiency and not with what is right and what is wrong, promoting order and harmony by means of promoting discussion.[107]

Regulatory law seems to be performing its tasks by promoting harmonious co-existence in a society by bringing together interest groups in a forum of discussion, it being a sign of civilisation.[108] Nevertheless, how civilised can a

---

[106] Habermas supports the argument that the debate surrounding the problem of legitimacy of the EU is anchored in a conceptualisation of politics organised around the state. However, if one does away with such an understanding of political participation to understand it around the direct participation of associations, then the interesting question would concern the creation of conditions for genuine political discussion and engagement. For a simple elaboration of his position see Habermas, J. (1995) 'Remarks on Dieter Grimm's "Does Europe need a Constitution?"' 1 *European Law Journal* 301-307. Also see Habermas, J. (1989) *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Cambridge: Polity).

[107] The same thoughts are expressed by Nader discussing conflict resolution, see Nader, L. (2002) 'Controlling processes. Tracing the dynamic components of power' in M. Mundy (ed), *Law and Anthropology* (Aldershot, Burlington, USA: Ashgate/Dartmouth), at p. 161-162. Also see Nader, L. (1990) *Harmony Ideology* (Stanford: Stanford University Press).

[108] ibid 'Controlling processes' at p. 163, making the argument that there is a social and legal evolution taking place shifting the focus from courts and justice to harmony and dispute resolution processes, which is thought to be a sign of civilisation. The author makes reference to anthropological

discussion be? How much unuttered by power relations? And why is it to the interest of everybody to find an *acceptable* solution to a problem?

Still, it appears it is to the *'interest'* of everybody to create a harmonious civil society, with interest groups trying to redefine the content of regulatory law and the European Commission maximising its role as a major think tank.[109] Hence, the process is also characterised by the merits of consensus: The tacit recognition to play the game is that discussion provides the way out of, for example, technological *dystopia*, and helps build a progressive new society.

Efforts to create a global information society, in the form of a *sustainable* society adequately balancing economic, social and cultural concerns by means of promoting public-private co-operation and consensus building, reflect this approach.

Still, employing regulatory law to neutrally mediate and maximise social capital, is a process that *does* tell right from wrong as it promotes the vision of socio-political harmony, the avoidance of conflict, the taming of individual *pathos* (cracking software codes?) on the basis of the existing corpus of legal doctrine and practice, with a view to ultimately build the perfect polis accommodating everybody's interests.[110]

Very importantly, it is a system promoting the virtues of *belonging* to groups and networks and adhering to their codes of practice, as it then that your voice as a

---

work in negotiation by Gulliver, see Gulliver, P. H. (1979) *Disputes and Negotiations: A Cross-Cultural Perspective* (New York: Academic Press).

[109] See for example http://www.jrc.es/iptsreport/vol32/english/ISS2E326.htm, (web page visited on 19 May 2003).

[110] On similar thoughts concerning the ethos of dispute resolution see Nader note 107 above.

citizen is heard. In these instances regulatory procedures facilitate belonging to a group as a means of promoting our *selves* and our *political being*.

How did consensus become the cornerstone of our social and political thinking? What are the problems of the requirement to belong to groups and networks in order to have our voice heard? Although action based on it is important, as the opposite would result in oppressive action, can we discard the possibility that it results in political normalisation, as Foucault pointed out?[111] This is why the important thing is to invent modes for political participation, safeguarding difference.[112] Yet, is this really the case in the attempt to create a sustainable information society in Europe?

---

[111] Foucault, M. (1997) 'Interview with M. Foucault: Problems, politics and problematisations' in Rabinow, P. (ed) (1997) *Ethics, Subjectivity and Truth: Essential Works of Foucault 1954-1984, Volume I* (New York: New Press).
[112] Haber, H. F. (1994) *Beyond Post-Modern Politics: Lyotard, Rortry, Foucault* (New York: Routledge), at p. 82; Foucault ibid.

D. CONCLUSIONS

This chapter concentrated on the ways in which social capital may be maximised. The notion of social capital denotes that its maximisation is a strategy amongst others, aiming at creating networks to advance common purposes, but also provides the theoretical tools to explore problems of structural asymmetries in such networks and differences in patterns of cognition amongst groups who participate in the creation of a sustainable civil society. Against this background, Bourdieu can provide the theoretical tools to explain distrust resulting in problematic consensus building.

This chapter followed this intuition in the context of the proposal to introduce patent protection in computer-implemented inventions in the EU. In a nutshell, the proposition is that minds are socially constructed and social capital has to be appreciated through them. Having said this, there is not a single pattern of perception for all agents in the European Commission. Structural patterns of thinking about the social world may be derived from *'lawyer thinking'* and as such promote harmonisation, legal certainty and continuity.

Alternatively, they may be based on professional background, and as such reproduce different understandings with regard to the legal/illegal taxonomy, closer to the needs of the industry. Moreover, it can be that minds coincide with structures and reproduce its basic operating principle, neutrality and objectivity for the sake of impartially. Or it may be that minds accept the merits of discussion and consensus building.

Finally, habitus may emerge at the conscious level and become a strategy. This is what happened in the case of the habitus of dependency and compromise when the insider/outsider taxonomy was challenged by interest groups, which demanded their views to be taken into account when decisions are taken.

Nevertheless, insiders neither have the same amounts of power (capital) nor the same way of perceiving and appreciating social problems. As for the problem of diverse structural patterns, the focus of the previous analysis was on showing that interest groups were very active in forming an alliance, which supported a vision of free information and non-proprietary standards. This vision can be understood if reference is made to the first steps of the development of the Internet to see that it was actually built on the need to have free flows of information and speech, hence the different structural patterns challenging the orthodoxy in the field.

The social capital of these interest groups lies on that there is a new approach in the EU, which supports the effective engagement of NGOs in the policy process in order to create a European civil society. Moreover, the expert knowledge that these groups have adds weight to their opinion, since they have been so far able to circumvent controls opposing the Internet culture,[113] and come up with proposals due to their ability to understand technical issues and identify problems.

Conflicts for them involve maximising the existing capital, and pushing for new definitions as to the proper role of information and property. In a nutshell,

---

[113] See Chapter IV Section C on architectural solutions introduced by the industry in DVDs.

conflicts are generated by differences in views between their position and orthodoxy.

In the case of business interests, the European Commission, government officials and patent lawyers, they represent the orthodoxy in the field, endorsing assumptions locating the innovator at the centre of the innovation process and market integration. As for the European Commission in particular, structural patterns of cognition are underlined by practices pointing to harmonisation, codification and successful market integration, while the proprietary understanding of information is viewed as driving markets and market integration.

The taken for granted assumptions being reproduced by means of the above practices include the understanding that firms, in other words the innovator, are central in the course of innovation (as opposed to assumptions that situate the exchange of information at the heart of the innovation process).

As for the resources available to interest groups in the alliance supporting software patents, they have important social, economic and symbolic capital. Social capital has a multiplication effect on other forms of capital, while economic capital is being converted to symbolic, by means of sustaining the orthodox definitions of property and innovation.

As for political and economic capital, patent experts working at the EPO or in the legal departments of large IT companies come from a group with important

economic resources. Moreover, firms lobbying for software patents include IBM, Siemens, Nokia, Thomson and Alcatel and powerful professional associations.[114]

On this basis, the nine per cent of the respondents to the consultation who supported the patentability of software, were thought to be an *'economic majority,'* despite the fact that critics have noted that the European Commission should take into account the fact that the most innovative software in Europe competing with Microsoft is being developed outside these large companies. Economic capital is converted into organisational, social and symbolic capital, the latter maintaining the belief in the role of big businesses in sustaining global competitiveness.

In view of the above, power asymmetries and conflicts between orthodox and heterodox cognitive schemas characterise the maximisation of social capital. Since this is the form of capital at the heart of any attempt to build a sustainable information society, it seems that the process of creating a true forum for discussion is not spread with roses.

---

[114] On these issues see Aigrain note 61 above, especially see the section *Who controls and what drives the European Patent Office?* In this section, Aigrain asks: *'Now where does the EPO (like most patent offices) get its money from? Not at all from public funding. A predominant part of its resources are generated by maintenance fees on patents in force, and most of the rest from application fees. The European Patent Office is an incredibly profitable organisation. Its operating surplus in 2000 is 284 million DEM, 20% of its operating income. This is almost Microsoft-level performance, and allows the EPO to have a staff growth of 10% per year, no doubt opening the way to further growth.'*

Appendix 1

FFII European Software Patent Company Statistics

Rank	Company	Number of Patents	Rank	Company	Number of Patents
1	IBM (US)	1842	25	PIONEER ELECTRONIC CORP (JP)	161
2	CANON KK (JP)	1364	26	THOMSON CSF (FR)	154
3	SIEMENS AG (DE)	1104	27	MINNESOTA MINING & MFG (US)	152
4	SONY CORP (JP)	1069	28	KONINKL PHILIPS ELECTRONICS NV (NL)	144
5	NIPPON ELECTRIC CO (JP)	874	29	BOSCH GMBH ROBERT (DE)	138
6	FUJITSU LTD (JP)	742	30	SGS THOMSON MICROELECTRONICS (FR)	137
7	TOKYO SHIBAURA ELECTRIC CO (JP)	706	31	GEN ELECTRIC (US)	128
8	MATSUSHITA ELECTRIC IND CO LTD (JP)	626	32	FANUC LTD (JP)	127
9	HEWLETT PACKARD CO (US)	504	33	ERICSSON TELEFON AB L M (SE)	119
10	HITACHI LTD (JP)	495	34	GRUNDIG EMV (DE)	117
11	AMERICAN TELEPHONE & TELEGRAPH (US)	474	35	NCR CO (US)	113
12	SHARP KK (JP)	375	36	OKI ELECTRIC IND CO LTD (JP)	113
13	EASTMAN KODAK CO (US)	351	37	ALCATEL NV (NL)	112
14	XEROX CORP (US)	342	38	HONEYWELL INC (US)	112
15	MITSUBISHI ELECTRIC CORP (JP)	340	46	THOMSON BRANDT GMBH (DE)	97
16	DIGITAL EQUIPMENT CORP (US)	330	47	TEKTRONIX INC (US)	95
17	PHILIPS NV (NL)	316	48	CASIO COMPUTER CO LTD (JP)	94
18	PHILIPS CORP (US)	299	49	SANYO ELECTRIC CO (JP)	94
19	MOTOROLA INC (US)	298	50	ANT NACHRICHTENTECH (DE)	90
20	ADVANCED MICRO DEVICES INC (US)	252			Total in Top50: 16513
21	HONDA MOTOR CO LTD (JP)	217			
22	FUJI PHOTO FILM CO LTD (JP)	201			
23	HUGHES AIRCRAFT CO (US)	198			
24	TEXAS INSTRUMENTS INC (US)	174			

Note: Although it is difficult to estimate exactly from published figures, the FFII produced figures based on patent databases, which show that 50 companies hold 43 per cent of 38852 EPO software-related patents, and the top-10 companies hold 24 per cent.

Source: http://swpat.ffii.org/vreji/pikta/perled/app_stat.html.

319

Appendix 2

European Research Advisory Board (EURAB) Members

AMANCIO Lígia Prof.
Associate Professor of Social Psychology
Instituto Superior de Ciencias do Trabalho e de Emresa Portugal

ARNON Ruth Prof. Professor of Immunology, Weizmann Institute of Science Israel

BANDA Enric Prof. Secretary General of the European Science Foundation (ESF) France
BLASI Paolo Prof. Professor of Physics, University of Florence Italy

BREDAS Jean-Luc Prof.
Professor of Chemistry, University of Arizona (USA) & University of Mons (Belgium)

BUYS Charles Prof.
Professor of Human Genetics & Chairman of the Dept. of Medical Genetics,
University of Groningen
Head of Dept. of Clinical Genetics, Academic Hospital Groningen The Netherlands

BYRNE Gerry Prof.
Head of Department of Mechanical Engineering, University College Dublin
Ireland

CESARSKY Catherine Dr. Director General of the European Southern Observatory (ESO) Germany

DAVIES Graham Prof. Head of International Relations, BT Exact Technologies United Kingdom

DEN BERG Ellen Dr. Director of R&D and Technology, DSM Fine Chemicals The Netherlands

DEKKER Jan Alexander Mr President, Netherlands Organisation for Applied Scientific Research (TNO)
The Netherlands

GRIMSON Jane Prof. Dean of Engineering & System Science and Co-chair of the Center for Health Informatics,
Trinity College Dublin Ireland

HAEMERS Guy Dr. Corporate Vice-President, Bekaert Advanced Materials Belgium

HALLIDAY Ian Prof. Chief Executive of the Particle Physics & Astronomy Research Council United Kingdom

HATZOPOULOS Miltiades Prof. Director of the Research Center for Greek & Roman Antiquity
National Hellenic Foundation

ILLNEROVÁ Helena Prof. President of the Czech Academy of Sciences Associate Professor in Dept. of
Evolutionary Biology & Comparative Physiology, Charles University Czech Republic

JASKULKE Elizabeth Ms. Responsable de la "Cellule Ile de France" - Eau et Force, filiale de la
Lyonnaise des Eaux France

JEPSEN Maria Kristina Ms. Senior Researcher, European Trade Union Institute Belgium

KORADECKA Danuta Prof. Professor of Medical Sciences Director, Central Institute for Labour Protection
Poland

KROÓ Norbert Prof. Secretary General of the Hungarian Academy of Sciences Hungary

KUUSI Eino Juhani Prof. Dr. Senior Vice President, Nokia Corporation Finland

LIST Helmut Mr. Chairman and Chief Executive Officer, AVL List GmbH Austria

MAJÓ CRUZAT Joan Dr. Former Minister of Industry and Energy Chairman of the European Institute for the
Media (Düsseldorf) Vice Chairman, La Seda de Barcelona, S.A. Spain

MÉGIE Gérard Prof. President of the Centre National de la Recherche Scientifique (CNRS) Professor at the

Université Pierre et Marie-Curie (Paris) France

MIRDAL Gretty Prof. Professor of Transcultural Clinical Psychology, University of Copenhagen Denmark

MORAIS Carlos Campos Prof. President of the National Institute for Engineering and Industrial Technology Portugal

MULET Juan Prof. Director General, Cotec Foundation for Technological Innovation Spain

NEHER Erwin Prof.Director of the Membrane Biophysics Dept. Max-Planck-Institut für Biophysikalische Chemie Germany

NEUMANN Rainer Dr. Head of Trade Promotion Department Zentralverband des Deutschen Handwerks Germany

NOWOTNY Helga Prof. Professor of Philosophy and Social Studies of Science Swiss Federal Institute of Technology Director Collegium Helveticum Switzerland

ÖQUIST Gunnar Prof. Professor of Plant Physiology, University of Umeå Sweden

OTTOLINI Enrico Dr. Director Manager, Associazione Piccole e Medie Industrie (Varese) Italy

ROSTRUP-NIELSEN Jens Dr. Director of Research & Development Division Member of Executive Board, Haldor Topsoe A/S Denmark

RÜBSAMEN-WAIGMANN Helga Prof. Dr. Director, Antiviral Research, Bayer AG Germany SAMUELS Gill Dr. Senior Director, Science Policy & Scientific Affairs – Europe Pfizer Global Research & Development United Kingdom

SCHLEICH Arno Mr. former President, Deloitte and Touche (Luxembourg) Luxembourg

SCHMIDT Arnold Prof. President of the Austrian Science Research Fund Chairman of the Institut für Photonik, Technical University Vienna Austria

SERREAULT Brigitte Ms. Senior Coordinator, Industrial, Research & Technology Directorate, European Aeronautics, Space and Defence Company (EADS) France

SOBOLL Horst Dr. Director, Research Policy, DaimlerChrysler AG Germany

TARRACH Rolf Prof. President of the Spanish Council for Scientific Research Professor of Theoretical Physics, University of Barcelona Spain

TZAVARAS Yannis V. Dr. General Manager for Research & Development, Intracom Greece

UGGERI Fulvio Dr. Director, Milano Research Centre, Bracco S.p.A. Italy

VIHKO Reijo Prof. President & Director General of the Academy of Finland, Finland

WALLØE Lars Prof. President of the Norwegian Academy of Sciences & Letters Professor of Physiology, Faculty of Medicine, University of Oslo Research Director at the Institute of Marine Research (Bergen) Norway

WITTLÖV Arne Dr. Executive Vice President, AB Volvo Sweden

Source : European Commission - Research Directorate-General. *Last update:* 25 September 2001.

Appendix 3

IST Programme Committee ISTC –Information Society Technologies

AUSTRIA	BELGIUM	BULGARIA	CYPRUS	CZECH REPUBLIC
Mr Reinhard GOEBL Bundesministeriu m für Wissenschaft und Verkehr Mr Otto PEPERNA Bundesministeriu m für wirtschaftliche Angelegenheiten Abt. IX/B/12 Stubenring 1	Ms Claudine BELLEFLAMME SSTC Mr Karel GOOSSENS IWT Dr. Baudouin JAMBE Ministère de la Region Wallone, Directeur Generale des Technologies, de la Recherche et de I™Energie,	Mr Ivan TAUSHANOV Committee of Posts and Telecommunications, 6 Gurko Str., Mr Kiril BOYANOV Helsinki University of Technology Telecommunications Software and Multi-Media	Mr Marios D. DIKAIAKOS Dept. of Computer Science, University of Cyprus, Mr Sophocles HADJSOPHOCLEOUS Cyprus Telecommunications Authority,	Professor Jiri ZLATUSKA Masaryk University Œ Rector, Zerotinovo nam. Dr. Jiri KADLEC The Institute of Information Theory and Automation
DENMARK	**UNITED KINGDOM**	**FINLAND**	**FRANCE**	**NETHERLANDS**
Mr Holger RASMUSSEN Ministry of Research and I Bredgade 43 Mr Jimmy ROSENBERG National Telecom Agency Mr Kristian STUBKJAER Technical University of Denmark Research Centre Committee Ms. Anu LAMBERG Technology Counsellor, TEKES, National Technology Agency,	Mr Patrick MC DONALD Department of Trade and Industry (DTI) Mr Alun GERMANDepartment of Trade and Industry (DTI) Mr Martin BOYLE Department of Trade and Industry (DTI) Mr David ALLEN Department of Trade and Industry (DTI) Mr Christopher MATTEWS Department of Trade and Industry (DTI) Ms Margaret DENNIS Department of Trade and Industry (DTI)	Mr Kari TILLI Director (Telecommunications and Electronics), TEKES, National Technology Agency, Kari.Tilli@tekes.fi Ms. Annu JYLHA-PYYKONEN Senior Advisor, Department for Education & Science Policy, Ministry for Education,	Mr Alain BRENAC Ministry of Research alain.brenac@technolog ies.go uv.fr Mr Patrick SCHOULLER Ministère de I™Economie, des Finances et de I™Industrie	Mr Wim VAN T'HOF Ministry of Economic Affairs Mr Gijs VAN DER STARRE Ministry of Education, Culture & Science,

| GERMANY
Mr Klaus
SCHUTZ
DLR; PT-IT
Linder Höhe
Mr. Friedhelm
GILLESSEN
DLRe.V./PT of
BMBF
Linder Höhe
D Œ 51147 Köln
Mr R.
HOCHREITER
Federal Ministry
of
Economics and
Technology
HUNGARY
Ms Marietta
ZOLD ROSKA
Mr. Sandor
BOTTKA
Vice President,
National
Committee for
Technological
Development, | Mr Günther FREY
Hessisches Ministerium
für
Wirtschaft, Verkehr und
Landesentwicklung
Dr. Dirk PETRAT
C/o der Senator für
Wirtschaft und Haefen
Zweite Schlachtpforte 3
ISRAEL
Mr Myer MORRON
ISERD
Mr Dan
SHKLARSKYNational
Committee for
Information
Technolgies Infrastructure | Mr Ralf FRANKE
Federal Ministry of
Economics and
Technology
SWEDEN
Mr Olof SANDBERG
Desk Officer,
Ministry of Industry,
Employment and
Communications,
S-10333 Stockholm

Mr Karl-EINAR
SJODIN
NUTEK | **GREECE**
Mr Pavlo SPIRAKIS
University of Patras,
Dep. of Comp. Science
and Engineering
Mr E. SPITHAS
General Secretariat for
Research and
Technology
ITALY
Mr Franco DENOTH
Istituto per le
Applicazioni
Telematiche,
Mr Aldo MASCIOLI
M.U.R.S.T
Mr Saverio SALERNO
Universita degli Studi
di Salerno, | **NORWAY**
Mr. Tron
ESPELLI
Advisor,
Industry and
Energy Division,
The Research
Council of
Norway,
Mr. Pål
GRETLAND
Ministry of Trade
and
Industry
Mr. Jostein
MYKLETUN
Science
Counsellor,
Mission of
Norway to EU |

Source: **ftp://ftp.cordis.lu/pub/econtent/docs/istc.pdf**. *Last* **update: 25 September 2001.**

VI

Conclusions

O Voltaire! O humaneness! O nonsense!

There is something about 'truth,' about the search for truth;

and when a human being is too human about it –

'il ne cherche le vrai que pour faire le bien' –

I bet he finds nothing.

Friedrich Nietzsche Beyond Good an Evil: 35.

Information travels freely. It is a valuable commodity. It empowers people. Such rhetoric underlined the effort to create the information society in Europe by means of opening up and integrating markets, and harmonising laws. Fostering innovation is at the heart of relevant efforts, as it results in better transmitting and manipulating information, while the Internet in particular bears with it the promise of profitable business, technological experimentation, political emancipation and communication amongst global networks.

This thesis concentrated on information society regulation initiated by the European Commission, with special emphasis on Internet regulation. The latter, due to its decentralised character, presents an example of efforts to adopt *reflexive* regulatory instruments allowing for *heterarchical*, decentred regulation, respectful of

difference, inscribed in the codes of conduct of interest groups and networks of actors, and sympathetic to building forums of discussion.

Having focused on the processes of forming legislative proposals and implementing laws, the question addressed in this thesis was: What is the role of regulatory law in the process? An analysis inspired by systems theory would say that regulatory law is neutral and objective. Institutionalists would argue that regulatory law is a structure constraining action, co-existing with other multiple norms regulating life.

An internal to law analysis would consider regulatory law as being initiated by a regulator detached from the social milieu, working in the name of a public good. A market failure perspective would come to grips with regulatory law as being engaged in the efficient management of markets, while functionalists would think of it as serving a European ideology.

Contrary to all of the above approaches, the purpose of this thesis was to look at the role of regulatory law with a view to question the feasibility of designing forums for discussion by means of flexible instruments and the possibility of putting in place neutral procedures in the course of initiating proposals and implementing laws relating to the regulation of information society in Europe.

To this effect, I injected agency in my analysis, but I did away with the limits of intentionality. I looked at the operating parameters particular to a field with a juridical character, thus giving an *'internal'* to the legal system account, while simultaneously took into account the specific *'interests'* of agents striving to

influence the content of regulation. Finally, I placed the notion of power at the heart

of my analysis, hence the focus on the ways the exercise of power is reconfigured.

The following will consolidate the basic points that emerged in the discussion of this

thesis.

1. *Agents, civil servants working for the European Commission are not profit*
   maximising agents engaged in a problem-solving exercise, but strive to reproduce
   forms of power, capital, characteristic of a particular field at a particular time and
   place.

I employed Bourdieu's framework to conceptualise the formation of

regulatory proposals and implementation of laws as a process in the course of which

various DGs of the European Commission strive to maximise their position as a

major think tank, continuity, power, status, in a way compatible to institutionalised

practices and/or individual cognitive understandings, while caught in interaction

with other agents inhabiting different fields of activity. This is a process requiring

the maximisation of *juridical, informational/technocratic, social* and *symbolic* capital.

Juridical capital signifies the power to tell right from wrong by means of

fitting the social world in legal categories. Forming a legislative proposal is an

exercise predominantly concerned with this kind of power, as it requires the ability

to be able to translate information in meaningful legal agreements, which further

involves mastering the art of arranging a social problem in such a way that it is

incorporated in the body of existing legal texts, so as to preserve the continuity of legal arguments deriving their basis from legal codes and cases.

Informational/technocratic capital signifies the power to collect and treat information according to classifications inscribed in law, such as age and sex, and through bureaucratic procedures. The concentration of this form of capital is crucial so that juridical capital effectively fits the social world in legal categories and ultimately imposes common forms of division, forms of thinking and forms of classification.

The latter point links to symbolic capital: Accumulating and preserving symbolic capital, consisting of the power to shape mainstream understandings, is of major importance in a field with a juridical element such as the field of the EU administration, since then the faith in the neutrality and objectivity of law is preserved, the latter being an operating principle.

Forging social networks is meant to assist the maximisation of informational capital and juridical capital, as, to form laws, information is required in order to come up with concrete proposals, and this can only be furnished by interested parties.

This is especially true in the case of the European Commission, since the stocks of juridical capital of the European Commission are not high due to the new forms of decentralised regulation and due to the structural organisation of the EU political system characterised by the dispersion of political power amongst many institutions and agents. Therefore, the European Commission can avoid potential

conflicts in the implementation phase by means of early bargaining and dialogue, and in this instance *social* capital is converted into *juridical* and *informational capital.*

To illustrate the above process, in the case of the proposal to introduce patent protection in computer-implemented inventions, the European Commission preserved/accumulated juridical capital by means of forming a legislative proposal, which sought to include certain types of software, computer-implemented inventions, in the subject matter of patent law. By categorising such inventions as subject to patent protection, a social problem, innovation and how it should be promoted, is being fit in existing legal categories and requirements.

Computer-implemented inventions are not thought to be literary works anymore, but, shifting the focus of the analysis from the notion of author to the notion of invention, different rules apply as to what constitutes fair use and illegal copying. The decision to propose a change of legal regime governing such inventions is based on the translation in legal language of how software works by means of employing terms, such as *technical field* and *field of technology,* which acquire meaning in the light of legal precedent and existing interpretations of legal codes, a process aiming at guaranteeing continuity and legal certainty.

Therefore, a retranslation of meaning is taking place when a person trained in law tries to understand the function of software in order to fit it in legal categories. In this instance, technocratic/informational capital is crucial and consists of collecting information, (number of software patents granted by the EPO, innovation indexes in European countries and the USA, studies on the effects of patents), since,

by means of accumulating it, the European Commission is in a position to form informed proposals.

Collecting information can also be done by means of consulting interested parties, thus gathering a wide array of views and arguments coming from the everyday experience of software developers. The latter can also be seen in the context of maximising social capital. Forging networks and creating forums of discussion is important, as interests can be accommodated at an early stage and thus conflicts can be avoided when the Directive is read by the Council and the Parliament.

This was especially important in the case of the proposal to introduce patents in computer-implemented inventions in the EU, not only because of the contentious nature of the proposal, but also because of the fact that software developers are well organised in professional associations, and of the symbolic character of the Internet as a place for technological experimentation.

The maximisation of symbolic capital underlines all the above instances, since the European Commission is viewed as furnishing the truth of scientific information and a framework of objective legal rules neutrally aiming at harmonising national laws and integrating markets in Europe, losing sight of the assumptions encapsulating in rules and data, them being the product of history.

2. *Although it would be within agents' intention to design neutral rules and within regulatory law's original function to promote participation and deliberation, law encapsulates a vision that outruns its function and agents perceive the social world in a way that outruns perception.*

This argument here was that common, often unspoken, ways of thinking about the social world are always encapsulated in legal texts, binding or not. How value neutral are software filters and what is harmful material? Some interest groups believe that communication on the net should not be monitored, but the Safer Internet Action plan in Europe does not embrace this approach. Thus, the mere choice to promote filters and steer activity to this direction, even by means of soft law, is loaded with options as to the form our communication on the net should take, and excludes alternative visions.

Be it in the promotion of filters, in the context of implementing the Framework Programme funding European projects, or in the drafting of the proposal introducing patent protection in computer-implemented inventions, the European Commission maximises its capital. However, capital only presents potentialities, which have to be appreciated through minds, through cognitive taxonomies developed in the course of upbringing and interacting in particular settings.

These modes of perception and appreciation are termed by Bourdieu as habitus. Action then is understood as being both in bodies, (habitus, dispositions)

and in institutions (fields, spaces of positions), overcoming the dichotomy of action and structure.

In other words, maximising and preserving capital is not an automatic process. It has to be first appreciated by agents' minds. Professionals in the field possess cognitive schemas through which the potentialities inscribed in the forms of capital identified in the field have to be appreciated. Such classificatory schemes may owe their existence to professional background and nationality for example. They may also become institutionalised in whole Units or DGs.

Hence the differences in view amongst DGs, leading to a hierarchical system within the field with different approaches competing with each other. Therefore, the initiation of regulation by the EU administration is the outcome of the competition amongst the various DGs of the European Commission for the monopoly of the right to form legislative proposals and implement laws.

Professional habitus

To illustrate the above, in the case of competition law enforcement, DGs seemed to have a different view as to what is the 'correct' and 'authorised' interpretation of legal texts, thus revealing a picture different than the one propagated by the principle of collegiality. A confrontation occurs amongst these actors, with regard to the technical competence to *interpret* a corpus of legal texts and collect the information necessary to conduct reliable assessments, as to what

kind of legislation is required and what would be the efficient execution of the mandate of a law.

For example, DG Information Society and DG Research are viewed as being the most collusive with big business, in contrast to DG Competition, which is considered a *'liberal'* DG.

This may be attributed to that a big number of the officials of DG Information Society has a scientific background, as they have been trained as electronic or telecommunication engineers. Moreover, many of them have worked both in the industry and in national administrative systems. Therefore, they feel that they are close to lobbyists, as they speak the same *'scientific language'* with national groups affected by the Research and Development policies of the European Commission. Hence, these officials regard themselves as mediators.

As for DG Competition, it is overpopulated by lawyers and had many German Director Generals. Moreover, DG Competition appeared to be of particular importance to the German Government. One reason to explain this may be that competition law has always been viewed by the Germans as being of prime importance to the functioning of open markets, as it was thought to safeguard against the abuses of both private and public power.

To this effect, many Germans were influential during the early steps of the European Union in laying the foundations of competition law, although the latter was not thought to have its own *raison d'être,* but would collapse in the realm of

industrial policy in other countries participating in the creation of a common market in Europe.

In view of the above, differences in approach were revealed between DG Competition and DG Information Society, when the latter strongly favoured a proposed joint venture (JV), the MSG Media Services GmbH, as it considered it to be a player capable of competing internationally, while DG Competition sought to prohibit it.

The same kind of tensions was manifested in the course of negotiating the content of the file *'Attacks against Information Systems.'* While DG Information Society argued that it was important to compromise the needs of interested parties with the requirements to enforce law in an environment often described as a Virtual Wild West, DG Justice and Home Affairs adopted a purely internal to law analysis.

The legal habitus

What is more *natural* for someone with legal training than the belief that the legal system and legal institutions are effective? Or that social problems can effectively, neutrally and objectively be solved by recourse to legal texts and precedent? However, in this instance agents lose sight of the set of assumptions reproduced in such documents, such as the importance of innovation.

Tracing the history of the information society in Europe is important in order to come to grips with the contingency of understandings such as neutral procedures, innovation and market integration, as these are thought to emerge as a result of

specific socio-historical conditions. For example, the experience of the industrial revolution fed into various theoretical frameworks, which understood innovation as going hand in hand with socio-economic prosperity.

The foundational days of the EU understood the role of the European Commission as in interest intermediation and expertise provision. The *ordoliberal* framework provided an understanding of law as being neutral, indirectly intervening to balance private and public power, and placed competition law at the heart of the effort to regulate markets.

These understandings are carried over to the present days in the conceptualisation of regulatory law as indirectly intervening in open markets and as protecting against the abuse of private power, and of the European Commission as a neutral regulator promoting the merits of discussion in forums. The legal form disguises the effects of power, as it gives neutrality, objectivity and universality in the assumptions reproduced in a legal text, and a civil servant forming legal arguments loses sight of his central role in reproducing the social world.

Multiple habitus

We saw so far that there is not a single pattern for appreciating the social world. Agents have many *roles* available to them, multiple classificatory schemes. In addition to the ones already mentioned, another pattern of perception emerges in the context of *the habitus of dependency and compromise*. This is a classificatory scheme pointing to the powerful insider/outsider taxonomy and cohesion in a group.

334

As for cohesion, this was understood by means of uncovering practices which 'tie' members of a group together, by means of creating relations where the one is dependent on the other in order to do a job, create a good reputation, maintain social face, acquire recognition. To this effect, I looked at practices, such as promotion, working on shared files and participating in committees, in order to argue that people working for the European Commission *have to* take others into account, and this is why they are a distinctive group, not because they serve some common ideals.

This means that building networks of people is important inside the European Commission, as the arguments in a legal file are the result of the complex interaction amongst many persons. Such interaction may be successful, or less successful, depending on how contentious a legal file is, but is underlined by certain understandings, particular norms of conduct, as to how things are get done inside the European Commission. These norms regulate life inside DGs and further give meaning as to how an insider is expected to act in order to be successful.

3. Habitus is subject to experience: Challenging patterns of praxis

The notion of capital presents us with *potentialities inscribed in formal structures*, in the sense that it has to be appreciated by human minds before being actualised. In this way, power is analysed as in the way it is *communicated* and *manifested* in social relations, and not as a component of structures.

In this sense, Bourdieu's conceptualisation of capital and power follows Nietzsche's understanding that any relevant analysis should never concentrate on

power in *potentia*, but should be concerned with what power can do when exercised. The crucial question then is not who has power, but how, how much and why power is exercised, as it is then that the possibility is always left open that power relations can be subjected to critique.

Challenging the insider/outside taxonomy

Interest groups demanding their inclusion in the decision-making process have challenged the powerful *insider/outsider* taxonomy encapsulated in the habitus of *dependency and compromise*. Dependency and compromise denotes that people working for the European Commission have to co-exist. It occurs as a result of the need to collect information, identify social problems, draft legal proposals offering solutions and efficiently implementing laws. This is what underlines the workings of every administration and manifests itself as a basic operating practice.

However, it acquires particular meaning in the context of dependency and compromise, in other words in the context of the meaning attributed to who is an insider and who is an outsider, and this is why there is a *'European administration'* or a *'European way of doing things,'* in other words a European way of identifying problems, collecting information and categorising.

The meaning attributed to the insider/outsider taxonomy is characterised by the inclusion of interest groups and the creation of forums of discussion. The European Commission is being directly approached by interest groups and commentators have noted that it acts as a *'broker'* seeking access to specialised

knowledge. The European Round Table of Industrialists and the CyberCrime Forum are a good examples of the above trends, as forums of discussion are organised with a view to create a sustainable information society promoting an ethos of consensus and intermediation.

Challenging the juridico-administrative habitus

The juridico-administrative element of the field implies that the assumptions encapsulated in a legal text acquire universality and neutrality, as if the logic of their production is purely internal to a body of legal doctrine. However, to take the example of intellectual property, the very assumptions underpinning it concern, for a start, the role of property. It is assumed to be one of the cornerstones of liberal markets and the law is meant to protect it.

Intellectual property is further assumed to promote the importance of the *innovator* in the proper functioning of the economy. However, this does not mean that there are no alternative conceptualisations of how the economy in general and a liberal economy in particular could function. And there is certainly not one way to '*design*' the information society in Europe.

This is why the process of building a sustainable information society is hotly debated, as the dominant taxonomies inscribed in power relations inside the field are challenged by interest groups willing to influence the content of regulation. These groups bring with them social capital, as the new EU approach to governance

supports the effective engagement of NGOs in the policy process in order to create a European civil society.

Moreover, the expert knowledge that these groups have adds weight to their opinion, since they have been so far able to circumvent controls opposing the Internet culture, and come up with concrete technical proposals, on the basis of which they try to influence regulation.

Capital and objective potentialities are subject to the common way of doing things, the taken for granted views of the world. Interest groups bring with them new definitions as to notions such as public domain, property, innovation and information. Open source and *libre* software developers believe that innovation and information should be shared, allowing for technological experimentation and public discussion, especially in the case of technologies running as fast as software. They promote a vision of knowledge as being built on top of past knowledge, hence, sharing is the prerequisite for truly innovative projects.

4. Such an approach implies an analysis that focuses on the becoming of the construction of visions of the social world that legitimise change and the role of objective positions and agents' dispositions in this process. Hence, regulatory law can never be neutral, but encapsulates a vision. It can never be static, but is constantly subject to transformation manifesting a temporary crystallisation of power relations. It is neither the product of a regulator detached from the social milieu nor the creation of knowledgeable agents rationally pursuing their interests, as most of the time agents reproduce their taken for granted vision owing its existence to cognitive schemas making action meaningful.

Striving to influence definitions and challenge established values is an expression of an increase in power and always implies the antagonism amongst different *loci* of power, different conceptualisations of what is worth pursuing. There are no eternal values, but context dependent struggles to create according to desires anchored in our perception of how our lives should be.

Against this background, I have offered an analysis of regulatory law initiated by the European administration that is concerned with uncovering forms of domination and how these seek to replace old ones and impose new varieties of classification embraced by law. Albeit the struggles involved in redefinitions, there are always unchallenged beliefs presenting us with the doxic element of the field, as is the belief that discussion should be the way out of technological dystopia.

Nevertheless, action and human minds may always challenge dominant classifications, and as such a static conceptualisation of regulatory law as involving the engulfment of dominant taxonomies, simultaneously implies the possibility of struggles to redefine it according to alternative heretic visions. Therefore, the study of regulatory law should neither be on structures nor on minds, but on the continuous processes of communications amongst these.

We saw that the Internet is a model for the study of such processes, due to its decentralised character supporting participation and neutral intermediation. But how unuttered by power relations is a forum of discussion? And how neutral is procedural law?

The argument supported was that alternative regulation reproduces historically contingent assumptions, such as the belief in scientific objectivity, in the responsible emancipated rational agent able to regulate itself, in law's impartiality and neutrality and in the potential of consensus building amongst agents with a free will.

However, in the future, it is always possible that we challenge the common way of doing things by promoting novel understandings. Simultaneously, these new, revolutionary visions will always present us with new attempts to control conduct and impose the *'right'* way to conceptualise regulation.

If one accepts that power is at the heart of relations, then we do away with a view of society and law as moving towards a refined *'good'* society unuttered by vulgar antagonisms. And if one accepts that power is a *modus vivendi*, then the focus of analysis should be on the transformation of tools of domination and loci of power. The study of law should then be prepared to come to grips with social phenomena by means of flexible concepts and frameworks of analysis, as truth is making and unmaking itself all the time on the basis of an ongoing reorganisation of power relations.

METHODOLOGICAL APPENDIX

A. Library, online resources, legal material, databases

This thesis used library material (such as theoretical material, legal analysis and ethnographic works) legal material (reports, decisions, green papers, consultations) available on the website of the European Commission and legal databases such as Westlaw.

B. Qualitative research (ethnographic fieldwork, interviews, textual analysis, discourse analysis)

For the purposes of this thesis, several methods of data collection were deployed in the context of qualitative research, such as participant observation, interviewing and textual analysis.

Ethnography, (participant observation, textual analysis, discourse analysis).

Ethnographic research consists of understanding the experience and activities of people in a given field[1] and requires the participation of the observer. My observations are based on a four-month period of time I spent at the European Commission as a trainee (September-December 1998). By means of participating in everyday work with the people I was observing, I effectively gained membership and learnt the codes of conduct governing life inside the European Commission.

---

[1] Brewer, J. D. (2000) *Ethnography* (Buckingham, Philadelphia, PA: Open University Press).

341

My role as an observer is understood as being part of my observations. My account of the life inside the European Commission does not seek to apply the model of natural sciences in social science. The observer is not thought to be detached describing the object under observation *'as it is,'* as realists would assert.

Therefore, the method I used to collect data was unstructured and open ended, as too much structure may result in losing sight of real life and impose presuppositions not so well thought. In fact, I sought to present life inside the European Commission as a story, hence I presented it in many parts as a first person account. Therefore, my account should be considered as autobiographical (autoethnography).

This way to approach ethnography has been criticised as unscientific, since, when ethnography is autobiographical and a story telling, data cannot be verified and truth claims cannot be generalised. This is true and presents us with the weakness of this approach. However, autobiographical reflexivity requires that an ethnographic account is presented in such a way to remind the reader that it bears with it the *'deficiency'* and necessary limitations of interpretation, challenging the authority of texts in general.[2]

This account is meant to show that there are different stories to be told, as there are no objective accounts. In fact, this methodology reminds us that there

---

[2] Clifford, J. (1986) 'On ethnographic allegory' in Clifford, S. and Marcus, G. (eds) (1986) *Writing Culture: The Poets and Politics of Ethnography* (Berkley, CA: University of California).

may be *'voices'* suppressed as, for example, in the case the ethnographer neglects to take on board the views of groups challenging deeply embedded values.[3]

However, the extreme version of postmodern reflexive ethnography is not unproblematic.[4] The fact that the ethnographer is part of her ethnography means that it is impossible to describe *'reality.'*[5] The more a researcher becomes part of the setting she is describing, the more she experiences a personal journey of individual development together with the subjects she is observing.[6]

A different approach is supported by Brunner who argues that autoethnography conveys meanings understandable not only to the researcher but also to others, as interpretations are made by means of common understandings crystallised in the structural setting in which an organisation operates.[7] In the same spirit Chia argues for a conceptualisation of reality in ethnographic research as *'becoming realism,'* where reality is being reinterpreted all the time, hence the focus on *processes*, in other words not on structures *per se* but on the communication between structures and agents.[8]

In my thesis the latter view is embraced. I have already argued that Bourdieu's account allows for a conceptualisation of social reality as being in itself and in agents' minds, providing for coming to grips with the process of

[3] Travers, M. (2001) Qualitative Research Through Case Studies (London: SAGE).

[4] Atkinson, P. and Hammersley, M. (second ed 1995) *Ethnography: Principles in Practice* (London; New York: Routledge). The authors promote a view of *'subtle realism.'*

[5] On postmodernism see Lyotard, F. (1984) *The Postmodern Condition. A Report on Knowledge* (Manchester: Manchester University Press, orig. 1979).

[6] Coffey, A. (1999) The Ethnographic Self: Fieldwork and the Representation of Identity (London: SAGE).

[7] Brunner, J. (1990) *Acts of Meaning* (USA, Harvard University Press).

[8] Chia, R. (1996) 'The problem of reflexivity in organisational research: Towards a postmodern science of organisation' 3 *Organisation* 31-60; also see Hammersley and Atkinson note 4 above. An online text embracing this position is by Cupchik, G. (2001) 'Constructivist realism: An ontology that encompasses positivist and constructivist approaches to the social sciences' 2 *Forum: Qualitative Research* 1, at http://www.qualitative-research.net/fqs-texte/1-01/1-01cupchik-e.htm.

communication amongst them. I argued that the truth of the object under observation is not impossible. It may be context dependent and fluid, but can be attained.

In my research, the data I used involve details as regards the architectural setting (such as the shape of buildings), photos and maps. I also used statistics, referred to particular characteristics of spatial and numerical concentration that I found *'appropriate'* to be mentioned for the purposes of ethnographic research, discussed elements of the jargon used by civil servants (discourse analysis) followed the life of particular files, which I thought were controversial in order to depict battles amongst DGs and the conditions under which people cooperate, and finally analysed the tone and character of internal notes (textual analysis).

There is certainly a tale to be told in this sense. However, the European Commission, its hierarchies, the multilingual setting, the Franco-German influence, are all a *'reality'* experienced by civil servants. Moreover, there are certain shared assumptions, common sense knowledge, *habitus*, which result in making life inside the European Commission reasonable for everybody. These I tried to uncover, following the autobiographical methodology of flexible and open-ended data collection, while accepting (as ethnomethodologists and symbolic interactionists do) that it is not impossible to depict common sense assumptions, although the researcher is witnessing and experiencing an instance of social interaction constantly subject to change and redefinition.[9]

---

[9] Goffman's dramaturgical method (symbolic interactionism) and Garfinkel's ethnomethodology both show how people construct and interpret the social world rejecting the natural science model, Goffman, E. (1959) *The Presentation of Self in Everyday Life* (New York: Doubleday; London: Mayflower), also see Blumer, H. (1986) *Symbolic Interactionism: Perspective and Method* (Berkley:

Interviews

It was important that I have been at the European Commission as a trainee prior to conducting interviews, as it was easy to gain the trust of my interviewees. I could also use the names of the people I worked with as a trainee (having first asked for their permission) before contacting my interviewees. I first sent a two-page letter showing very generally what kind of topics I would like to discuss.

I was quite provocative in these letters, in the sense that I raised in a straightforward way contested issues, but this always worked. People were delighted to talk to someone who had some experience of how things are done inside the European Commission, and with whom they would feel that the discussion could go off the beaten track. The interviews were unstructured and relaxed, often went on during lunch and drinks, where I gave my interviewees the opportunity to test my views, thus having interviews like conversations.

I conducted 15 interviews. I was careful to choose people from all stages in the hierarchy. The interviews were not recorded with a tape recorder. Although I had one with me, I realised during the first interview that my interviewee was feeling very uncomfortable with its presence in the room. I thus decided not to use it, and instead took notes.

University of California Press). Garfinkel's ethnomethodological study of courts sough to show how people decide and that there is a difference between the rule one has to follow and what she actually decides in the light of common sense knowledge. In this sense ethnomethodology went further than symbolic interactionism in showing how social reality can be interpreted and re-interpreted according to common sense knowledge, but retained the idea that interactions can be described by the researcher, who is herself part of an unfolding social reality, see Garfinkel, H. (1967) *Studies in Ethnomethodology* (Cambridge: Polity); Garfinkel, H. (1996) 'Ethnomethodology's programme' 59 *Social Psychology Quarterly* 5-21.

Most of the time, my interviewees wanted me to assure them that I would not give their names, thus called for confidential treatment of the information they would give me. It is characteristic of this that most of my interviewees preferred to give an interview in the conference room (where we could close the doors) instead of having it in their office.

Overall, once my interviewees had my assurance that their names would not be disclosed, they were delighted to engage in a thorough conversation of the issues I raised. Of course, I had interviewees who were not receptive, but they were the exception. Generally I think that interviewing is an art and there are no exact rules of what a good interview is, but in the case of this research a decisive factor was my enthusiasm and true admiration for the remarkable work of the people working for an organisation such as the European Commission.

Bibliography

A

Abélès, M. et Béliers, I. (1996) ' La Commission Européenne: Du compromis culturel à la culture du compromis' 46 *Revue Française des Sciences Sociales* 431-455.

Ackerman, B. and Stewart, R. (1985) 'Reforming environmental law' 37 *Stanford Law Review* 1333-1367.

Ahmad, S. (1996) 'Smith's division of labour and Rae's "invention": A study of the second dichotomy with an evaluation of the first' 28 *History of Political Economy* 95-107.

Aigrain, P. (2001) '11 questions on software patentability in Europe and the US' paper prepared for the *Software and Business Method Patents: Policy Development in the US and Europe Meeting*, organised by *the Center for Information Policy, University of Maryland* on 10 December 2001.

_____(2002) 'Domaine et espace publics' in Le Pré aux Cercs (ed) (2002) *Dictionnaire Critique de la Mondialisation* (Le Pré aux Clercs).

Althusser, L. (1984) *Essays on Ideology* (London: Verso).

Arnold, G. R. and Carr, H. (second ed 1992) *Computer Software: Legal Protection in the United Kingdom* (London: Sweet & Maxwell).

Atkinson, P. and Hammersley, M. (second ed 1995) *Ethnography: Principles in Practice* (London; New York: Routledge).

Audretsch, D. B., Baumol, W. J. and Burke, A. E. (2001) 'Competition policy in dynamic markets' 19 *International Journal of Industrial Organization* 613-634.

Ayres, I. and Braithwaite, J. (1992) *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, New York).

B

Babbage, C. (1963) *On the Economy of Machinery and Manufactures*, (Frank Cass & co London, orig. 1835).

Baldwin, R. and Cave, M. (1999) *Understanding Regulation: Theory, Strategy and Practice* (Oxford University Press).

Baldwin, R., Hood, and C. Scott, C. (eds) (1998) *A Reader on Regulation* (Oxford: Oxford University Press).

Baldwin, R. and Cave, M. (1999) *Understanding Regulation* (Oxford: Oxford University Press).

Barlow, P. (1996) 'A declaration of the independence of cyberspace,' at http://www.eff.org/~barlow/Declaration-Final.html, (web page visited on 14 May 2003).

Beck, U. (1992) *The Risk Society: Towards a New Modernity* (London: Sage Publications).

Bellier, I. (1994) ' La Commission Européenne: Hauts fonctionnaires et culture du management' (1994) 70 *Revue Française d'Administration Publique* 253-262.

Bently, L. and Sherman, B. (2001) *Intellectual Property Law* (Oxford: Oxford University Press).

Beresford K. (2000) *Patenting Software Under the European Patent Convention* (London: Sweet & Maxwell).

Berger, P. L. and Luckman, T. (1967) *The Social Construction of Reality* (Garden City, NY: Doubledey).

Bergson, H. (1911) *Matter and Memory* (Swan Sonneshein & Co., orig. 1896).

_____(1928) *Creative Evolution* (London: R&R Clark, orig. 1907).

_____(1936) *Essai sur les Données Immediates de la Conscience* (Paris: F. Alcan).

_____(1961) 'La conscience et la vie' VI *Les études Bergsoniennes* 7-29.

Bessen, J. (2002) 'Patent thickets: Strategic patenting of complex technologies' *Research on Innovation Working Paper 8.*

Bessen, J. and Maskin, E. (2000) 'Sequential innovation, patents and imitation' *MIT and Harvard Working Paper Series 00-01.*

Bettig, R. V. (1996) *Copyrighting Culture: The Political Economy of Intellectual Property* (Westview Press).

Bignami, M. (1999) 'The administrative state in a separation of powers Constitution: Lessons for European community rule making from the US' *Harvard Jean Monnet Working Paper 5/1999*.

Black, J. (1996) 'Constitutionalising self-regulation' 59 *Modern Law Review* 24-56.

_____(1997) 'New institutionalism and naturalism in socio-legal analysis: Institutionalist approaches to regulatory decision making' 19 *Law and Policy* 59–93.

_____(1997) *Rules and Regulators* (Oxford: Clarendon).

_____(1998) 'Talking about regulation' *Public Law* 77-112.

_____(2000) 'Proceduralizing regulation-Part I' 20 *Oxford Journal of Legal Studies* 597-614.

_____(2001) 'Proceduralizing regulation- Part II' 21 *Oxford Journal of Legal Studies* 33-58.

_____(2001) 'Decentring regulation: Understanding the role of regulation and self-regulation in a "post-regulatory" world' 54 *Current Legal Problems* 103-146.

_____(2002) 'Critical reflections on regulation' *Centre for the Analysis of Risk and Regulation (CARR) Discussion Paper 4/2002*.

_____(2002) 'Regulatory conversations' 29 *Journal of Law and Society* 163-196.

Blumer, H. (1986) *Symbolic Interactionism: Perspective and Method* (Berkley: University of California Press).

Boam, C. (1997) 'Giving the phoenix wings: the Deutsche Telecom/FranceTelecom/Sprint alliance' (1997) 50 *Common Law Conspectus* 426-467.

Bomberg, E. and Peterson, J. (1999) *Decision Making in the European Union* (New York: St. Martin's Press).

Borgatti, S., Hesterly, W. S. and Jones, C. (1997) 'Exchange conditions and social mechanism' 22 *Academy of Management Review* 911-945.

Born, G. (1996) '(Im) materiality and sociality: The dynamics of intellectual property in a computer software research culture' (1996) 4 *Social Anthropology* 101-115.

Börzel, T. A. (1997) 'What's so special about policy networks? – An exploration of the concept and its usefulness in studying European governance' *European Integration Online Papers (EIoP) No 16*, Florence: European University Institute.

Bourdieu, P. (1972) *Esquisse d'une Théorie de la Pratique. Precédé de Trois Etudes d'Ethnologie Kabyle* (Geneve: Droz).

_____(1977) *Outline of a Theory of Practice* (Cambridge: Cambridge University Press, orig. 1972).

_____(1979) *Algeria 1960: Essays* (Cambridge [Eng.]; New York: Cambridge University Press).

_____(1980) 'Le capital social' 32 *Actes de la Recherche en Sciences Sociales* 2-21.

_____(1984) *Distinction: A Social Critique of the Judgment of Taste* (London: Routledge & Kegan Paul, orig. 1979).

_____(1986) 'La force du droit: Eléments pour une sociologie du champ juridique' (1986) 64 *Actes de la Recherche en Sciences Sociales* 3-19.

_____(1986) 'Habitus, code et codification' 64 *Actes de la Recherche en Sciences Sociales* 40-44.

_____ 'What makes a social class?: On the theoretical and practical existence of groups' (1987) XXXII *Berkeley Journal of Sociology* 1-18.

_____(1990) *The Logic of Practice* (Cambridge: Polity, orig. 1979).

_____(1990) *In other Words. Essays Towards a Reflexive Sociology* (Oxford: Polity, orig. 1987).

_____(1991) *Language and Symbolic Power* (Cambridge: Polity in association with Basil Blackwell, orig. 1977-1984).

_____(1993) *The Field of Cultural Production: Essays on Art and Literature* (Cambridge: Polity Press, orig. 1992).

_____(1994) 'Rethinking the state: Genesis and structure of the bureaucratic field' 12 *Sociological Theory* 1-18.

_____(1996) *State Nobility: Elite Schools in the Field of Power* (Oxford: Polity Press, orig. 1989).

Bourdieu, P. and Wacquant, L. (1992) *An Invitation to Reflexive Sociology* (Chicago: University of Chicago Press).

Boyle, J. (1996) *Shamans, Software, and Spleens. Law and the Construction of Information Society* (Cambridge, Mass: Harvard University Press).

_____(1997) 'A politics of intellectual property: Environmentalism for the net' 47 *Duke Law Journal* 87-106.

_____(1997) 'Foucault in cyberspace: Surveillance, sovereignty, and hard-wired censors' 66 *University of Cincinnati Law Review* 177-193.

Business Development Research Consultants, Intermediate Evaluation of the Safer Internet Action Plan Volume 1, Final Report, 31 May 2001, conducted for the European Commission available at http://europa.eu.int/information_society/programmes/evaluation/pdf/report1ia p_en.pdf, (web page visited on 16 May 2003).

Brian, C. (2000) *Shovelling Fuel for a Runaway Train: Errant Economists, Shameful Spenders, and a Plan to Stop Them All* (Berkeley: University of California Press).

Braithwaite, J. and Drahos, P. (2000) *Global Business Regulation* (Cambridge: Cambridge University Press).

Bramsted, E. K. and Melhuish, K. J. (eds) (1978) *Western Liberalism: A History in Documents from Locke to Croce* (London: Longman).

Brewer, A. (1991) 'Economic growth and technical change: John Rae's critique of Adam Smith' 23 *History of Political Economy* 1-12.

Brewer, J. D. (2000) *Ethnography* (Buckingham, Philadelphia, PA: Open University Press).

Breyer, S. (1982) *Regulation and its Reform* (Harvard University Press)

Breyer, S. (1993) *Breaking the Vicious circle: Towards Effective Risk Regulation* (Harvard University Press).

Brunner, J. (1990) *Acts of Meaning* (USA, Harvard University Press).

Burchell, G., Gordon, C. and Miller, P. (eds) (1991) *The Foucault Effect: Studies in Governmentality; with Two Lectures by and an Interview with Michel Foucault* (London: Harvester Wheatsheaf; Chicago: University of Chicago Press).

C

Calhoun, C., LiPuma, E. and Postone M. (eds) (1993) *Bourdieu: Critical Perspectives* (Chicago, Ill: University of Chicago Press).

Cameron J. (1998) 'Patents, copyright, trademarks, and literary property course handbook series' 507 *Practicing Law Institute* 919-945.

Capps, P. and Olsen, H. P. (2002) 'Legal autonomy and reflexive rationality in modern societies' 11 *Social and Legal Studies* 521-552.

Carlberg, R. (2001) 'The persistence of the *dirigiste* model: Wireless spectrum allocation in Europe *à la Francaise*' 54 *Federal Communications Law Journal* 130-163.

Castells, M. (first ed 1996) *The Rise of the Network Society* (Oxford: Blackwell).

_____(2001) *The Internet Galaxy: Reflections on the Internet, Business and Society* (Oxford; New York: Oxford University Press).

Catephores, G. (1994) 'The imperious Austrian: Schumpeter as bourgeois Marxist' (1994) 205 *New Left Review* 3-30.

Cerf, V. G., Clark, D. D., Leiner, B. M., Lynch, D. C., Kahn, R. E., Kleinrock, L., Postel, J., Roberts, L. G. and Wolff, S., 'A Brief history of the Internet by those who made the history, including Barry M. Leiner, Vinton G. Cerf, David D. Clark, Robert E. Kahn, Leonard Kleinrock, Daniel C. Lynch, Jon Postel, Lawrence G. Roberts, Stephen Wolff' available at http://www.isoc.org/internet/history/, (web page visited on 14 May 2003).

Chia, R. (1996) 'The problem of reflexivity in organisational research: Towards a postmodern science of organisation' 3 *Organisation* 31-60.

Christiansen, T. (1994) 'European integration between political science and international relations theory: The end of sovereignty' *European Integration Online Papers (EIoP) No 4*, Florence: European University Institute.

_____(1997) 'Tensions of European governance: Politicized bureaucracy and multiple accountability in the European Commission' 4 *Journal of European Public Policy* 73-90.

Cini, M. (1996) *The European Commission. Leadership, Organisation and Culture in the EU Administration* (Manchester; New York: Manchester University Press; New York: St. Martin's Press).

_____(1996) 'Organisational culture and reform: The case of the European Commission under Jacques Santer' *EUI Working Paper* EC (1996/00/25).

_____(1999) 'Discretion and politicisation in the EU competition policy: The case of merger control' (1999) 12 *Governance* 175-200.

Cini, M., McGowan, L., Nugent, N. W., Paterson E. and Wright, V. (1998) *Competition Policy in the European Union* (London: Macmillan).

Clavin, P. (2000) *The Great Depression in Europe, 1929-1939* (Basingstoke: Macmillan).

Clifford, S. and Marcus, G. (eds) (1986) *Writing Culture: The Poets and Politics of Ethnography* (Berkley, CA: University of California).

Coffey, A. (1999) *The Ethnographic Self: Fieldwork and the Representation of Identity* (London: SAGE).

Coglianese, C. (1997) 'Assessing consensus: The promise and performance of negotiated rulemaking' 46 *Duke Law Journal* 255-1349.

_____(2000) 'Is consensus an appropriate basis for regulatory policy?' in Orts, E. and Deketelaere, K. (eds) (2000) *Environmental Contracts: Comparative Approaches toRegulatory Innovation in the United States and Europe* (Kluwer Law International).

Coleman, J. (1988) 'Social capital in the creation of human capital' 94 *American Journal of Sociology* 95-120 (Supplement).

_____(1990) *Foundations of Social Theory* (Cambridge, Mass.: Harvard University Press).

_____(1993) 'The rational reconstruction of society' 58 *American Sociological Review* 1-15.

Cook, C and Stevenson J. (1994) *Britain in the Depression* (London; New York: Longman).

Cohen, E. (1992) *Le Colbertisme 'High-Tech': Economie des Télécoms et des Grands Projets* (Paris: Hachette).

Cooley, C. H. (1930) *Sociological Theory and Social Research: Selected Papers* (New York, H. Holt and company).

Cotterell, R. (second ed 1992) *The Sociology of Law: An Introduction* (London: Butterworth).

Cover, R. M. (1983) The Supreme Court, 1982 term - Foreword: Nomos and narrative' (1983) 97 *Harvard Law Review* 4-25.

Craig, P. and de Búrca, G. (third ed 2003) *EU Law: Text, Cases, and Materials* (New York: Oxford University Press).

Craig, P. and Harlow, C. (eds) (1998) *Lawmaking in the European Union* (London, Boston: Kluwer Law International).

Cram, L. (2001) 'Imagining the Union: A case of banal Europeanism?' in Wallace, H. (ed) (2001) *Whose Europe? Interlocking Dimensions of Integration* (London: Macmillan, 2001).

Croskery, P. (1993) 'Institutional utilitarianism and intellectual property' 68 *Chicago-Kent Law Review* 631-664.

Cupchik, G. (2001) 'Constructivist realism: An ontology that encompasses positivist and constructivist approaches to the social sciences' 2 *Forum: Qualitative Research* 1, at http://www.qualitative-research.net/fqs-texte/1-01/1-01cupchik-e.htm.

D

Daintith, T. C. (ed) (1988) *Law as an Instrument of Economic Policy: Comparative and Critical Approaches* (Berlin: Walter de Gruyter).

Dang-Nguyen, G., Schneider, V. and Werle, R. (1993) 'Corporate actor networks in European policy making: Harmonizing telecommunications policy' *Max-Planck-Institut für Gesellschaftsforschung (MPIFG) Discussion Paper 93/4*.

_____ (1994) 'Corporate network actors in European policy-making: Harmonising telecommunications policy' 32 *Journal of Common Market Studies* 473-498.

Dasgupta, P. and Stoneman, P. (eds) (1987) *Economic Policy and Technological Performance* (Cambridge: Cambridge University Press).

David, P. A. (1990) 'The computer and the dynamo: A historical perspective on the productivity paradox' *The American Economic Review Papers and Proceedings* 355-361.

Daintith, T. (1979) *Regulation* (Tübingen: Mohr Siebeck).

Dehousse, R. (1997) 'Regulating by networks in the European Community: The role of European agencies' 4 *Journal of Public Policy* 246-255.

Dezalay, Y. and Garth, B .G. (1997) 'Law, lawyers and social capital: "Rule of law" versus relational capitalism' 6 *Social and Legal Studies* 109-141.

_____*Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago, Ill: The University of Chicago Press).

_____(1996) 'Fussing about the forum: categories and definitions as stakes in a professional competition' 21 *Law & Social Inquiry* 285-312.

_____(eds) (2002) *Global Prescriptions: The production, Exportation and Importation of a New Legal Orthodoxy* (Ann Arbor: University of Michigan Press).

Dezalay, Y. (1994) 'The forum should fit the fuss: The economics and politics of negotiated justice' in Cain M. and Harrington C. B. (eds) *Lawyers in a Postmodern World: Transition and Transgression* (Buckingham: Open University Press).

DiMaggio, P. J. (1979) 'A review essay: On Pierre Bourdieu' 84 *American Journal of Sociology* 191-115.

Doern, B. and Wilks, S. (eds) (1998) *Changing Regulatory Institutions in Britain and North America* (Toronto: Toronto University Press).

Dogan, N. (1997) 'Little procedures with big implications' 20 *West European Politics* 31-60.

Drahos, P. (ed) (1999) *Intellectual Property* (Aldershot: Dartmouth/Ashgate).

Dunlop, J. (1984) *Dispute Resolution: Negotiation and Consensus Building* (Auburn Publishing, Dover, Massachusetts)

Durkheim, E. (second ed 1960) *The Division of Labour in Society* (Glencoe, Ill., Free Press, orig. 1902).

_____(2001) *The Elementary Forms of the Religious Life* (Oxford: Oxford University Press, orig. 1912).

Dutilh, P., Ide, N. and Strowel, B. (1997) 'What really happened in Geneva: An inside look at the WIPO treaties' paper presented in the *World Computer Law Congress and 1997 Computer and Telecommunications Law Update.*

E

Edwards, G. and Spence, D. (eds) (second ed 1997) *The European Commission* (Harlow, UK: Longman Current Affairs).

Egeberg, M. (1996) 'Organisation and nationality in the European Commission services' (1996) 3 *Public Administration* 235-248.

_____(1999) 'Transcending intergovernmentalism? Identity and role perceptions of national officials in EU decision making' 6 *Journal of European Public Policy* 456-474.

Elliott, J. (1980) 'Marx and Schumpeter on capitalism's creative destruction: A comparative restatement' 95 *Quarterly Journal of Economics* 45-68.

Estrin, S. (1983) *French Planning in Theory and Practice* (London: Allen and Unwin).

Eucken, W. (1950) *The Foundations of Economics: History and Theory in the Analysis of Economic Reality* (London, Edinburg, Glasgow: William Hodge and Company Limited, orig. 1940).

European Commission, DG Enterprise (2003) *Enforcing Small Firms' Patent Rights. A Publication from the Innovation/SMEs Programme Part of the Fifth Research Programme* (Luxemburg: Office for Official Publications of the European Union).

European Commission, Report by the Inspectorate-General of 7 July 1999 'Designing Tomorrow's Commission - A Review of the Commission's Organisation and Operation,' available at http://europa.eu.int/comm/reform/decode/screening_en.pdf, (web page visited on 16 may 2003).

European Commission Communication SEC (2000) 2305/5 of 21 December 2000 on the Appraisal, Selection and Appointment of Senior Commission Officials.

Commission Report on the Implementation and Effects of Directive 91/250/EEC, COM (2000) 199 final of 10 April 2000.

European Commission, 'Patentability of Computer Implemented Inventions' Consultation Paper by the Services of the Directorate General for the Internal Market of 19 October 2000, available at http://europa.eu.int/comm/internal_market/en/indprop/comp/softpaten.htm

(web page visited on 16 May 2003).

European Commission, Guidelines on Mobility SEC (12 February 2002) 146.

Evans, T. M. S. (1999) 'Bourdieu and the logic of practice: Is all giving Indian-giving or is it "generalised materialism" not enough' 17 *Sociological Theory* 3-31.

Everson, M. (1998) 'Administering Europe?' 36 *Journal of Common Market Studies* 195-216.

F
Featherstone, K. (1994) 'Jean Monnet and the democratic deficit in the European Union' 32 *Journal of Common Market Studies* 149-170.

Flynn, L. (1995) 'Telecommunications and EU integration' 3 *European Community Utilities Law and Policy* 37-65.

Foucault, M. (1972) *The Archaeology of Knowledge* (London: Tavistock Publications, orig. 1969).

_____(1979) *Discipline and Punish: The Birth of the Prison* (Harmondsworth: Penguin, orig. 1975).

_____(1981) *The history of Sexuality Vol 1: An introduction* (Harmondsworth: Penguin, orig. 1976).

_____(1990) *The Care of the Self: The History of Sexuality Vol III* (New York: Vintage Books, orig. 1984).

_____(1990) *Madness and Civilisation: A History of Insanity in the Age of Reason* (London: Routledge, orig. 1961).

Freeman, L. C. (1979) 'Centrality in social networks: Conceptual clarification' 1 *Social Networks* 215-239.

Freeman, J. (1996) 'Collaborative governance in the administrative state' 45 *UCLA Law Review* 1-98.

Froomkin, M. (2002) 'ICANN'S Uniform Dispute Resolution Policy: Causes and (Partial) Cures' 67 *Brooklyn Law Review* 608-718.

_____(2000) 'Wrong turn in cyberspace: Using ICANN to route around the APA and the Constitution' 50 *Duke Law Journal* 17-184.

Frow, J. (1998) 'Repetition and limitation: Computer software and copyright law' 29 *Screen* 4-20.

Fuchs, G. (1994) 'Policy-making in a system of multi-level governance. The Commission of the European Community and the restructuring of the telecommunications sector' 1 *Journal European of Public Policy* 177-194.

Fukuyama, F. (1995) *Trust: The Social Virtues and the Creation of Prosperity* (London: Hamish Hamilton).
_____ (1999) *The Great Disruption. Human Nature and the Reconstitution of Social Order* (London: Profile Books).

G
Gambetta, D. (ed) (1998) *Trust: Making and Breaking Cooperative Relations* (Oxford: Basil Blackwell).

Gannon, P. (1997) *Trojan Horses and National Champions* (Apt-amatic books, 1997).

Garfinkel, H. (1967) *Studies in Ethnomethodology* (Cambridge: Polity).

_____(1996) 'Ethnomethodology's programme' 59 *Social Psychology Quarterly* 5-21.

Gargiulo, M. (1993) 'Two-step leverage: Managing constraint in organizational politics' 38 *Administrative Science Quarterly* 1-19.

Geertz, C. (1973) *The Interpretation of Cultures: Selected Essays* (New York: Basic Books).

Gerber, D. J. (1998) *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford: Clarendon Press; New York: Oxford University Press).

Gerth, H. and Mills, C. W. (eds) (1991) *From Max Weber: Essays in Sociology* (London: Routledge).

Gibbons, T. (second ed 1998) *Regulating the Media* (London: Sweet and Maxwell).

Goffman, E. (1959) *The Presentation of Self in Everyday Life* (New York: Doubleday; London: Mayflower).

_____(1967) *Interaction Ritual: Essays in Face-to-Face Behavior* (London; Chicago: The Penguin Press: Aldine).

Goldberg, D., Prosser, T. and Verhulst, S. (eds) (1998), *Regulating the Changing Media: A Comparative Study* (Oxford: Clarendon Press; New York: Oxford University Press).

Gordon, C. (ed) (1980) *M. Foucault, Power/Knowledge: Selected Interviews and Other Writings, 1972-1977* (Brighton: Harvester Press).

Grabosky, P. N. (1995) 'Using Non-Governmental Resources to Foster Regulatory Compliance' 8 *Governance* 527-550.

Grabowsky, P. and Braithwaite, J. (eds) (1993) *Business Regulation and Australia's Future* (Canberra: Australian Institute of Criminology).

Graham, B., Gordon, C. and Miller, P. (eds) (1991) *The Foucault Effect: Studies in Governmentality: With two Lectures By and an Interview With Michel Foucault* (London: Harvester Wheatsheaf; Chicago University of Chicago Press).

Graham, C. and Prosser, T. (1991) *Privatising Public Enterprises: Constitutions, the State and Regulation in Comparative Perspective* (Oxford: Clarendon Press).

Granovetter, M. (1973) 'The strength of weak ties' (1973) *78American Journal of Sociology* 1360-1380.

Grendstad, G. and Selle, P. (1995) 'Cultural theory and the new institutionalism' (1995) *7 Journal of Theoretical Politics* 5-27.

Grewlich, K. W. (1999) 'Good governance in the age of cyberspace' 1 *Info* 264-270.

Grosz, E. (ed) (1999) *Becomings: Explorations in Time, Memory and Futures* (Ithaca: Cornell University Press).

Gulati, R. and Garguilo, M. (1999) 'Where do interorganizational networks come from?' 104 *American Journal of Sociology* 1439-1493.

Gulati, R. and Singh, H. (1998) 'The architecture of cooperation: Managing coordination uncertainty and interdependence in strategic alliances' 43 *Administrative Science Quarterly* 781-814.

Gurvitch, G. (1947) *Sociology of Law* (Butler and Tanner).

Gustavsson, J. and Lewin, L. (eds) (1996) *The Future of the Nation State* (London; New York: Routledge).

H

Haas, B. E. (1958) *The Uniting of Europe: Political, Economic and Social Forces, 1950 – 1957* (London: Stevens).

Haas, P. M. (1992) 'Introduction: Epistemic communities and international policy co-ordination' 46 *International Organisation* 1-35.

Haber, H. F. (1994) *Beyond Post-Modern Politics: Lyotard, Rortry, Foucault* (New York: Routledge).

Habermas, J. (1989) *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Cambridge: Polity).

_____(1993) *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Oxford : Polity, 1996).

_____(1995) 'Remarks on Dieter Grimm's "Does Europe need a Constitution?" ' 1 *European Law Journal* 301-307.

Hall, C., Hood, C. and Scott, C. (1999) *Telecommunications Regulation: Culture, Chaos and Interdependence inside the Regulatory Process* (London: Routledge).

Hallstein, W. (1972) *Europe in the Making* (London: Allen and Unwin; New York: Norton, orig. 1969).

Hancher, L. and Moran, M. (1989) *Capitalism, Culture and Economic Regulation* (Oxford: Clarendon Press).

Hardt, M. (1993) *G. Deleuze: An Apprenticeship in Philosophy* (Minneapolis: University of Minnesota Press).

Harlow, C. (1996) 'Codification of EC administrative procedures? Fitting foot to the shoe or the shoe to the foot' 2 *European Law Journal* 3-25.

_____(2002) *Accountability in the European Union* (Oxford: Oxford University Press).

Harrison, K. (1998) 'Talking with the donkey: Cooperative approaches to environmental protection' 2 *Journal of Industrial Ecology* 51-72.

Harter, P. (1997) 'Fear of commitment: An affliction of adolescents' 46 *Duke Law Journal* 1389-1423.

Hayek, F. A. (1949) *Individualism and Economic Order* (London: Routledge & Kegan Paul).

_____(1960) *The Constitution of Liberty* (London: Routledge & Kegan Paul).

Hayward, J. E. C. (ed) (1995) *Industrial Enterprise and European Integration: From National to International Champions in Western Europe* (Oxford: Oxford University Press).

Heclo, H. and Wildavsky, A. (second ed 1981) *The Private Government of Public Money: Community and Policy inside British Politics* (London: Macmillan).

Held, D. (2002) 'Law of states, law of peoples' 8 *Legal Theory* 1-44.

Hettingerm E. C. (1989) 'Justifying intellectual property' 18 *Philosophy and Public Affairs* 31-52.

Héritier, A., Christoph K., and Mingers, S. (1996) *Ringing the Changes in Europe: Regulatory Competition and the Redefining of the State: Britain, France, Germany* (Berlin, New York: de Gruyter).

Hirschman, A. O. (1984) *Getting Ahead Collectively: Grass-Roots Organizations in Latin America* (New York: Pergamon Press).

Hood, C. and Scott, C. (2000) 'Regulating government in a "managerial" age: Towards a cross-national perspective' *Centre for the Analysis of Risk and Regulation (CARR) Discussion Paper 1/2000.*

I

Iggers, G., Enfantin, B. P. and Barrault, E. (second ed 1958) *The Doctrine of Saint-Simon: An Exposition; First Year, 1828-1829* (New York: Schocken Books, orig. 1828).

Immergut, E. M. (1998) 'The theoretical core of new institutionalism' 26 *Politics and Society* 5-34.

J

Jachtenfuchs, M. (1995) 'Theoretical perspectives on European governance' 1 *European Law Journal* 115-133.

Jacob, J. (1963) *The Death and Life of Great American Cities* (New York: Random House).

_____(1984) *Cities and the Wealth of Nations* (New York: Random House).

Jenkins, R. (1982) 'Pierre Bourdieu and the reproduction of determinism' 16 *Sociology* 270-281.

Joerges, C. (2001) 'Law science and the management of risks to health at the national, European and international level-stories on baby dummies, mad cows and hormones in beef' 7 *Columbia Journal of European Law* 1-19.

_____(2001) 'Deliberative supranationalism: A defence' *European Integration Online Papers (EIoP) No 8*, Florence, European University Institute.

Joerges, C. et al (eds) (1997) *Integrating Scientific Expertise into Regulatory Decision - Making* (Baden-Baden: Nomos).

Johnson, D. R. and Post, D. (1996) 'Law and borders: The rise of law in cyberspace' 48 *Stanford Law Review* 1367-1402.

Jourdain, L. (1996) 'La Commission Européenne et la construction d'un nouveau modèle d'intervention publique' 43 *Revue Française des Sciences Sociales* 59-82.

K

Kahin, B. and Nesson, C. (eds) (1997) *Borders in Cyberspace, Information Policy and the Global Information Infrastructure* (Cambridge, Mass: MIT Press).

Kassim, H. (1994) 'Policy networks, networks and European Union policy-making: A sceptical view' 17 *West European Politics* 15-27.

Katzenstein, P. J. (1985) *Small States in World Markets: Industrial Policy in Europe* (Ithaca, N.Y.: Cornell University Press).

King, A. (2000) 'Thinking Bourdieu against Bourdieu: A practical critique of the habitus' 18 *Sociological Theory* 417-434.

Knoke, D. (1990) *Political Networks. The Structural Perspective* (Cambridge: Cambridge University Press).

Koeble, J. (1995) 'The new institutionalism in political science and sociology' 27 *Comparative Politics* 231-244.

Kohler-Kock, B. (1996) 'Catching up with change: The transformation of governance in the European Union' 3 *Journal of European Public Policy* 359-380 (Supplement).

Koren, N. E. (1996) 'Cyberlaw and social change: A democratic approach to copyright' 215 *Cardozo Arts & Entertainment Law Journal* 272-293.

Kurzweil, R. (1990) *The Age of Intelligent Machines* (Cambridge, Mass: MIT Press).

L

Latour, B. (1996) *Aramis or the Love of Technology* (Cambridge, Mass.: Harvard University Press).

Landau, R. and Rosenberg, N. (eds) (1986) *The Positive Sum Strategy: Harnessing Technology for Economic Growth* (Washington, D.C: National Academy Press).

Landes, D. S. (1960) *The Unbound Prometheus: Technological Change and Industrial Development in Western Europe from 1750 to the Present* (London: Cambridge University Press).

Landes, W. M. and Posner, R. A. (1989) 'An economic analysis of copyright law' 18 *Journal of Legal Studies* 325-363.

Lawton, T. C. (2000) 'Uniting European industrial policy: A commission agenda for integration' in Nugent, N. (ed) (2000) *At the Heart of the Union: Studies of the European Commission* (Macmillan; St Martins).

Lemley, M. A. (1996) 'Antitrust and the Internet standardisation problem' 28 *Connecticut Law Review* 1041-1094.

Lenaerts, K. and Verhoevenm A. (2000) 'towards a new framework for executive rule making in the EU? The contribution of the new comitology decision' (2000) 37 *Common Market Law Review* 645-686.

Leonardi, R., Nanetti, P. and Putnam, R. (1993) *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton, N.J: Princeton University Press).

Lessig, L. (1995) 'The path of cyberlaw' 104 *Yale Law Journal* 1743-1770.

_____(1997) 'What cyberlaw might teach' *Technology Law Review Working Papers*.

_____(1999) *Code and Other Laws in Cyberspace* (New York, N.Y.: Basic Books).

_____(2001) *The Future of Ideas: The Fate of the Commons in a Connected World* (New York: Random House).

Lévi-Strauss, C. (1963) *Structural Anthropology* (New York: Basic Books, orig. 1958).

Levine D. N. (ed) (1971) *Georg Simmel: On Individuality and Social Forms: Selected writings of Georg Simmel* (Chicago, Ill; London: University of Chicago Press, orig. 1908).

Littlechild, S. C. (second ed 1986) *The Fallacy of the Mixed Economy: An 'Austrian' Critique of Recent Economic Thinking and Policy* (London: Institute of Economic Affairs).

Loader, B. D. (ed) (1997) *The Governance of Cyberspace* (London; New York: Routledge).

Love, J. and Nader, R. (1998) 'Microsoft's ambitions and antitrust policy' Remarks at the Cato Institution Policy Forum on Antitrust and Microsoft, April 20, available at http://www.essential.org/antitrust/ms/catoapril20.html and http://lists.essential.org/1998/info-policy-notes/msg00020.html, (web pages visited on 16 May 2003).

Luhmann, N. (1979) *Trust and Power* (Chichester: Wiley).

_____(1985) *A Sociological Theory of Law* (London: Routledge & Kegan Paul).

_____(1992) 'Operational closure and structural coupling: The differentiation of the legal system' 13 *Cardozo Law Review* 1419-1441.

_____(1995) *Social Systems* (Stanford, Calif.: Stanford University Press, orig. 1984).

Lury, C. (1993) *Cultural Rights: Technology, Legality Personality* (London; New York: Routledge).

Lyotard, F. (1984) *The Postmodern Condition. A Report on Knowledge* (Manchester: Manchester University Press, orig. 1979).

M
Marin, B. and Mayntz, R. (eds) (1991) *Policy Networks - Empirical Evidence and Theoretical Considerations* (Frankfurt/M.: Campus).

Majone, G. (1996) *Regulating Europe* (London; New York: Routledge).

_____(1997) 'From the positive to the regulatory state: Causes and consequences of changes in the mode of governance' 17 *Journal of Public Policy* 139-165.

Marsh, D. and Rhodes, R. A. W. (eds) (1992) *Policy Networks in British Government* (Oxford: Clarendon Press; Oxford; New York: Oxford University Press).

Mazey, S. and Richardson, J. (eds) (1993) *Lobbying in the European Union* (Oxford; New York: Oxford University Press).

MacLeod, R. M. (ed) (1986) *Technology and the Human Prospect* (London: Pinter).

Mead, G. H. (1967) *Mind, Self and Society: From the Standpoint of a Social Behaviourist* (Chicago: University of Chicago Press, orig. 1934).

Millard C. (1996) 'A European perspective' 14 *John Marshall Journal of Computer and Information Law* 269-294.

Mitnick, B. M. (1980) *The Political Economy of Regulation: Creating, Designing and Removing Regulatory Forms* (New York: Columbia University Press).

Moran, L. (2002) 'Review article: Understanding the regulatory state' 32 *British Journal of Political Science* 391-413.

Moravcsik, A. (1991) 'Negotiating the Single European Act: National interests and conventional statecraft in the European Community' 45 *International Organization* 19-56.

_____(1993) 'Preferences and power in the European Community' 31 *Journal of Common Market Studies* 473-524.

Mokyr, J. (1985) *The Economics of the Industrial Revolution* (London: Allen & Unwin).

Mueller, M. (1999) 'ICCAN and Internet governance: Sorting through the debris of self-regulation' 1 *Info* 497-520.

Mundy, M. (ed) (2002) *Law and Anthropology* (Aldershot, Burlington, USA: Ashgate/Dartmouth).

Murphy, W. T. (1997) *The Oldest Social Science? Configurations of Law and Modernity* (Oxford: Clarendon Press).

Murray, A. and Scott, C. (2002) 'Controlling the new media: Hybrid responses to new forms of power' 65 *Modern Law Review* 491-516.

N

Nader, L. and Nader, C. (1985) 'A wide angle on regulation: An anthropological perspective' in Noll R. (ed) (1985) *Regulatory Policy and the Social Sciences* (Berkeley: University of California Press, 1985).

Netanel, N. W. (1996) 'Copyright and a democratic civil society' 106 *Yale Law Journal* 283-387.

Neyer, N. (2000) 'The regulation of risks and the power of people: Lessons from the BSE crises' *European Integration Online Papers* (EIoP) *No 4*, Florence: European University Institute.

Noll, R. (ed) (1985) *Regulatory policy and the Social Sciences* (Berkeley: University of California Press).

Nugent, N. (ed) (second ed 2000) *At the Heart of the Union: Studies of the European Commission* (Macmillan; St Martins).

O

Ogus, A (1994) *Legal Form and Economic Theory* (Clarendon Law Series, Oxford, 1994).

_____(1995) 'Rethinking Self-regulation' 15 *Oxford Journal of Legal Studies* 97-108.

P

Page, E. G. (1997) *People Who Run Europe* (Oxford: Clarendon Press).

Palmer, T. G. (1989) 'Intellectual property: A non-Posnerian law and economics approach' *Hamline Law Review* 261-304.

Parsons, T. (second ed 1991) *The Social System* (London: Routledge, orig. 1951).

Pavlich, G. (1996) 'The power of community mediation: Government and formation of self-identity' 30 *Law and Society Review* 707-733.

Perry, D. (2000) 'Trademarks as commodities: The famous roadblock to applying trademark dilution law in cyberspace' 32 *Connecticut Law Review* 1127-1131.

Patterson, J. and Teubner, G. (1998) 'Changing maps: Empirical legal autopoiesis' 7 *Social and Legal Studies* 451-486.

PbT Consultants, 'The Results of the European Commission Exercise on the Patentability of Computer Implemented Inventions' (2000) available at

http://europa.eu.int/comm/internal_market/en/indprop/comp/softanalyse.pdf, (web page visited on 16 May 2003).

Peterson, J. (1991) 'Technology policy in Europe: Explaining the Framework program and Eureka in theory and practice' XXIX *Journal of Common Market Studies* 269-290.

Peterson, J. and Sharp, M. (1998) *Technology Policy in the European Union* (Basingstoke: Macmillan).

Posner, R. A. (1979) 'The Chicago school of economic analysis' 127 *University of Pennsylvania Law Journal* 925-952.

_____(fifth ed 1998) *Economic Analysis of Law* (Boston: Aspen Law & Business).

Post, G. (1997) 'Governing cyberspace' 43 *Wayne Law Review* 155-171.

_____(2000) 'What Larry doesn't get: Code, law and liberty in cyberspace' 52 *Stanford Law Review* 1439-1459.

Potter, G. (2000) 'Bourdieu against Alexander: Reality and reduction' 30 *Journal for the Theory of Social Behaviour* 229-247.

Powel, W. and DiMaggio, P. J. (1991) *The New Institutionalism in Organisational Analysis* (Chicago: University of Chicago Press).

Pildes R. and Sunstein C. R. (1995) 'Reinventing the regulatory state' 62 *University of Chicago Law Review* 7-33.

Prosser, T. (1999) 'Theorising utility regulation' 62 *Modern Law Review* 196-217.

Putnam, R. (1988) 'Diplomacy and domestic politics: The logic of two-level-games,' 42 *International Organisation* 427-460.

_____(1993) 'The prosperous community: Social capital and public life' 4 *American Prospect* 13-19.

_____(1995) 'Bowling alone: America's declining social capital' 6 *The Journal of Democracy* 65-78.

_____(1996) 'The strange disappearance of civic America' 7 *American Prospect* 24-38.

_____(2000) *Bowling Alone. The Collapse and Revival of American Community* (New York: Simon and Schuster).

_____(ed) (2002) *Democracies in Flux: The Evolution of Social Capital in Contemporary Society* (New York: Oxford University Press).

R
Rabinow, P. (ed) (1986) *The Foucault Reader* (Harmondsworth: Penguin).

Rabinow, P. (ed) (1997) *Ethics, Subjectivity and Truth: Essential Works of Foucault 1954-1984, Volume I* (New York: New Press).

Radice, L. (1984) *Beatrice and Sidney Webb: Fabian Socialists* (London: Macmillan).

Rae, J. (1905) *The Sociological Theory of Capital: A Complete Reprint of the 'New Principles of Political Economy'* (New York: The Macmillan Company; London: Macmillan and Co., ltd, orig. 1834).

Reidenberg, J. (1998) 'The formulation of information policy rules through technology' 76 *Texas Law Review* 553-594.

Rescher, N. (1993) *Pluralism: Against the Demand for Consensus* (Clarendon Press, Oxford).

Rhodes R. A. W. (1996) *Understanding Governance* (Buckingham: Open University Press).

Richardson, J. G. (ed) (1986) *Handbook of Theory and Research for the Sociology of Education* (New York: Greenwood Press).

Richardson, J. (ed) (second ed 2001) *European Union: Power and Policy-Making* (London: Routledge).

Rose, N. S. (1987) 'Beyond the public/private division: Law, power and the family' 14 *Journal of Law & Society* 61-76.

_____(1994) 'Expertise and the government of conduct' 14 *Studies in Law, Politics & Society* 359-397.

_____(1996) 'The death of the social? Re-figuring the territory of government' 25 *Economy & Society* 327-356.

_____(1996) 'Governing "advanced" liberal democracies,' in Barry, A., Osborne, T. and Rose, N. (eds) *Foucault and Political Reason* (London: UCL Press).

_____(1999) *Powers of Freedom: Reframing Political Thought* (Cambridge: Cambridge University Press).

Rose, N. S. and Valverde, M. (1998) 'Governed by law?' 7 *Social & Legal Studies* 541-551.

Rose, N. S. and Miller, P. (1992) 'Political power beyond the state: Problematics of government' *British Journal of Sociology* 173-205.

Rose, M. (1993) *Authors and Owners. The Invention of Copyright* (Cambridge: Harvard University Press).

Rosenau, J. N. and Czempiel E. O. (eds) (1992) *Governance Without Government: Order and Change in World Politics* (Cambridge: Cambridge University Press).

Rosenberg, N. (1972) *Technology and the American Economic Growth* (New York; London: Harper and Row).

_____(1982) *Inside the Black Box: Technology and Economics* (Cambridge: Cambridge University Press).

_____(1994) *Exploring the Black Box. Technology, Economics and History* (Cambridge, [England]; New York: Cambridge University Press).

Rossi, J. (1997) 'Participation run amok: The costs of mass participation for deliberative agency decisionmaking' 9 *Northwestern University Law Review* 173-249.

Ruggiero, G. (1981) *The History of European Liberalism* (Gloucester (Mass.): Peter Smith, orig. 1927).

Ruggie, J. G. (1993) 'Territoriality and beyond: Problematising modernity in international relations' 47 *International Organization* 139-174.

S
Sabatier, P. and Hank, C. (eds) (1993) *Policy Change and Learning: An Advocacy Coalition Approach* (Boulder; Colo: Westview Press).

Salvadori, M. (1977) *The Liberal Heresy: Origins and Historical Development* (London: Macmillan).

Sandholtz, W. (1992) *High-tech Europe. The Politics of International Cooperation* (Berkeley: University of California Press).

Sandholtz W. and Stone Sweet, A. (eds) (1998) *European Integration and Supranational Governance* (New York: Oxford University Press).

Sandholtz W. and Zysman J. (1989) '1992: Recasting the European bargain' 42 *World European Politics* 95-128.

Santos, Boaventura de Sousa (2002) *Towards the New Legal Common Sense* (London: Butterworths).

Sassen, S. (2000) 'Digital networks and the state: Some governance questions' (2000) 17 *Culture, Theory and Society* 19-32.

Schmidt, S. K. (1998) 'Commission activism: Subsuming telecommunications and electricity under European competition law' 5 *Journal of European Public Policy* 169-184.

_____(1996) 'Sterile debates and dubious generalisations: European integration theory tested by telecommunications and electricity' 16 *Journal of Public Policy* 233-271.

Schumpeter, J. A. (1983) *The Theory of Economic Development: An inquiry into Profits, Capital, Credit, Interest, and the Business Cycle* (New Brunswick; Transaction Books, orig. 1934).

_____(seventh ed 1987) *Capitalism, Socialism and Democracy* (London: Unwin Paperbacks, orig. 1942).

Scott, C. (1995) 'Changing patterns of European community utilities law and policy: An institutional hypothesis' in Shaw, J. and More, G. (eds) (1995) *New Legal Dynamics of European Union* (New York: Clarendon Press).

Scott, C. (1998) 'The proceduralisation of telecommunications Law' 22 *Telecommunications Policy* 243-254.

_____(2002) 'The governance of the European Union: The potential for multi-level control' 8 *European Law Journal* 59-79.

_____ (2003) 'Regulation in the age of governance: The rise of the post-regulatory state' in Jordana, J. and Levy-Faur, D. (2003) *The Politics of Regulation* (Cheltenham: Edward Elgar).

Selle, P. (1995) 'Cultural theory and the new institutionalism' 7 *Journal of Theoretical Politics* 5-27.

Sen, K. A. (1977) 'Rational fools: A critique of the behavioural foundations of economic theory' 1 *Philosophy and Public Affairs* 317-344.

Sherman, B. (1991) 'Patentability of computer-related inventions' 13 *European intellectual Property Review* 85-112.

Sherman, B. and Strowel, A. (eds) (1994) *Of Authors and Origins: Essays on Copyright Law* (Oxford: Clarendon Press).

Schlag, P. (1993) 'Clerks in the maze' 91 *Michigan Law Review* 2053-2069.

_____(1995) 'Law and the postmodern mind: Intellectualism' 16 *Cardozo Law Review* 111-1118.

Schneider, V., Dang-Nguyen, G. and Werle R. (1994) 'Corporate network actors in European policy-making: Harmonising telecommunications policy' 32 *Journal of Common Market Studies* 473-498.

Shore, C. (2000) *Building Europe, The Cultural Politics of European Integration* (London: Routledge).

_____(2001) 'European Union and the politics of culture' *Bruges Group Occasional Paper No 42*.

Silverman, D. (1985) *Qualitative Methodology and Sociology. Describing the Social World* (Aldershot: Gower).

Singer, O. (1990) 'Policy communities and discourse coalitions. The role of policy analysis in economic policy making' 11 *Knowledge: Creation, Diffusion, Utilization* 428-458.

Smith, A. (1991) *The Wealth of Nations* (London: Everyman's Library, orig. 1776).

Snyder, F. G. (1990) *New Directions in European Community Law* (London: Weidenfeld and Nicolson).

Sornarajah, M. (1994) *The International Law on Foreign Investment* (Cambridge; New York, NY, USA: Cambridge University Press).

Strasser, M. (2000) 'The Rational basis of trademark protection revisited: Putting the dilution doctrine into context' 10 *Fordham Media & Entertainment Law Journal* 375-425.

T

Taylor, K. (1982) *The Political Ideas of the Utopian Socialists* (London: Cass).

Technological Options Assessment (STOA) Programme of the European Parliament, PE 167 327/Fin.St., October, 1998 (PE 167 327/ Fin. St.).

Teubner, G. (1983) 'Substantive and reflexive elements of modern law' 17 *Law and Society Review* 239-285.

_____(ed) (1986) *Dilemmas of Law in the Welfare State* (Berlin; New York: Walter de Gruyter).

_____(ed) (1987) *Juridification of the Social Spheres* (Berlin: De Gruyter).

_____(ed) (1987) *Autopoietic Law: A New Approach to Law and Society* (Berlin: de Gruyter).

_____(1989) 'How the law thinks: Toward a constructivist epistemology of law' 23 *Law and Society Review* 727-757.

_____(1992) 'The two faces of Janus: Rethinking legal pluralism' 13 *Cardozo Law Review* 1443- 1462.

_____(1993) *Law as an Autopoietic System* (Oxford, UK; Cambridge, Mass., USA: Blackwell Publishers).

_____(ed) (1997) *Global Law Without a State* (Aldershot: Dartmouth Publishing).

Thatcher, M. (1999) *The Politics of Telecommunications* (New York: Oxford University Press).

_____ (2001) 'The EU Commission and national governments as partners: EC regulatory expansion in telecommunications 1979-2000' *Centre for the Analysis of Risk and Regulation (CARR) Discussion Paper 2/2001*.

Travers, M. (2001) *Qualitative Research Through Case Studies* (London: SAGE).

Trondal, J. (2001) 'The parallel administration of the European Commission: National officials in European clothes?' *Arena Working Papers 01/25*.

V

Vandenberghe, F. (1999) 'The real is relational: An epistemological analysis of Bourdieu's generative structuralism' 17 *Sociological Theory* 32-68.

Van Schendelen, M. P. C. M. (ed) (1998) *EU Committees as Influential Policy Makers* (Brookfield, Vt.: Ashgate).

Vogel, D. (2001) 'The new politics of risk regulation in Europe' *Centre for the Analysis of Risk and Regulation (CARR) Discussion Paper 3/2001*.

Vos, E. (1997) 'The rise of committees' 3 *European Law Journal* 210-229.

W

Wacquant, L. (1989) ' Towards a reflexive sociology - a workshop with Pierre Bourdieu' 7 *Sociological Theory* 26-63.

Wallace, H., Wallace, W. and Webb C. (eds) (second ed 1983) *Policy Making in the European Community* (London: John Wiley & Sons).

Wallace, H. (ed) (2001) *Whose Europe? Interlocking Dimensions of Integration* (London: Macmillan).

Wallertsein, I. (1979) *The Capitalist World-Economy* (Cambridge: Cambridge University Press/Maison des Sciences de l'Homme).

Ward, J. R. (1994) 'The industrial revolution and British imperialism, 1750-1850' 47 *The Economic History Review* 44-65.

Weber, M. (second ed 1992) *The Protestant Ethic and the Spirit of Capitalism* (London: Routledge, orig. 1904).

Webster, F. (second ed 1995) *Theories of the Information Society* (London: Routledge).

Weiler, J. H. H. (1991) 'The transformation of Europe' 100 *Yale Law Journal* 2403-2483.

Weinberg, J. (1997) 'Rating the net' (1997) 19 *Hastings Communication & Entertainment Law Journal* 453-482.

_____ (2000) 'ICANN and the problem of legitimacy' 50 *Duke Law Journal* 187-260.

Weir, D. R. (1984) 'Life under pressure: France and England, 1670-1870' 42 *Journal of Economic History* 27-47.

Weisberg, R. (1992) 'Autopoiesis and positivism' 13 *Cardozo Law Review* 1693-1728.

Wilson, J. Q. (1980) *The Politics of Regulation* (New York: Basic Books).

Wolfe, A. (1992) 'Sociological theory in the absence of people: The limits of Luhmann's systems theory' 13 *Cardozo Law Review* 1729-1743.

Woolcock, M. (1998) 'Social capital and economic development: Toward a theoretical synthesis and policy framework' 27 *Theory and Society* 151-208.

Wohlgemuth, M. (2002) 'Unification, Integration, Globalisation: The German social market economy facing a threefold challenge' working paper *Walter Eucken Institut, Freiburg and University of Witten/Herdecke*.