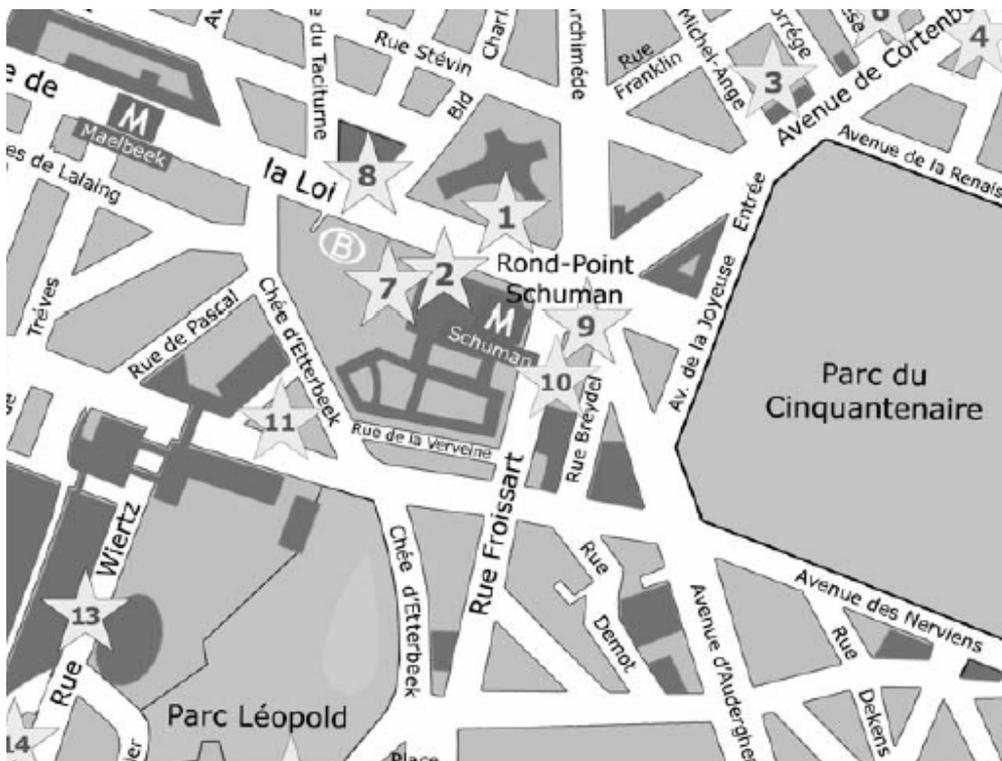


‘Where you stand depends on where you sit: “Improving” the Bolkestein Directive’



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Table of Contents

Abstract.....	6
1. Introduction.....	7
1.1 Research Topic.....	7
1.2 Research Question	9
1.3 Research Methodology/ Research Outline.....	10
1.3 Research limitations.....	14
2. Power, decision-making and interest group concepts.....	15
2.1 Interpreting Power and Influence.....	15
2.3 Interest group theories.....	18
2.3.1 On interest groups	18
2.3.2 Theories of the state-interest groups relations	21
2.3.3 The role of interest groups in policymaking: Lobbying or influencing?	22
3. The Services directive vis-à-vis EU theoretical concepts.....	24
3.1 Theories of EU Integration and EU Governance.....	24
3.1.1 Theories of European Integration	24
3.1.2 On EU Governance and Policy Making: Where is the locus of power?.....	26
3.2 1999-2004: ‘It’s the Internal Market Stupid!’	31
3.2.1 History.....	31
3.2.2 The Services Directive.....	33
3.3 Welcome to the Brussels Lobbyocracy.....	35
3.3.1 Lobbying begets more lobbying!	35
3.3.2 EU-Interest groups relations: searching for willing channels of influence.....	37
3.4 The Commission: a ‘purposeful opportunist’	40
3.4.1 Primus inter pares	42
3.4.2 ‘Institutionalizing’ the Norms.....	44
3.4.3 New Institutionalism: Institutions Matter!.....	46
3.4.5 Breaking the Norms: The beginning of a fiasco	50
3.4.6 Mapping the Arena	52
3.5 2004-2006: The Frankenstein Directive	54
3.5.1 The new Commission and the new strategy	54
3.5.2 Policy-making and attention shifting.....	57
3.5.3 The Polish Plumber.....	59
3.5.4 Bad Timing!	64
3.6 European Parliament: Multiple influence venues	67
3.6.1 The ‘divided loyalties’ of the MEP.....	67
3.6.2 European parliament and Interest Groups.....	69
3.6.3 The Co-decision procedure	69
3.7 The Directive at the Parliament	75
3.8 The end.....	82
3.9 Who pays? Who gains?.....	84
4. Conclusion	86
Bibliography	88

List of Tables

Table 1: Main Decision-Making flows EU and Member States.....	28
Table 2: Timeline of the Services Directive	34
Table 3: Institutional Context for Policy Change.	49
Table 4: The Co-decision Procedure.....	72

List of Abbreviations

CEO: Corporate Europe Observatory

EC: European Commission

ECSC: European Coal and Steel Community

EP: European Parliament

ERT: European Round Table of Industrialists

ETUC: European trade Union Confederation

EU: European Union

EUAPME: European Association of Craft Small and Medium-Sized Enterprises

EUPA: European Union Public Affairs

IGC: Intergovernmental Conference

IMCO: Committee for Internal Market and Consumer Protection, European Parliament

DG MARKET: Directorate General of Internal Market

NGO: Non Governmental Organization

P.A.: Public Affairs

SEA: Single European Act

TEC: Treaty of the European Communities

TEU: Treaty of the European Union

UNICE: Confederation of European Business

USA: United States of America

Abstract

The aim of this project was to assess in which way different groups tried to influence the legislative process regarding the Services Directive. Tabled by the Commission in the early 2004 while the Dutch Frits Bolkestein was Commissioner for Internal Market, this Directive, also called the ‘Bolkestein Directive’, desired to liberalize the European services sector.

By conducting interviews with three major stakeholders, we examine the reason why the European Parliament in its first reading altered the nature of the directive by reducing its scope and omitting its key points. Our timeline is the presentation of the Directive in 2004 and until the first reading of the Parliament in 2006. We conclude that with its choice not to consult with the different parties before presenting the draft directive, the Commission empowered some lobby groups while it weakened others. Moreover, we suggest that the outcome was also influenced by the French Referendum on the European Constitutional Treaty; by employing the technique of issue manipulation and attention shifting, the groups opposing the Directive managed to link the two issues; the Services Directive became a ‘hot’ political matter with the vast majority of the public opinion being against it. We propose that the final outcome, meaning the vote of the European Parliament, clearly illustrated this development.

1. Introduction

1.1 Research Topic

This research will put the hotly debated Services Directive under the microscope. The directive put forward by the Commission while the Dutch Frits Bolkestein was Commissioner of Internal Market in 2004, aimed at lifting the cross border obstacles for services among the member states. It was a directive that would bring a revolution: to give an example, Italian architects would be able to offer their services in France without having to register with the local architects association; or a Polish company could establish itself in France, but it would still be subject to Polish labour laws.

Nonetheless, this directive divided Europe; many claimed it constituted the root of the rejection of the European Constitution in the French referendum and had only recently found its way through the European Parliament and the Council of Ministers. However, the interesting part is that the Directive today has nothing to do with the Directive presented more than two years ago, since it contains more than 1,000 substantial amendments made by the Parliament and 'ratified' by the Commission and the Council.

More specifically, the first reading of the European Parliament changed the three fundamental pillars of the directive: the Parliament, due in particular to the largely favourable vote of the PPE-DE (Christian Democrats and Conservatives), PSE (Socialists) and ALDE (Liberal Democrats) groups, adopted three major changes. "Firstly, it replaced the rule according to which service providers would be subject to the law of the country in which they are established, when temporarily providing a service in another Member State, by that of the "free provision of services". This eliminated the automatism of the original proposal, giving greater room for manoeuvre to the destination country. This Parliamentary amendment was taken up by the Commission in the compromise proposal presented on 4 April in Strasbourg.

Secondly, the MEPs reduced the number of areas to which the directive applies, notably excluding health and social services, which are no longer covered by the directive.

Services of general interest also remain excluded, as do financial services, transport and port services, audiovisual services, services provided by temporary work agencies, gambling and security services.

Thirdly, it is now clearly indicated that the directive will be applied without prejudice to labour law and social law. Any reference to the temporary assignment of workers in a Member State other than that in which the company providing the services is established has been removed.”¹

In 1999, Frits Bolkestein took over the post of Internal Market Commissioner with a mind set on 'free market'. On January of 2004 the Commission presented its original proposal on the liberation of services. Once the draft proposal was tabled, it took the Parliament two years to decide on the matter; the critical vote in the Parliament took place on the 16th February 2006 and the Council of Ministers did not take a decision on the matter before the end of July 2006. This two year gap can be explained only if we consider two things: the role of the interest groups involved and a seemingly exogenous factor, the French Referendum on the European Constitutional Treaty. Still, let us clear that we will be discussing a ‘dynamic’ procedure: nothing is over yet.

Our view on the Services Directive differs from the view of a law or an economics student; we are not interested in the developments this directive will bring to the European landscape. We will not attempt to analyze this highly technical and complex document, except for some necessary key points. Our research will be guided by a sub-discipline of public administration and political science in general: interest groups. As implied by the title of this project, we will try to see which actors intervened and lobbied in order to gain favorable outcomes from this process. One of the persons interviewed for the needs of this research substituted the term ‘lobbying’ or ‘influence’ with ‘improving’. So, in his own words, our aspiration is to investigate *in which ways interest groups strived to ‘improve’ the Directive.*

¹ http://www.europarl.europa.eu/news/public/story_page/056-7421-108-04-16-909-20060418STO07420-2006-18-04-2006/default_en.htm

1.2 Research Question

Our curiosity lies in this question:

- *Why the content of the directive approved by the Council of Ministers at the end of May is fundamentally different compared to the directive presented by the Commission in 2004?*

Deducting, and since we focus on the role of interest groups, we are led to ask

- *In which ways interest groups strived to 'improve' the Directive.*

Of course this a vague research question incorporating many different aspects. For instance, trying to depict how interest groups actually intervened is almost impossible. We are not in position to know which contacts UNICE has inside DG MARKT, which MEPs ETUC approached or the detailed strategy of UEAPME.

Keeping in mind the mentioned limitations, we are looking for

- *The factors that facilitated the efforts of some groups and impeded the efforts of others to influence the process.*

In this respect, our sub questions are:

- *Were the European Commission's actions effective and efficient? Did its decision not to consult with the interested parties during drafting the directive play a role in the final outcome?*
- *Did this behavior empower the opposing groups in the arena?*
- *What was the role of the European Parliament? Did the fact that the Services Directive falls under the co decision procedure make any difference?*
- *Did the French Referendum on the European Constitution affect the course of events regarding the Directive?*

1.3 Research Methodology/ Research Outline

Finding a proper theoretical framework to guide our research proved to be particularly tricky. One could point out that that our case study is not something new; the Commission puts forward a piece of legislation and different interest groups compete to lobby. Or, as we said, “to improve it”, meaning the process in order to achieve better (for them) outcomes. This has happened many times in the past; to name two high profile instances, the Genetically Modified Organisms case or the Software Patent directive. Nonetheless, we will show that our case-study has several special features which make it quite unique and worth examining.

First of all, this directive is not the result of delegated legislation; it falls- under the co-decision procedure, so the European Parliament has not just a say but an unconditional veto. Instantly this expands the arena and gives more opportunities to some actors while it imposes difficulties and constrains to others. Second, as the ep rapporteur said, this is “the most important piece of EU legislation apart from the Constitution” (Gebhardt 2006)². We mean that this is an issue high in the European political agenda affecting many groups, if not everybody in Europe. It can be identified as a highly ideological and normative controversy as well, or at least that was how certain groups opposing the directive tried to present it: Anglo-Saxon neo-liberalism vs. the European Social Model.

So, we are not going to use a 'coherent theory' as a guide; nor are we going to test a set of theories against a hypothesis or against our case study. The reader needs to keep in mind that our project is *descriptive* rather than *theoretical*. We are describing a case-study, trying to answer some practical questions with the help of, among other means, theoretical frameworks. Therefore, we will select a set of theoretical tools on the basis of our main hypothesis - that interest groups intervened and lobbied to their own interest - and on the base of the facts: that the Commission presented the directive, and two years later – one after the French Referendum – the European Parliament gave its first reading. In many cases some of these theories work as background to our research; for example, it

² www.europarl.europa.eu/.../056-5221-47-2-7-909-20060213IPR05194-16-02-2006-2006--true/default_en.htm

is not necessary to analyze 'interest group notions'; but given that we are talking about interest groups, a brief literature review on the issue puts our subject into perspective.

Thus we begin by presenting a literature review on the basic topics and conceptual frameworks of interest groups, power and influence. Power and influence notions need to be explained and clarified, stemming from our research question/indication that interest groups had the power to influence the process. Then, we resort to classic political studies, exploring the nature of interest groups as well as their relations with the state and their role in policy making; interest groups on the EU level are investigated in chapter 3.3.

In Chapter 3, we shift our attention to our actual case study; in the beginning, we make a literature review on theories of European Integration. This part is a 'background note' to chapter 3.3, explaining in an indirect way the existence of interest groups at the EU level. Subsequently, we focus on the EU governance and policy-making. This is an extremely important part for our research, since understanding that in the EU there is not one single center of power puts the role of interest groups into perspective. We then proceed by providing the reader with a short description of the Services Directive. More particularly, we describe its background, the story from 1999 when Frits Bolkestein took office until the day the first draft was presented in 2004.

Moving on, we reach our core research sub questions: first of all, we examine the Commission. We describe its unique role in the European Institutional Arena, which makes it the first target for interest groups and then we explore the relation it holds with them. We then utilize new institutionalism which provides us with a useful framework on the production of decisions. We pay special attention to the consultation procedure that the Commission follows when drafting a proposal. We suggest that in the case of the Services Directive, the Commission acted as a 'bad lawmaker': it broke the consultation norm and this was a decisive factor, since as a result the proposal was severely altered by the Parliament.

In Chapter 3.5.3 we depict an exogenous event that had a tremendous effect on the process: the French Referendum on the European Constitutional Treaty. Having the

'policy making and attention shifting theories' of 3.5.2 as a guideline framework, we see how the opposing to the directive groups reframed and redefined the issues under question, blurring the limits between the Directive and the Constitution. They succeeded in linking these two irrelevant things, winning in this way points in the public opinion arena and getting an advantageous position for the next round: the European Parliament.

In the last part of the research we portray the European Parliament as the final actor in the process. We first explain its 'peculiarities' and its openness towards interest groups before describing the critical compromise that led to the adoption of a completely altered proposal in comparison to the one the Commission had proposed. We advocate that the Parliament's role was crucial because of the co decision procedure and the fact that MEPs proved to be, as always, willing to be influenced by the various interest groups; in this case the French Referendum had 'biased' the way MEPs provided different opportunities for the interest groups.

Apart from the use of theories, the use of hard data was also a vital methodological tool. Hard data consists of official documents, news archives and personal interviews. For the purpose of our research, we interviewed five people.

The people interviewed are:

Mr. Carlos Amarez, in charge of the Services Dossier, *Union des Industries de la Communauté Européenne* (UNICE-Confederation of European Business). Founded in 1958, the UNICE is one of the recognized social partners of the EU, with a long history and an influential role in European Affairs. UNICE supported the draft Directive tabled in 2004, suggesting that it would boost European Economy and create jobs.³

Mr. Luc Hendrickx, European Association of Craft Small and Medium-Sized Enterprises (UEAPME). "As the European SME umbrella organisation, UEAPME incorporates 78 member organisations consisting of national cross-sectorial SME federations, European branch federations and other associate members, which support the SME family.

³ <http://www.unice.org>

UEAPME represents more than 11 million enterprises, which employ around 50 million people across Europe”⁴

Mr. Wolfgang Kowalsky, European Trade Union Confederation (**ETUC**). Set up in 1973, ETUC is a European Social Partner representing 81 National Trade Union –and millions of workers across Europe. ETUC was against the draft directive, considering that it would undermine the rights of European workers and the European Social Model. So its goal was at least the fundamental revision of the Directive.⁵

Prof. Dr. M.P.C.M van Schendelen. A scholar and Public Affairs practitioner, professor at the political science department of Erasmus University. His research activities on which he has produced numerous articles and books include European Union, politics-business relationships, business lobbying and public affairs. His professional activities include training, consultancy and research in Public Affairs Management and Lobbying at the European Union level for companies, trade associations, NGOs, regional and national governments⁶.

One further interview with the personal assistant of a Socialist MEP opposing the Directive was conducted. This interview was carried out off the record, so he is treated as an ‘anonymous source’.

⁴ <http://www.ueapme.com/EN/index.shtml>

⁵ <http://www.etuc.org>

⁶ <http://www.eur.nl/fsw/staff/homepages/vanschendelen>

1.3 Research limitations

Obviously, we acknowledge that our research is far from complete. The reader will discover that many (secondary) questions are not answered, while some are not even posed. This is due to the space limitation we encounter. For example, one might be surprised by the fact that we did not investigate the role of the Council, the Committee of the Regions or of the European Economic and Social Committee. Space limitation combined with our belief that their role was minimal compared to the role of the Parliament or the Commission led us to completely omit the latter two and make some references to the other. Moreover, we were unable to find data on any ad-hoc coalitions or private consultancies that interfered-but this does not mean that there were none.

What is more, while we tried to use as much hard data as possible, this was not always feasible. In the bounds of this research five interviews – three of which with the three most important stakeholders - were conducted, a number not allowing us to extract safe conclusions. This is why the reader should remain cautious as to the arguments that are presented here from the interviewees and this played an important part leading us to conclusions. Moreover, sometimes the people interviewed were contradicting each other. Of course, we do not believe that they were trying to ‘manipulate’ us. However, it is normal that their responses are colored by their (organization’s) beliefs and whether they were on the winning or the losing side. Here, we should also note that many people did not want to be interviewed. Anyone who followed a part of the story, should know that we are about to examine a highly controversial issue. That affected our research (which was carried out in the middle of the process). Mr Bolkestein refused, Mrs. Gebhardt (the Parliament’s rapporteur), Mr Harbour (the shadow rapporteur) and many other MEPs declined to talk to us.

2. Power, decision-making and interest group concepts

2.1 Interpreting Power and Influence

As mentioned in the preface, our research ambition targets the way different actors intervened in order to influence the process for their own interest and the factors that gave them an advantageous position to influence the process. Here we encounter a methodological problem well-known to political scientists: how can we measure influence? How is power attributed to different groups, reinforcing in this way their position in the game? And maybe most importantly, how can we define influence and power? To answer these questions we have to look into basic textbooks and concepts of political science. In our case we will largely draw on Dahl. In his book *Modern Political Analysis* (1991), he indicates the difficulty of a standard terminology. What is power for one scholar is influence for another. He quotes Aristotle, saying that these terms (power and influence) do not need special elaboration since their meaning can be easily understood by common people. Nagel (as ref in Dahl 1991:28) adds a causality attribute to the term power. Pfeffer too (1992:33) proposes the definition of power as “the potential ability to influence behavior, to change the course of events, to overcome resistance, and to get people to do things they would not otherwise do. Politics and influence are the processes, the actions and the behaviors through which this potential power is utilized and realized”, regarding in this way influence as an instrument. However, he seems to imply that influence can be the result of coercion-which is not always the case, as influence tends to have a more subtle, covert nature, especially in the Public Affairs Arena. More practical and much simpler is the definition provided by March: “Power is the capability to get what you want or to fulfill your identity” (March 1994: 141). As we can see, the debate and the relevant bibliography on the subject are enormous.

Dahl makes a distinction between negative and positive influence, by clarifying that since negative influence has occasional importance, influence terms will refer to causal relations in which results are favorable for the actor exerting influence. We shall adopt his proposition. Luke (as ref. in Dahl 1991:29) proposes a concept of power whereas A

exercises power over B when A affects B in a manner contrary to B's interests, falling again in the trap of terminology: how do we define B's interests? A more constructivist approach would argue that B's interests are formulated by norms, culture, stereotypes and prejudices- so how can we say that they are actually *his* interests? As Dahl puts it, "the attempt to define power by linking it with interests combines all the problems associated not only with one but with two highly problematic concepts" (Dahl 1991: 32). Instead, he proposes to define power and influence as "something like A's capacity to bring about outcomes favorable to A's preferences or desires" (ibid).

In our project we are not so much interested in power as in influence. Plus, we have to keep in mind that power and influence mean dissimilar things for scholars from diverse disciplines. In EU P.A. field they can (also) be quite different. The definition we propose for the P.A. field, drawing on Van Schendelen (see footnote) is: A influences B (with B being a person, an organization, a *process* etc) if the outcomes of B's actions (or the outcomes of the process) are i) matching A's goals and desires and ii) can be attributed to A's actions⁷. We acknowledge that this definition is highly functionalist and deterministic. Nonetheless, we need to make a clear distinction between *potential* and *actual* influence. Having the capacity to influence somebody or a process may or may not mean anything in EUPA. Sometimes, the important thing is to *exercise* this capacity. Let us give an example: imagine a PA practitioner working for a EuroFed, who has a good relationship with an EU Official of the DG MARKT. DG MARKT sets up a comitology committee to form a piece of legislation that is relevant to the EuroFed's interests. If the practitioner is late and does not use his contact to get access to that committee, he failed. He had the potential to at least try and influence the process-but he did not; his possibility to influence as perceived from opposing interest groups may have mobilized them. Moreover, does the *perceived* influence matter? Meaning that a group may not actually have the capacity to influence, but the rival groups think it has. Does this change the

⁷ According to Potters "A political influence attempt is any action by an agent L intended to change the behavior of a governmental agent G, relative to what this behavior would be, had agent L not acted or acted differently" (Potters 1992: 26). While this definition is close to ours, we do not want to constrain ourselves to "influence on governmental agent"; indeed, in the PA Arena actors constantly try to influence each other as well. Van Schendelen (2005: 67) defines influence "in terms of a relationship between two or more actors: A influences B if B's behaviour changes (either in accordance to the wishes of A or in any other direction) due to the behaviour of A...influence is not a constant but a variable factor, depending on time, arena, intelligence, supply and many other circumstances."

power balance? Our answer would be yes. An actor plans his battles having in mind how the others will react. In this scenario, the perceived image of somebody else's influence may affect the actor's behavior.

2.3 Interest group theories

In this section we are going to present general theories on interest groups and their relationship with the state. Nonetheless, the reader should pay attention to the fact that we will not address one important question: why are interest groups “allowed” (by the political system or the actors) to interfere with policy-making. The reasoning is that the answer to this question relies heavily on the context; if we look in the American literature, we will find one explanation while in EU there is another one. We present the EU case in practical terms in the third chapter

2.3.1 On interest groups

Once again, we fall into a familiar trap: how should we define interest groups? Is it the same term as pressure groups? And once again, the debate among scholars is endless. We should, however, warn the reader that the interest group – as well as the lobbying – literature is divided in two big categories: the Anglo-Saxon (meaning USA and Great Britain) and the Continental⁸. The theories presented here come mostly from the first grouping, since it is richer in qualitative and quantitative data. In Chapter 3.3 we will refer to the second grouping, and more particularly to interest groups in the EU level.

Castles defines pressure groups as “any group attempting to bring about political change, whether through government activity or not, and which is not a political party, in the sense of being represented at that particular time, in the legislative body” (Castles 1967: 1). If we follow this definition by letter, we can name pressure group a political party which is not represented in the legislative body at a particular time-or a group of people who are seeking to change a country’s regime through means of violence. In other words, its scope is too broad - Radaelli calls it “concept stretching” (Radaelli 2003: 31-32). He then makes a sub-classification, dividing pressure groups to what he calls “attitude” and “interest” groups (Castles 1967: 2), the former being a group “set up to achieve a

⁸ This is probably due to the fact that, with some exceptions (Nordic Countries), the concept of interest groups as presented here is more or less unknown to Europeans. Some major interest groups are called “social partners” and can be officially engaged in some stages of policy making. Nonetheless, in very few member-states of the EU shall we find a formalized status for interest groups (see Van Schendelen 2006: 152-163 and http://www.europarl.europa.eu/workingpapers/pana/w5/default_en.htm)

specifically delimited objective or cause and which is defined not in terms of the common interests of its members, but in relation to their shared values and beliefs” whereas the latter “is set up to protect shared sectional interests” (ibid)⁹.

While from time to time this may be the case, there are many instances where a group’s common interests rise from its shared beliefs, with the greatest example being the European Round Table of Industrialists (ERT). Sometimes their actions come from their common interests and other times from their shared beliefs-and some times from both of them. As Greenwood explains, “the UK Guardian newspaper once described the European Round Table of Industrialists as ‘a shadowy lobby group that has, for the past 15 years, exerted an iron grip on policy making in Brussels’... At the other end of the scale, a string of admirers have told the story of how the ERT built the single market in six days and rested on the seventh by telling sometimes reluctant governments that they would move their operations to the US if the Single European Act was not passed” (Greenwood 2003a: 2). ERT’s struggle for the Single Market is founded on deep normative (apart from interest) grounds.

On the other hand, Woll defines interest groups as “formally organised groups who are united by specific political objectives and who try to influence the policy process in the pursuit of these goals” (Woll 2006: 465), and names “non governmental actors” the private actors who are not just groups. She avoids the use of the term “collective action”, as it “refers to all common activities of all groups, which are not necessarily aimed at influencing the policy process” (ibid).¹⁰

Truman (Truman 1971: 33) defines interest groups as “any group that on the basis of one or more shared attitudes, makes certain claims upon other groups in the society from the establishment, maintenance or enhancement of forms of behavior that are implied by the shared attitudes”. So, Truman follows the pluralist model (as we will note below), prescribing a struggle for survival between the different groups. Political influence, or

⁹ Interest groups in the bibliography can be found under the names of factions, special interests and lobbies as well; a ‘modern’ name attributed to them is ‘civil society’.

¹⁰ Van Schendelen (2005: 43) gives a more “semantic” explanation; for him “if a public or private group comes to the decision that on an issue some action to influence would be rational, it changes from an interest group into a so-called pressure group”, thus putting emphasis on the action input.

attempts to influence the policy process are hardly implied. As he explains, he does not include interests in his definition because “shared beliefs constitute interests” (ibid: 34). Moreover, according to his view, interest groups do not need to be formally organised.

Gigler and Loomis in “Interest group politics” acknowledge that “interest groups are natural phenomena in democratic regime; individuals will band together to protect their interests” (Gigler and Loomis 1986: 2). They also note that political science by the time their book was published had not produced much evidence to support links between interest groups’ actions and patterns of influence. Nonetheless, they also acknowledge the difficulty of assessing this impact. They quote a lobbyist saying that “determining actual influence is like finding a black cat in the coal bin at midnight” (ibid: 22).

Wilson gives a more descriptive explanation: “Interest groups are generally defined as organizations, separate from government though often in close partnership with government, which attempt to influence public policy. As such, interest groups provide the institutional linkage between government or the state and major sectors of society” (Wilson 1990:1). This definition is very useful since it describes interest groups as organizations, implying the principle of membership. Some writers argued that not all interest groups are organizations; for instance women in the USA are considered as an interest group (ibid). Nevertheless, this view can lead to concept stretching since, in this sense, there are countless interest groups, bounded together with loose ties of shared beliefs and perceptions. Moreover, Wilson’s definition highlights the (potential in certain systems) close relationship between these groups and the government. So, from now on, when talking about interest groups in this research, the reader should have this definition in mind

2.3.2 Theories of the state-interest groups relations

All theories on interest groups rise from theories for the state. The three most dominant approaches for decades in political science as far as the relationship between state and society is concerned are the following (adopted from Pierre and Peters 2000: 34-35)

- *Pluralism*: Very familiar in North America. It was developed by Dahl, Lindblom and Truman (McFarland 1987), and it prescribes that state is “relatively little involved with interest groups directly...rather, government establishes the arenas through which the groups work out their own political struggles and establishes a set of ‘rules of the game’ about how decisions are made... no group has a dominant position in the arena but they are all considered to have equal chances of winning on any issue...further, groups move in and out of the policy process relatively easily, with impunity, and largely at their own initiative” (Pierre and Peters 2000: 34). The most interesting indication for us to notice is that the pluralists do not see the relationship between state and interest groups as being formalized or institutionalized. They considers the state as the most powerful actor, since it has the ability select its partners¹¹.
- *Corporatism*: This model sees a more institutionalized link between state and society. “In corporatism particular interest groups are accorded a legitimate role as representatives of their sector of their economy or society” (ibid). Still, the state holds the dominant position and the number of actors that can participate is limited¹².
- *Corporate Pluralist model*: This paradigm falls in the middle. It prescribes a large number of legitimate actors influencing policy who have an institutionalized relationship with the state, while the arena shows a high degree of mobility. This pattern is observed “in Norway and ...other Scandinavian countries...[interest] groups are recognized as legitimate participants in the policy process, and they

¹¹ The plural elite notion is very popular in the pluralist model. One of the ideas scholars developed is that “elites manipulate public opinion by creating political forms which give the impression that some problem is being solved, or some policy is being followed, when this is not the case... small groups, following rational political strategies, will frequently defeat the interests of very large publics, confused by political symbols and following irrational political strategies. (McFarland, 1987:132)

¹² Some scholars call it neo-corporatist model. See Kickert 2003

tend to establish stable relationships with formal actors in the public sector, particularly the ministries (ibid: 35)

2.3.3 The role of interest groups in policymaking: Lobbying or influencing?

In chapter 2.1 we talked about influence, avoiding mentioning the term “lobbying”. But, when the terms “interest groups” and “influence” appear in the same sentence, we commonly substitute the second for “lobby”. So, does influencing and lobbying mean the same thing? Wikipedia offers a good starting point for our discussion: “ **Lobbying** is the professional practice of public affairs advocacy, with the goal of influencing a governing body by promoting a point of view. A **lobbyist** is a person who is paid to influence legislation as well as public opinion” (<http://en.wikipedia.org/wiki/Lobbying>)

Peddler and Van Schendelen quote Saint Augustine, who “once commented on political influence that “we all perfectly know what it is, until we are asked to tell” (Peddler and Van Schendelen 1994: xi). This observation applies to lobbying as well. It has something to do with trying to influence political authorities “but not in the formal, convenient ways of going to courts, voting and participating in committees” (ibid.). What about though, the authors wonder, going to court as means of exchanging claims with decision makers, “making use of the corridors around committees or convincing people to vote differently?”(ibid). In that spirit, they refer to lobbying as something that has to do with “more *informal efforts to influence others, particularly public authorities*. The informal aspect may refer to the setting (the corridor, the coffee room), the atmosphere (relaxed, confidential)...the route (going indirectly) or whatever element of the game to (try to) influence decision makers” (ibid). So, for them lobbying is the informal exercise of political influence.

Nonetheless, this is a more academic point of view. In our interviews with members of EuroFeds, none of the interviewee’s made a distinction between their formal and informal efforts to influence the policy process. For them, lobbying includes everything—from the informal meetings with officials to their communication, i.e. the position papers they issue. For Woll (2006: 465) lobbying includes “all activities by private actors which aim at influencing political decision makers”. Of course, we do not wish to engage

ourselves in a definitional debate. However, the use of the right words is of high importance. Therefore, when referring to lobbying, we will mean the *formal as well as the informal efforts of interest groups to influence the policy process essentially through their interaction with, amongst others, public officials; lobbying is characterized by distinctive practices and techniques*. By the latter we want to stress the close relationship of lobbying with PA, since in order to influence, prior actions are needed. These actions may range as we will see from coalition building to issue manipulation and re-definition.

3. The Services directive vis-à-vis EU theoretical concepts

3.1 Theories of EU Integration and EU Governance

What is the European Union? Probably, the number of answers to this question equals the number of books on Europe. As Pollack points out, “Oversimplifying only slightly, the political science literature has tended to focus on the *integration process* during active periods of deepening integration, such as the 1950s and 1960s and the heyday of the Delors Commission in the late 1980s and early 1990s. During periods of stagnation or retrenchment, on the other hand, the focus has tended to shift from integration as a process to the Community as *political system*, examining the EC as an arena for policy-making in the late 1970s and early 1980s (Wallace *et al.* 1977, 1983), and as a system of governance in the early 1990s (Marks *et al.* 1996; Pollack 1996). In these works, the emphasis is on the workings of Community institutions and on their implications for both democratic governance and for the representation of particular interests in European society with some scholars trying to explain it based on the question “what is the European Integration”, while others focus on the way it is governed” (Pollack 1997: 1). Therefore, the reader should not be surprised to find a reference to these issues in a research paper for (European) interest groups. Many times, the key to the question why interest groups “open their shop in Brussels” can be found in the same nature of the EU and its goals.

3.1.1 Theories of European Integration¹³

Since its creation in 1957 by the Treaty of Rome, three major schools of thought have tried to explain EU integration process. They all come from the International Relations discipline. While for some they may be considered outdated, such an approach can nevertheless suggest valuable insights, explaining the nature of the EU. These three paradigms are:

¹³ The presentation of these theories is adopted by George S and Bache I, 2001, *Politics in the EU*, Oxford University Press, New York pp.9-31

Neofunctionalism: An answer to the realism approach, this theoretical paradigm claims that the concept of ‘state’ is extremely complex, and cannot be explained by the ‘state as a unified actor’ theory; on the contrary, neofunctionalist scholars acknowledge the importance of non-state actors as well as bureaucratic actors and interest groups while accepting that they are not confined in the domestic arena. They expect them to come together with counterparts from other member states, thus promoting ‘transnationalism’ and ‘transgovernmentalism’ and they see European Integration moving forward through the so-called ‘functional spill over effects’. The idea of ‘political spillover’¹⁴ was also added, explaining why interest groups try to influence the EU policy-making. The European Commission plays a unique role in this model, since the EC is believed to foster alliances with emerging European interest groups and national bureaucrats against reluctant national governments. While these assumptions were popular in the 1950s and early 1960s, George and Bache (ibid: 12) describe how the ‘empty chair’ crisis of 1965-6 revealed the true power of national governments-and showed that they were ready to “use it to determine the nature and the pace of integration”.

Intergovernmentalism: Originally presented by Hoffman, this theory rejects Neofunctionalism by claiming that the member states are in charge of integration. He suggested that while the process might evolve in “technical matters”, it would never touch the matters of the so called ‘high politics’ like defence. “The governments of states were said to be uniquely powerful for two reasons. First, because they possessed legal sovereignty; and second because they had political legitimacy as the only democratically elected actors in the integration process...where the power of supranational institutions increased, it did so because governments believed it to be in their national interests... [so] the integration process remained therefore essentially intergovernmental: it would go as far as the governments were prepared to allow it to go” (ibid 13)

¹⁴ Simply put, functional spillover can be explained as a "snowball effect"; once EU tackles a problem in a policy domain, this creates the need to deal with another one-so, integration is promoted. Political spillover means the pressure from within the states for further integration. Interest groups are given a special role: once they realise how the integration process could favour them, they will lobby their governments for more while forming a barrier in case their member states want to retreat. This process is similar to the "increasing returns "or the "path dependency" theory. See George and Bache 2001: 11, and Pierson 2000.

Liberal Intergovernmentalism: Morasvick highlighted the central role of the preferences of national governments as well. According to him though, these national preferences reflect the (domestic) balance of economic interests, and the delegation of powers to supranational¹⁵ institutions should be seen as means to ensure that all parties' commitments are carried out (ibid).

3.1.2 On EU Governance¹⁶ and Policy Making: Where is the locus of power?

More pertinent to this discussion is the role of the EU as a political order/structure, something which will allow us to look into its policy-making mechanisms. As George and Bache (ibid: 19) point out, such attempts employ approaches from comparative politics and public policy, rejecting the dichotomy between Supranationalism and Intergovernmentalism. One could state that this is the other side of the same coin: scholars now incorporate to their theories “contemporary” concepts like governance and networks, putting the nature rather than the process of the EU Integration under the microscope. Hix (Hix, 1999: 1) for instance, shifts our attention from the role of states within EU to questions such as “How the parliament can influence legislation” or the role of interest groups.

In this context, we feel it would be irrelevant or even counterproductive to make an explicit list of theories. Richardson (Richardson 1996) explains that the search for one model that explains EU policy process may be mistaken since we can determine European policies at a diverse number of levels and stages. Even policy areas themselves may be “episodic, exhibiting different characteristics in different periods of time.

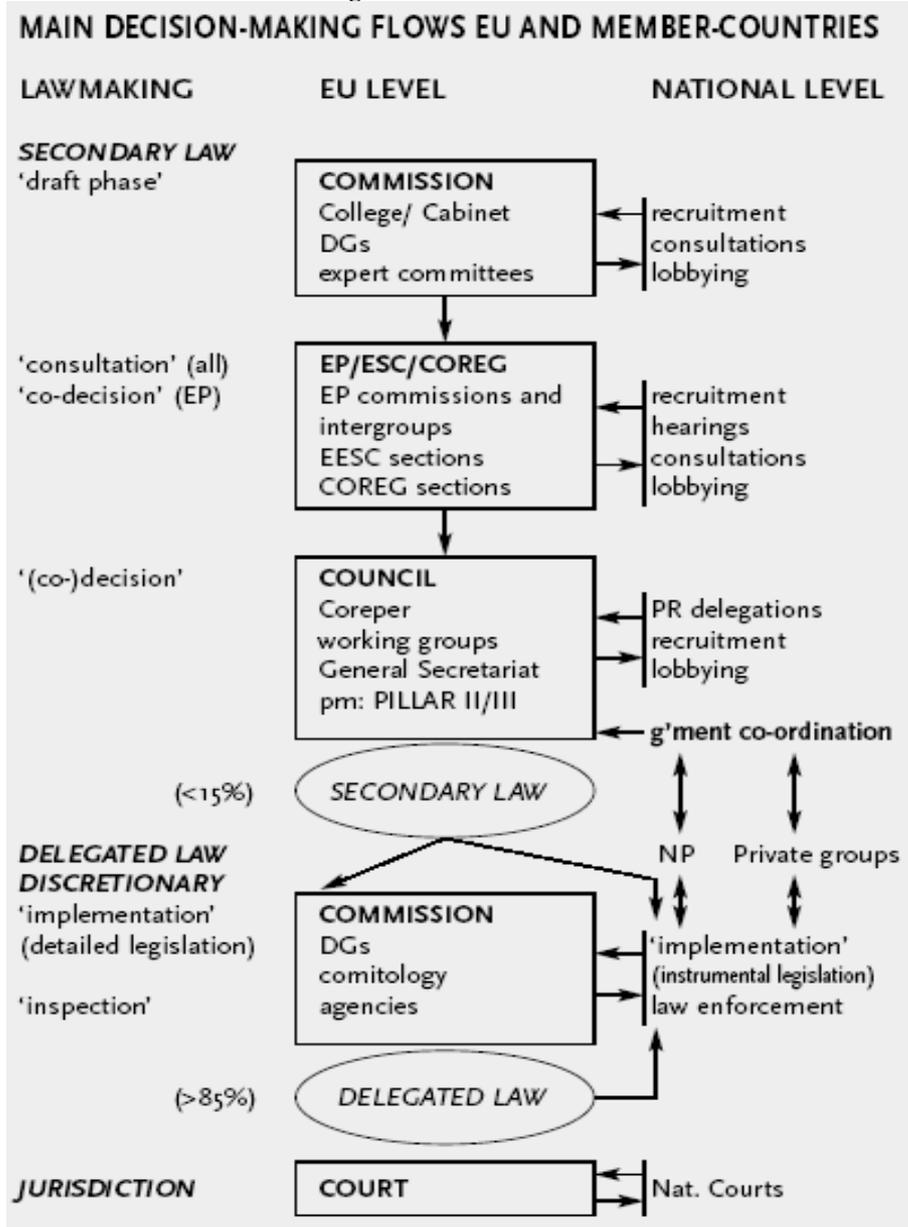
¹⁶ Along with globalization, governance has become a “catch-word” in the political science. If one hits it on Google scholar, he will get around 800,000 results. Except from offering a definition, we will not enter the debate around this. So, Kooiman defines it as “the totality of interactions, in which public as well as private actors participate, aimed at solving societal problems or creating societal opportunities; attending to the institutions as contexts for these governing interactions; and establishing a normative foundation for all those activities” (Kooiman, J., “Governing as Governance”, 2003, Sage, London). Christiansen et al. see governance “as the production of authoritative decisions which are not produced by a single hierarchical structure, such as a democratically elected legislative assembly and government, but instead rise from the interaction of a plethora of public and private, collective and individual actors” (Christiansen et. al., 2003:.6).

Different models of analysis may be useful at different stages of the policy process...reality is likely to be much more messy, suggesting that we need a fairly eclectic use of concepts and models...there are major cross sectoral variations in EU policy styles. For example, some policy areas may be highly pluralistic (e.g. environmental policy) and others may exhibit some corporatist tendencies (e.g. agriculture).” (ibid :5)

Following Richardson, we will select our methodological tools with awareness of what we want to explain. Let us pose one seemingly simple question: where is the locus of power in the EU structure? There are many possible answers to this, all depending on the context in which the question is being posed. Of which policy domain are we talking and of which stage inside the policy process? As Bernard (Bernard 2002: 9) smoothly puts it, “the literature on lobbying in the EU brings the point home. In so far as the lobbying involves tracking down sources of power in order to influence decision making, following the lobbying trail is a good indicator of how the decision making actually occurs. A consistent finding of studies on lobbying is that successful lobbying in the EU has to take into account the multiplicity of actors capable of influencing legislative outcomes”.

What Bernard implies in this sentence (and clearly states in other part of his book) is that in the EU there is no one single centre of power. A counter-argument to this view could be that this statement is true even for states. Is there an institution in charge in the case of the European Union? An easy answer would be that the European Council is the major actor, since it has the final say for every law (except for co-decision, where it shares its decision-making power with the European Parliament and except for delegated legislation, where law making power has been delegated to the Commission). However, reality is more complex. Christiansen and Jørgensen claim that even in an Intergovernmental Conference (IGC) “member states exercise a slightly greater than usual degree of control” (Christiansen T and Jørgensen K.E. 1999 ‘The Amsterdam process: A structuralist perspective on EU treaty reform’ as refer. in ibid. p. 9-10).

Table 1: Main Decision-Making flows between EU and Member States



Source: As seen in Van Schendelen 2005: 58

Furthermore, Christiansen and Piattoni highlight two other aspects of EU decision making. They state that EU is “a non-hierarchical negotiation system: decisions require extensive consultation involving private and public actors even before draft proposals are tabled, and yet more discussions across the policy-making organs of the Union, and between Europe-level actors and member states representatives in the actual decision-making process...in the absence of hierarchical structures the EU has a propensity towards the negotiation of outcomes in contrast to the partisan decision-making which is

familiar from majoritarian systems on the national level” (Christiansen and Piattoni, 2003: 9). However, they note that EU policies are not always consensually agreed by all participants.

They also emphasise the importance of informal governance in EU. “Governance is informal when participation in the decision-making process is not yet or cannot be codified and publicly enforced...because the actors who may contribute crucial resources to the decision making process are not known in advance, informal governance operates through the creation of semi-official arenas to which all those who can potentially affect the policy decision, or might be affected by it, have access-at least in principle” (ibid : 6). These mentioned semi-formal arenas, as we will see can have different forms in the policy-making process of the EU, depending on the institution under question.

We need to clarify that this multi-centricity is *dynamic* rather than *stable*. In Pillar II, for instance, the Council of Ministers of Foreign Affairs has more decision-making power than the Commission. Under Pillar I though, and in combination with informal routes, the Commission often is the dominant actor. This balance of power relies, as mentioned before, on the policy under question and the ability of the actors to exploit opportunities offered by the informal side of EU.

Our point is illustrated in table 1. Van Schendelen identifies the various centres in the decision making process and two levels in the “governance” system: the first being the formal (in the middle column) and the second being the informal (mainly in the right column). In this perspective, *we shall treat the EU as a non hierarchical, multi-centric system* (as far as the distribution of power is concerned) *which is governed in two levels: the formal and the informal one.*

These features of the EU have led to the extensive use of the “policy networks” theory. “Simply put, policy networks are arenas in which decision makers and interests come together to mediate differences and search for solutions... [They] vary in character according to three key variables: the relative stability (or instability) of network memberships; the relative insularity (or permeability) of networks; and the relative

strength (or weakness) of resource dependencies” (Nugent 2003: 490-491). Peterson distinguishes between policy communities, being tightly bounded, with constant and often hierarchical membership where participants are resource-dependent to each-other, and “loosely integrated issue *networks*, in which membership is fluid and non hierarchical, the network is easily permeated by external influences, and actors are highly self-reliant” (Peterson 1995: 77).

Various other factors have led academics to the networks approach: “the multiplicity of interests at the EU level that are anxious to have access to policy-makers; the highly technical –almost non political- nature of much EU policy content; the powerful policy positions held by senior officials, especially in the Commission and especially in the early stages of policy-making; and the heavy reliance of officials on outside interests for information and advice about policy contents and implementation” (Nugent 2003: 491).

3.2 1999-2004: 'It's the Internal Market Stupid!'¹⁷

3.2.1 History

In 1999, Frits Bolkestein became Commissioner of Internal Market and Services. He had been member of the Dutch Liberal Party (VVD) since 1978, holding both the Ministry of Foreign Trade (1982-1986) and the Ministry of Defense (1988-1989). In 1999, he took office at DG MARKT. Under his presence, DG MARKT moved towards the completion of the Single Market programme. As Mr. Bolkestein himself declared, “the mistake that is often made is to think that after ten years the Internal Market is completed. This is to misunderstand the Internal Market. It is not a finite task that we shall at some point be able to regard as done. It is a continuous process that will require constant attention. Even after we have filled the obvious remaining gaps, the work of repair, maintenance and updating will continue”¹⁸.

Article 49 of the 1957 Treaty establishing the European Community clearly states that “Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.” (TEC¹⁹). The Commission believes that Services could offer a big boost to the European Economy; “ Services more generally offer some of the biggest potential gains from further integration. More competition in business services alone could add up to €350 bn to the Union’s GDP⁸. Already, services have been by far the most important engine of employment growth throughout the Community in the late 1990s. And they offer the greatest potential for further job growth the gap in employment between the EU and the US is not in agriculture or manufacturing but in services where the difference in employment rates is 14 percentage points – or 36 million jobs. In order to unleash this potential, it is essential that remaining Internal Market barriers to cross-border service provision by business, the take-up by consumers

¹⁷ UNICE 2004

¹⁸ <http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/03/2&format=HTML&aged=0&language=EN&guiLanguage=en>, acc. On 25/05/2006

¹⁹ <http://europa.eu/abc/treaties/archives/en/eltoc05.htm>

and freedom of establishment are removed. Progress on the Commission's Services Strategy must be stepped up" (ibid: 10).

Nonetheless, as Bolkestein indicated, while Single Market is a reality as far as goods are concerned, the same cannot be said for services since there are still obstacles preventing enterprises and individuals from offering their services to another member state. In this respect, the Commission launched a Consultative Communication where it stressed its wish to kick-off a debate between interest parties, eventually leading to a policy which could liberalise services in the (enlarged) EU (Commission of the European Communities 1999). In this document we find the intentions of the new Commission: "The Internal Market has proved an effective means of integrating goods markets, despite some remaining problems. Less progress has been made in the services' sector. The Community's objective must now be to eradicate any remaining obstacles to cross-border trade and to prevent the emergence of new barriers. Concrete work is now under way to address the problems identified in business surveys. These include problems with the application of the mutual recognition principle, the additional costs incurred by business in conforming with national testing and approval procedure; inadequate access to national procurement markets; misuse of national rules protecting the "public good" in order to restrict unfairly the cross-border provision of services. Many of these weaknesses were identified in the Single Market Action Plan as needing further attention" (ibid 14-15)

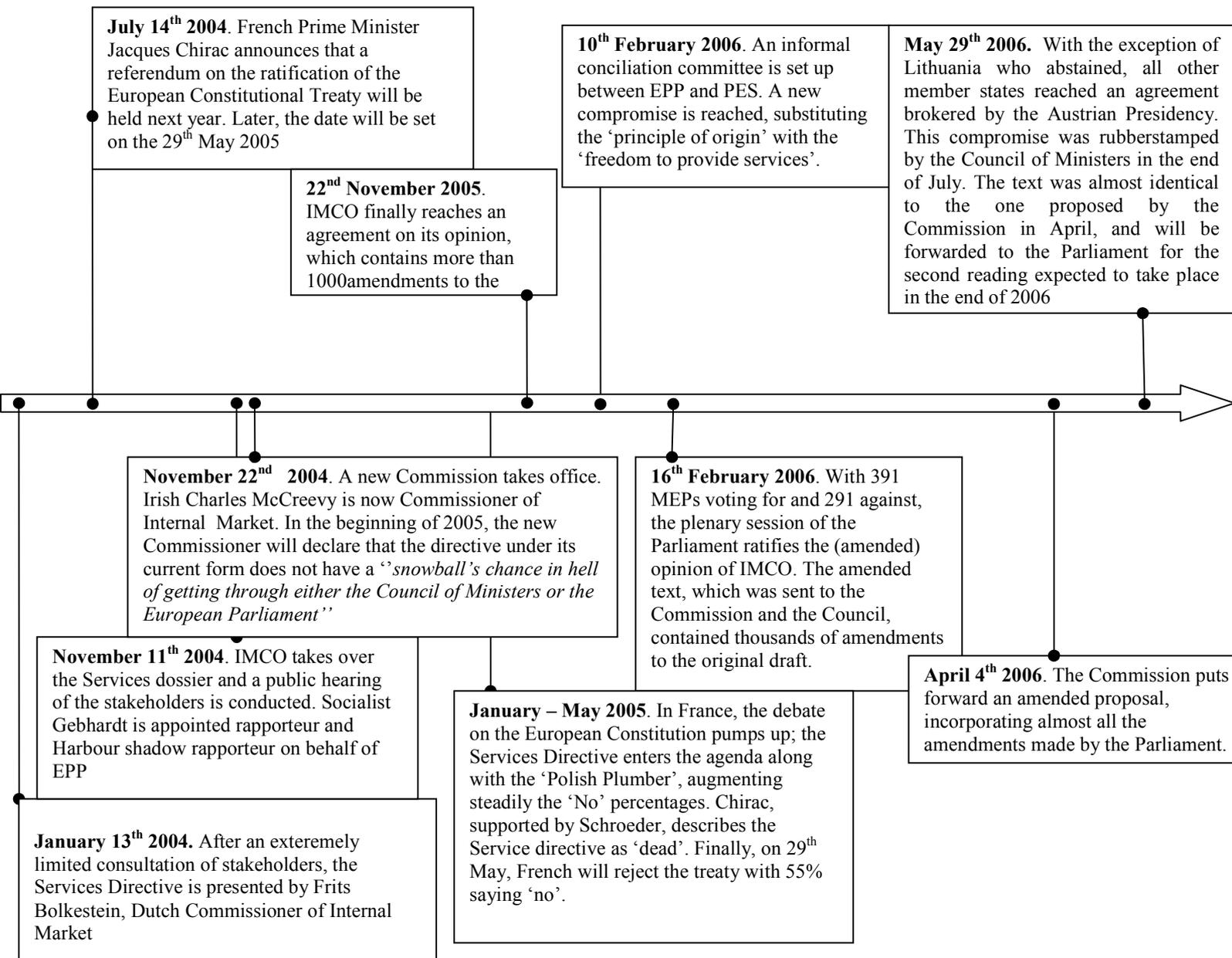
The EC published Communications on internal market every year describing its progress in different dossiers, yet always expressing its disappointment about the services sector. Especially after the launch of the Lisbon Strategy in 2000, aiming at transforming the European economy into the most competitive economy of the world by the year 2010, the services sector went up in the MARKET's agenda. It even received a mandate from both the Internal Market Council and from the European Lisbon Council to come up with a plan in order to remove barriers in the cross-border exercise of services (Commission of the European Communities 2000:4). Nonetheless, in its 2002 Communication it acknowledged that it had, so far, failed to launch a services strategy "due to complexity and slow input from member states" (Commission of the European Communities 2002d: 6). Giving special weight to the (then) forthcoming enlargement, which could, according to the Commission, further enhance the dynamic of the liberalisation of the cross-border

services, the EC committed to delivering a proposal to remove Internal Market barriers in services no later than June 2003. It was finally presented on the 5th March 2004, while an earlier draft preceded on the 13th January 2004.

3.2.2 The Services Directive

The presentation of the services directive took most of the stakeholders by surprise. For brevity technical details will not be discussed here, while the focus will be on more controversial parts. First of all Article 16 titled “country of origin principle”, states that “Member States shall ensure that providers are subject only to the national provisions of their Member State of origin which fall within the coordinated field...[this paragraph] shall cover national provisions relating to access to and the exercise of a service activity, in particular those requirements governing the behaviour of the provider, the quality or content of the service, advertising, contracts and the provider's liability” (Commission of the European Communities 2004: 55). However, some sectors, such as postal services were excluded, while case-by-case derogations were foreseen. Another topic was the scope of the directive, since it covered almost all services provided to consumers. Finally, various parameters of the directive were non-satisfactory for some stakeholders. For instance, ETUC wanted the Directive on the Posting of workers to be the sole guide for this issue, while it insisted for temporary work agencies to be excluded. This directive would change the services market as we know it today; touching almost every sector, it would diminish the ability of the country-recipient to control/regulate the service provider-this would be taken care by the providers’ country of origin. Needless to say that it would affect everybody, either as consumers or as providers of services, and for that reason a number of stakeholders had a legitimate saying in the process.

The Services Directive: Development's Timeline



3.3 Welcome to the Brussels Lobbyocracy²⁰

Brussels is generally considered to be the centre of lobbying along with Washington D.C. Numbers are indicative: while it is difficult to determine the exact figure of people dealing directly or indirectly with lobbying the EU institutions, this number is believed to be around 15,000 with 3,000 of them accredited to the EP²¹ while Greenwood reports 1,500 interest groups (Greenwood 2003a: 2).

The Belgian capital “has gone through a major transformation since it developed into the self-declared capital of Europe. Nowhere has the metamorphosis been more dramatic than in the European quarter in the eastern part of town. Once a wealthy residential neighborhood known as the Quartier Léopold, with a fair amount of art nouveau architecture, over the past decades it was transformed into some kind of Gotham City, largely deserted after office hours. The area has been colonised by the ever expanding office buildings of the EU institutions and the booming ecosystem of power brokers wanting to be located in the proximity of power” (Corporate Europe Observatory *ibid*). The Financial Times, covering the Software Patent Directive story describes how “lobbyists have taken Brussels by storm” (Minder 2006: 11)

3.3.1 Lobbying begets more lobbying!²²

When the European Community was created, there were few interest groups organised around it that viewed it as a new opportunity to pursue their interests²³. The majority of them concerned business groups. “Literally, business organizations had the greatest *interest* in the early years of EC. Their opponents inevitably followed business groups to Brussels. The new venue could not be left exclusively to business interests [...]European trade union-interest group organizations emerged because of a perceived threat from

²⁰ Brussels: The EU Quarter, 2005, Corporate Europe Observatory, Amsterdam

²¹ An important clarification is that this number includes only those who *actually live* in Brussels. As Mazey and Richardson (2001: 75) state, in 2002 there were 22 flights per day from London to Brussels. We can argue that the actual number of people who regularly visit Brussels with lobbying purposes can be estimated to thousands.

²² Heinz et al. 1993 as ref in Mazey and Richardson 2001:80

²³ The actual number was around 50. For a more detailed chart, see Flingstein and Stone Sweet (2001:43-44)

already organised business groups[...]Once one set of groups begins to exploit incentive and opportunity structures at the European level, others are bound to follow; they cannot afford to be left out, whatever the cost“ (Mazey and Richardson 2001: 74). Truman (1971) identified this kind of group mobilization in terms of ‘risk avoidance’, pointing to groups that mobilise in order not to leave potential political space to rival groupings.

These groups saw new opportunities to exploit: “Many of these groupings established themselves at the Community level in response to the formation of a new level of decision-making and as result of advantages from Community action “ (Kirchner 1980 as ref at Mazey and Richardson 1996: 203). These advantages can be various: as Mazey and Richardson (2001: 74) put it, “the incentive structure for the formation of Euro-level lobbying is twofold: first, European regulations could have an adverse effect on interests. Second, the shaping of new European regulations was also an *opportunity* to be exploited to the disadvantage of others unaware of the importance of the new venue or less able or willing to mobilize the necessary resources. Rules of the game-informal and formal-distribute costs and benefits between interests unevenly”. Furthermore, interest groups discovered a new opportunity to bypass the national government; for instance, in order to tackle a non favorable national legislation. Or, as Kirchner (ref in Mazey and Richardson 2001: 75) states, “they could now promote at the European level the interests which became extremely difficult to promote at the national level”.

It took some years for other types of interest groups to follow. Van Schendelen notes that “[the] basic design for common decision making goes back to three dominant political beliefs among the original six member-states...[one of them being that] both the main political parties and the major interest parties should be consulted in formulating a common decision” (2005: 57). Mazey and Richardson point to the “path dependency” theory, as under the wishes of Monnet, members of the High Authority of the European Coal and Steel Community “involved in policy making began the first stages of a long process of institutionalizing the cross cutting relationships with organised interests and national administrations.” (ibid: 71)

The passage to the Single European Act (SEA) was marked by a considerable increase of the number of interest groups “going to Brussels”, since it altered the rules of the game. Besides from being the prelude for the single market project, for which all national obstacles had to be removed, the SEA “had the potential for revolution, suggesting a shift in the existing balance of power away from the member states towards the Community institutions” (Urwin as ref. in George and Bache 2001: 117). This treaty “gave the Community more responsibility in areas such as the environment, research and development and regional policy” (Bleijenberg 2005: 20) while European Institutions, and especially EP, were empowered, amending the institutional incentives for interest groups. The result was that lobbying activity started slowly, grew steadily and after the creation of the SEA exploded (Stone Sweet, Fligstein et. al. 2001: 23). As suggested (Mazey and Richardson 2001, Stone Sweet and Fligstein 2001), we can trace a casual linkage between EU legislation procedure and interest groups: EU legislation on a sector can provoke more attention from interest groups and vice versa; if the number of interest groups present in Brussels increases, this will result in increasing EU legislation in this sector as well. Especially with the SEA, the EU emerged as a “regulatory super-state”²⁴ where negative integration²⁵ is predominant, creating a ‘vicious cycle’ where interest groups and EU legislation are interconnected.

3.3.2 EU-Interest groups relations: searching for willing channels of influence

As we have seen, interest groups were engaged with the European Community from the early stages of its existence. The EU has always been characterised by an extremely high degree of openness towards interest groups, even if “the Treaty did not design a system of accommodating lobbying organizations in Brussels, nor did it outline procedures for incorporating them into the policy process. The Treaty did create an Economic and Social Committee to act as a sounding board for the Commission and Council in order to gather

²⁴ Moravcsik 2003

²⁵ Generally put, negative integration could be described as ‘Europeanization through regulation’, while in positive integration EU obligations prescribe an institutional model to which ‘domestic arrangements have to be adjusted’. See Stone Sweet, Sandholtz and Fligstein 2001 and for a more detailed analysis Scharpf 1997

opinions. But that organization never exerted much influence over legislative processes.” (Fligstein and Stone Sweet 2001: 36).

Greenwood takes this one step further and describes organised interests as “natural constituencies of the Commission and the Parliament. As allies in the drive for European Integration, they reduce the dependence of these institutions upon national administrations and form a demand constituency upon member States” (Greenwood 2003b: 4-5). A further cause for this openness can be traced in the so called “democratic deficit” of the EU, as there is considered to be a lack of input legitimacy²⁶ (Michalovitz 2004). Scharpf suggested that “a decrease in problem solving capacity of national political systems –a loss of output legitimacy- forced national governments to engage in European Integration...[but] this could not solve the problem of accountability and legitimacy in terms of input: the stronger the role of the non-accountable supranational institutions, the less legitimacy can be assured through the intergovernmental mechanism of national accountability” (Scharpf as ref. in Kersbergen and van Waarden, 2004: 158). Especially after the Irish rejection of the treaty of Nice, Michalovitz notices that “the distance between the European Institutions and the people of Europe caused particular concern. Consequently, the European Institutions seek more legitimacy through participation, or in other words, they seek more input legitimacy”. (Michalovitz 2004:146). She then continues to explore how this notion is currently translated in terms of ‘existing civil society’ engagement in European policy making. Existing civil society in this context “concentrates on EU interest representation, or more precisely, on different types of lobbyists active on the European level as well as on representatives of regional offices” (ibid)²⁷.

Thus, openness towards organised interests is seen on a normative level as the remedy for the accusations of ‘democratic deficit’, since organised interests function as the linkage between society and EU. This approach was vividly presented in the Commission’s

²⁶ Input legitimacy: “decisions made according to procedures that include some minimal forms of accountability such as the rule of law, democracy, or political or economic competition” whereas output legitimacy can be found where “institutions of power that work, perform, are able to deliver the goods”, making them legitimate in the eyes of citizens. (Kersbergen, and van Waarden, 2004: 156)

²⁷ Civil society involvement in policy making is one of the basic principles of deliberative democracy; see Pierre and Peters 2000, chapter 7.

White Paper on European Governance (Commission of the European Communities 2001). The Commission, acknowledging that there is a gap between the Union and its citizens, emphasises openness as a *sine qua non* condition for good governance. It especially recognises civil society²⁸ as the medium “giving voice to the concerns of citizens and delivering services that meet people’s needs” (ibid: 14) Furthermore, let us not forget that the EU is not a majoritarian, zero-sum system; on the contrary, consensus building and consultation of the various interests were among its milestones.

²⁸ EC defines civil society as following: “ Civil society includes the following: trade unions and employers’ organisations (“social partners”); nongovernmental organisations; professional associations; charities; grass-roots organisations; organisations that involve citizens in local and municipal life with a particular contribution from churches and religious communities” (ibid: 14).

3.4 The Commission: a 'purposeful opportunist'

The EC has always been a 'willing accommodator' of interest groups. As described above one reason for this is the lack of legitimacy it is perceived to have; the European Council has an indirect legitimacy (since it is consisted of elected members of national governments) while the European Parliament has a direct legitimacy (having its members directly elected from European citizens). On the contrary, a legitimacy of this kind cannot be attributed to the Commission.

Nonetheless, there are more 'practical reasons' for the openness of EC towards interest groups; in the context of their research, Mazey and Richardson carried out a survey among EC officials. "In response to the statement '*The Commission cannot function as a policy formulator without the active assistance and advice of outside firms*', the vast majority of the respondents indicated that they either 'strongly agreed' or 'agreed' with this statement... Many officials in fact listed between ten and twenty groups or firms with whom they had had official contact in the month preceding the survey (February 1992)." (Mazey and Richardson 1996: 201)

There are various explanations for this phenomenon. One of them is that the EC is seriously underresourced and thus unable to cope with the extremely heavy load of work with which it deals. It has a total budget of 100 milliard euros and "its administrative staff is much smaller than that of the local city of Rotterdam... the average size of a policy unit is about twenty people. Due to its scarce resources of budget and manpower the Commission has a strong appetite for information and support from outside" (Van Schendelen 2005: 68-9). Commission officials see in interest groups invaluable potential *information input* and *expertise* which is difficult to be obtained otherwise, given its limited resources. EC is "a broker [...] a *purposeful opportunist* [...] at the center of a complex and varied network of relationships" (Mazey and Richardson 2001: 78) searching for information, support and legitimacy (ibid). Moreover, Greenwood notes that "organised interests... are a source of support for its role in drafting legislation; they are a means of 'testing out' proposals among stakeholders, and the ways these are likely to be received in different national settings ahead of the Council of Ministers; they seek

out points of view about them; and, for the Commission's role as guardian of the Treaties, they collect information about the implementation of the measures, and their impact...the small size of the Commission relative to its functions makes it dependent upon that outside interests bring for drafting workable and technically feasible policy proposals" (Greenwood 2003b: 5). It is also important to remember that in the early years of the Community, in order for the Commission to legislate, it needed to have a mandate from the Council, the member states or the EP. Getting support from interest groups, who have access to national governments, can provide the EC with such a mandate (Haas 1958).

Bouwen (2004) codes the need of the Commission for information in the bounds of the 'access goods' framework. He argues that in return for the access it provides, a European Institution (the EP in his research, the EC in ours) demands certain 'access goods' vital for its functioning. He distinguishes them in three categories

- i) *Expert knowledge (EK)*. Technical expertise and know-how indispensable for understanding the market or the 'street', so as to effectively construct legislation in this policy area
- ii) *Information about the European Encompassing Interest (IEEI)*. Information on the members of a EuroFed, for instance UNICE, on an intended legislation concerning services directive
- iii) *Information about the Domestic Encompassing Interest (IDEI)*. The same as IEEI but on a domestic level.

In addition, in a number of occasions the Commission sees in interest groups valuable allies to take forward its plans; Héritier (Héritier 2001:64) provides us with a framework, explaining how the Commission engages in network building and mobilisation of national actors in order to build support for a policy area and by-pass objections imposed by national governments; she illustrates her argument with an example of anti-poverty policy (ibid), where the Commission set up a network of 'friendly actors' and mobilized Non-Governmental Organizations, thus gaining support for its goals, as well as managing to bypass opposition from Britain and Germany. She also analyzes the 'committing

actors'²⁹ strategy pursued, since “decisions may be made primarily to secure the support of actors and to create motivation and expectations which encourage participants to pledge themselves to a specific action...the prime intention here is to reduce the uncertainty about actors' behaviour” (ibid: 66).

All these factors explain the eagerness of the Commission to work with interest groups, as well as the support it shows to them. Mazey and Richardson assume that “bureaucracies have a tendency to construct stable and manageable relationships with interest groups in each policy area, as a means of securing some kind of ‘negotiated order’ or stable environment” (Mazey and Richardson 2001: 72), while Sidjanski noticed that public bureaucrats often assist the emergence and creation of groups (Sidjanski 1970: 402 as ref. in Mazey and Richardson 1996: 203). This is certainly true in the case of the Commission as well. Greenwood (2003a: 3) reports that the EC spends around 1,000 million euros a year to support NGOs-many of them keep surviving thanks to Commission’s funds. He also points out that “where interest groups don’t exist and the Commission needs a collective interlocutor, it simply creates the forum under the umbrella of its own structures” (ibid)-Green Cowles also describes how “the first list of potential industry members [for ERT] was drawn up in 1982 in the Commission’s Berlaymont building by Volvo and Commission staff” (Green Cowles 1995: 504).

3.4.1 Primus inter pares

On the other hand, the institutional terrain of the Commission makes it the 'perfect target' for interest groups. One reason for this phenomenon is the ‘openness’ of the institution, as described before. Mazey and Richardson (1996: 208) suggest that “if lobbyists had to choose [...] they would almost choose to have links with Commission officials”. Van Schendelen (2005: 56) also makes an excellent point: he declares that in the EU “a dynamic difference between the *formalité* and the *réalité* is a normal fact of life. The use of any machinery is in practice always somewhat different from how it was planned”-making the Commission a *primus inter pares* lobbying target.

²⁹ See also Pierre and Peters 2000, Part 2

Formally, the Commission holds the initiative of proposing and drafting legislation. According to Article 211 of TEU, “the Commission shall formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary” (TEU³⁰), acting in this way as an agenda setter and a gatekeeper (Van Schendelen 2005, Peters 1996). The reality here is the absence of political or legislative direction; Nugent points out that “senior officials who have transferred from national civil services are often greatly surprised by the lack of political direction from above and the amount of room for policy and legislative initiation that is available to them” (Nugent 2003: 126). This, combined with the fact that much of the Commission’s workload is on highly technical details, leaves room for ‘outsiders’ intervention. The other reality is that, as far as secondary legislation is concerned, the Commission is probably the most crucial actor in the policy-making process, possibly even more important than the Council or the EP, which have the final saying on the legislation piece³¹. The rationale of our statement is simply that the Commission has the first saying.

Van Schendelen calls it the “blank A4-format of paper” (Van Schendelen 2005: 68), since practice has shown that “in most cases the Council decision is largely identical to the legally binding part of the proposed text...the changes made largely fall under the non-binding considerations in the beginnings (‘whereas’)”³² (ibid: 69). An old British Civil Service adage confirms this suggestion: “it is better to know the person who drafts the letter than the person who signs it” (Mazey and Richardson 1996: 208); the rapporteur responsible for producing a first draft of legislation is “a very lonely person sitting in front of a blank piece of paper wondering what to write on it” (Hull, 1993, p. 83), being in this way open to any outside input; lobbyists with an established relationship with this A 12-8 *chef de dossier* have a unique opportunity to shape the future policy at the earliest stage. This is the best time to lobby, since “a contact at a late stage of the policy-making process is disturbing and completely useless [...] the best time to lobby the Commission

³⁰ <http://europa.eu/abc/treaties/archives/en/eltoc05.htm>

³¹ We are referring to secondary legislation, where Council decides with the Consultation or, where appropriate, with the Co-decision of the EP on a Commission’s proposal. We will not deal with primary or delegated legislation.

³² Of course, this applies primarily to the delegated legislation; 85% of EU’s legislation is delegated to the Commission which is responsible for drafting and implementation through a complex system of Committees – the so-called ‘Comitology System’. For a more detailed analysis see Van Schendelen 1998.

is when a proposal is merely a glint in an official's eye" (Mazey and Richardson 1996: 208) In this respect, lobbyists and interest groups by participating to an expert group for instance, have the chance of putting their footprint in the future legislation. It is important to notice that expert groups can be created either by a legislative act (formal groups) or by a Commission Service (informal). They are composed of stakeholders coming from the public and the private sector, and their role is to provide advice or identify a potential problem³³.

3.4.2 'Institutionalizing' the Norms

As previously mentioned, the *norm* has been to consult interested parties that for every important piece of legislation³⁴. This has been institutionalised for matters of social policy: article 138 of the TEU mentions that "before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Community action" (European Communities 2002 TEU³⁵). Furthermore, the protocol No. 7 of the Treaty of Amsterdam states that "the Commission should [...] consult widely before proposing legislation and, wherever appropriate, publish consultation documents" (Treaty of Amsterdam³⁶)

After the launch of the White Paper on European Governance and in the framework of its reform strategy, the Commission continued the debate with two Communications on Consultation (Commission of the European Communities 2002a and 2002b)³⁷, a part of the 'Action plan for better regulation'. There the EOC explicitly mentions that "wide

³³ <http://ec.europa.eu/transparency/regexpert/faq/faq.cfm?aide=2>

³⁴ With Consultation we shall mean "those processes through which the Commission wishes to trigger input from outside interested parties for the shaping of policy prior to a decision by the Commission" (Commission of the European Communities 2002b: 15)

³⁵ http://europa.eu/eur-lex/en/treaties/dat/C_2002325EN.003301.html

³⁶ europa.eu.int/eur-lex/el/treaties/dat/amsterdam.html

³⁷ It is interesting to notice that these documents were the answer to the events of the Santer Commission; in 1999, the Santer Commission, led by Jacques Santer was forced to resign under heavy accusations about fraud and nepotism. The accusations primary touched Edith Cresson, but she refused to resign alone, stating that the whole commission was to be held responsible. The new Commission under Romano Prodi began a campaign to reform EC, as a response to the claims on the 'secrecy and corruption of the Brussels Bureaucracy'. For the record, in 2006 Cresson was found guilty by the European Court of Justice because during her stay as Commissioner she appointed a close friend of hers (in the Commission), even if he did not comply with the standards wanted for this particular post.

consultation by the Commission is not a new phenomenon. In fact, the Commission has a long tradition of consulting outside interest parties in the formulation of its policies. The Commission incorporates external consultation into the development of almost all its policy areas” (Commission of the European Communities 2002a: 3). These Communications aim at developing a common framework for Consultation for all DGs, by providing general principles with respect to the various practices of the different units. A wide range of ways of how the consultation should take place is mentioned; in this respect green and white papers are considered to be parts of this procedure; *ad hoc* consultation with interested parties is projected; nonetheless, for the sake of *efficiency*, there seems to be a preference for collective consultation through European Associations. However, in all circumstances the interested parties in a future legislation act *have* to be consulted. Furthermore, the Commission committed itself into taking into respect the impact of the future legislation by using the 'impact assessment'; this technique is to be applied on every significant piece of legislation the Commission is about to draft (Commission of the European Communities 2002c).

Mazey and Richardson (2001: 86) describe the typical procedure EC tends to follow for consultation:

Stage 1: *Initiating dialogue and Debate*, usually via a Green Paper or Communications

Stage 2: *Mapping opinions, frames and interests*: gathering the stakeholders through a forum or a conference

Stage 3: *Insider processing*, through an advisory committee, expert-group or high-level group

Stage 4: *Formal proposals*: here the Commission still maintains a closed dialogue with selected stakeholders

This is not always the case though, as consultation with a selected number of stakeholders may precede the Green Paper (ibid). Still, it can be seen that some actors have privileged positions. This may happen due to the ‘institutional memory’ of the Commission- when “previous policy exercises have already identified who matters” (ibid).

While these initiatives and procedures are not legally binding (except for the provisions in the Treaties), they reveal our previous argument: consultation has always been the *norm* for the Commission and the recent communications show its will to institutionalise them.

3.4.3 New Institutionalism: Institutions Matter³⁸!

At this point, the role of the Commission and interest groups within the European Arena can be better comprehended by make a brief reference to institutional theories. Hall and Taylor, in their classic “The three new institutionalisms” (Hall and Taylor, 1996) distinguish what they call “new institutionalism”, from Historical, Rational Choice and Sociological Institutionalism. While they all claim to be new institutionalists, they follow different paths, as Hall and Taylor prove.

Historical Institutionalists (ibid: 952-973) builds upon group theories of politics and structural-functionalism of the ‘60s and ‘70s. They accept that “conflict among rival groups for scarce resources lies at the heart of politics” (ibid: 937) and in order to explain the inequalities generated by such clash, they look into “the way institutional organization of the polity and economy structures conflict so as to privilege some interests while demobilizing others” (ibid). Indeed, they view the institutional structure as an important parameter, which affects collective behaviour. Some of the scholars in this paradigm believe that actors have a calculus approach while others see a cultural approach. In the former case actors precede acting instrumentally in order to attain their goals and maximise their benefits, while in the latter they have a ‘bounded rationality’, meaning that their rationale is constrained by their worldview-individuals seen as satisfiers rather than utility maximisers, and their action “depends on the interpretation of a situation rather than on a purely instrumental calculation” (ibid p. 399). According to the calculus approach, institutions³⁹ affect the actors’ behaviour by structuring their

³⁸ Bulmer 1998 Journal of European Public Policy 5:3 September 1998: 365-86

³⁹ We shall define institutions as “formal or informal procedures, routines, norms and conventions embedded in the organizational structure of the polity or political economy. They can range from the rules of a constitutional order or the standard operating procedures of a bureaucracy to the conventions

expectations on how the other actors will behave. Contrarily in the cultural approach they provide moral or cognitive templates for action and interpretation. Therefore, in the words of Hall and Taylor, institutions “provide the filters for interpretation, of both the situation and one self, out of which a course of action is constructed” (ibid: 399).

Rational Choice Institutionalism (ibid: 400-4) sees actors as having a fixed set of preferences and acting strategically and instrumentally in order to pursue them. In other words, it only follows the calculus approach. Moreover, this calculus will be affected by the actors’ expectations on the way others will behave. Politics is seen as a collective action dilemma and institutions matter because they reduce transaction costs- Williamson (as ref. in Hall and Taylor 1996: 401) argued that “the development of a particular organizational form can be explained as the result of an effort to reduce the transaction costs of undertaking the same activity without such an institution”- thus reducing uncertainty on the behaviour of other actors.

Finally, Sociological Institutionalism (ibid: 405-8) challenges the term ‘rationality’ by stating that many of the forms and procedures that are de facto included in this word should be seen “as culturally specific practices, akin to the myths and ceremonies devised by many societies, and assimilated into organizations, not necessarily to enhance their formal means-end efficiency, but as a result of the kind of processes associated with the transmission of cultural practices more generally. Thus, even the most seemingly bureaucratic of practices have to be explained in cultural terms” (ibid. p.406). Sociological Institutionalism bridges cultural and institutional approaches by viewing institutions as means that produce roles which incorporate ‘norms of behaviour’ for the individuals to follow. As characteristically indicated, “[institutions] do not simply affect the strategic calculations of individuals, as rational choice institutionalists contend, but also their most basic preferences and their very identity. The self-images and identities of social actors are said to be constituted from the institutional forms, images and signs provided by social life” (ibid: 407).

governing trade union behavior or bank-firm relations, or they can be symbol systems, cognitive scripts and moral templates offering “frames of meaning” that guide human action” (ibid pp. 397-8 & 406)

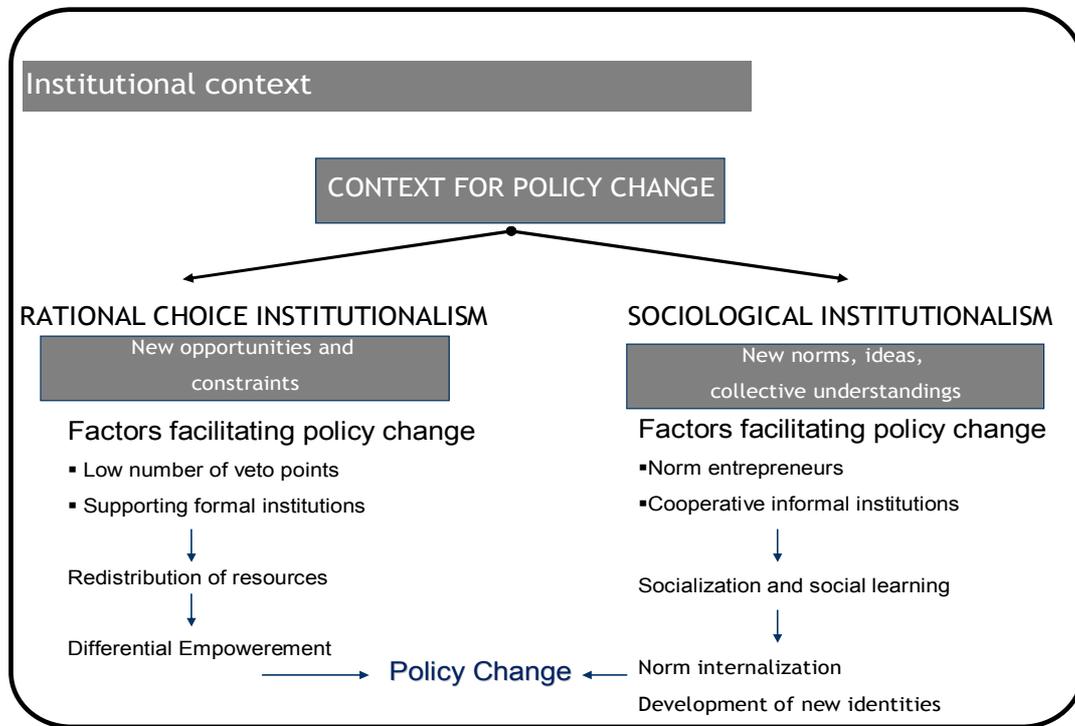
Let us now see how the institutional context previously described actually interacts with policy making. Börzel and Risse (Börzel and Risse 2003) used institutional theory as their guide to see how Europeanisation affects domestic policies of member states, or, to be more specific, when we can expect domestic changes in response to Europeanisation and in which institutional environment. In order to employ their hypothesis, they turned to two schools of new institutionalism: the Rational Choice and the Sociological Institutionalism searching for the distinctive features that facilitate and support policy change. In their view and by using the premise applied by Hall and Taylor in the framework of Rational Choice, pressure for policy change creates new opportunities and constrains for the stakeholders; in case there is a low number of veto players that have the ability to block the policy and supporting formal institutions, we are led to redistribution of resources and differential empowerment among actors. In the Sociological Institutionalism, a new policy carries new norms, ideas and collective understandings. So, in order to succeed there is a need for norm entrepreneurs that can alter the pre-existing norms and for informal co-operating institutions, thus resulting in norm interpretation, new collective understandings and development of new identities which leads to the recognition of the policy in question. In this direction, Börzel and Risse (ibid p. 75) give an example of how Mitterrand managed to transform the monetary and economic policy of France during the early 1980s in a model not compatible with the Socialist collective identities and preferences by altering the preferences of the French Left.

As already stated, Börzel and Risse apply their hypothesis to the domestic level, looking how member states respond to the pressure (of Europeanisation) for change. That notwithstanding, we will use their model adapted to see how any institutional context- be it national or European-would respond to a new policy that implies severe change in many fronts.

Hereafter, we indicate two factors that will become particularly useful later in our research: the low number of veto points and norm entrepreneurs. Paraphrasing the authors, “multiple veto points in an institutional structure can effectively empower actors with diverse interests to resist adaptational pressures, while change agents or norm

entrepreneurs mobilize and persuade others to redefine their interests and identities” (ibid: 58-59). In our case, this is extremely important: low number of veto points means that potential stakeholders have limited channels for influence, or that some of them may be in an advantageous position in comparison to others; absence of norm entrepreneurs means that the new norms, identities and self-images integrated in the directive will not succeed in replacing the existing ones. In more practical terms, the new norms can (and did in the case of the directive, as we will see) become an extremely valuable resource for some groups-and a constraint for others.

Table 3: Institutional Context for Policy Change.



Source: Adopted by Börzel and Risse 2003 p. 69 as presented in Kontogeorgos and Tofan 2006 p. 7

3.4.5 Breaking the Norms: The beginning of a fiasco

We already described how critical the consultation process can be—the EC itself acknowledges that. Moreover, looking back to new institutionalism, consultation can be described as an institution that indeed affects the actors' behaviour by structuring their expectations on how the other actors will behave. On the other hand though, in the cultural approach it provides moral or cognitive templates for action and interpretation. Nonetheless, we have reasons to believe that there was not a procedure like that in the making of the directive under question. Mr. Hendrickx of UEAPME gives us one side of the story: “ *I think it was in 2001, the Commission issued a Communication on its Strategy for the Internal Market...the approach was, ok, there are still a lot of barriers for the internal market [on services] and we want to abolish them...the problem was that the barriers described in these Communications are not objective, in the sense that there were not Consultation documents... and the Commission said always ‘Oh, this is not our position, this is a report on what we receive as complaints’, and they were always using this example. It is even mentioned that companies complained that when they wanted to open a retail shop, they needed a permit. But...in order to built, you need a permit! ... The main problem was that the Commission did not consultate with the stakeholders...there was incorrect information coming from different stakeholders because EC didn't communicate...they just wanted to push this directive...if as a legislator you do not discuss, you have a fiasco*” (Hendrickx, Personal Interview, 4th May 2006). Mr. Kowalsky of ETUC shares the same opinion: “*The Commission never consulted us, even if the Treaty clearly states that there must be consultation*” (Kowalsky, Personal Interview, 5th May 2006)

Even Mr Almarez from UNICE, an association in favor of the original proposal, admits that “*There was no big consultation, I think... Of course there was a lot of research on the barriers, there were some documents and studies prior to the presentation of the proposal but there was no big public consultation or big public hearing on that... Probably because they did not thought it was going to be so difficult*” (Almarez 2006, Personal Interview)

Van Schendelen, on the other hand, claims that *“there has been some consultation before, during the drafting process by the way of standard expert committees as always, and they produced a green and a white paper in 2003, but there has been some consultation before⁴⁰. Some interest groups have sat around a table. But apparently, after the presentation to the Parliament and the Council, the real consultation started to take place...all sorts of stakeholders complained they were not consulted before...In the services directive the Commission made an error by not inviting in that early process many more interest groups, by the way of, for example, the ‘call of interest’...and the outcome so far is that we will now get a text that is much less proposed by Bolkestein and more than the half [resume] of the acquis communautaire.”* (Van Schendelen, Personal Interview, 17th May 2006).

From the interviews, we could make logical assumptions of how this directive was created. Since there was no large consultation, but just merely round tables probably made up by associations or individuals who shared the same line of thought with the officials who created the directive, we could assume that this piece of legislation was foremost the result of the will of Mr. Bolkestein himself and a directory inside DG MARKT⁴¹. Mr. Bolkestein is a very liberal politician and in his speeches/articles he has always supported that European cross border services should be liberalised (see for instance Bolkestein 2005). The fraction inside DG MARKT can be found in Directory E, dealing with services. We should mention that the preparation of the directive was not welcomed by everybody inside the Commission. Van Schendelen (2005: 71) describes how within DG MARKT, “(French) opponents to the planned Directive on Services in the Internal Market published their different green paper on Public Services; the green

⁴⁰ On the expert register of the Europa site, we did not come across of an expert group like the one described by Mr. Van Schendelen. The persons interviewed were not familiar with such a group either. It is possible that it was deleted after the release of the green and white paper. We found though an expert group under the name ‘Forum européen sur les services dans le Marché intérieur’ (European Forum on the Services in the internal Market-EFOSIM) created in the end of 2003. Made up of practitioners, consumer organizations, employers and employees associations and academics, its goal is the consultation on matters of services in the internal market, and it is chaired by a high level official of the DG MARKT. The group had its (probably) first meeting last March.

⁴¹ There are even stories that “the genesis of the services directive began with a group of industrialists in the EU employers federation (UNICE) and the European Round Table of Industrialists (ERT)” (Denny 2006)

paper was withdrawn”. “*I was in Brussels that day and I met Bolkestein for lunch...he was angry [with this green paper]...very angry!*”⁴²(Van Schendelen 2006, Personal Interview)

3.4.6 Mapping the Arena

The core of the argument we will be making in this research is the one that Lowi made more than forty years ago: *policy determines politics* (Lowi 1964: 689-690 & Lowi 1972). According to Burns (2005: 486) “Theodore Lowi (1964) argued that the type of policy under consideration is often *the* key determinant of influence, as it shapes the political arena within which policy is debated, as well as the institutional rules of the game, and determines the actors who mobilize to mould legislation”. Lowi made a distinction between constituent, regulatory, distributive and redistributive policies. The services directive falls under the regulatory category. By taking Lowi’s argument one step further, we claim that every policy has its distinctive features which are likely to affect the process; these features make it different from every other policy, even if they can both be placed in the same category. Thus, each one needs specific attention and delicate handling.

At this point, we shall point out the first mistake of the Commission⁴³: it did not widely consultate with the various stakeholders, but preferred to continue with a few friends and a lot of enemies. This is probably due to the fact that it had underestimated the importance of the issue and the reactions it would cause. Let us put it in another way: had this been a case of delegated legislation, the Commission would have still been accused of not being democratic and accountable, but it could have won. But the service directive falls under the co-decision procedure, thus the Parliament can alter the directive through amendments and even block the process through an unconditional veto. Interest groups like EUAPME and especially ETUC, angry to the fact that they were not consulted in the

⁴² When a dossier falls under the interest of more than one DGs, the interservice procedure is followed: it is a formal channel to settle their differences (Van Schendelen 2005). We are in no position to know if there was such a procedure in our case.

⁴³ DG MARKT was responsible for drafting the directive, but as every piece of legislation produced by a DG, it needs the consensus of all the other commissioners through the College of Commissioners. The services Directive was indeed produced through unanimity of all Commissioners.

drafting phase, will now have (willing) channels or influence; or, to quote Börzel, willing veto points.

Following the blank A-4 Format, the Commission would be in the driver's seat even if there was a wide and open consultation. With the exception of some controversial points (such as article 16), the text in that case would be very much similar or even identical to the directive presented. Moreover the process would have been legitimized. However the Commission, not only being the most powerful actor did it miscalculate the weight of the directive itself, but it also underestimated the effect the Parliament could (and did) have as well. Finally, as we will examine it failed to remember that the timing to present such a directive was not the most appropriate. DG MARKT and the Commission with their behaviour in this stage undermined by themselves the directive they produced, involuntarily empowering opposing interest groups.

3.5 2004-2006: The Frankenstein Directive

The actors in the arena started mobilising themselves for the second stage of the game; the EP was now in charge. The dossier went to IMCO, the Parliament Committee on Internal Market and Consumer Protection. Evelyne Gebhardt, a German Socialist of PES was appointed rapporteur, while the shadow rapporteur from EPP was Malcom Harbour, coming from the British Conservative Party. Unfortunately, having declined the possibility of an interview, we cannot be certain about the course of events in that period. Though, based on previous practice, we can guess that they were the target of exhaustive lobbying from the stakeholders, having meetings at the same time with COREPER and Commission officials. All three stakeholders interviewed admitted that they had meetings with Mrs. Gebhardt and Mr. Harbour, while they also mobilized their network, approaching several MEPs in key positions as well.

3.5.1 The new Commission and the new strategy

Meanwhile, on the 22nd November 2004 the Barroso Commission took office and Frits Bolkestein was replaced by the Irish Charlie McCreevy. In a hearing in front of IMCO Mr McCreevy declared that Europe needs to meet the Lisbon Strategy goals by 2010 and that the removal of obstacles from cross-border services would be a decisive factor towards this direction. Nonetheless, he “argued strongly that this did not aim to sacrifice social or environmental standards in the interests of economic growth. All three were required and interlocked, *“like the three legs of a stool,”*” he said. In any case, economic growth was essential if environmental protection and the European social model were to be retained. Calling the directive *“a visionary piece of legislation”* he acknowledged that it had raised concerns. He committed himself to address these concerns in the legislative process, and adjustments could be made to avoid unintended consequences. He mentioned that the country of origin principle was not the only option for opening markets, but he stressed that market opening was *“not a zero sum game.”*” (Hearing of Charlie McCreevy⁴⁴).

⁴⁴ http://ec.europa.eu/commission_barroso/mccreevy/docs/speeches/2004-10-07/summary_en.pdf

Mr. McCreevy's support for the original proposal declined steadily as he realised the size of the upheaval it had created, even if on the 14th December 2004 he defended the work of his predecessor: "The previous Commission has left us an important legacy with an ambitious blueprint for opening up the Services market...I am conscious that the proposal has provoked a great deal of discussion. This is exactly what a proposal this ambitious and far-reaching can be expected to do. It shows that the proposal is addressing very important questions. At the same time this also means that we have a challenge ahead of us in achieving our common goal. People who know me well will confirm that I have never stepped back from a challenge...The starting point for obtaining a good result should be the acceptance that maintaining the status quo is not an option...I remain convinced of the importance of maintaining an ambitious and visionary proposal with a broad scope that will have a real impact and that will unleash the economic potential of our service sectors." (Speech 14/12/2004⁴⁵).

By 2005 Mr McCreevy had well understood that the directive with its current content would never make its way through EP or the Council. "The services directive, as proposed by the previous Commission, was a noble and very innovative attempt to do something dramatic in this vital area. I could take a pristine, pure view of this – as some Commission officials might want – and stand in my office on the ninth floor of the Berlaymont, open the window, get a trumpet and broadcast that 'this is wonderful! I am going to stand on the barricades for ever and ever and defend this proposal from the last Commission! It is absolutely brilliant and I am going to defend it from now until death – and into the Valley of Death I would ride!' However, *I realise that the services directive as initiated has not a snowball's chance in hell of getting through either the Council of Ministers or the European Parliament.* I could be pristine and pure and say that I will make great speeches about it, get nothing through, offer no services directive at all and do nothing to address the problems facing us all over Europe...[But] I have taken the pragmatic view." (Speech 9/3/2005, highlight added⁴⁶).

45

<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/04/541&format=HTML&aged=0&language=EN&guiLanguage=en>

46

<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/148&format=HTML&aged=0&language=EN&guiLanguage=en>

What this change of attitude meant in practice is described by Mr Almarez: *“The relationship that we had the Commission was at two levels: at the level of the services, with the ones that drafted the directive and at the level of the political layers, meaning the Cabinets. We had high level meetings with Commissioners and especially McCreevy and we had regular contacts with the technicians...however, you probably now what the Commission’s position has been in the debate. They decided not to interfere. So they sent the proposal, the proposal was so controversial that McCreevy decided they would not interfere at the debate until the Parliament did their first reading, which is a very unusual procedure. Normally the Commission holds the right of initiative, they present something and then during the debate with other institutions they are very active! They defend, they explain, they go to meetings with stakeholders, they participate in public debates to defend what they created. But in this case the Commission decided ‘no, we are not interfering’ and people from services were instructed not to participate in public debates except for the ones they had to participate, like in the Parliament...but in the Parliament I was there, the Commission would not say anything...they were not responding with technical arguments...the DG MARKT wanted to follow a strategy based on technical arguments to defend the thesis, but the Cabinet of McCreevy had a political strategy in mind, with the Cabinet being the one who decides in the end...they were in disagreement and this is a really peculiar case...even some Commissioners were disappointed [by the stance of McCreevy], because there were too many concessions, too many loses...due to this decision[not to interfere], Commission’s place was filled in by others; ETUC, UNICE, etc. People who hadn’t drafted the proposal. Imagine how surreal it was that you [as a stakeholder] have to defend the proposal and explain it. Many commission civil servants were frustrated that they were not able to do it themselves... and with the Commission’s approach of not interfering, the Parliament became the key player, and they happily accepted to become the saviors of this mess”* (Almarez, Personal Interview). Mr Hendrickx, on the contrary, describes this new approach as realistic, since Mr McCreevy committed himself to taking into account the amendments proposed by the Parliament (Hendrickx 2006).

With the Parliament being formally as well as informally in the driver’s seat, after the political decision of the Commission not to interfere, we can argue that interest groups

opposing the directive in general or having doubts about certain articles found willing partners in the face of many MEPs. Both Mr Kowalsky of ETUC and Mr Hendrickx of UEAPME said that certain DG MARKT civil servants were “angry and hostile with them” because of their actions, and they did not maintain very good relations. We can easily understand that with the Commission out of the picture, their mission is easier. Their position was further empowered by a seemingly irrelevant fact, which however turned out to be one of the main reasons for the Commission’s resolution not to interfere as well as a crucial factor that shaped the procedure: the French Referendum on the European Constitutional Treaty.

3.5.2 Policy-making and attention shifting

Baumgartner and Jones (Baumgartner and Jones 2002) describe how positive and negative feedback in politics contribute in stability and change in public policy. They define positive feedback as processes where dramatic and unpredictable changes in policy are common, and they are characterised by self re-enforcing processes. On the contrary, negative feedback mechanisms induce stability; shocks are encountered by the self-correcting nature of the system. They refer to policy monopolies, that help create stable policy outcomes by dominating “images and venues”, that is “powerful supporting ideas that often limit the ways in which the given issue is discussed” and “institutional structures which limit who can participate in the debate” (ibid p.12).

By attempting to see how the transition from negative to positive feedback can be achieved, they give us a powerful analytical tool: attention shifting. So, “when people are called upon to make decisions in complex and multidimensional issues, they may be forced to focus on some elements more than others” (ibid: 19), since important decisions have many aspects and it is almost impossible to pay attention at the same time to all of them. Consequently, shifting the notion of the debate from some elements of the policy to some others can be a prevailing supply for some groups-and a disaster for others. But for this to happen, we need to have a public debate on the issue, which implies that the case in question has moved on from a small policy-making elite and has become a public debate.

A number of scholars questioned that. Neo-Marxists, in order to see why capitalism is so persistent, claimed that the state is somewhat insulated by organised social interests. Hall (1993) tested this hypothesis in the case of economic policy making in Britain during 1970-1989. According to him, there are three types of policy change: the first, the second and the third order. First order change consists of incrementalism and routinised decision making. Then follows development of new policy instruments and in the third order change we have a policy paradigm shift. Economic and monetary policy making is a highly technical issue; so, we would normally expect a few economic elites to deal with this matter with no further debate.

Hall finds this true for the first and the second order change. Through the paradigm shift though, from Keynesianism to more monetarist traditions, the Treasury, “which had enjoyed a virtual monopoly of such matters...lost influence... [There was] a shift in the locus of authority...an extraordinary intensification in debate about economic issues in the media and financial circles...the outside “marketplace in economic ideas” expanded dramatically in the 1975-1979 period...Macroeconomic management became the subject of an intense public debate” (ibid p. 285-6). Do not forget that the UK became indebted in IMF in 1976, pumping up this way the whole debate. In the end, the whole issue became political: state protectionism (Keynesianism) vs. free market (Monetarism). In this spirit, Hall makes some useful observations. He mentions Media as another transmission belt between the state and society, besides political parties and organised interests. He even makes self-criticism on behalf of political scientists, since “although we habitually acknowledge its presence, we rarely incorporate an adequate appreciation of the importance of the media into our analyses. In this case, the British press...magnified the prominence given to monetarist doctrine and catapulted monetarist thinking into the public agendas. The press is both a mirror of public opinion and a magnifying glass for the issues that it takes up.” (ibid: 288). He concludes that this example is “ a struggle for power in which competing interests press their views on the government...to borrow Hecló’s unusual verbs, many of the actors involved in changing policy not only “puzzle”: they also power” (ibid 289).

3.5.3 The Polish Plumber

The fact we referred to at the end of 3.5.1 is the French referendum on the ratification of the so-called European Constitution. Signed on the 29th of October 2004 by the heads of the member-states, this Constitutional Treaty needed to be ratified by the each member, either by the national parliament or through a referendum. Spain was the first to declare that it would perform a referendum. It was followed by a number of countries: France, Great Britain and The Netherlands were among them. In the case of France, the Prime Minister Jacques Chirac must have seen an opportunity to raise his profile through the ratification of the Constitution⁴⁷. Something certain in his eyes, given the strong pro-European feelings of France, one of the founding members of European Union. Indeed, the first opinion polls in 2004 clear majority to ‘yes’. But, in the beginning of 2005, the ‘no’ side took the lead.

What has this to do with the Services Directive? We propose that the opponents of the Constitution in France followed a common technique in public affairs: using a con-neo liberal rhetoric, they redefined and re-framed the issues under question, linking in this way two completely unrelated matters: the Constitution and the Directive. Van Schendelen identifies this practice, saying that one of the dilemmas of Public Affairs Management is whether to politicise or depoliticise, broaden or narrow down, mix or separate the issues under question (Van Schendelen 2005: 233). The ‘No’ side picked the first option in each case. They highly politicised the issue of the Constitution, they broadened the arena in terms of issues including the Services Directive, thus expanding the arena in terms of stakeholders and they mixed or linked these issues together to the point that it was impossible to tell one from another. In terms of communication this act can also be described as *propaganda*⁴⁸; indeed, Jowett and O’ Donnell, focusing on the

⁴⁷ For a more detailed description of the reasons behind the referendum, see Qvortrup M, 2006, The three referendums on the European Constitution Treaty in 2005, *The political Quarterly*, 77(1), pp.89-97

⁴⁸ The reader should note that we are not using this term with a negative intention. According to Levinson, “the word propaganda has some negative associations; people often associate it with dishonesty and lies. The working definition is, however: ‘Propaganda consists of the planned use of any form of public or mass-produced communication designed to affect the minds and emotions of a given group for a specific purpose, whether military, economic, or political’”. (Levinson W. 1999 as ref in Sternberg 1963: 37). In

communication process describe propaganda as the “*deliberate, systematic attempt to shape perceptions, manipulate cognitions and direct behavior to achieve a response that furthers the desired intent of the propagandist*” (Jowett and O’ Donnell 1999: 6). The means of propaganda vary: manipulation of symbols and the psychology of the individual as well as meaningless association are frequent instruments (ibid: 4).

In this way, the opponents of the directive and of the constitution took advantage of the public feeling. Two of the major concerns of the French is the unemployment and the ‘delocalisation’, that is when an enterprise leaves France in order to establish new plants to countries with cheaper labour, notably in Eastern Europe. Meanwhile, in 2004 the enlargement of EU took place. Ten new member states, eight of which are located in Central and Eastern Europe, became full members of the Union. While in 2002 the French were in favour of the enlargement⁴⁹, this gradually started to change. In 2003, 67% of the French sample of the population interviewed for the Eurobarometer considered the EU as ill prepared to accept ten more countries⁵⁰. In the days prior to the Referendum, Le Monde captured this trend under the title “one year after, the enlargement continues to inspire fear” (Le Monde 2nd May 2005, p. 8)

As mentioned before, in the beginning the victory of the ‘oui’ side seemed inevitable. “When President Chirac set the date for the referendum on 4 March 2005, the yes side was enjoying a 20 percent lead. Within a mere of two weeks, this lead had been reversed to a 4 percent lead for the opponents of the constitution... Why this amazing turn-around? Were the voters swayed by their arguments? And, if so, which arguments?... One important factor in France often cited was the opposition to the so-called Bolkestein Directive... The directive aroused the fears about a threat of influx of cheap labourers from Central and Eastern Europe. And while Chirac ensured that the directive was withdrawn, the theme of the ‘Polish plumber’ remained an Achilles’ heel for the pro-

this perspective, we acknowledge that propaganda nowadays is present in our every day life- from state to corporate and advertising communication. For a description of propaganda see Jowett and O’ Donnell 1999.

⁴⁹ See Eurobarometer on the enlargement October 2002, acc at http://ec.europa.eu/public_opinion/flash/fl132_en.pdf p. 21

⁵⁰ See Eurobarometer on the Enlargement April 2003, acc at http://ec.europa.eu/public_opinion/flash/fl140_en.pdf p. 24

constitutionalists- *and a godsend for the anti-constitutionalists, who skillfully played on the voters' fears*" (Qvortrup 2006: 91-92, highlight added).

The percentages of 'no' started to rise exactly when the Bolkestein Directive became part of the agenda for the debate on the European Constitution. By shifting the attention of the public opinion from the actual elements of the Constitutional Treaty to Directives that had nothing to do with it, not only did its opponent manage to kill the Constitution, but the Bolkestein Directive as well. The whole thing began in early 2005. In Bolkestein's own words, "Despite its anticipated EU-wide benefits, the proposed services directive has met with heavy opposition from some quarters. This opposition is mainly politically inspired. It started in Belgium, more precisely in Wallonia. The Walloon Socialist Party wished to criticize the government headed by the liberal Guy Verhofstadt. But since they themselves were represented in that government, they had to find a round-about way of doing so. They therefore hit upon the idea of using the proposed services directive as a stick to hit the government with. Indeed, the first demonstration against this proposal took place in Brussels. From Wallonia the fever spread to France" (Bolkestein *ibid*: 4).

The constitution provided the perfect chance to "spread the fever". The directive was used as a weapon to kill the Constitution. Let us not forget that "proper definition is a vital foundation for effective issue management, and comprises a sound understanding of the issue itself, choosing exactly the right words to best position the issue and securing the agreement on the definition. It also requires a full appreciation of the techniques used by other parties to try to redefine the issue to their competing agenda" (Tony 2004: 191). And the game of issue management was absolutely won by the opposing camp, with the 'Frankenstein Directive' and especially the 'Polish Plumber' myth. This catchword which could have been created in the ateliers of major communication consultancies⁵¹, was the flag against the Constitution, symbolising the cheap labour that would invade France in case the Constitution was ratified and would leave French workers unemployed. It was a fatal communication mistake of Bolkestein himself (Hendrickx 2006, Van Schendelen

⁵¹ It was in fact used by the Polish Ministry of Tourism as their main slogan for the campaign aiming to attract French tourists!

2006, personal interviews), who confessed during a press conference “ that he would like to hire a Polish plumber because he finds it hard to find a good handyman for his second house in northern France” (http://en.wikipedia.org/wiki/Polish_Plumber). After that, “*France wanted to kill him*” (Van Schendelen 2006)⁵². As McCreevy indicates, “Many believe that it was the proposed Directive, and its embodiment, the fabled Polish plumber, that brought down the European Constitution in France” (Speech National Forum on Europe, 23 February 2006⁵³)

At this point it is interesting to emphasise that the groups opposing the Constitution were the same opposing the directive as well. ATTAC, a non-governmental organization was active combating the Treaty and the Directive. In our interview with the ETUC representative, Mr Kowalsky, he claimed that it was never the intention of ETUC to play this kind of game, meaning to link the debates for the Constitution and the Directive. Nonetheless, one of the main polls of opposition in France both towards the Constitution and the Directive was the French Trade Union Confédération Générale du Travail (CGT). In fact, the current Confederal Secretary of ETUC comes from CGT. In any case, there was a direct linkage between the two dossiers so the agenda was expanded. In the ‘Le Monde’ of the 30 April 2005, in a special section on the Referendum, we find an interview of the Luxemburgish Prime Minister about the European Constitution. It is extraordinary that the last question of the journalist concerns the Bolkestein Directive and whether it will be reviewed (Le Monde 30 April 2006, "L’idée d’une renégociation du traité est d’une naïveté criante", p. 6). Some days later Bernard Thibault, Secretary General of CGT puts it more bluntly “It is less the Constitution itself and more the conditions and the ends of this Union that are the objects of the ‘war’. The conditions, mainly social and economic, of the enlargement, were not a part of a debate involving the totality of the citizens. All the European Trade Unions gathered at Brussels on the 19th of March [to protest] for the employment and against the Bolkestein Directive on the Service, proving that the movement of syndicalism was not motivated from

⁵² “The next week [after Mr Bolkestein’s press conference] a band of rogue electricians from the state-owned utility EDF cut off the power supply to his country home in the village of Ramousies” (The New York Times, 25 June 2005, "Unlike hero in Europe’s Spat: The beckoning polish plumber" , p.1)

⁵³ www.entemp.ie/trade/marketaccess/singlemarket/06serv198.doc

nationalism... [it is] the ultra liberal positions that we fight” (Le Monde, ‘L’ issue du referendum ne changera pas le quotidien des salaries’, 2 May 2005, p. 7).

The effect of this mobilisation on the level of the Referendum is well-known: the treaty was not ratified with 54, 68% of the voters opposing it. It is interesting to notice though that the fear of the Polish Plumber shaped this vote. According to the Eurobarometer dedicated to the Referendum, to the question “Which are all the reasons for which you voted no at the Referendum”, 57% of the respondents say that the treaty would have unpleasant effects on the employment in France, that it would lead to the delocalization of many enterprises and that the percentage of unemployment in France would increase to extremely high levels. On the other hand 19% claims that the treaty was too liberal⁵⁴. So, by incorporating the Directive into the debate about the Constitution (and vice versa), and framing it as a battle against ultraliberalism, the partisans of no (both to the proposed treaty and to the Directive) managed to hit two birds with one stone: make the Treaty and the Directive more or less useless with the content they had at that point.

The mobilisation described basically led to the end of the draft directive as well. Chirac understood that it was being used by the side of ‘no’ as an argument against the Treaty. In a final attempt to save the game, during a European Summit “he made public his contempt for the Services Directive and German Chancellor Gerhard Schroeder conveniently jumped on the bandwagon of the chorus of dissent. “I fully agree with president Chirac, we can’t allow freedom in services to open the door to social dumping and to the disregard of safety standards in Germany and in Europe”, Mr. Schroeder told the German Parliament.” (New Europe, April 3-9 2005, "Brussels should listen to European Vox Populi", p. 48)⁵⁵. But even before that, on the 26th April 2005, Mr. Chirac declared that “the Bolkestein Directive on the free circulation of services ‘does not exist anymore” (le Monde, 28 April 2005, "L’OCDE souhaite liberalizer les services", p. 7).

The opponents of the Directive had succeeded: it escaped a narrow circle of technocrats and elites and became part of the public agenda. Europeans could see that the French had

⁵⁴ http://ec.europa.eu/public_opinion/constitution_en.htm

⁵⁵ It is interesting to notice that when the Directive was tabled, in 2004, France and Germany supported it.

voted in favour, the Directive would have allowed cheap labour from Eastern Europe to take over their jobs-regardless of the complete inaccuracy of such an assumption. In this perspective, it is easier to understand Schroeder's reaction; at that period, his popularity was extremely low and the German public opinion was against the Directive. Thus, a new potential deadlock was created: even if the directive made its way through the European Parliament, it would never do so through the Council, with France and Germany on the opposing side.

3.5.4 Bad Timing!

I Van Schendelen, when analyzing the way a good PA practitioner functions, he highlights the 'Triple P' theory: knowing the right Person in the right Position and following the right Practice will result to victory (Van Schendelen 2005: 119). Identifying the opportunities to grasp is equally (and in some cases more) important. And the opposing groups happily accepted this 'godsend' offered to them by the Commission itself.

We propose that the second critical mistake of the Commission consists of the timing of launching the Directive. This, colliding with the enlargement and with the debate for the European Constitution, empowered the opposing interest groups, while it severely weakened the position of the supporting groups in the arena. By mid-2005, everybody knew what the end of the Directive would be, even if it had not yet been discussed in the Parliament.

"Of course you have to go back a little bit. Before the vote in the Parliament we had the referenda on the new Convention. Due to misinformation many people voted against especially in France...so this has influenced the whole file." (Hendrickx 2006).

"Q. Do you feel that if there was not the coincidence with the referendum in France you would have better outcomes?"

A. *I feel that the time and the momentum in which this directive was tabled was the worst you could ever imagine. Because it was right after the enlargement, and right prior the Constitution Treaty. I think that if this Directive was tabled right before the enlargement, I think it would have been adopted in half the time. But because of the enlargement, ok we were happy, ten new members, fine, but people started realize that these guys have the same rights: they can come and live, work, study...it had a negative effect in member states, mixed with an economic little crisis in key member states. These people had a lot of domestic economic troubles, so enlargement is not necessarily good news yet... [As far as the Constitutional Treaty is concerned], a lot of people were picking problems and saying 'the Constitution will make it worst'. And in some countries the Services Directive was a key part of the discussion, like in France...and this is unbelievable! This Directive will exist with or without the Constitutional Treaty; it's a development of fundamental freedom which can be found already in Community law. It was so weird to see that link-but that link worked for those who wanted to stop the Constitution. With the issue of Turkey it was the main reason for the 'No' Campaign!" (Almarez 2006, Personal Interview)*

Mr Kowalsky admits that *"the Constitution helped our goals because there was a big debate going on about the Directive and led to high levels of mobilization...but having the Constitution rejected was not in our goals"* (Kowalsky 2006, Personal Interview).

Mr Van Schendelen gives a more long term view on this matter:

"Q. Would you consider the attempt of the opposing [to the directive] groups to link the directive with the referendum for the constitution in France as effective?"

A. *It was definitely effective. Apart from the lobbying, one of the other factors that have influenced the position of the MEPs, was the outcome of the referenda in France and here [in the Netherlands] and that gave a sensitivity among a number of MEPs, that Europe is going too fast. They should slow pace, slow integration. That is a factor. And you might say that only two countries [rejected the Constitution]...yeah, but just Spain ratified it with a referendum, all others had ratified it through their parliaments and that*

is in the control of the government-not the voice of the people... [Also] Media became a factor particularly after the outcome of the referenda...the more general fear of more European Integration. At that time the Directive begun to speed up in the European Parliament, and then the media invested a lot of energy and attention in following the Directive, even in front pages.

Q. *And that was in favor of some groups, I guess...*

A. *That was in favor of some groups and a disadvantage for others.” (Van Schendelen 2006, Personal Interview)*

That means that not only did the referendum empower the opposing groups at that point, but it also empowered them for the battle that would follow in the Parliament. The groups supporting the Services Directive were in an extremely disadvantageous position. The game was being lost, and the chances to save it at the Parliament were becoming smaller everyday that newspapers published at their covers caricatures of Bolkestein as Frankenstein. The Commission had underestimated the situation: the directive had few chances to be adopted in such an atmosphere. Let us not forget that the directive carried new norms: the ‘Polish plumber’ (for the opponents) or the workers mobility (for the supporters) was one of them. However, such norms needed the right timing. In the middle of a mini economic crisis and especially in a country like France, with a traditionally high level of social uncertainty⁵⁶, it was certain that they would create hostility. All these facts, combined with the absence of prior consultation from the Commission steered the course of events. If, for example, the Directive had been tabled in early 2003, or even today, things would probably have been completely different, since “*at certain moments it is not easy to sell*” (Socialist MEP’s assistant, Personal Interview 2006).

⁵⁶ We are referring to Hofstede’s “Uncertainty Avoidance Index (UAI), which describes ‘the level of tolerance for uncertainty and ambiguity within the society.... A low uncertainty avoidance index indicates the country more readily accepts risks and takes more and greater risks’⁵⁶. France scores 90% on UAI, when the European average is 80% and the World average 60%”. See Kontogeorgos and Toflan 2006: 8 and www.geert-hofstede.com/hofstede_france.shtml

3.6 European Parliament: Multiple influence venues

The European Parliament is a contender with the Commission for the “crown of the ‘most open of all the European Institutions’” (Greenwood 2003b: 57). Nonetheless, it took some time for interest groups to grasp this opportunity. Since its establishment with its current name, the EP was considered to be a powerless, non-influential, almost decorative institution. Back in the early days, lobbyists and interest groups did not have much interest in it, since it had a merely consultative role⁵⁷. Things changed with the launch of SEA in 1987, which increased the formal powers of the EP. The co-operation procedure was introduced, applying to all Single European Market (SEM) legislation. Now the EP had the chance for a second reading along with a conditional veto⁵⁸. Its powers were enhanced further enhanced with the introduction of the co-decision procedure under the Treaty of Maastricht (1992). Co-decision was revised under the Treaties of Amsterdam (1997) and Nice (2000), broadening its scope. Now EP has an unconditional veto which may be executed after two readings and a reconciliation committee, made up of MEP’s and Council officials. But before talking more throughout about co-decision, which is a crucial factor in the services directive procedure, let us have a look in its institutional settings.

3.6.1 The ‘divided loyalties’ of the MEP

The EP can generally be considered as a highly unpredictable institution, considering the fact that it is composed of 732 MEPs coming from 25 different states and 200 political parties. These politicians hold a sort of ‘dual mandate’: one from their country (and their domestic political party) and one at the European level (and the European political group in which they participate). This sort of polyphony enhances “the chance of inconsistent decision-making... [The fact that] it is the only parliament in Europe which cannot be dissolved and which is free from the Trojan horse of a government-controlled majority” (Van Schendelen 2005: 79). Nonetheless, this peculiar situation creates a ‘hostage condition’ for MEPs. “An active member of a committee or of a Political Group may well

⁵⁷ This is the formalité; however, the réalité is that by adopting resolutions EP can have an agenda setting function and in this way MEPs have more influence than power (Van Schendelen 2005).

⁵⁸ For a more detailed description of the co-operation procedure see (George and Bache 2001: 263).

gain greater influence within the Parliament, with prestigious *rapporteurships*, and so on. On the other hand, a member can be extremely active within the Parliament and lose touch with his or her own political base at home, and risk not being re-elected. While the choice is not usually as stark as this ... a member must select an appropriate balance of priorities” (Corbet et.al.1995:62 as quoted at Hix et. al. 1999:7). MEPs come from different national backgrounds, each one seeing this European experience either as an opportunity, exile or simply as the closing of their political careers.

In their seminal study of MEPs behavior, Hix et al. (1999) made some very important observations: first, they talk about divided loyalties of MEPs between their personal ideology, their European and their Domestic Political Party. Accepting empirical data which shows that MEPs are more likely to be loyal to their domestic party, they however suggest that in order to predict or interpret the MEPs’ behaviour in the EP, we have to take into consideration factors like the domestic institutional setting as well as the supranational setting and their personal goals⁵⁹. Moreover, they argue that when EPs decisions are likely to make a difference (through co-operation or co-decision), their voting turnout is high. If we add to this the cultural diversity (for instance, Socialism in Greece is not perceived in the same way as in the Netherlands), we can understand why it is difficult particularly for the two main European political parties (EPP-ED and PSE) to maintain a coherent line, especially in thorny issues. The Bolkestein Directive was no exception to this rule.

⁵⁹ Hix et al. propose the following model for this purpose:

$$B = w_1R + w_2P + w_3O$$

where

B = position in the MEP behaviour space

R = re-election-seeking behaviour,

P = policy-seeking behaviour,

O = office-seeking behaviour, and w_1 , w_2 and w_3 are coefficients representing the weights of each form of behaviour. For a detailed explanation of the model see Hix et al. 1999: 14-29. The model can be found *ibid* p.14.

3.6.2 European parliament and Interest Groups

The structure of the Parliament as described above displays the multiplicity of entry points for interest groups; among 626 MEPs with diverse (national and ideological) points of view there will surely be some who share the stands of an interest group. The EP is particularly believed to be a shelter for ‘weak’ interests, like consumer and social groupings. While Greenwood (2003b) seems to share this view, Mazey and Richardson (1996) consider it more of a myth. Practice though has shown that ‘social interests’ are likely to have an easier access to EP, and we could argue that the Parliament is a keen supporter of them (Greenwood 2003b).

This is partly due to the fact that it is easier to establish connections with the EP than with the EC. We described before that in Commission, there is a small ‘iron triangle’ that can exert influence over a proposed legislation, with the key-player being the chef de dossier. In the EP however, the key-player is the rapporteur, but there are fifty in the Committees and even 732 people in the plenary session that can alter or even block the process⁶⁰. With co-decision, interest groups can shape future legislation through the proposed amendments. The rapporteur, as shown, is ‘the gatekeeper’. The ‘access goods’ hypothesis of Bouwen (2004) applies perfectly here, since MEPs are in more need of expertise and ‘street information’ than EC officials. MEPs themselves seem to think that the information provided by interest groups plays an important role, determining their stance towards a dossier (BM 2001). MEPs, their assistants, the supporting secretary of the Commissions and Political Parties can all be influential factors in the process-and interest groups are eager to grasp these opportunities.

3.6.3 The Co-decision procedure

Since the TEU, the EP has acquired great power to influence legislation through the co-decision procedure. Through this rather complex procedure, this is presented in table 4, the EP holds the right for two readings on the proposed legislation as well as an

⁶⁰ In conditions of co-decision.

unconditional veto, while there can be a conciliation committee between the Council and EP in order to find a common ground.

The main work floors for Parliament's activities, and an important constituency of the co-decision procedure, are about twenty commissions, "each being a kind of micro-parliament for a specific policy field" (van Schendelen 2005: 77). They usually consist of between fifty and eighty MEPs and are the primary targets for interest groups, with a secretariat of five officials. This Secretariat provides the members of the committee with advice, thus being a channel for outside interests (Greenwood 2003: 55). Because MEPs usually have doubts for the impact assessment made by the Commission on a proposed legislation (ibid: 57), they are eager to receive external expertise, given that they normally lack the resources to provide it themselves. Public hearings are organised, where experts and interest groups are invited. When a proposal for the Commission is submitted, a rapporteur is appointed⁶¹; he or she generally comes from one of the two main political parties and has the task of drafting a proposal accepted by the majority of the commission and the plenary session. The common practice is that other parties appoint shadow rapporteurs to supervise the process.

The rapporteur is the key-person concerning a proposed legislation; he or she "exerts an important influence on amendments [made to the original proposal]; they have an assistant who carries out the research and produces a draft resolution and amendments, an explanation of the proposal, and a report of the views of other committees. The Rapporteur then presents the draft report, which is discussed by each of the political groups who receive advice from shadow rapporteurs appointed by the political group to advice them. During the committee stage, any member can propose amendments to it" (Gillies 1998: 181).

At the plenary session, an amendment needs the support of at least 32 MEPs or the support of the committee in charge of a political group, in order to enter the agenda. Benedetto (2005) describes a rapporteur as a legislative entrepreneur, being just one side of an 'iron polygon'; indeed, the rapporteur has many (informal) contacts with the

⁶¹ For an 'insider's' description of how rapporteurs are allocated, see Wurzel 1999: 12 and Kaeding 2004.

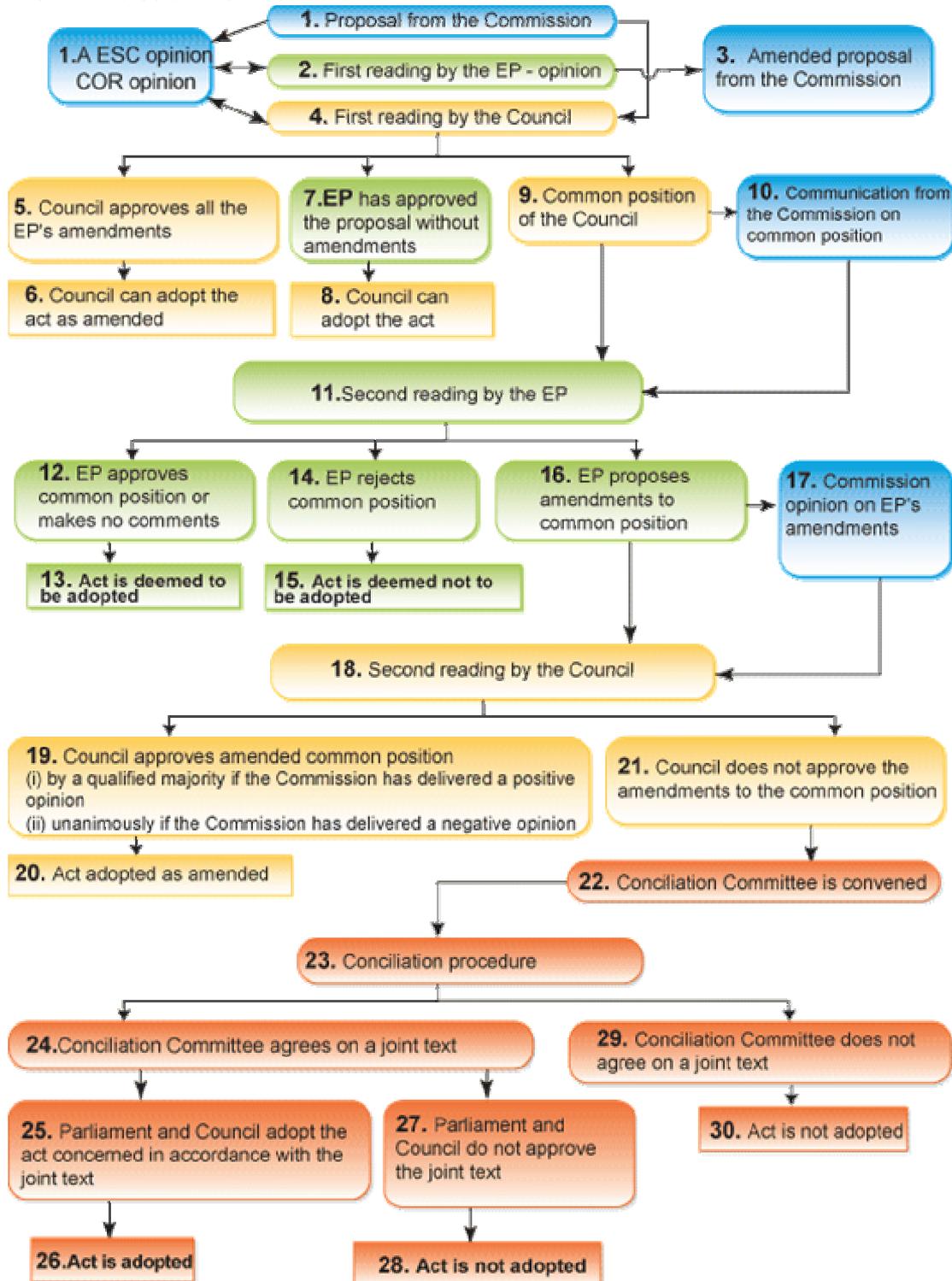
Committee of Permanent Representatives (COREPER) and Commission officials, fellow MEPs and interest groups. Gillies describes how ‘final actions on controversial proposals are preceded by intense negotiations between the Committee convenor, rapporteur, shadow rapporteur, leaders of major political groups, representatives of the Commission DG making the proposal, staff of the Council, and with concerned lobbyists and interest groups’ (Gillies 1998: 181).

The most interesting stage of the Co-decision procedure is the Conciliation Committee between EP and Council: “at second reading the Parliament must readopt by an absolute majority of members, i.e. 314 members,³ its amendments that were not incorporated into the Council’s common position following its first reading. If the Council cannot accept these readopted amendments to its common position (which is often the case since, of course, the Council’s own common position is the result of a hard-fought compromise between fifteen governments), a Conciliation Committee will be convened to negotiate a compromise. This joint Committee will consist of equal numbers of Council and Parliament representatives and they will have a six-week period (with the possibility of a one-month extension) within which to negotiate. If the Committee cannot reach a compromise acceptable to both sides in the time available, the Parliament is able to exercise a final veto. If a compromise is reached, each party to the agreement must formally ratify the decision” (Garman and Hiditch 1998: 272).

In this bargaining game, informal processes are the rule (ibid). Shackleton (2000:334-6) comments on how dialogues, that is small informal meetings attended by only the key actors involved in negotiations, have evolved as a platform of normative templates between the EP and Council; they are considered to be a decisive part of the negotiation process. Nonetheless, Farrell and Héritier (2003) show how the EP manipulates the need of COREPER for informal meetings in the bounds of co-decision for its own benefit⁶², while they “have served to accentuate the sense of Council and Parliament

⁶² They argue that due to its institutional settings (lack of resources, etc) COREPER is keener to informal meetings in order to find a common ground, placing in this way the Parliament in a more advantageous position.

Table 4: The Co-decision Procedure



Source: http://ec.europa.eu/codecision/stepbystep/index_en.htm

enjoying a special relationship from which the Commission is excluded” (Shackleton 2000: 336). But even from a rational actor approach, these informal dialogues are supposed to be more important from the conciliation committee. A former MEP and Committee Chairman is very illuminating: they usually involve “the Deputy Permanent representative of the country that holds the Presidency of the Council, the Parliament’s rapporteur and Parliament’s Committee Chairman, together with the Senior Commission Director-General...[they are] extremely crucial [since they] establish the negotiation process” (Wurzel 1999: 8).

Indeed, the Commission does not have a formal saying in these dialogues; its role is considered to be purely advisory and facilitating. Burns (2004) describes how Commission officials were totally excluded from the informal meetings between the EP and the Council on the novel foods regulation, and on other occasions the Commission representative was not allowed to speak (Wurzel 1999). Since it has no formal power in this final stage of decision making, the EC has to adapt to these new informal institutional settings in order to maximise its potential by being present in the Conciliation committees and formal dialogues⁶³.

These developments have led many scholars to notice the emerging role of the EP under co-decision⁶⁴. Does this suggest that the Commission, on the other hand, has a declining role? Burns makes three key hypotheses:

“- In order to be able to secure an outcome close to its ideal policy, the Commission must share preferences with a majority of both the Council and the EP, or with a minority of the Council and a majority of the EP.

⁶³ EC’s role can be influential if it shares the same preferences with either the Council or, preferably, the Parliament. In the second case, it can even participate in the preparation of EC’s conciliation delegations (Burns 2004)

⁶⁴ For contrary arguments, see Tsebelis et. al. 2001

- If the Commission, Parliament and Council are equally impatient, or if the Commission has the same level of impatience as either the Council or the Parliament, the Commission is more likely to achieve an outcome close to its ideal position.

- The Commission is less likely to achieve its policy goals if it has a poor relationship with the relevant officials in the Parliament.” (Burns 2004: 15)

She also notes that “ It seems likely that in future the Commission will continue building early informal contacts with officials in the Council and EP and will seek to anticipate and shape the Council’s and EP’s policy preferences. It is unclear, however, what the Commission is likely to do if, as in the novel foods case, it has different preferences from the Council and EP. The novel foods case suggests that it would be dangerous for the Commission to seek to impose its preferences or to block or withdraw legislation, as such action can have long-term implications. It seems likely, therefore, that if faced with similar circumstances in future the Commission will cede to the preferences of its legislative partners” (ibid). This hypothesis is of vital importance to us, since the services directive falls clearly under the second remark she makes: as we will see, the Commission and the majority of the Parliament share different preferences.

3.7 The Directive at the Parliament

Under the Co-decision procedure, the dossier was now in the hands of the Parliament. IMCO in cooperation with EMPL had already conducted a hearing in November 2004, which included stakeholders as well as experts. The latter can be partly attributed to the fact that the impact assessment conducted by the Commission was deemed inadequate by many parties as inadequate. The intentions of IMCO were revealed in a Working Document in late 2004: it was clarified that the central aspects of a redraft of the Directive would include among other things the Scope of the Directive, the Country of Origin principle, and its provisions on the posting of workers. This text seems to keep many reservations for the Commission's proposal (European Parliament 2004). Now, all the interest groups targeted the MEPs, and especially the ones in key positions: Ms Gebhardt, Mr Harbour, Anneli Jäätteenmäki (the ALDE shadow rapporteur) and other 'gatekeepers'. As Mr Almarez and Mr Hendrickx explained, not all MEPs were familiar with the directive, which is very complex; in this sense, some MEPs who knew the details of the directive exercised influence on other members of their political grouping⁶⁵. All three interest groups that were interviewed said that they mobilised all their resources at this point, making in this way the MEPs, and especially the key MEPs (the rapporteur and the shadow rapporteur, the members of IMCO and Employment and Social Affairs Committee as well as other 'gatekeepers') targets of exhaustive lobbying. Needless to say, the whole net of relationships was taken into account; this meant that our interest groups even lobbied the Council, either as EuroFeds or through their national members.

On the theoretical framework we referred to Hix's conclusions on MEPs. To that matter, Van Schendelen adds another dimension: "*The new reality of the new European Parliament comes to table, meaning that it is less than before coherent. More than half of the members [MEPs] are new, freshmen, half of the members come from the new member states and need to embed themselves into the nine existing [European] political parties, and many don't feel quite comfortable with those nine parties, because, for instance,*

⁶⁵ "It was so fashionable to have something to say...and in order to say something, you need to have something to say. So the ones that did not study it [the Directive] were following others from their group" (Almarez 2006)

what does mean socialism in the European level? There is much fight between the German and the Dutch socialists for this” (Van Schendelen 2006).

The result of this was that finding a coherent stance among the MEPs of the three major European Political Parties (EPP-ED/PSE/ALDE) was almost impossible. All three agree that improvements are necessary, yet to a different degree. ALDE backs up the original idea: “[We want] a Directive on Services, but an amended and improved proposal. Our Group supports the work of the Commission to facilitate the free movement of services by removing all the unnecessary obstacles and red tape for businesses but we also want to ensure that the rights of citizens, consumers and workers will be respected in each Member State” (ALDE 2005⁶⁶). We do not have evidence of the EPP’s official position, but Mr. Harbor seems to support the idea of an improved directive, which would guarantee the free movement of services, taking into account the legitimate objections posed by interest parties⁶⁷. Finally, PSE rejects the draft presented by the Commission: “the draft directive on services in the internal market, in the form currently proposed by the Commission, is unacceptable. It constitutes a threat to consumer protection, the European social model and public services”, but it was willing to negotiate a completely amended text (PSE position paper, 2/3/2005⁶⁸). The supporters of the Directive found themselves in an extremely difficult position. At certain points, the fight was not about saving what was de facto left from the original draft, but about saving the idea of a directive on services itself. MEPs are divided between their loyalties. For instance, for a French MEP to publicly admit that he/she supports the original draft would probably count for political suicide. As we shall see, there were examples of MEPs coming from all parties that rejected even the amended proposition of EP. The debate was not technical but political and it was fuelled by the press.

“There were some political decisions in the beginning of the debate for strategy that were extremely difficult to reconduct after; some of the MEPs even though we explained to

⁶⁶ <http://alde.europarl.eu.int/5/CLJJKFPAIGGJMDOMKDAADLHNPDB19AF4F39DPY23BY9LI7TOAocs/DLS/2005-STAFF-0225-01-EN.htm>.

⁶⁷ Acc. at <http://epp-ed.europarl.eu.int/Press/showpr.asp?PRControlDocTypeID=1&PRControlID=4522&PRContentID=8210&PRContentLG=en>

⁶⁸ www.pes.org

them [our point of view] with legal and technical arguments would say to you 'Sorry, this purely political' ...and we were very frustrated because we were meeting MEPs and they were all coming up with the same thing 'Yeah, but if we do that we break the compromise and we have trade unions demonstrating'!" (Alvarez 2006, Personal Interview). This is confirmed by the personal assistant of a northern Socialist MEP who voted against the amended text: *"in the end, it was a political issue"* (Socialist MEP's assistant, Personal Interview 2006).

On the 19th April 2005 and in this atmosphere, Gebhardt delivered the first part of her report. It was a radical revision of the original text, narrowing the scope and scrapping article 16 on the country of origin principle. Nonetheless, for these reasons it was fiercely opposed by EPP and ALDE. There were huge divisions and absence of consensus between the parties; the sole point of contact seemed to be Gebhardt's comment that "we all agree we want a high level quality of services" (European Information Service, European Report, Services Directive: MEPs struggle to come up with compromise amendments, October 26 2005).

Those divisions were present in the interior of the parties as well; Mr Hendrickx informs us that EPP was divided in two sides: the liberal group (mostly consisting of MEPs coming from UK and the northern countries, as well as MEPs coming from the new member states) supporting - perhaps with some amendments - the directive, and the conservative group, rejecting the directive or being for major amendments. This division gave interest groups plenty of opportunities to exploit (Hendrickx 2006). Although we have no evidence, it would be appropriate to suggest that such a division existed in the Socialist grouping as well; it is difficult to imagine that for example the Greek Socialists shared the same positions on this matter with their colleagues from the UK.

In this complex political scenario, the interest groups tried to influence the process. Our interviewees MEP, which is member of the IMCO, thus being in a position where she could exercise a great deal of influence through the proposed amendments, was the target of *"exhaustive lobbying from all sides...the lobbyists were really active; we had frequent meetings with interest groups, while we received position papers all the time"* (Socialist

MEP's assistant, Personal Interview 2006). He too acknowledges the absence of consensus between and among the parties. That is why, he explains, during the last months before the plenary session where the discussion on the directive would take place, an informal group with four or five members from PSE and EPP was created; its aim was to come to some sort of compromises, so that the directive could be put for vote. He also explains that the Commission was unofficially present in meetings of IMCO, while McCreevy's cabinet had talks with MEPs and Gebhardt, trying to push for the Directive (ibid).

The absence of consensus between the different political parties resulted in the postponement of IMCO's opinion. While it was supposed to deliver it on the 4th of October 2005 it was unable to decide on over 1,600 hitherto proposed amendments. The media described it as "the complete collapse of efforts to reach a compromise between the different political parties (European Information Service, European Report, Services Directive: MEPs struggle to come up with compromise amendments, October 26 2005). Finally, after a "jovial 4-hour marathon session" (Europe Information Service, The End of the Beginning, 26 November 2005), IMCO adopted an opinion on the 22nd November of the same year. According to the decision, each of the two blocks had victories and losses: EPP and ALDE managed to keep an altered provision on the 'principle of origin' (Article 16)⁶⁹, while Socialists and Greens succeeded in narrowing down the scope of the directive, excluding services like general economic interest, healthcare services etc. Moreover, it was clarified that on the posting of workers, Directive 96/71/EC would be prevailing. (European Parliament 2005, Compromise Amendments CA 1- CA 20, PE 355.744v05-00). Meanwhile, Austria (the country that was to assume the presidency of EU for the first half of 2006) declared that it would delay approval of the directive until the second half of 2006, so that it "would meet the fears of many European Countries" concerning the flood of cheap labor from central and eastern European countries (International Herald Tribune, 1st December 2005, "Austria plans to delay EU services legislation; Concerns on flood of cheap labor cited", p 15)

⁶⁹ Mrs. Gebhardt tried to replace it with a 'country of destination' principle; this proposition was rejected because it was thought to create even more obstacles.

The debate was now taken to the plenary session of the Parliament which would decide on IMCO's proposed amendments. However, the media's attention to the directive had created a minefield for the MEPs. The directive was being debated in the front pages of leading opinion-making as well as in local newspapers. Demonstrations were being organised against the directive (in Athens Trade Unions called for a demonstration against the Bolkestein Directive and Globalisation! See "Gsee, Adedy calls for mass rally on Saturday against the Bolkestein Directive and Globalization", Athens News Agency, 13th October 2005), while the "Bolkestein Directive" was often placed in stories about unemployment (see "EU threat that puts price on everything", Western Morning News, 19th December 2005, p. 10; Ekman and Bilefsky 2005:13;). Even if the EPP in cooperation with ALDE was in position to bypass the other parties, in practice many MEPs were projected to vote in accordance with their national preferences (European Information Service-European Report, "Services Directive: Parliament may leave Directive intact, 1st October 2005).

Nonetheless, such a possibility mobilized the opponents of the directive. As the 13th of February, the day when the Directive would be discussed in the plenary, was coming closer, these groups intensified their lobbying. ETUC delivered a memorandum to the Chancellor of Austria, demanding for 'profound changes to the Directive (Agence France Presse, 'ETUC calls for profound changes in Bolkestein Directive', 11 January 2005); CEEP, the Public Service Lobby urged MEPs to reject IMCO's proposal; the parties opposing even the idea of a Directive (the Greens and the European United Left) said "it was vital 'to mobilize all the forces' and that 'opposition is as diverse as it is large'. Large-scale rallies are planned in the run-up to the crucial plenary vote" (European Information Service-European Report, 'Services: Left Plots to kill off Bolkestein Directive', 14th January 2006). UNICE sent an 'open letter' to all MEPs, making clear that it backed some compromises, while expecting some improvements (UNICE 2006⁷⁰).

These efforts were intensified as on the eve of the critical plenary, there were many informal meetings between the political groups; "With February 8 the deadline for tabling amendments, the EPP and Socialists are trying to hammer out a compromise on the main

⁷⁰ http://www.unice.org/DocShareNoFrame/Common/GetFileURL.asp?FileURL=F_3

sticking points, the proposal's scope and the country-of-origin principle” (European Information Service, Services Directive: Parliament talks enter crucial phase, 8th February 2006). By the 10th of February (two days after the final deadline for tabling amendments), the EPP and the PES had reached an agreement according to which the ‘country of origin’ principle would be eliminated, while services of general interest would remain in the scope of the directive. ALDE seemed to be backing this deal, while the Commission supported it as well (Euronews, Free Marketeers fight for full services liberalization, 10th February 2006). Socialists seemed particularly happy with this development, while some EPP members, particularly from new member countries, Finland and Sweden “were concerned the deal gave too much discretion to member states to restrict service-providers on ‘public interest’ grounds” M. Harbour stated (European Information Service, Services Directive: EPP-Socialist deal to overhaul ‘Bolkestein Blueprint’, 11th February 2006). However, in the midst of pan-European demonstrations against the directive⁷¹, there were doubts whether the MEPs would follow their (European) Parties mandate, thus making the deal “by no means certain” (Euronews, Thousands march against “Bolkestein Directive”, 11th February 2006). Indeed, some days before the critical vote, German MEPs from both sides of the political spectrum attacked the compromise, claiming that either the directive was still far too liberal, or that the directive still allowed for excessive state protectionism (EUobserver.com, MEPs compromise on services law directive, 13th February 2006).

Finally, on the 16th of February, the plenary of the Parliament approved the modified text put forward by IMCO, with a majority of 391 votes in favour, 291 against and 34 abstentions⁷². The compromises made were kept; article 16 was now named as “freedom to provide services”: “ Member States shall ensure that the powers of monitoring and supervision provided for in national law in respect of the *provider are* also exercised

⁷¹ It is interesting to notice that while rallies took place in Strasbourg during the days of the plenary (13-16 February), ETUC’s secretary general admitted that the compromises reached were ‘a true step forward’, while he highlighted the importance of the French ‘no’ as a decisive factor which influenced the whole debate (BBC Monitoring Europe, European trade union chief welcomes compromise on EU services directive, 14th February 2006)

⁷² The MEPs of EPP, PES and ALDE combined count for 554 persons. We can easily see that there was a major deviation from the parties’ position/mandate which supported the compromise text. This deviation was further empowered by the fact that the voting did not take place on the text as a whole, but on each individual amendment.

where a service is provided in another Member State” and “ *The competent authorities of the Member State where the service is provided may conduct checks, inspections and investigations on the spot, provided that those checks, inspections and investigations are objectively justified and non-discriminatory.*” (European Parliament 2006: 63). The scope of the directive was also cut down, in comparison to the first draft of the Commission: services of general interest, healthcare and social services, legal, audiovisual and gambling services were excluded from the Parliament’s amended proposal. It was also explicitly stated that as far as the posting of workers was concerned, the already in power Directive on posting of workers would prevail (ibid).

3.8 The end

For many analysts, this was a major compromise in the sense that in case it was violated by the commission, by not incorporating in its forthcoming proposal the amendments made by the Parliament, such a compromise in the Parliament's second reading would be impossible to be reached again. Mr Bartenstein, Austria's Economy Minister called it "a vast agreement in the political sense of the term" (Agence France Presse, EU Ministers near accord on liberalizing services sector, 22nd April 2006). McCreevy knew that, so he committed himself that the modified proposal would be based on the vote of the Parliament (Euractiv.com). Indeed, in the modified proposal put forward by the Commission, most of the amendments were taken into account. Article 16 was now named "freedom to provide services", with no reference to the 'principle of origin', most of the derogations proposed by the Parliament were there, while on the posting of workers the existing Directive prevails (Commission of the European Communities 2006).

Now, it was the Council's turn to decide on the Directive through Qualified Majority Voting (QMV). We already mentioned that here too there were countries supporting the (original) directive, while others rejected it and backed the Parliament's proposal. Nonetheless, on the 29th of May 2006 (exactly one year after the French 'non' to the European Constitution), the Council of Ministers after nine hours of negotiations agreed through unanimity⁷³ on a compromise text put forward by the Austrian Presidency. This compromise text was essentially the Commission's amended proposal, with "some cosmetic changes" (ibid). This political agreement was rubberstamped by the Competitiveness Council in the end of July 2006. Again with Lithuania abstaining (this time followed by Belgium, whose Francophone Socialist party engaged in the coalition government, is leading a campaign against the directive⁷⁴) the Council sent the directive back to the Parliament for second reading in autumn, with one possible conflict: the Council supports the Commission's will to exclude only "non-economic services of

⁷³ With the exception of Lithuania; the country abstained from the vote, because its Finance Minister said "Vilnius was looking for 'a more profound European integration'". (Agence France Presse, EU strikes deal on services sector reform, 30 May 2006).

⁷⁴ <http://www.euractiv.com/en/innovation/council-backs-commission-services/article-156941>

general interest”, while the Parliament voted to exclude “all services of general interest” (ibid). Nonetheless, after so many compromises such a small pitfall does not seem able to create a deadlock to the procedure

3.9 Who pays? Who gains?

In their own words⁷⁵:

UNICE: ‘UNICE considers that the European Parliament has deprived the directive of most of its capacity to create growth and jobs in Europe. Cross-border services will not be facilitated. Too many sectors are excluded from the scope. Application of legislation of the provider’s country of establishment is undermined by many derogations. It leaves excessive power for Member States to restrict services for multiple reasons which go way beyond well-founded reasons of public interest and could lead to protectionism. This will create great legal uncertainty for both companies and customers. The exclusion of labour law from the scope of the directive was not necessary as the posting of workers directive already adequately regulates the conditions for sending workers on temporary missions abroad. The Parliament also excludes temporary work agencies, which contribute to smooth functioning of labour markets and offer job opportunities. The only positive achievement left in the directive concerns freedom of establishment.’⁷⁵

ETUC : ‘‘The majority of the ETUC's demands have been met:

- labour law is excluded, and in particular issues linked to the posting of workers;
- sensitive sectors such as temporary work agencies and private security services are excluded;
- fundamental rights to collective bargaining and action are respected;
- services of general interest and some services of general economic interest, such as healthcare, are excluded;
- the country of origin principle has been abolished, enabling Member States to exercise better supervision and apply rules to protect the public interest.

This vote shows clearly that MEPs have succeeded in finding a compromise that allows for the opening up of the services market, while at the same time safeguarding the European Social Model, even if there are still some improvements to be

⁷⁵ Source: <http://www.euractiv.com/en/innovation/cheers-jeers-services-vote/article-152692>

made.” ETUC also stated that it will not rely on its gains, but will remain mobilised in order to achieve more improvements.

EUAPME: “The Parliament has shown today that it is able to find solutions on sensitive issues which have divided citizens and political parties for months. By listening to the concerns of the citizens and the SMEs, the Parliament has certainly contributed to closing the gap between the European Institutions and the citizens. [...] By introducing the right for enterprises to offer their services in countries other than those where they are set up, the European Parliament is proposing a principle much closer to one of the four basic freedoms of the Treaty than the controversial country of origin principle, as it was formulated in the Commission's proposal. By adding that this free access and free exercise cannot be governed by provisions, which fail to respect the principles of non-discrimination, necessity and proportionality, the *EP reminds the Member States of the principles of good lawmaking*. The exemptions to this basic right are only the consequence of the division of competences between the European level and the Member States” (highlight added)

The ‘big winner’ is UEAPME: as Mr. Hendrickx told us, through MEPs they were able to have most of their positions (translated into amendments) realised. We also see that there is much positive reference to the Parliament; this is probably because “*at some point we were not in speaking terms with the DG MARKT...the Parliament was our only way*” (Hendrickx 2006). If we consider as ETUC’s primary goal the withdrawal of the Directive, ETUC at least managed to achieve its secondary: attain major derogations such as on the matter of the exclusion of temporary work agencies. Finally, the one group who gained almost nothing is UNICE. It supported the original draft, it supported IMCO’s opinion, but still little was left.

4. Conclusions

In this final section, we shall return to the basic question we posed in the introduction of this research: why was the directive presented in 2004 altered in such a fundamental way by the Commission itself after two years, in April 2006? We have suggested that the Commission was the main responsible for that.

Over the years, the EU in general and the EC in particular have developed certain norms; the stakeholders should be consulted before drafting and tabling pieces of legislation. This procedure serves various purposes: it gives the legislators 'street information' to which they have no access and which are vital for them; it covers the 'democratic deficit' of the EU, since the legislators are not isolated from the representatives of civil society; above all this practice, based on consensus, leads to sustainable pieces of legislation. If all parties are consulted and a consensus is built, the risk of a stakeholder trying to alter the legislation through other channels (that in many cases are not in the Commission's sphere of control) is minimised.

Here we identified the first mistake of the Commission: it failed to consultate. In doing so, the opposing parties found other channels, mainly the Parliament which, in this particular case even holds the right of an unconditional veto. This, combined with the MEPs special features and the fact that the directive became the key issue of an unrelated event (the French referendum) - thus leaving a elitarian technocratic circle and evolving into a pan-European debate on which everybody had an opinion - left the (new) Commission with no alternative but to incorporate the amendments proposed by the EP in order to save what it could.

We proposed that with its behaviour the main responsible for the course of events is the Commission. It acted with arrogance towards the stakeholders and ignorance towards its environment, empowering in this way the enemies of the directive. This directive (and this behaviour) might have worked in the case that i) it fell under delegated legislation; the Parliament would not be involved, and the dissatisfied interest groups would not have found a possible veto point and a medium to channel their demands ii) the launch of the

directive would not have collided with the referendum; in doing so, the directive was linked with the European Constitutional Treaty by its enemies, became part of the *misleading* debate in an inaccurate way, making it ‘dangerous material’ in the light of the media for the public figures who supported it – plus, it had a major contribution in the mobilisation of the opposing groups. The fatal communication mistakes (see ‘polish plumber’) certainly did not help either.

These political slips were brilliantly used by the opponents of the directive. As Verwey indicated more than a decade ago, “a technical lobby, although initially necessary, tends to become weaker when it is overtaken by non-technical issues such as consumer interests and the influence of public opinion” (Verwey as ref. in Van Schendelen and Peddler 1994: 23). This is the route the opposing camp followed: in many cases technical arguments were replaced by political (in the best case) or by arguments that lie in the ‘thymic’. The dilemma European Citizens were faced with was “employment or the Bolkestein Directive, which equals with unemployment”. The reader should keep in mind that in no case are we choosing sides; on the contrary, we try to distinguish the PA techniques followed by the involved parties. For somebody not familiar with lobbying practices, they might seem malicious; however, the truth is that they are well-established, effective and efficient ways. The bottom line is twofold: we believe that in the future the Commission will handle dossiers like that with the utmost care and attention; and, as always, among the interest groups there will be winners and losers. It is highly unlikely that something will change during the EP’s second reading. The compromises made at every level are too delicate to be broken. One might expect that a group like UNICE would be on the winning side; this business lobby is very powerful, well connected and organised with a variety of resources (including a large budget). But, to quote Verwey once again “a large lobby-budget isn’t everything, ability to spread the message and a bit of luck is” (ibid.)

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