In the Shadow of Politicisation

Explaining services liberalisation in the European Union (2001-2011)

Thesis submitted in partial fulfilment of the requirements for the degree of Doctor of Philosophy in Politics (European Politics and Society) in the Department of Politics and International Relations at the University of Oxford

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In the Shadow of Politicisation – Explaining services liberalisation in the European Union (2001-2011) by Gabriëlle Krapels (St Edmund Hall) submitted for the D.Phil in European Politics, Trinity Term 2011.

This thesis researches the variation in levels of liberalisation within the European services market, focusing in detail on four selected service sectors (i.e. postal services, electricity services, healthcare services and the services covered by the Services Directive) from 2001 until 2011. In this thesis, I propose a model of European integration capable of explaining the exact levels of liberalisation in each service sector. I argue that the level of liberalisation can be explained by looking at the drivers of integration (i.e. expected economic benefits from further integration and the level of supranational activity), which determine the societal demand for further integration and the shape legislators' preferences and constraints, and the intervening influence of ad-hoc politicisation (i.e. the influence of public opinion through mass mobilisation). To illustrate this, this thesis applies a two-tiered approach of analysis. First, it explains the context in which the legislation is made to understand the economic implications of the proposed legislation, the level of supranational activity preceding the tabling of the legislation and the preferences of all actors involved. Second, taking preferences as exogenously given, this thesis applies a method of process tracing to study in detail the negotiations between legislators – the amending stage of the legislation. The case studies show that the drivers are crucial to explain the general demand for integration and at the same time show how politicisation, taking various guises, influences the level of liberalisation – primarily by altering legislators' relative power. Particularly interesting is that politicisation can affect the negotiations even in absence of politicisation actually materialising causing some legislation to be made in the 'shadow of politicisation'. These findings confirm existing explanations of European integration and add new insights as to how we can understand the process of European integration more generally.

Nothing worthwhile has ever been achieved without constant endeavor, some pain and constant application of the lash of ambition. That's the price of success as I see it.

Joseph French Johnson (1853-1925)

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Contents

Tables V
Figures VI
Introduction ..... - 1 -
I. Nature of services ..... - 4 -
II. Previous research: usefulness and shortcomings ..... - 8 -
III. Proposed research ..... - 11 -
IV. Value of this research ..... - 14 -
IV. Overview of the thesis ..... - 16 -
1. Literature Review ..... - 21 -
1.1 Theories of public policy-making ..... - 23 -
1.2 Traditional debate and beyond ..... - 27 -
1.2.1 Traditional theories of European integration ..... - 27 -
1.2.2 New institutionalisms ..... - 32 -
1.2.3 Research on the relative influence of legislators ..... - 38 -
1.3 Governance approach ..... - 44 -
1.4 Influence of politicisation ..... - 49 -
1.5 What specific research has been conducted on service liberalisation? ..... - 52 -
1.6 Conclusion ..... - 59 -
2. Theory ..... - 63 -
2.1 Research focus ..... - 65 -
2.2 Existing theoretical frameworks ..... - 72 -
2.3 Proposed amended model ..... - 79 -
2.3.1 Ad hoc politicisation ..... - 80 -
2.4 Methodology ..... - 93 -
2.5 Selection of cases ..... - 103 -
2.6 Data ..... - 104 -
2.7 Possible criticism – shortcomings of the model ..... - 107 -
3. Liberalisation of the Postal Market ..... - 111 -
3.1 Characteristics of the postal sector: what's at stake? ..... - 114 -
3.2 On the road to full liberalisation ..... - 123 -
3.3 Contextual changes favouring full liberalisation ..... - 136 -
3.4 Content of the draft 3rd Postal Directive ..... - 143 -
3.5 Negotiations ..... - 146 -
3.6 The level of liberal legalisation of the 3rd Postal Directive ..... - 157 -
3.7 The winners and losers of the 3rd Postal Directive ..... - 159 -
3.8 Explaining full postal market liberalisation – testing the model ..... - 162 -
3.9 Conclusion ..... - 165 -
4. Liberalisation of the Electricity Market ..... - 167 -
4.1. Electricity market: its particularities ..... - 170 -
4.2 What's at stake? ..... - 176 -
4.3. Developments to date ..... - 183 -
4.4 The 3rd Electricity Directive (2009/72/EC) ..... - 189 -

4.5 Negotiating the 3rd Electricity Directive ..... - 196 -
4.6 Assessing the negotiations: who shaped the outcome? ..... - 215 -
4.7 Explaining electricity market liberalisation – testing the model ..... - 220 -
4.8 Conclusion ..... - 224 -
5. Services Directive ..... - 227 -
5.1 Legal reality vs. practical reality – the need for the Services Directive ..... - 230 -
5.2 The Services Directive – what's at stake? ..... - 232 -
5.3 Explaining the content of the Services Directive ..... - 238 -
5.4 Politicisation materialises ..... - 244 -
5.4.1 The directive's main bones of contention ..... - 247 -
5.4.2 Explaining the effect of politicisation on Member States ..... - 255 -
5.5 Towards a compromise in Parliament and Council ..... - 258 -
5.6 The final level of liberal legalisation ..... - 269 -
5.7 Winners and losers – testing the model ..... - 274 -
5.8 Conclusion ..... - 278 -
6. Patient Mobility Directive ..... - 283 -
6.1 Demand for the Patient Mobility Directive ..... - 286 -
6.2 Patient Mobility – what's at stake? ..... - 288 -
6.3 Drafting the Patient Mobility Directive ..... - 295 -
6.4 Content of the Patient Mobility Directive ..... - 300 -
6.5 The negotiations ..... - 305 -
6.6 The directive's level of liberal legalisation ..... - 323 -
6.7 Winners and losers – testing the model ..... - 325 -
6.8 Conclusion ..... - 329 -
7. Conclusion ..... - 333 -
7.1 The results – what have the case studies shown? ..... - 336 -
7.2 The role of politicisation ..... - 346 -
7.3 Trends distilled from the negotiations? ..... - 352 -
7.4 What conclusions can be drawn for the future? ..... - 354 -
Bibliography ..... - 361 -
Appendices ..... - 395-

Tables

I.1	Indication of service activities	p.5
I.2	The GATS modes of services supply	p.6
2.1	Overview case studies	p.104
3.1	Result European elections 1999-2009 (by political party)	p.138
3.2	Most significant changes proposed by the draft 2008/6/EC directive (compared to the status quo)	p.144
3.3	Level of liberal legalisation of initial Commission proposal	p.146
3.4	Effect of Parliamentary amendments on the directive's level of liberal legalisation	p.151
3.5	Effect of Council's amendments on the directive's level of liberal legalisation	p.157
3.6	Overview of all amendments made to the directive's level of liberal legalisation	p.158
4.1	Main steps in electricity reform	p.173
4.2	Unbundling models of energy distribution networks in several European countries	p.193
4.3	Level of liberal legalisation of initial Commission proposal	p.196
4.4	Effect of Parliamentary amendments on the directive's level of liberal legalisation	p.205
4.5	Effect of Council's amendments on the directive's level of liberal legalisation	p.212
4.6	Overview of all amendments made to directive's level of liberal legalisation	p.215
5.1	Level of liberal legalisation of initial Commission proposal	p.244
5.2	Effect of Parliamentary amendments on the directive's level of liberal legalisation	p.266

5.3 Effect of Council's amendments on the directive's level of liberal legalisation p.268

5.4 Overview of all amendments made to directive's level of liberal legalisation p.272

6.1 Level of liberal legalisation of initial Commission proposal p.305

6.2 Effect of Parliamentary amendments on the directive's level of liberal legalisation p.311

6.3 Effect of Council's amendments on the draft directive's level of liberal legalisation p.317

6.4 Overview of all amendments made to the draft directive's level of liberal legalisation p.325

7.1 Overview liberalisation process per case study p.336

Figures

2.1 Theoretical model European integration p.78

2.2 Theoretical model European integration with inclusion of politicisation p.80

2.3 Full theoretical model of European integration (including politicisation) p.93

3.1 Product segmentation of the delivery services market p.114

3.2 Average growth rates in national employment (headcount, CAGR 1998-2007) p.120

3.3 EU domestic letter post, 1998-2007 p.127

3.4 Growth in letters, compared with economic growth, 1984-2007 p.128

Introduction

'Europe will not be made all at once, or according to a single plan….'
Schuman Declaration, 9 May 1950

What and who drives European integration? It is a question that remains difficult to answer even today. Due to its complexity, the topic has inspired academic researchers since the European Union's inception in 1957 and until this day has left us with various interpretations of what actually drives European integration. The need for a solid understanding of the process of integration becomes particularly urgent at a time when mounting protectionist pressures threaten to undermine the ideals of the European Union.

Given the staggering financial problems faced by the Union at present, the subsequent inclination for nation states to turn to protectionism and the increasing public discontent, some scholars, such as Walden Bello[1], have argued that 'deglobalisation' may be on the rise. This development, if proven to be true, could harm the backbone of the European project: the internal market. Although it is hard to imagine that the financial crisis, or its aftermath, will fundamentally threaten the European project, these developments do highlight the need to understand what factors contribute to further integration of the market, and more importantly, how they do so.

The initial reasoning behind a truly internal market was based on the idea that this would create an environment where competition would flourish, leading to higher efficiency and

[1] Bello, W. (2006), *Deglobalization : ideas for a new world economy.*

innovation, allowing companies access to a large market so as to exploit economies of scale. This, it was argued, would create stronger, more competitive companies and foster economic and political cooperation between countries through interconnectedness. The high level of interconnectedness of the market would reduce the likelihood of war between nation states within the European Union.

The completion of the services market was a pivotal step in obtaining a truly internal market. However, the liberalisation of this market had traditionally lagged behind the other areas of goods, capital and people. Whilst the aspiration for an internal economic market, based on a common market founded on the four freedoms (the free movement of persons, services, goods and capital), had been a focal point for politicians since the 1957 Treaty of Rome[2], the liberalisation of the services market has proven exceptionally arduous.

The Commission's 'State of the Internal Market for Services' report in 2002 indicated that services accounted for only a 'disproportionately low share of trade and investment'.[3] Intra-EU exports of services were valued at €386.4bn in 2001[4], which represented only around 20% of trade in the internal market.[5] This is problematic as

[2] The internal services market has continuously been on the political agenda as crucial part of the Internal Market Strategy since 1993. Recently, the European leaders reiterated this commitment during the Lisbon Summit by making the explicit wish to make the European Union the 'most competitive and dynamic knowledge-based economy' by 2010. Source: *Presidency Conclusions – Lisbon European Council 23 and 24 March 2000*, Lisbon 24 March 2000.

[3] *Report from the Commission to the Council and the European Parliament on the State of the Internal Market for Services*, COM (2002), Brussels 30 July 2002.

[4] *Extended Impact Assessment of Proposal for a Directive on Services in the Internal Market*, SEC (2004), 13 January 2004.

[5] Canoy, M. and P. Smith (2008), 'Services and the Single Market', *Journal of Industry, Competition and Trade*, p.321

services are increasingly making up a larger share of the European economy and currently account for 57% of GDP.[6] Economic theory would predict that large economic benefits can be gained from a more liberalised, open and efficient services market. Considering these figures, it is not surprising that the OECD in 2005 concluded that, in terms of liberalisation, 'the services sector has lagged behind'[7] compared to the EU market for goods.

Singling out general factors to explain these differences is difficult as developments in the internal market to date have shown that liberalisation does not proceed according to one plan. Moreover, the development of the services market has been far from uniform as there are great internal differences *between* service sectors in terms of levels of liberalisation. Some areas have been successfully liberalised, whilst others remain problematic or even untouched (e.g. financial services vs. healthcare services).

These differences in levels of liberalisation within the services market are rather curious. All service sectors are subject to the same institutional framework: an institutional framework favourable towards further integration and depending on the conditions, capable of fostering change to a greater or lesser extent.[8] Particularly the Commission has traditionally operated from an ideology that economic benefits are to be gained from further internal market integration.

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6 Ibid.

7 OECD (2005), 'The EU's single market: at your service?', by L. Vogt, *OECD Economics Department Working Paper no. 449*, p2.

8 Smith, M. (2005), *States of Liberalization: Redefining the Public Sector in Integrated Europe*, p. 11-12.

Starting from the premise that the European Union institutionally favours integration, with a Treaty providing the legal rights in support of further integration, what then explains the differences in liberalisation within the services market? Agreeing with Schumann that Europe will not be made at once, according to a single plan, what conditions are conducive to the further integration of the services market? Focusing in particular on the level of liberalisation, this leads me to pose the following research question: "*What explains the varying levels of liberalisation within the services sector*?"

In this thesis, I will propose a model of integration that is capable of explaining the differences in levels of liberalisation observed across service sectors. Detailed insight into the reasons underlying the variation of liberalisation within the services sector will start to answer the question why the services market as a whole has been lagging behind the other three freedoms and provides insight into the process of European integration.

I. Nature of services

Services are considered 'services' by the Treaty 'where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons'.[9] The essential criterion of this definition is the term 'remuneration', which means that a service activity only falls within the scope of the 'free movement of services' when the service is supplied for an economic counterpart. Therefore, public services, which are not provided for remuneration, fall outside the scope of the 'freedom to provide services'.

[9] EC Treaty, Art. 50. The article corresponds with the numbering used in the *Consolidated Version of the Treaty on the Functioning of the European Union*, Official Journal 115/49, 9 May 2008.

The legal basis for the free movement of services was laid down in Art. 56 to Art. 62 of the Treaty (freedom to provide services) and Art. 49 to Art. 55 (freedom of establishment).[10] The wide and imprecise definition of 'services' leads to the high plurality of the category 'services sector'. An important trait of services, which enables a distinction to be made, is the ease with which they can be traded across borders (i.e. their 'tradability'). The diversified nature of the complete range of services falling within the services sector has made it difficult to liberalise this sector by means of 'one size fits all' approaches. Table I.1 illustrates this. This table shows that the dominant approach used to liberalise the service sector has been the application of sectoral directives.

TABLE I.1. Indication of service activities

	High Tradability	*Low Tradability*
Sectoral directive	financial services (banking, insurance), telecommunications, energy service, professions paired with professional qualifications (doctors, nurses, architects etc), audiovisual services.	notaries.
Not subjected to a sectoral directive	tourist services, gambling services, management consultancy.	assistance for the elderly, child care, funeral transport.

(Table composed by author)

It is important to note that cross-border service provision is not a single action. There are four different modes which constitute cross-border service provision. They include national service providers moving across borders to provide services in another country; the provision of services in another country without the cross-border movement of the service provider (e.g. internet based services); movement of consumers to obtain services abroad; and the establishment of service providers in another country. Full liberalisation

[10] Treaty on the Functioning of the European Union (TFEU Treaty), *Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union: Charter of Fundamental Rights of the European Union (2010/C 83/01),* as amended by the Treaty of Lisbon (13 December 2007), Official Journal of the European Union C 83, 30 March 2010. When reference is made in this thesis to Treaty articles, these correspond to the articles in the TFEU Treaty (2010/C 83/01) unless otherwise stated.

of a particular service sector therefore requires barriers to be removed for all these four forms of cross-border movement. Table I.2 below provides an overview.

TABLE I.2. The GATS modes of services supply

Mode of supply	Definition
Mode 1	*Cross-border supply* Suppliers resident in one country provide services in another country without physical movement of either supplier or consumer
Mode 2	*Consumption abroad* Consumers resident in one country travel to the country of suppliers to consume a service
Mode 3	*Commercial presence* Firms (Legal persons) moving to the location of consumers through the establishment of a foreign affiliate or branch
Mode 4	*Temporary movement of natural persons* Individual suppliers travelling temporarily to the country of the consumers to provide a service

Source: Table based on Table 1 on page 7 of the DIIS Working Paper 2008/11 by Jon Mortensen.

Acknowledging that markets for services are highly diverse across services, within services and between countries, and that generalisations about them can be hazardous[11], there are some characteristics of the services market which render it particularly difficult to liberalise. First, services markets tend to be highly regulated. This is partly a result of the intangible nature of services. As services are often 'experience goods', which means evaluation of quality is only possible after consumption, there is a large information asymmetry between the producer and the consumer. This multiplicity of regulation leads to differences in standards and quality of services between countries and hampers easy European fit-all solutions.

Added to this is the realisation that Member States may be reluctant towards liberalisation due to the negative effect this would have on national control. Obtaining an open internal services market would inevitably require the removal of national regulation

[11] Canoy and Smith (2008), p. 324.

that functions as a barrier. The implications of this are that market liberalisation would indirectly imply a transfer of power from the national to the supranational level.

Second, the delivery of services greatly differs from goods, as the physical presence of an out-of-state service provider is often needed when providing a service. This stirs up concerns about national labour rights and labour standards. Temporary cross-border provision of services also requires the involvement of some governmental departments, such as the immigration office and labour office. This uncertainty makes governments more hesitant to support cross-border service provision.

Third, many large (non-governmental) services, such as financial services, transport services and all services in network industries such as telecommunications, postal, gas and electricity are subject to separate chapters of the Treaty.[12] De-regulation of these services on the principle of free movement of services is difficult, as the specific Treaty chapters assume priority over Art. 56.

Fourth, the complex nature of services, which often requires simultaneous production and consumption, the necessity of producer proximity and the importance of trust and confidence in a service provider, renders cross-border service trade inherently more difficult than goods, for example – not the least because issues of quality control and customer redress possibilities remain difficult to coordinate.

Despite these difficulties, liberalisation has taken place but in various degrees. Where financial services and telecommunications seem to have been liberalised to a great extent,

[12] Pelkmans, J. (2003), 'Mutual Recognition in Goods and Services', *ENEPRI Working Paper no. 16*, p.18.

other services such as electricity have proven difficult whilst some have only recently been put on the political agenda (e.g. healthcare services). What explains these differences in levels of liberalisation? In formulating an answer to this puzzle, academic research on European integration provides a useful starting point.

II. Previous research: usefulness and shortcomings

Various theories of European integration have been developed over the years to provide a more satisfactory answer to the puzzle how, when and why European integration takes place. Of particular significance to this thesis are those theories of European integration whose primary aim has been to explain the process of European integration. The initial debate among scholars of European integration had initially been dominated by the intergovernmentalists and neo-functionalists, but the debate slowly transgressed beyond this and moved towards a branch of theorising that focused on the conditions under which Member State and supranational institutions exert influence (e.g. new institutionalists).

These theories are particularly useful for this thesis in understanding the process of EU policy-making and European integration more generally. For one, the traditional intergovernmentalist vs. neo-functionalist debate unveiled the most important 'drivers of integration', i.e. those factors capable of generating societal demand for change that will subsequently put pressure on the European institutional framework to propose and on the legislators to supply legislation. Changing economic conditions and a change in supranational activism were both brought forward as important developments that can lead to demand for legislative change.

However, merely knowing what factors drive integration does not suffice to explain the different levels of liberalisation within the services market. It is also necessary to pay detailed attention to the stage where the exact shape of legislation is determined: i.e. the negotiation stage. Most theories of European integration have assumed that negotiations are an intergovernmental bargain where relative power and side-payments determine the outcome. Where the focus was on supranational institutions during the period in between bargains, scholars sacrificed an examination of the details of negotiations in order to uncover long-term trends. Thus, depending on the theory, Member States to a greater or lesser extent shape the outcome within the constraints set by the European institutions. However, each failed to specify the conditions under which their arguments hold.

The new institutionalist theories provided a better understanding of the policy-making process by studying the effect of institutions on actors' behaviour, outlining the conditions under which supranational influence increases or decreases. In particular, rational choice institutionalism proved useful, as it specified the conditions under which the relative influence of supranational institutions increases or decreases. This offered a more detailed understanding of policy-making, and thereby helps one to understand the policy outcome better.

Nonetheless, for the purpose of this thesis a thorough understanding of the negotiations also required a better understanding of the role of societal interest groups and how they come to influence the process of European integration. The governance approach proved useful here as it provides valuable insights to one's general understanding of the process

of EU policy-making. Governance theories direct their research focus to the process of decision-making and diverge from the assumption that formal power divisions and intergovernmental bargaining adequately explain this process. Their research has, for example, discussed how societal interest groups can influence policy-making independently from the Member States and pointed at the increasingly influential role of general public opinion in recent years. This research shows that EU policy-making is much more complex than one might expect, and demonstrates that the assumption of formal power division, although sometimes necessary for research purposes, may not always do justice to the reality of policy-making.

In line with these novel insights on policy-making, one particularly important factor requires discussion, namely the influence of politicisation. More recent work by political scientists on the influence of politicisation has shown that policy-making in the European Union is becoming increasingly politicised. The theories of European integration to date seem to have paid too little attention to the effect of politicisation on the process of integration through their influence on the negotiations. Particularly as I expect that politicisation can influence policy-making beyond its actual manifestation by casting some service sectors under a 'shadow of politicisation' – meaning that a credible possibility of politicisation affects policy-making.

I will refrain from giving a more elaborate account of the theoretical work that has been conducted on European integration, as this will be the topic of the next chapter. It is there

that I will review the theories that may be useful in answering the main research question of this thesis.

III. Proposed research

In this research, I propose a model of integration that can account for the differences in levels of liberalisation within the services sector. By adopting general insights about the main drivers of integration and combining this with a more in-depth account of the negotiations (i.e. the decision-making process), I hope to be able to explain the *differences in levels of liberalisation* within the services market.

Assuming that actors are strategic, power maximisers, with bounded rationality, my model of integration explains the levels of liberalisation in a service sector, at any point in time, as being the result of the (anticipated) economic benefits of further liberalisation, the level of supranational activity and the level of politicisation of the debate during the negotiations. This research therefore does not oppose or contradict the insights generated by traditional theories of integration, but rather aims to refine them by detailing how exactly the drivers of integration shape outcomes.

I put this model to the test by examining the current levels of liberalisation in four different service sectors: the postal, electricity, and healthcare markets and the services covered by the Services Directive. I do this by analysing the level of liberalisation of each of the most recent pieces of legislation concluded in each area: the 3rd Postal Directive, the 3rd Electricity Directive, the Services Directive and the Patient Mobility Directive.

In order to explain the levels of liberalisation in each of these sectors, I apply a two-tiered approach. First, one needs to explain the context in which the particular piece of legislation was tabled. Negotiations do not take place in a vacuum but are partly the product of a development over time. This means that it is essential to account for the effect of history on current negotiations, particularly when they are the product of earlier legislation. Historical institutionalism illustrates how past decisions can influence future negotiations through path-dependency [13] and increased returns and explains how preferences were formed and changed over time. I therefore first explain the developments that preceded the tabling of the piece of legislation at hand, and discuss the preferences of all actors.

The second step then is to explain the negotiations in detail. The reason for this detailed focus on the negotiations is that in order to explain differences in the levels of liberalisation of a services sector, one needs to understand how the exact shape of the legislation came about. In practise this means explaining why the legislators amended the way they did and to what extent they failed to amend the way they wanted.

Given that the context of the negotiations has already been discussed, and preferences have been explained in the first tier, I assume in the second tier that actors (be they states, individuals or supranational organisations) have fixed, exogenously given preferences prior to the negotiations and act systematically to maximize those preferences within the

[13] Path-dependency, as defined by Pierson, refers to instances where 'early decisions provide incentives for actors to perpetuate institutional and policy choices inherited from the past' (source: Pierson, P. (2000), 'Increasing Returns, Path Dependence and the Study of Politics', *American Political Science Review*, p.252).

constraints of the EU institutional system. The focus here is thus on the power struggle between actors and on how external factors can influence the relative power of the legislators.

Particular attention should be paid to the impact of general public opinion, the large scale influence of which can lead to the politicisation of the negotiations. I show how politicisation can influence the level of liberalisation through a change in relative power of those legislators which represent the concerns of the general public, therefore functioning as an intervening variable in the negotiations.

The model proposed in this thesis explains on the one hand how the drivers of integration influence the demand for legislative change and at the same time shows how politicisation as an intervening variable affects the policy outcome. This model challenges the notion that European integration is a purely functionalist outcome (i.e. an outcome providing a solution to an existing problem). Functionalist accounts overlook 'the intensely political nature of international rule-making'[14], sidestep the possibility of unintended consequences and disregard the short-term interests of policy-makers; factors which the case studies examined here will illustrate are significant factors shaping the legislative outcome. My model explains how given economic demand for change and/or levels of supranational activism, the level of liberalisation can vary from the level that would have been expected a priori by acknowledging the intervening influence politicisation or the possibility thereof. At the same time, it challenges the realist notion of integration by acknowledging the significant constraining effect which supranational

[14] Helleiner, E. (2009), 'Filling a Hole in Global Financial Governance? The Politics of Regulating Sovereign Debt Restructuring', in Mattli, W. and N. Woods (eds.) *The Politics of Global Regulation*, p.118.

institutions and external factors, such as politicisation, can have on the relative influence of legislators.

IV. Value of this research

The value of this research is fivefold. First, it contributes to a better understanding of the developments of the European services market. Although the services sector constitutes a major share of the European economy, liberalisation of this sector has not been self-evident. As liberalisation brings potential economic benefits but also implies costs (e.g. re-regulation, loss of sovereignty, enhanced competitive pressure on state companies), this thesis sheds more light on the conditions under which the services market will be opened up further. This thesis shows how changes in economic conditions and increases in supranational activism influence the policy outcome by shaping legislators' preferences. At the same time, it demonstrates how politicisation can affect the legislation's level of liberalisation. By using the insights which the final legislative outcome generates about the process of decision-making (i.e. relative actor influence, drivers of integration, mediating factors etc.), one can explain the negotiation process and thereby explain the level of liberalisation of the services sector. In addition, this research could provide tools to explain future developments concerning service market liberalisation. Some authors have even argued that the European single market in services could function as a 'laboratory' for the possibility of market integration of services in other contexts of regional cooperation, such as GATS and NAFTA.[15]

[15] See: Canoy and Smith (2008).

Second, by opening up the negotiation stage, this thesis contributes more generally to the theoretical debate about how European integration proceeds. By creating a model that can explain the levels of liberalisation in the services sector, it adds to our understanding of European integration in general. The more liberalised the domestic services market, the higher the degree of cross-border interaction between these markets. As more intertwined markets require more common market rules, liberalisation leads to a higher level of European integration. Thus, by analysing the process of liberalisation of the European services market, this thesis contributes to the larger work on European integration.

Third, this research factors the political nature of policy-making back into the equation. It illustrates the influence that public opinion can have on the shape of the policy outcomes. That this influence is far from negligible has already been hinted at by past research.[16] Although significant research has been conducted on the effects of politicisation and public opinion on policy-making, less research seems to have taken place on the effect of politicisation when not actually materialised, i.e. when policy is made in the 'shadow of politicisation'. By focusing more closely on the conditionality and exact influence of politicisation, this research sheds additional light on the mediating impact of public opinion involvement on the negotiations.

Fourth, where theories of European integration mainly focus on the drivers of the entire process of integration, this research outlines who shaped legislation and why they did so. The new insights generated by focusing on negotiations could have implications for the

[16] See: De Wilde, P. (2011), 'No Polity for Old Politics? A Framework for Analyzing the Politicization of European Integration', *Journal of European Integration.*

ongoing debate about legitimacy in the European Union, in particular for those discussing input legitimacy and the democratic nature of policy-making.

Fifth, there is value in this research for policy makers. This research shows why the services sector is problematic and under what conditions the levels of liberal legalisation are likely to increase. This could benefit bureaucratic officials in charge of drafting legislation. Considering that there is still much untapped potential within this sector, the issue of service liberalisation is expected to feature prominently on the political agenda in coming years. The insights generated will therefore not only contribute to our understanding of developments past, but also of those to come.

IV. Overview of the thesis

The thesis will proceed to answer the main research question as follows. Chapter 1 starts with a literature review of the scholarly work that has been done on European integration. Close attention will be paid to the theories of European integration and their shortcomings, for the purpose of this thesis, will be discussed. In addition, I will discuss governance theories and the recent work on the influence of public opinion and politicisation in EU policy-making as they provide useful insights towards answering the question of this thesis. I conclude that the theories of European integration provide useful insights regarding the drivers of integration, but that these theories should be complemented with a more detailed analysis of the political negotiations so as to capture the influence of societal actors and possible politicisation.

Then, in chapter 2, I continue by proposing a theoretical model capable of explaining the levels of liberalisation within the services market. Starting from a simple model, I use the drivers of integration to explain demand for change. I add one intervening variable (i.e. politicisation) to the model which I expect is capable of intervening on the policy-making process primarily through the negotiation stage. I then continue by explaining the research methodology I use, how I will measure the independent variables and the dependent variable and discuss the choices I have made in doing this. Subsequently, I will discuss the data I will use and conclude by discussing possible shortcomings of this model and the research more generally.

Having outlined the model and presented my research design, I then turn to four case studies of service liberalisation which will be used to test this model. In chapters 3 and 4, I consider the liberalisation of former public network services, namely postal and electricity services. The focus here is particularly on the conclusion of the 3rd Postal Directive and the 3rd Electricity Market Directive. With the conclusion of the 3rd Postal Directive and the 3rd Electricity Directive, these markets have been, in theory, almost completely liberalised. Where there were clear economic benefits in pursuing the proposed measure of liberalisation in the case of the postal sector, these were less apparent in the electricity market as liberalisation imposed rather high economic costs on some Member States. Nevertheless, the current level of liberalisation in both sectors is quite high. This presents an interesting case for the exact influence of the drivers of integration on the legislative outcome. It becomes clear that the level of supranational activity in the electricity case was conducive to further liberalisation of the sector.

Although in the case of the postal sector supranational activity was similarly crucial to further integration, the Commission was assisted in its plea by the changing economic conditions of a declining postal market which enhanced the desirability of liberalisation. That said, the strong mobilisation of opposition by incumbent operators, supported both by labour unions, led to possible politicisation in the postal sector and prevented a speedy liberalisation process.

Chapter 5 turns to the Services Directive. This directive illustrates the forcefulness of mass mobilization as a brake on further integration despite strong demand. The initial expectations were that this directive would bring primarily economic benefits. Considering that this directive had been preceded by high levels of supranational activity on the part of the European Court of Justice (ECJ), the Commission initially expected this directive to be passed without too many difficulties. However, the sudden politicisation of this directive led the compromise on the Services Directive to be watered down. Besides illustrating the influence of politicisation on a process of policy-making, this case study also provided an example of a rare power division between legislators with Parliament being the dominant actor shaping the compromise on the Services Directive. This case illustrates how the Parliament benefited from an internal division within the Council brought about by politicisation of the negotiations.

In chapter 6, I focus on the Patient Mobility Directive, a pioneering directive in the area of cross-border healthcare. The tabling of this directive is the direct result of an activist Court, whose rulings created a discrepancy between the practical and theoretical rights of

patients. This case illustrates the limitations of supranational activism in pushing integration, and again highlights that societal support is essential for further market integration. The expected public opposition towards healthcare liberalisation and the general opposition of the Member States had led the Commission to table a prudent directive which would lead to a limited liberalisation of the healthcare market. Given the absence of any societal demand in favour of this directive, the Council was able to remain dominant in shaping the final content of the directive.

Finally, in chapter 7, I consider the findings from the case studies. I assess the extent to which my model is capable of accounting for the levels of liberal legalisation obtained in each of the case studies and illustrate where my model proves valuable over existing models of European integration. I discuss how the case studies contribute to our understanding of politicisation as an intervening factor and show how this influence transcends beyond actual politicisation by casting some service sectors under the shadow of politicisation. I conclude by discussing the implications of these insights for the study of European integration more generally.

1. Literature Review

> *'What I see and judge to be important and accept as adequate depends not only on the evidence but also on the 'conceptual lenses' through which I look at evidence'*
>
> *Graham T. Allison (1971)*[1]

The process of European integration has been a prominent area of research in political science ever since the signing of the Treaty of Rome in 1957. It has inspired scholars to think about a wide array of questions, ranging from debates on what the European Union actually is or ought to be to questions on how policy is made and how integration proceeds. Although the question of European integration may seem like a straightforward one, the answers are diverse. This is the result of what some scholars have termed the application of different 'conceptual lenses'[2], which leads different scholars to study different aspects of the same phenomenon. Similarly, Puchala observed this effect and famously summed up European integration research as a group of blind men approaching an elephant and all touching a different part of the animal, describing the entire animal as that one part they touched.[3] The result is that research on European integration often complements each other, where in first instance it may have appeared contradictory.

In explaining the different levels of liberalisation observed in the services market today, it is useful to discuss theories of European integration that aim at explaining the *process* of European integration, asking what or who drives integration. The initial dichotomous debate between intergovernmentalism and neo-functionalism and the subsequent refinement of these theories illustrate how both Member States and supranational

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1 Allison, G. (1971), *Essence of decision: explaining the Cuban missile crisis,* p.3.

2 See: Allison (1971)

3 Puchala, D.(1971), 'Of blind men, elephants and international integration', *Journal of Common Market Studies,* p.267.

institutions influence the process of European integration. Due to the inherent limitations of approaches that continue to advocate the primacy of one institution or actor over another, I decided to focus also on new institutionalist theories. New institutionalist theories study the influence of institutions on the process of European integration and clearly specify the conditions under which each of the actors influenced the integration process. Detailed research on the individual European institutions, often in line with the rational choice institutionalist framework, complemented this research.

Although these theories are extremely useful for my own research in explaining variations in levels of liberalisation within the services market, it is also necessary to focus on the negotiations in more depth. The governance approach, although not capable of explaining long-term processes of European integration, provides valuable insights into policy-making and is useful in gaining better understanding of the negotiation stage of policy-making. It offers insights into the power relationships between all actors, in particular the independent influence of societal groups on EU level policy-making, and leads it to argue that authority for EU policymaking is shared between sub-national, national and supranational actors.

In addition, the increasing attention paid to the influence of politicisation on EU policy-making is discussed, particularly as this is a phenomenon that tends to arise when discussing controversial topics that have a high salience. Cross-border movement of services, as discussed in the previous chapter, tends to be contested and to face

opposition, which is why I expect politicisation to occur during negotiations and possibly have a significant effect on the levels of liberalisation within the services market.

I start this chapter with a discussion of the general theories of public policy-making. As European integration develops through law making, it is important to understand the different views on why regulation is put in place and what the logic behind delegation is. I then turn to the theories of European integration and discuss the various competing and complementary theories which have dominated this research area. Through this discussion, I will highlight how these theories can be useful in answering the main question of this thesis and where they fall short. Finally, I will briefly outline what research has been done on the case studies I address and indicate where gaps remain.

1.1 Theories of public policy-making

To understand the process of European integration, it is important to understand the European Union's core task of producing legislation and regulation. Over the years, the EU has adopted a vast amount of regulation as a means towards completing the internal market.[4] To better account for these outcomes, one should understand why states need to regulate at all. When do legislators produce regulation?

Scholarly research on this question can be divided roughly into two branches: a normative account and a positivist account. In the latter, a distinction can be made between those who view the outcome as the result of intended rational calculation (i.e.

[4] This has led some to describe the EU primarily as a regulatory state. See: Majone, G. (1996), *Regulating Europe*.

there are clear economic benefits of doing so) versus those who argue that decisions are a result of socialised behaviour (i.e. it is appropriate to do so).

The normative approach to explaining regulation argues that the state produces outcomes when these serve the public interest. Failures of free markets, for example, necessitate state intervention and the production of regulation.[5] This approach takes its assumptions about the preferences of bureaucrats from Median Voter theory, meaning bureaucrats will create policy for society as a whole. The justification of this assumption is that those providing benefits to the largest group of constituents will receive high electoral pay-off. The problem, however, with normative theory is that it provides an answer to what regulation-making ought to be, but does not allow whether legislation actually serves this function to be put to the test.

Positivist theories, in particular public choice theory, are better suited here. A breakthrough was made by Gordon Tullock's *The Politics of Bureaucracy* (1965) and Anthony Down's *Inside Bureaucracy* (1967). Rather than assuming that bureaucrats are without self-interest, they start from the premise that bureaucrats are rational actors largely motivated by self-interest.[6] Niskanen developed this theory further and argued that bureaucrats could, in some instances, even force the legislator into decisions it does not prefer.[7] The problem with this theory is that this model is rather one-sided and

[5] See: Mitnick, B.M. (1980), *The Political Economy of Regulation: Creating, Designing and Removing Regulatory*; Sunstein, C. R. (1990), *After the Rights Revolution: Reconsidering the Regulatory State*.

[6] See: Moe, T. (1984), 'The New Economics of Organization', *American Journal of Political Science*, pp. 739-777.

[7] Niskanen, W. (1971), *Bureaucracy and representative government*.

perceives the legislature as a passive actor.[8] This is problematic, as the legislature has mechanisms to control the bureaucrats and, assuming it is also strategic, can reasonably be expected to use these.

The economic free-market approach to the study of politics, put forward by Stigler, seems more useful in explaining why regulation is made.[9] Regulation, he argues, is the result of demand by private interests supplied by politicians. On the demand side, those groups which are most successful in mobilising themselves will have the largest influence on policy outcomes. Specialised business interests have much to gain from regulation if the rules are designed in line with their interests. The clearer the benefits or costs of a policy, the likelier it is that affected groups will mobilise for or against policy. Olson's work on the collective action problem of interest group organisations complements Stigler's assumptions about private interest mobilisation.[10]

On the supply side (i.e. reaction of public policy makers), the assumption is made that politicians are strategic, rational actors who aim to maximise their power and seek re-election. Contrary to Median Voter theory, the reasoning here is that rents will be higher for policy makers when catering for the wishes of the minority. Later work, e.g. Bishin's

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8 Miller, G. and T. Moe (1983), 'Bureaucrats, legislators and the size of government', *American Political Science Review*.

9 Stigler, G. (1971), 'The theory of economic regulation', *Bell Journal of Economics and Management Science*.

10 A collective action problem occurs when it is in everyone's interest to cooperate even though there it is in nobody's individual interest to provide this collective good. Olson states that 'unless the number of individuals is quite small, or there is coercion or some other special device to make individuals act in their common interest, rational, self-interested, individuals will not act to achieve their common or group interests' (source: Olson, M. (1965), *The Logic of Collective Action*, p.2).

'Subconstituency Politics Theory of Representation'[11], built on these insights. According to this theory, politicians appeal to groups rather than the public as a whole. While the average citizen is uninformed about and uninterested in politics, organised groups are not. They are likely to mobilise when the opportunity arises for them to secure group benefits. Bishin argued that policy makers will be more inclined to create policy for separate interest groups, hoping to gain these votes, without the risk of incurring costs as the general public remains uninformed. This explains why policy makers will cater for the wishes of those with the strongest demand.

The constructivist account of why regulation is made focuses, on the other hand, on the influence of norms and ideas that motivate people to create certain regulations. In this thesis, I side with the rationalist explanation for why regulation is made, viewing regulation as the product of societal demand for change. This provides me with a more valuable tool to explain the pieces of legislation I analyse than the constructivist account, which bases its explanation on theories of modification of identities and norms as a process over time. Given that the pieces of legislation on which I focus were all concluded within the same time frame, the explanations offered by constructivism will not have varied over the course of my analysis, which renders them, for the purpose of this thesis, not very useful.

[11] Bishin, B. (2009), *Tyranny of the Minority: the subconstituency politics of theory of representation*.

1.2 Traditional debate and beyond

In starting to formulate an answer to the question of this thesis, it is useful to turn to academic research on European integration which has aimed at answering similar questions. Refuting any attempts which have tried to reduce the debate of European integration to a rational economic interest calculation[12], I turn to the theories that conceive of European integration as a more complex process than merely the result of economic interests.

I divide this research into roughly three parts: the 'traditional' theories of European integration, the 'new institutionalisms' and the research into the relative influence of legislators. I discuss these different branches of theory as each contributes to understanding the process of European integration.

1.2.1 Traditional theories of European integration

The first body of academic work I focus on are European Integration theories, which explain the process of European integration. The traditional debate initially pitted neo-functionalist models of integration vs. intergovernmentalist models of integration. Intergovernmentalism views integration as the result of an intergovernmental bargain between Member States. These theories assigned prominence to the Member States which meant national preferences set the limit to the transformational capacities of European-level policies. Neo-functionalists, on the other hand, argue that the capacity of European integration to transform domestic political economies is defined by the

[12] As Mattli, W. (1999) in *The Logic of Regional Integration: Europe and Beyond* already argued, one needs institutions *and* market transactions to explain the outcome.

limitations of supranational entrepreneurship to capitalise on their powers. These early theories primarily sought to explain the process of European integration, rather than, for example, explaining policy-making, thereby drawing extensively on theories of international relations.

The neofunctionalists dominated early theoretical work on European integration. Haas's theory of integration, which explained European integration as the outcome of functional spill-over from one policy area into another, formed the basis of neo-functionalism.[13] The countermovement came from Hoffman's intergovernmentalist school of integration theory, stressing the importance of the nation-state for the process of European integration.[14] They all operate within a rationalist framework of international cooperation, which means that the relevant actors are assumed to have fixed preferences and are assumed to act systematically to achieve those preferences.

The shortcomings of this dichotomous approach, however, are manifold. Its most prominent flaw is that each theory fails to set out the conditions under which supranational institutions or Member States are able to exert more or less influence on the process of European integration.[15] Attempts to refine these theories have been copious on both accounts.

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13 Haas, E. (1958), *The Uniting of Europe.*

14 Hoffmann, S. (1966), 'Obstinate or Obsolete? The Fate of the Nation-State and the Case of Western Europe', *Daedalus.*

15 Pollack, M.A.(2005), 'Theorizing EU Policy-Making', in Wallace et al., *Policy-Making in the European Union*; Mattli (1999).

A significant elaboration of the traditional intergovernmentalist theory was provided by Andrew Moravcsik. His theory of 'liberal intergovernmentalism' explained European integration as the direct result of an intergovernmental bargain; according to some, this was the leading theory of European integration in the 1990s.[16] He explains the process of European integration in stages. In the first stage, national preferences are determined on a domestic level 'by the constraints and opportunities of economic interdependence'.[17] In the second stage, domestic governments take their national preferences to the international level where intergovernmental bargaining takes place. The outcome is argued to be a result of the 'relative bargaining power of governments and the functional incentives for institutionalization'. [18] In the third step, he argued that supranational institutions are created to ensure credible commitment.[19] The value of Moravcsik's work lies in his recognition of the influence of various domestic groups on national preference formation and the subsequent effect this has on the relative power of the actors in shaping the outcome of bargaining; an insight later elaborated on by others.[20] His disregard of the autonomous influence of supranational institutions, viewing them as mere agents of the Member States, weakens the liberal intergovernmentalist account. In addition, his primary focus on grand bargains and a relative disinterest in day-to-day policymaking skews his data and might fail to recognise what alternative factors can influence negotiations when the political significance of the issue debated is slightly lower.

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16 Pollack, M.A.(2010), 'Theorizing EU Policy-Making' in Wallace et. al. (eds.), *Policy-Making in the European Union*, p.21.

17 Moravcsik, A (1993). 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach', *Journal of Common Market Studies*, p. 517.

18 Ibid.

19 Moravcsik, A (1998), *The choice for Europe: social purpose and state power from Messina to Maastricht*.

20 See for example: Cowles, M.(1995), 'Setting the agenda for a new Europe: the ERT and EC 1992', *Journal of Common Market Studies*. He points to the pivotal role of industry on agenda setting and outcome.

Similarly, scholars also built on the core ideas of neo-functionalism, which gained new momentum with the relaunching of the integration process in the early 1990s. This was viewed by some as a vindication of neo-functionalist theory. Sandholtz and Zysman's work provides a good example of this. In their work, they argue for the pivotal role which the European Commission has had in the relaunching of the 1992 movement.[21] In a similar vein, Burley and Mattli direct attention back to the role of the ECJ within the process of European integration. According to their analysis, the 'drivers of this process [legal integration] are supranational and sub-national actors pursuing their own self-interests within a politically insulated sphere'.[22]

Another important theoretical contribution, building on the core ideas of neo-functionalism, was made by Stone Sweet and Sandholtz. Their supranational governance theory of integration persuasively illustrates how increases in (expected) transnational exchange (e.g. trade, investment, development of Euro-groups and networks), lead to an increase in costs which then increases the incentives for government to act in ways that 'favour the expansion of supranational governance'.[23] Societal demand for supranational rules and organisational capacity to regulate increases as transnational exchange rises.[24] The result is an increase of European rules which will generate a self-sustaining dynamic that leads to spill-over and a deepening of integration. Variation in the liberalisation of

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[21] Sandholtz, W. and J. Zysman (1989), '1992: Recasting the European Bargain', *World Politics.*

[22] Burley, A. and W. Mattli (1993), 'Europe before the Court: A Political Theory of Legal Integration', *International Organisation*, p.43.

[23] Stone Sweet, A. and W. Sandholtz (1998), 'Integration, Supranational Governance and the Institutionalization of the European Polity', in Alec Stone Sweet and Wayne Sandholtz (eds.) *European Integration and Supranational Governance*, p4.

[24] Ibid. p.12

different service sectors, they argue, can thus be explained by *variation in the levels of cross-border interactions*.[25]

By focusing on the necessity of interest group mobilisation for further integration, this theory brings the political aspect of European integration, back into the equation – something which had been slightly disregarded by traditional neo-functionalist scholars.[26] Useful as Stone Sweet & Sandholtz's theorising is, there seems to be a bias in case selection as most service sectors discussed were of a very technical nature, characterised by relatively low Member State opposition (e.g. telecommunications, aviation). Therefore, in these instances supranational influence may have been the result of corresponding preferences rather than enhanced autonomy. In addition, the theory does not specify when the demand created by transnational exchange results in successful supranational activity, and how this influences bargaining in the legislature. Furthermore, it fails to pay attention to instances where the demand from transnational exchange is low and legislation is nonetheless agreed (e.g. healthcare services) or instances where public discontent is a dominant intervening factor with the ability to influence the outcome.

These theories have been very useful in delineating the main drivers behind European integration. However, a shortcoming of this group of theories, for the purpose of this thesis, is that they firstly argue in favour of primacy of Member States or supranational institutions over the other. It seems rather than one being right, they both hold true depending on the condition. Secondly, they assume intergovernmental bargaining takes

[25] Stone Sweet and Sandholtz (1998), p.14. (italics added).
[26] Stone Sweet and Sandholtz (1998).

place between legislators on the basis of relative power and side-payments but often focus on the grand bargains as case studies rather than on day-to-day policy-making (i.e. intergovernmental theory) or focus their attention on period in between negotiations where supranational institutions have more room for activism. The result is neo-functionalist theories generally refrain from studying the process of negotiations in close detail and that intergovernmentalist theories use unique cases to test their model. These shortcomings make them ill-equipped in themselves to explain the differences in liberalisation between service sectors. However, they do provide valuable insights into where demand for further integration comes from.

1.2.2 New institutionalisms

To overcome these limitations based on arguments of the primacy of one actor over another, some scholars agreed that both theories hold true under certain conditions and started to focus on the conditions of actors' influence. This was paired with a renewed interest in institutions and their subsequent effect on policy-making. Applied to the European Union, this led to a new branch of theory generally termed 'new institutionalism'.

The new institutionalists, an overarching name for rational choice, sociological and historical institutionalism, can according to some be seen as a countermovement against the institution-free accounts of politics which had dominated political science up to the 1970s.[27] These three institutionalist theories can be positioned along a spectrum, with

[27] See: Hall, P. and R. Taylor (1996), 'Political Science and the Three New Institutionalisms', *Political Studies*; Pollack (2005).

rationalist on the one hand (rational choice institutionalism) and constructivist on the other hand (sociological institutionalism), placing historical institutionalism somewhere in the middle. They start from the premise that Member State governments are not in full control of policy outcomes, and that supranational institutions are able to exert significant independent influence on institutional and policy outcomes.[28] They are novel in the sense that they focus on 'factors beyond the formal roles or legal powers'[29] of actors and study the effect of institutions on behaviour.

Rational choice institutionalism originated within political science research conducted in the US in an attempt to 'understand the origins and effects of U.S. Congressional institutions on legislative behaviour and policy outcomes'.[30] This theory has the dual focus of explaining the European Union as a polity and providing a theory of the process of European integration. Its model explaining European integration acknowledges the role which supranational institutions can play as drivers of integration, but in contrast to neo-functionalist accounts it is more balanced. It considers the interaction effect between supranational institutions and Member States and seeks to set out conditions under which supranational influence on the process of European integration increases.

Rational choice institutionalists focus on the role of institutions as shaping incentives for public and private actors, affecting the number of conceivable political choices. Assuming actors' preferences are exogenously given, i.e. they leave fundamental

[28] Hix, S. (2005), *The Political System of the European Union*.

[29] Peterson, J. and E. Bomberg (2003), 'Making Sense of EU Decision Making', in Nelson, B. and A. Stubb (eds.), *The European Union: readings on the theory and practice of European integration*, p.324.

[30] Pollack (2005), p.362.

preferences and identities of actors untouched[31], their main argument is that institutions affect actors' behaviour by the incentives they provide.[32] They argue that supranational institutions neither blindly follow the wishes of the Member States, nor do they 'run amok'.[33] Instead, they 'pursue their own preferences within the confines of Member State control mechanisms'.[34]

The principle-agent (PA) model proved very useful for rational choice institutionalists in how to model the relationship between Member States and supranational institutions. Starting from the premise that Member States will delegate some power away to obtain lower transaction costs, to ensure monitoring of compliance, to resolve the interpretation of incomplete contracts, to ensure issuance of secondary regulation and formal agenda setting, the relationship between the 'delegator' and the 'delegated' was perceived as one between a principal and an agent.[35] Given that agents have their own preferences which might not correspond to those of the principal, a number of *ex post* and *ex ante* control mechanisms are put in place by the principal to prevent agency drift.[36] However, as these control mechanisms are costly (time, effectiveness) a trade-off has to be made between the costs of perfect control and the desired outcome. The main advantage of the PA

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31 Ibid., p.364.

32 See: Hall and Taylor (1996)

33 Pollack, M.A. (1997), 'Delegation, agency, and agenda setting in the European Community', *International Organization*, p.110.

34 Ibid.

35 See: Moe (1984); Kiewiet, D. and M. McCubbins (1991), *The Logic of Delegation*.

36 Epstein, D. and S. O'Halloran (1999), *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers*; Huber, J.D. and C.R. Shipan (2000), 'The Costs of Control: Legislators, Agencies and Transaction Costs', *Legislative Studies Quarterly*.

approach is that it enables scholars to generate testable hypotheses about 'the extent of agents' autonomy and influence'.[37]

Interesting work on the relative influence of supranational institutions has been done by Pollack. Starting from the premise that initial primacy lies with the Member States, he argues that supranational autonomy is relative and a function of: (a) institutional rules that assign power; (b) the extent to which the supranational entrepreneur is supported by sub-national actors or is able to create supporting networks; (c) transaction costs and waiting costs (i.e. costs of foregone agreement); (d) the distributional effects of a policy (i.e. this determines MS opposition or support).[38]

An interesting illustration of rational choice institutionalism applied to a particular institution of the European Union is provided by Garrett's et al. work on the role of the ECJ on the process of European integration.[39] This research shows that supranational influence is dependent on external factors, with policy-making neither controlled by Member State governments nor by EU institutions. Overall, rational choice institutionalists have provided valuable tools for understanding the EU policy-making process and the role of institutions therein.

A slightly different approach to explaining the causes and direction of integration was provided by historical institutionalism. This theory focuses its attention on the

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[37] Pollack, M. (2007), 'Principal-Agent Analysis and International Delegation: Red Herrings, Theoretical Clarifications and Empirical Disputes', *Bruges Political Research Papers No 2*, p.6.

[38] Pollack (1997), pp.126-127.

[39] Garrett, G., R. Kelemen, H. Schulz (1998), 'The European Court of Justice, National Governments and Legal Integration in the European Union', *International Organization*.

(constraining) effect of institutions *over time.*[40] A major scholar in this tradition is Paul Pierson, who argued that gaps may occur in 'Member State control over the evolution of European institutions and public policies'[41] despite the initial primacy of member governments in the design of EU institutions and policies. He argued that this is the result of Member State occupation with short-term concerns, the ubiquity of unintended consequences, the instability of Member State policy preferences and the lock-in from vested interests from below (i.e. from societal actors)'.[42] Once these gaps have emerged, the notion of increased returns (referring to a situation where the costs of exit have risen, which makes it preferable to continue the development already begun) stimulates path-dependency. Path-dependency refers to instances where 'early decisions provide incentives for actors to perpetuate institutional and policy choices inherited from the past, even when the resulting outcomes are manifestly inefficient'.[43] Institutional difficulties in changing policy in combination with the sunk costs of agreeing policy in the first place make change considerably more difficult. This means that the benefits for legislators to continue with an initiated development are higher than diverting from the initial development, and implies that policy-making cannot simply be viewed as the transmission of preferences from interest groups and political parties to policy makers.[44] This is an important insight for the purpose of this thesis, as it shows how past decisions influence current negotiation processes.

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40 Pollack (2005) in Wallace (2005), p.22. Italics added.

41 Pierson, P.(1996), 'The Path to European Integration: A Historical Institutionalist Analysis', *Comparative Political Studies*, p.126.

42 Ibid., p.123; Pollack (2005) in Wallace et al (2005), p.23

43 See: Pierson (2000), p.252.

44 Immergut, E.(1998), 'The Theoretical Core of the New Institutionalism', *Politics & Society*.

A countermovement to historical and rational choice institutionalism came from sociological institutionalism, which holds that 'human agents do not exist independently from their social environment and its collectively shared systems of meanings'[45] and argue that informal norms influence actor's identities and preferences. Preferences are thus endogenously formed. As the explanatory value of constructivist theories of European integration, and so also of sociological institutionalism, lies in long-term processes of preference and identity formation by values and norms (factors that tend to vary only over long periods of time), a constructivist theory cannot account for differences in levels of liberalisation between short periods of time and is therefore not useful for the purpose of this thesis.

The theories set in a rationalist framework (i.e. rational choice institutionalism and historical institutionalism) on the other hand are useful for my thesis, as they help to understand how actors operate and how they may be constrained in their behaviour by the institutional framework in which they operate. The rational choice institutionalist conception of European institutions operating as strategic actors, aiming at maximising their influence within the boundaries set by the Member States, provides a very helpful model of how to understand their role in the process of European integration. Similarly the historical institutionalist theories are useful as they show how institutions can constrain actors in their behaviour over time, as a result of path-dependency and increased returns.

[45] Risse, T. (2004), 'Social Constructivism and European integration', in Wiener, A. and T. Diez (eds.), *European Integration Theory*, p.161.

That said, again there are some shortcomings which prevent me from simply adopting these theories to explain the differences in levels of service liberalisation. First, historical institutionalism seems to have positioned itself between rationalist accounts and constructivist accounts of integration, assuming initial rational actors but acknowledging the formative influence of actors' norms and identities on institutions over time, leading actors' preferences to become endogenous to the process and institutions rather than exogenously given. This means its explanatory value again lies in the long-term process of change. This renders it slightly problematic in accounting, by itself, for the differences in levels of liberalisation between service sectors at a particular point in time or over short time periods.

Second, the assumptions made by rational choice institutionalists, who assume very rational and calculated mobilisation of groups within society, preclude the observation and explanation of the involvement of societal groups on the basis of (partly) emotional grounds detached from, or perhaps contrary to, any economic cost-benefit analysis. It fails to account for instances where these groups, for whom cost-benefit analyses are not based on an economic calculation, can alter the relative influence of actors during negotiations due to their power base (e.g. being supported by the public at large).

1.2.3 Research on the relative influence of legislators

Following the new institutionalist approach, some scholars have applied these insights specifically to European institutions in an attempt to explain the European Union as a political system. By researching the legislative, executive and judicial functions of the Union, they were able to specify in great detail under what conditions actors' influence

changes.[46] It is useful to discuss the work of those scholars who have studied the relative influence of the individual European actors for the purpose of this thesis, as this provides a more detailed understanding of policy-making, particularly the negotiation process, and of to the role of individual actors in the process of European integration more generally.

Particularly the more detailed research into the conditional influence of the European Parliament and the Council is interesting.[47] Although the Parliament and the Council in theory have equal power under co-decision procedures, many studies on decision-making in the European Union seem to support a Council-centric view of decision-making. This means there are conditions that enhance the Council's influence over the Parliament. The underlying reason is that in practice, the Parliament's power is much lower than the Council's.[48] This is the result of two factors. First, as the Parliament usually tends to prefer a conclusion of a legislative proposal transferring power to the European level over the status quo, it thereby reduces its bargaining power vis-à-vis the Council. The latter is generally more concerned about maintaining its level of sovereignty and may generally

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[46] See among others: Kreppel, A. (2002),'Moving Beyond Procedure: An Empirical Analysis of European Parliament Legislative Influence', *Comparative Political Studies*; Hix, S., A. Noury and G. Roland (2007), *Democratic Politics in the European Parliament*; Mattila, M.(2004), 'Contested Decisions – Empirical Analysis of Voting in the EU Council of Ministers', *European Journal of Political Research*; Tsebelis, G. and G. Garrett (2000), 'Legislative Politics in the European Union', *European Union Politics*; Tallberg, J. (2007) 'Executive Politics' in K.E. Jorgensen, Pollack and Rosamond (eds.), *The Handbook of European Union Politics*; Pollack, M. (2003), *The Engines of European Integration: delegation, agency and agenda setting in the EU*; Garrett, G. and B. Weingast (1993), 'Ideas, Interests and Institutions: Constructing the European Community's Internal Market', in J. Goldstein and R. Keohane (eds.), *Ideas and Foreign Policy*; Burley and Mattli, (1993); Mattli, W. and A. Slaughter (1998), 'Revisiting the European Court of Justice', *International Organization*.

[47] I agree with recent scholarly work that the Commission, particularly under the co-decision procedure, has become a 'net loser from the burgeoning activities in the EUs informal sphere'. Source: Stacey, J. (2003), 'Displacement of the Council via informal dynamics? Comparing the Commission and Parliament', *Journal of European Public Policy*, p.951. See also: Thomson, R. and M. Hosli (2006), 'Explaining legislative decision-making in the European Union', in Thomson, R. et all. (eds.), *The European Union Decides*.

[48] Thomson and Hosli (2006), p.415.

attach lower value to the proposed legislative proposal than the Parliament. Second, the Council has the ability to influence the members of Parliament by issuing voting instructions.[49] This again reduces the relative influence of the Parliament vis-à-vis the Council.

Although the Council seems to have an advantage over the Parliament in terms of relative power, this does not mean it is by definition more powerful. The Council's power is also relative and depends largely on its internal cohesion. The level of internal cohesion determines both the Council's ability to amend proposals and to reject Parliamentary amendments. Low levels of internal cohesion hamper the Council in amending policy proposals; particularly when considering that the adoption of amendments often proceeds through unanimity rather than Qualified Majority Voting (QMV), even when QMV is the rule in theory. Schmidt's work, for example, confirms this and shows that it is generally easier for the Council to accept than to amend legislation.[50] Furthermore, internal division also hampers the Council in rejecting Parliamentary amendments that have already been accepted by the Commission. Again, as the Council needs to decide on this through a unanimous vote, this will be problematic when it faces strong internal divisions.

The Parliament, on the other hand, benefits from factors that create internal division within the Council. The reason is that Parliament is better able than the Council to overcome internal division. It seems the Parliament's structure of political parties and

[49] Raunio, T. (2000), 'Losing Independence or Finally Gaining Recognition? Contacts Between MEPs and National Parties', *Party Politics.*

[50] Schmidt, S. (2000), 'Only an Agenda Setter? The European Commission's Power over the Council of Ministers', *European Union Politics.*

subsequent party discipline facilitates the conclusion of internal compromise.[51] This unique ability to overcome internal differences and an ability to agree on a common position strengthens its influence vis-à-vis the Council. This means the Parliament's compromise will become the basis for the Council's compromise, particularly since the Council will find it hard to reject the Parliament's proposal in a situation of internal disagreement. The result is that internal divisions in Council can lead to situations where the Parliament can enhance its relative influence over the Council.

Aside from this factor, scholarly research has unveiled some other factors that seem to enhance the Parliament's influence on decision-making. Its influence seems to be higher when trialogue meetings[52] and informal negotiations before and between formal readings are used[53], and when its amendments are primarily public statements, having less direct effect on the restraining nature of the legislative outcome on Member States.[54] These specific insights about the conditionality of influence will prove useful when explaining how levels of liberalisation were agreed upon.

However, actors' influence is not only relative but can also change over time, leading to enhanced pressure on legislators to adjust the formal rules to ongoing informal changes.

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[51] A good example is the Takeover Directive of April 2004, where the Parliament's role was crucial in overcoming the collective action problem internal to the legislature (Source: Hix, S., A. Noury and G. Roland (2007), *Democratic Politics in the European Parliament*).

[52] This term refers to informal negotiations between the vice president of the Parliament, the Council presidency, the rapporteur, the chairpersons of the committee concerned, the Parliamentary delegation and the Council working party.

[53] Farrell, H. and A. Héritier (2003), 'Formal and Informal Institutions Under Codecision: Continuous Constitution-Building in Europe', *Governance: An International Journal of Policy, Administration, and Institutions*; Shackleton, M. and T. Raunio (2003), 'Codecision since Amsterdam: a laboratory for institutional innovation and change', *Journal of European Public Policy*.

[54] Kreppel, A.(1999), 'What Affects the European Parliament's Legislative Influence? An Analysis of the Success of EP Amendments', *Journal of Common Market Studies*.

Farrell and Héritier's work shows how informal institutional change can take place in between formal Treaty amendments.[55] They show how incompleteness of contracts leads to a bargaining between actors on the implementation of political procedures, which subsequently can lead to the interstitial creation of informal institutions which will affect the creation of future rounds of Treaty bargaining.[56] They deviate from the idea that principals can create complete contracts, and argue that these incomplete contracts 'serve as a starting point for new negotiations and bargaining among the main organisational actors within the EU legislative process over competences'.[57] The conclusion is that the dominance of one actor, e.g. the Council, over another is by no means a given, but that these power relations are in constant flux[58], leading to informal institutional change between negotiations.[59] Although they can easily be overlooked as they are theoretically not laid down, the result of the presence of two sets of institutions is that actors' influence is highly relative[60]; something which a purely legalistic approach is unable to detect.

Altogether, what all this research has shown is that assumptions of static formal power division, although necessary at times, clearly obscure some interesting variation in relative power divisions between legislators on a European level. The value of this research for this thesis is that it helps to clarify the general understanding of EU policy-

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55 Farrell and Héritier (2003); Farrell, H. and A. Héritier (2007), 'Codecision and institutional change', *West European Politics.*

56 Farrell and Héritier (2007), p.286.

57 Ibid., p.287-288. See also: Héritier, A. and C. Moury (2011), 'Contested Delegation: The Impact of Codecision on Comitology', *West European Politics*.

58 See Farrell and Héritier (2003). Also see: Farrell, H. and A. Héritier (2004), 'Interorganizational Negotiation and Intraorganizational Power in Shared Decision Making – Early Agreements Under Codecision and Their Impact on the European Parliament and Council', *Comparative Political Studies*.

59 Farrell and Héritier (2007), p.299.

60 This leads Thomson and Hosli (2006) in Thomson et al. to argue that 'researchers who include informal institutions in their analyses also reach different conclusions regarding the balance of power between the European Commission, Parliament and Council' (p.393).

making by providing insight into the relative, and perhaps changing, individual roles of EU institutions.

Quantitative approach to EU policy-making

Finally, while this research is all qualitative in nature, there are also scholars who have adopted a quantitative approach in researching the process of decision-making in the European Union. Rather than aiming at detailing the conditions under which the relative influence of decision-makers changes, they seek to provide a general model that best describes decision-making in the European Union. Thomson et al tried this with their research, and in so doing, deviated from the qualitative approach and adopted a quantitative approach with a large N.[61] This approach built on earlier quantitative work done by Bueno de Mesquita and Stokman, who assessed the usefulness of two classes of models (the non-cooperative expected utility model and the cooperative exchange model of voting positions) in explaining decision-making in the European Community.[62] Set within a rationalist framework, Thomson et al. assessed the explanatory power of three different models (procedural models, bargaining models and mixed models) and concluded that bargaining models provide the best model for explaining decision-making in the European Union. Where procedural models fall short by failing to account for deviant behaviour (the dominant application of unanimity in the Council, even in areas where QMV is theoretically applied), bargaining models work best in accounting for the 'interplay between institutions and preferences in determining policy outcomes'.[63]

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61 Thomson et al. (2006).

62 Bueno de Mesquita, B. and F.N. Stokman (eds.) (1994), *European Community Decision Making - Models, Applications and Comparisons.*

63 Thomson and Hosli (2006) in Thomson et al., p.9.

Large N-studies, such as this, sacrifice detail for general trends. Therefore, where Thomson et al. (2006) searched for regularities among different cases[64], my focus is on explaining differences in levels of liberalisation by focusing on the irregularities of negotiations. Despite Thomson et al.'s research being too general to explain the question which this thesis addresses, what is interesting is that this large N-study shows that EU policy-making can generally be described using a Council-centric approach. This says something about the rarity of instances where other institutions prove dominant during negotiations.

1.3 Governance approach

Given that this thesis will focus in close detail on the negotiation process, I now turn to a branch of theorising referred to generally as the governance approach, which has studied primarily the policy-making process, taking the Euro-polity as an independent rather than a dependent variable.[65] Whereas the theories discussed above research the process of European integration and EU policy-making by keeping the institutional set-up constant, governance theorists challenge this assumption by showing how the process of integration over time changes the institutional set-up and thereby the process of policy-making.[66] The value of their approach for this thesis is that it not only offers an alternative way of viewing and studying EU policy-making, but more importantly provides novel insights into the process of policy-making, and in particular into the direct influence of societal interest groups.

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64 Ibid., p.11.

65 Jachtenfuchs, M. (2001), 'The Governance Approach to European Integration', *Journal of Common Market Studies*, p.245.

66 See: Jachtenfuchs, M. (2003), 'The Governance Approach to European Integration', in Nelson, B. and A. Stubb (eds.), *The European Union: readings on the theory and practice of European integration*, p.335.

Governance is defined here as 'the imposition of overall direction or control on the allocation of valued resources'.[67] It diverges from the assumption that the European Union has a dominant decision-making model and views Member States as simply one actor among many sub-national and supranational actors. Governance theory is not a single theory 'but rather a cluster of related theories emphasizing common themes'[68] which share the assumption that the EU is a system of governance without government.[69]

This analysis, they argue, shows how the process of European integration has affected domestic policies, led to the rise of the EU as a regulatory state, and most importantly, led to a change in policy-making through a permanent change in modes of governance.[70]

Another take on studying the governance of the European Union came from Europeanisation theorists. Europeanisation is defined as 'the emergence and the development at the European level of distinct structures of governance on the domestic structures of the Member States'.[71] This theory's interest lies in understanding whether and how ongoing processes of European integration change nation-states' domestic institutions and political cultures, and in aiming to explain 'under what conditions Europeanisation shapes a variety of domestic structures in a number of countries'.[72]

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67 Peterson, J. and E. Bomberg, 'Making Sense of EU Decision Making', in Nelson, B. and A. Stubb (eds.), *The European Union: readings on the theory and practice of European integration*, p.314.

68 Pollack (2005) in Wallace (2005), p.35.

69 Jachtenfuchs (2001); Jachtenfuchs, M. (2007), 'The European Union as a Polity (II)' in K.E. Jorgensen, M. Pollack and B. Rosamond (eds.), *The Handbook of European Union Politics*; Jachtenfuchs, M. and B. Kohler-Koch (2004), 'Governance and Institutional Development' in A. Wiener and T. Diez (eds.), *European Integration Theory*.

70 See for example: Majone, G. (1994).

71 Caporaso, J., M. Green Cowles and T. Risse (eds.) (2001), *Transforming Europe: Europeanization and Domestic Change* , p.1

72 Ibid., p.3.

Being an 'offshoot from the multi-level governance tradition'[73], it is also partly based on the ideas of historical institutionalism and builds on earlier work by Gourevitch's second-image reverse theory and Putnam's two-level game work.[74] Europeanisation theory therefore gives an account of how governance is changing by focusing on the feedback effect of European legislation on European integration.

This theory is interesting for this thesis as it points at the importance of feedback effects of European legislation on future legislative steps[75] and has also been used by scholars trying to explain variation in levels of liberalisation. A good example is the work by Smith who draws on Europeanisation theory as part of his explanation of why differences in levels of liberalisation between public service sectors can be observed.[76]

However, the most useful insights within the governance approach for the purpose of this thesis come from the work of multi-level governance theorists on the multiplicity of actors involved in policy-making in the European Union.[77] This theory, containing residues of 'neo-functionalism, Nye and Keohane's transgovernmentalism and historical institutionalism'[78], has studied the consequences of European integration for the

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73 Pollack (2005) in Wallace et al (2005), p.40.

74 Gourevitch, P.(1978), 'Second Image Reversed: The International Sources of Domestic Politics', *International Organization*; Putnam, R.(1988), 'Diplomacy and Domestic Politics: The Logic of Two-Level Games', *International Organization.*

75 Caporaso et al. (eds) (2001); Thatcher, M. (2007), *Internationalization and economic institutions: comparing European experiences*.

76 Smith (2005).

77 Marks, G., L. Hooghe and K. Blank (1996), 'European Integration from the 1980s: State-Centric v. Multi-level Governance', *Journal of Common Market Studies.*

78 Jordan, A. (2001), 'The European Union: an evolving system of multi-level governance…or government?', *Policy and Politics*, p.199.

'autonomy and authority of the state in Europe'.[79] Although rejecting the notion that national governments have become obsolete, they simply assert that 'the state no longer monopolizes European-level policy making'.[80] They thereby provided a new conception of the EU as a governance structure where power is shared among sub-national, national and supranational level actors.[81]

To account for this general weakening of the state, they start by arguing that European integration has led to a diffusion of control to other supranational institutions, such as the European Council and European Parliament.[82] As these supranational institutions increasingly become more powerful, this means the European Union offers multiple points of access for interest groups. This in turn means that national governments cling to their status as the exclusive nexus between domestic politics and international relations.[83] Recent studies seem to support the view that the autonomy of states is weakened and can even be challenged by factors such as the direct involvement of interest groups.[84]

Although I do not necessarily share the view that the European Union is changing into a less hierarchical polity with increasingly shared power, as I still hold the view that policy-making is the direct effect of negotiations between legislators (i.e. Member States and Parliament make up the legislature, and the European Commission holds the right to initiate legislation) during co-decision, I do share the view that societal actors can

79 Hooghe, L. and G. Marks (2001), *Multi-level Governance and European Integration*, p.1.
80 Ibid., p.3.
81 See: Hooghe and Marks (2001)
82 Hooghe, L. and G. Marks (2008),'European Union?', *West European Politics*, p. 114.
83 See: Hooghe and Marks (2001), p.28. See also Bartolini, S. (2005), *Restructuring Europe: Centre Formation, System Building and Political Restructuring between the Nation-State and the European Union.*
84 See: Mazey, S. and J. Richardson (2001), 'Interest group and EU policy-making: Organisational logic and venue shopping', in Richardson, J. J. (ed.) (2001), *European Union: Power and policy-making*.

influence the negotiations directly and independently from Member States. This explains how 'third actors', i.e. actors other than Member States and supranational institutions, such as societal interest groups, can independently influence public policy-making in the European Union.

Important shortcomings of multi-level governance theory are firstly that it often fails to specify the conditions under which sub-national actors will be influential, assuming influence merely because they are able to operate independently.[85] Secondly, although they somehow refute traditional politics and government, these traditional structures (executive, judiciary, legislature) do exist.[86] In addition, as work on politicisation illustrates rather well, policy-making remains political and thereby prohibits the reduction of the European Union to a regulatory unit.

Therefore, although these theorists successfully showed the need to probe beyond economic preferences so as to better understand how and when various forms of societal demand (public opinion, interest organisations, identity etc.) are mobilised[87], how this impacts on policy-making and how the process of integration could fundamentally change the process of policy-making, their aim is not to provide any insight into the direction or causes of European integration. This renders them, in itself, incapable of formulating an answer to the question of this thesis.

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85 See: Jordan, A. (2001).

86 Hix, S. (1998), 'The Study of the European Union II: The "New Governance" Agenda and Its Rival', *Journal European Public Policy*, p.54.

87 Hooghe and Marks (2009), p.2.

1.4 Influence of politicisation

A particularly interesting development in research aimed at explaining the process of European integration is the growing scholarly attention to 'politicisation' of policy-making in the European Union; the term politicisation generally refers to the enhanced influence of party politicians and/or the general public on policy-making. This phenomenon, which can significantly impact EU decision-making, seems to arise particularly during negotiations of issues that are highly controversial; services being an important one of these.

Politicisation is not a new concept in itself and has, in recent years, increasingly featured in theories explaining European integration.[88] For example, it was an essential aspect of the neo-functionalist explanation of regional integration, referring to a process where enhanced controversy over a joint decision leads to a widening of the audience interested in integration, leading to a redefinition of the original objectives which ultimately would lead towards a shift in loyalty towards the new regional centres.[89] Functionality being the engine of integration, politicisation, they argued, determined how and when these functional pressures affected regional integration.[90]

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[88] See: De Wilde, P. (2011) for a discussion of Hooghe and Marks (2009); Beyers, J. and B. Kerremans (2004), 'Bureaucrats, politicians and societal interests: how is European policy making politicized?', *Comparative Political Studies*; Christiansen, T.(1997), 'Tensions of European governance: politicized bureaucracy and multiple accountability in the European Commission', *Journal of European Public Policy*; Buonfino, A.(2004), 'Between Unity and plurality: the politicization and securitization of the discourse of immigration in Europe', *New Political Science*. See also: Pelkmans (2007), 'Deepening Services Market Integration – A Critical Assessment', *Romanian Journal of European Affairs*.

[89] Schmitter, P. (1969), 'Three Neofunctional Hypotheses About International Integration', *International Organization*, p.166.

[90] Ibid.

Where politicisation in the neo-functionalist story referred to the outcome of a process where increasing controversy over joint decision-making, as a result of a *process of integration which slowly draws in more issues*, would lead to a widening of the audience interested and active in integration[91], more recently politicisation is used slightly differently to refer to the *direct effect of enhanced public involvement* as an independent factor in the policy-making process, leading to enhanced controversy of decision-making. This influence of the general public opinion through mass mobilisation had been disregarded for a long time. Interest group theories largely ignored the mass public and modelled policy-makers as responsive to organised economic interests.[92] This was based on the claim that citizens are insufficiently informed and not interested in European integration.

However, recent scholarly work seems to suggest otherwise. An elaborate overview of research conducted on this issue is given by Hooghe and Marks[93], and convincingly illustrates the importance of public opinion as a factor increasingly influencing European integration by politicising the process of decision-making. Increasingly, scholars have focused on politicisation as an important explanatory variable for explaining the process and direction of European integration. Although the term is not always well defined and indeed varies in its definitions, the various manifestations of politicisation discussed in the literature can, according to de Wilde, generally be grouped in three categories

91 Ibid.
92 Katzenstein, P. (1978), *Between Power and Plenty*.
93 See pp.6-14 in Hooghe and Marks (2009)

affecting European institutions, the European Union's decision-making processes and the general issues addressed by the European Union.[94]

For example, studies have pointed to the 'growing party politicisation of the College of Commissioners'[95] and to the politicisation of the European Commission more generally[96], whilst other scholars have shown the effect of politicisation on the EU Council Working Groups.[97] Institutions such as the European Commission and Parliament become politicised 'when party politicians gain a tighter grip on their operations leading to increasing prominence of party political conflict'.[98] Politicisation of decision-making processes, on the other hand, occurs when politicians increase their influence on the day-to-day functioning of these institutions at the expense of professionals. The third form of politicisation, i.e. of issues, refers to instances of increasing salience of and diversity of opinion on certain societal topics.[99]

Other scholars have focused specifically on the influence of 'mass media, parliamentary debates and street protest'.[100] Some scholars have identified long-term processes of

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94 De Wilde, (2011)

95 Ibid., p.5 referring to Egeberg, M. (2006), 'Europe's executive branch of government in the melting pot – an overview' in Egeberg, M. (ed.) *Multilevel union administration: the transformation of executive politics in Europe.*

96 Christiansen (1997)

97 Fouilleux, E., J. de Maillard and A. Smith (2005), 'Technical or political ? The working groups of the EU Council of Ministers', *Journal of European Public Policy*.

98 De Wilde (2011), p.3.

99 Ibid., p.3.

100 De Wilde (2011) provides an overview of scholars who have studied these issues on page 5 listing among others: De Vreese, C.H. (2001), ''Europe' in the news: a cross-national comparative study of the news coverage of key EU events', *European Union Politics*; Koopmans, R. (2006), 'Who inhabits the European public sphere? Winners and losers, supporters and opponents in Europeanised political debates', *European Journal of Political Research*; Glencross, A.(2009), 'The difficulty of justifying European integration as a consequence of depoliticization: evidence from the 2005 referendum', *Government and Opposition.*

enhanced politicisation, such as politicisation of identity[101], whereas others have focused on politicisation of EU issues in 'bounded episodes of contention'.[102] In instances of contestation and increasing public demand, the issue at hand will become politicised. In this sense, 'politicisation functions to highlight the importance of EU policies for the daily lives of EU citizens'.[103]

These various strands of research provide ample evidence that politicisation is a phenomenon which is becoming increasingly visible, although defined in different ways, and that should be considered when explaining the process of European integration more generally.

1.5 What specific research has been conducted on service liberalisation?

Having discussed the theories which I deemed useful to help explain the main research question of this thesis, I now turn to the research that has already been conducted on the specific service sectors that I will be addressing in my thesis. As the liberalisation of the services market is a very general research topic, I demarcated my research area by focusing on four specific case studies, i.e. postal, healthcare and electricity services and the services covered by the Services Directive.[104] What this analysis will show is that there is a relative absence of scholarly research explaining the variation in the liberalisation of service sectors. While political science scholars have written on the service sectors that I research in this thesis, they often research them as topics in

[101] See: Checkel, J.T. and P.J. Katzenstein (2009), 'The politicization of European identity' in Checkel, J.T. and P.J. Katzenstein (eds.), *European identity;* Marks and Hooghe (2009).
[102] See for example: Tilly, C. and S. Tarrow (2007), *Contentious politics.*
[103] De Wilde (2011), p.6.
[104] The reasons for choosing these case studies will be explained in the next chapter.

themselves (i.e. describing the development of the entire sector) or as case studies to analyse the effect of EU legislation on domestic structures. Most of this work remains vertically oriented, meaning that the research is confined to one particular service sector (in some cases two for purposes of comparison), and very few studies have compared service sectors to explain why there is variation between them.

It is interesting to note that legal scholars have generally studied the legislative pieces of this thesis in detail. That said, the problem with this work is that they only focus on the legislative outcome and are not interested in the political bargaining process preceding the conclusion of the legislation.

One exception is the research conducted by Smith on 'States of Liberalisation'[105], which had a similar research aim to this thesis (i.e. explaining the differences in liberalisation between service sectors). Smith's research was born out of his observation of the contradicting levels of public sector liberalisation. To explain the differences in timing and scope of economic liberalisation he created a model. He observed that the mere presence of a market-oriented institutional structure was not in itself sufficient to guarantee liberalising legislation. A change in Member State positions had to take place, and he analysed what caused Member States to change their standpoint. He used a rational choice institutionalist approach and supplemented this with some long-term effects resulting from Europeanisation[106] to explain the outcomes he observes.

[105] Smith (2005).

[106] I question whether the term 'Europeanisation' is adequately used here and applies to what Smith is actually focusing on. The long-term processes he describes, of implementation and transposition of EU law and the subsequent effect this has on legislator's preferences is not, I argue, that what the term

While his research objectives mirror my own, there are some significant shortcomings of Smith's research. First, I argue that his dependent variable is not comprehensive of all aspects that eventually determine a sector's 'level of liberalisation'. He measures this by considering the scope and timing of the legislation, leaving one important aspect, namely the actual content of the directive, largely unaddressed.[107] Second, this research focused exclusively on public services; services that, by nature, face slightly different problems than private services. This reduced the generalisability of the model; a shortcoming which I will try to overcome in my own research design which will be discussed in chapter 2.

Postal Services

The academic debate on postal liberalisation can be divided into a political and a legal debate. The legal debate, as far as this author is aware, has focused on various aspects of postal liberalisation: the evolution of the international postal law[108], in particular the content of the various postal directives in light of the rulings of the ECJ, the technical obstacles to liberalisation (i.e. terminal dues, remail), the market definition of postal services[109], the issue of market power in postal services[110] and the developments towards

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Europeanisation, as defined by Caporaso et al. (2001), tries to capture. Europeanisation, as defined by Caporaso et al., refers to a much more complicated, constructivist story of long-term changes in institutional design. Thus, the extent to which domestic political interaction with European-level policies and institutions fosters a reduction in the weight of public sector monopolists in national policy formulation may not, to my mind, be a process of Europeanisation but simply the process of policy implementation.

[107] As I will explain in more detail in the next chapter, I will overcome this shortcoming by including a third dimension, namely the directive's 'degree of market integration'.

[108] Campbell, J.I. (2002), 'The Evolution of Terminal Dues and Remail Provisions in European and International Postal Law' in Damien Geradin (2002) *The Liberalisation of the Postal Services in the European Union.*

[109] Baker, S. and J. Dodgson (2002), 'Market Definition in Postal Services' in Geradin, D. (2002) *The Liberalisation of the Postal Services in the European Union.*

postal liberalisation made so far.[111] The work by Bishop fits in with this legal scholarship on the development of the postal market.[112]

Where some scholars, such as Bunse, have studied the postal sector as a case study to analyse the role of certain European actors (e.g. the influence of the Council presidency)[113], most political science research fits in with the Europeanisation approach. Eckert, for example, studied the effect of domestic factors on the politics of reform and regulation.[114] Eckert explained the nature of political opposition and how this influenced the transposition of EU legislation into national law with attention to four sets of country-specific factors, leaving the debate on how EU legislation was actually achieved untouched. Along a similar line, Thatcher researched postal liberalisation to assess the effect of EU policy-making on domestic reform. He argued that enforcement by the Commission of 'EU regulation was central to overcoming opposition in France and Italy'[115], but failed to account for the exact outcome and the conditionality of this development. Smith's work added to this.[116] In explaining postal liberalisation, he pointed to the effect of complaints from private sector actors on the decision to put the postal sector on the political agenda, and to the Europeanisation effect as an explanatory

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110 Derenne, J. and C. Stockford (2002), 'Abuse of Market Power in Postal Services: Lessons from the Commission's Decisional Practice and Court of Justice' in Geradin, D. (2002) *The Liberalisation of the Postal Services in the European Union*.

111 Art, J. (2002), 'Merger Control in the Postal Sector' in Geradin, D. (2002) *The Liberalisation of the Postal Services in the European Union*; Visco Comandini, V., 'The Provision and Funding of Universal Service Obligations in a Liberalized Environment' in Geradin, D. (2002) *The Liberalisation of the Postal Services in the European Union*.

112 Bishop, W. and King's College (1998) (University of London), *Liberalising postal services: on the limits of competition policy intervention.*

113 Bunse, S.(2009), *Small States and EU Governance: Leadership through the Council Presidency*.

114 Eckert, S. (2009), 'Postal reform around the globe: Comparing the Asian and European experience', *Policy and Society*.

115 Thatcher, M. (2007), p.246.

116 Smith, M. (2001), 'In pursuit of selective liberalization : single market competition and its limits', *Journal of European Public Policy*; Smith (2005).

factor for the subsequent developments of the sector. Again, the focus here was on explaining longer-term processes of liberalisation rather than on trying to account for exact legislative outcomes in the services sector.

Electricity

Both economists and political scientists have extensively researched the effects of market liberalisation on domestic markets[117], theorised on best practice, the desirability of an internal electricity market[118] and discussed the effects of previously concluded legislation on domestic markets.[119] But again, fewer scholars have focused in detail on the process of policy-making, in particular the negotiations that preceded European legislation so as to explain its exact shape. The research done by Eising and Eberlein did focus on the process of negotiations on the electricity directives and discussed how the electricity market actually came to be established.[120] However, as this was not the main focus for Eberlein, his research leaves gaps in our understanding specifically of the political negotiations. The work done by Eising and Jabko on the conclusion of the 1st Energy Package does give a thorough account of the political negotiations.[121] However, it seems no similar studies have been conducted on the 2nd and 3rd Electricity Directives. This, to my mind, means there is still demand for this research.

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117 Glachant, J.M. and F. Lévêque (eds.) (2009), *Electricity Reform in Europe: towards a single energy market*; Smith (2005).

118 Domanico, F. (2007), 'Concentration in the European electricity industry: the internal market as solution?', *Energy Policy.*

119 See: Von Danwitz, T. (2006), 'Regulation and Liberalization of the European Electricity Market – A German View', *Energy Law Journal.*

120 Eising, R (2002)., 'Policy learning in embedded Negotiations: Explaining EU Electricity Liberalization', *International Organization;* Eberlein, B. (2008), 'The Making of the European Energy Market: The Interplay of Governance and Government', *Journal of Public Policy.*

121 Eising, R. and N. Jabko (2010), 'Moving Targets National Interests and Electricity Liberalization in the European Union', *Comparative Political Studies.*

Services Directive

Here again, legal scholars have worked extensively on explaining the Services Directive.[122] The increasingly active role of the ECJ in recent years, especially in the area of service liberalisation, has triggered scholarly study of the influence of the ECJ on the liberalisation of these service sectors. In addition, the heavily amended content of the legislation has provided fertile ground for legal research as regards the legal novelty of the legislation.

Contrary to the other service sectors, the political negotiations preceding the conclusion of the Services Directive have been studied in more depth by political scientists. Nicolaïdis and Schmidt provided a good analysis of the political negotiations preceding the conclusion of the Services Directive[123], explaining the reasons for the deletion of some crucial principles. In addition, Pelkmans[124] and Miklin [125] gave a thorough account of the factors that influenced bargaining on this directive. Pelkmans argued that politicisation of the political debate, politicised collective identity, and the role of the EP as compromise maker were the dominant factors shaping the outcome. More recently, Loder provided a very thorough analysis of the negotiations trying to explain the high

[122] Hatzopoulos, V.G. and T. Do (2006), 'The Case Law of the ECJ Concerning the Free Provision of Services: 2000-2005', *Common Market Law Review*; Blanpain, R. (ed.) (2006), *Freedom of services in the European Union : labour and social security law : the Bolkestein initiative*, Series: Bulletin of Comparative Labour Relations; Drijber, B.J. (2004), 'De Bezems van Bolkestein', *Nederlands Tijdschrift voor Europees Recht*; Drijber, B.J. (2007),Van Democratie en Bureaucratie: de Dienstenrichtlijn is er door', *Nederlands Tijdschrift voor Europees Recht.*

[123] Nicolaïdis, K. and S. Schmidt (2007), 'Mutual Recognition on Trial: The Long Road to Services Liberalisation', *Journal of European Public Policy.*

[124] Pelkmans (2007) .

[125] Miklin, E.(2009), 'Government Positions on the EU Services Directive in the Council: National Interests or Individual Ideological Preferences?', *West European Politics.*

level of politicisation that surrounded the Services Directive.[126] In addition, others analysed the (expected) effect of the directive[127] or studied the expected effects of this directive on domestic markets. Serving as useful starting points, these studies do remain quite general in their analysis of what and who determined the exact shape of the Services Directive.

Healthcare – Patient Mobility

Turning to the area of cross-border healthcare, this is an extremely complex topic covering a wide number of issues ranging from pharmaceuticals[128] to direct regulation of blood[129] to qualifications of doctors. Similarly to the postal sector, the healthcare sector has proven to be of great interest to legal scholars. Extensive research has been carried out on the role of the ECJ in defining patient mobility and the effect of general EU legislation on national health systems.[130]

Looking at political science research, Scott L. Greer is among the leading scholars in this area, primarily researching the process of EU integration in this sector. His research is

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126 Loder, J., 'The Lisbon Strategy and the politicization of EU policy-making: the case of the Services Directive', *Journal of European Public Policy*.

127 OECD report (2005), 'The EU's single market: at your service?', *OECD Economics Department Working Paper no. 449*, by L. Vogt.

128 Hancher, L. (2010),'The EU pharmaceuticals market: parameters and pathways', in Mossialos et al (eds.) (2010), *Health Systems Governance in Europe: The Role of EU Law and Policy.*

129 See e.g. Clergeau, C.(2005), 'European Food Safety Policies: Between a Single Market and a Political Crisis', in Monika Steffen (ed.) *The Governance of Health in Europe.*

130 Greer, S. (2008), 'Choosing paths in European Union health services policy: a political analysis of a critical juncture', *Journal of European Public Policy* on page 222 lists a number of scholars who have researched this: Hatzopoulos, V. G. (2005), 'Health Law and Policy: The Impact of the EU' in G. De Búrca (ed.), *EU Law and the Welfare State;* Hervey, T.K. and J.V. McHale (2004), *Health Law and the European Union*; McKee, M. and E. Mossialos (2006), 'Health policy and European law: Closing the gaps', *Public Health*; McKee, M., E. Mossialos and R. Baeten (2002), *The Impact of EU Law on Health Care Systems*; Mossialos, E. and M. McKee (2004), *EU Law and the Social Character of Health Care*. See also Hervey, T. K.(2007), 'The Current Legal Framework and the Right to Seek Healthcare Abroad in the European Union' in *Cambridge Yearbook of European Legal Studies*; Sieveking, K.(2007), 'ECJ Rulings on Health Care Services and Their Effects on the Freedom of Cross-Border Patient Mobility in the EU', *European Journal of Migration and Law*; Mossialos E., Permanand P., Baeten R., Hervey T.H. (eds.) (2010), *Health Systems Governance in Europe: The Role of EU Law and Policy* Mossialos et al. (2010).

deeply embedded in legal scholarship. He explained the increasing EU competence in health as something which is the result of 'political spill-over', i.e. integration is the result of 'activities of supranational political institutions'.[131] His argument centred around the pivotal role of the Court in putting this issue on the agenda, given the absence of strong demand from society. Although Greer focuses on patient mobility in the EU, the aspect of cross-border healthcare which this thesis is interested in, his primary research interest lies in explaining why the issue of healthcare came to be placed on the political agenda at all. Considering furthermore that the Patient Mobility Directive has only recently been concluded, there is little research which has studied the direct outcome of this directive and the negotiations that preceded it.

In sum, the shortcomings of the academic research to date on the sectors that I study in this thesis display that there is a clear need for more in-depth research on each of these sectors. This thesis will aim at doing precisely that for each of the case studies that will be addressed.

1.6 Conclusion

This chapter has discussed various theories which have dominated the scholarly work on European integration, and discussed their usefulness and shortcomings for the purpose of this thesis. It has become clear that most theories cannot be deemed either wrong or right, but rather, as Allison and Puchala so eloquently observed, differ in their research foci.

What this chapter has shown is that there are various ways of approaching the issue of European integration. Where some theorists focus primarily on explaining the processes

[131] Greer, S. (2009), *The Politics of European Union Health Policies*, p.11.

of European integration, others aim at setting out the conditions under which one could expect further integration or specifically direct their attention towards the role of the actors involved in the policy-making process, and may even propose new theories on how to understand the European Union (government vs. governance).

The theories of European integration, with their main research focus on explaining long-term processes of integration, provide the starting point for a model that can explain the differences in levels of liberalisation in the services sector which I observed. They uncovered the main drivers of integration and provide the basis for understanding the process of European integration.

However, to some extent their analysis of the negotiation stage, assuming an intergovernmental bargain, led them to overlook some important dynamics that can affect these negotiations. The research by rational choice and historical institutionalists has shed light on the conditions under which actors enhance or decrease their influence, and has shown how institutions can constrain future rounds of negotiations. At the same time, the governance theorists unveiled the multiplicity of actors involved in policy-making and argued for a new conception of EU governance which has resulted from integration over time.

Of particular importance is the increasingly apparent role of the public, and the subsequent politicisation, in policy-making. It seems that the public, organised in various forms, is not as uninterested in or absent from the debate as many had thought. A prime

example to date is of course the rejection of the constitutional Treaty by the Dutch and French people during referenda held in 2005. Through studying referenda and elections, scholars have shown how the public can influence EU policy-making, thereby complementing the traditional idea of economic incentives shaping legislators' preferences.

In sum, this thesis observes a gap in the literature when it comes to a comprehensive model, capable of explaining the detailed variations in levels of liberalisation. Our current inability to explain these differences will only become more problematic in future as integration in the services sector proceeds. As I expect that the variation observed is partly the result of differences of politicisation of the negotiations, it is important to understand the effect of politicisation better, not the least as this may affect one's understanding of the democratic nature of EU policy-making. In the next chapter, I will propose a model which, I argue, is capable of explaining the varying levels of liberalisation within the services sector.

The influence of general societal demand, or public opinion more specifically, is likely to become an increasingly important factor in future negotiations. First, developing technology facilitates mass mobilisation. The internet allows for immediate access to information, opens up the possibility of immediate communication with (potentially) many others and offers a platform for mobilisation. This enhances the success rate of mass mobilisation. A prime example of mass mobilisation and protest that was, to a large extent, organised by online social media are the Arab Spring protests, or Jasmine

Revolutions, of 2011. Second, there are increasingly more grounds for why people should want to mobilise. As European economic integration has 'largely completed the internal market for products'[132], the supranational institutions are inclined to branch out into service sectors which were traditionally not considered to fall under the competences of the European Union.[133] Given the slow expansion of the scope of issues where European integration is to be pursued, shifting away from purely technical areas and branching out in more sensitive ones, it becomes more likely that public opinion will become involved in the political negotiations. To that effect, this factor should not be ignored.

[132] Höpner, M. and A. Schäfer (2007), 'A New Phase of European Integration – Organized Capitalisms in Post-Ricardian Europe', *Max-Planck Institute for the Study of Societies, MPIfG Discussion Paper*, p.21

[133] See: Höpner and Schäfer's (2007) post-Ricardian theory. Where the initial goal of European integration centred on the idea of removing disguised protectionism so as to allow for fair competition between companies, Höpner and Schäfer hold that lately the Commission's interpretation of a level playing field has come to mean that *institutional differences as such* are an obstacle to competition (p.8). Indirectly, this means that organized economies are no longer viewed as equally valid production regimes and are at times taken as institutions which present barriers to the Economic Union. By denoting some of these institutions as obstacles to free cross-border trade, the Court and the Commission directly target and change Member State institutions. This leads the authors to conclude that European-level actors have extended the interpretations of the 'four freedoms' to an extent that it becomes increasingly questionable whether the wordings and spirit of the treaties provide (input) legitimacy for the respective liberalisation measures (p.11).

2. Theory

'In der Beschränkung zeigt sich erst der Meister (...)'[1]
Johann Wolfgang von Goethe

The objective of this thesis is to explain the level of liberalisation in the European services market. By liberalisation, I mean the extent to which markets are open and allow for cross-border movement of services.

Current theories of integration go a long way in providing answers as to why one can observe differences in levels of liberalisation in the services market today, but fail to account for the exact levels of liberalisation. This is, as discussed before, a direct result of their research objective, which is to explain long-term processes of European integration over time. In this thesis, I draw up a model capable of explaining the different levels of liberalisation within the services sector. I start by outlining the two drivers of change, i.e. changes in economic conditions and supranational activity. These drivers influence the negotiations by setting societal and institutional incentives which subsequently shape legislator's preferences.

In addition to this, I include a third factor, namely the influence of politicisation of the political debate, which acts as an intervening variable on the negotiations. Politicisation of the negotiations occurs when public opinion directly gets involved in the debate through mobilisation of the general public. I acknowledge the independent influence of societal actors (i.e. independent from Member States) on EU negotiations and hold that this influence is not, as Moravcsik for example assumes, merely channelled through

[1] Translated in English as: 'Only in moderation is the master revealed'.

Member State preferences. I expect politicisation to influence the level of liberal legalisation primarily by altering the relative influence of the legislators. Those who adopt the concerns of the public and come to represent their concerns will likely experience an increase in relative influence on the negotiations. I will test this new model by analysing the level of liberalisation in four service sectors, each of which will be studied in detail: the postal sector, the electricity market, the healthcare market and the small and medium business services covered by the Services Directive.

In explaining the differences in levels of liberalisation in each of these sectors, I adopt a two-tiered approach. I first explain the context in which the legislation was drafted, what legislation preceded it and discuss the preferences of all stakeholders involved. This explains where the legislation came from, why it was tabled in the first place and helps to understand the behaviour of the legislators during negotiations better. Second, understanding the context, I take preferences as exogenously given, and focus on the negotiations. Of particular importance is the influence of ad hoc politicisation on the negotiations. I research how politicisation, in its various forms, alters the relative influence of legislators and thereby affects the level of liberalisation of the concluded legislation.

In this chapter, I will start by operationalising the dependent variable of this thesis (i.e. the level of liberalisation). As liberalisation is difficult to measure, I need to establish a proxy for liberalisation which can be measured; in this thesis I term this the ‘level of

liberal legalisation'.[2] I continue by discussing where previous work done on European integration falls short for the purpose of this thesis. I discuss why attention should be paid to politicisation, and how I will define this. I will then present my own model, which I argue is capable of explaining the different levels of liberalisation between various service sectors. I continue by discussing my methodology to analyse the developments within each of the service sectors. A detailed analysis of the negotiations, comparing actors' preferred positions with the final outcome, can illustrate what factors influenced the negotiations, and in particular how politicisation, if present, influenced the legislative outcome. Finally, I will present the data I will use to conduct this research and discuss possible shortcomings of the model.

2.1 Research focus

This thesis, as stated before, researches the liberalisation of the services market. This term requires some explanation. In some contexts, liberalisation of markets has been used to refer to merely a process of negative integration.[3] This definition, however, is too narrow. When referring to a liberalised market, I mean a market which is not only free of technical and legal barriers, but one where mechanisms are also in place to actually facilitate this movement. For example, free movement of services not only requires open access to foreign markets, but also measures that facilitate this cross-border movement (e.g. information provision, harmonisation of regulation, dispute resolution rules).

[2] This term will be explained under 2.1.

[3] As Tinbergen (1965) already argued, economic policy theory traditionally distinguishes between 'negative' and 'positive integration'. According to Scharpf, F. (1999), *Governing in Europe: Effective and Democratic?*, negative integration 'refers to the removal of tariffs, quantitative restrictions and other barriers to trade or obstacles to free and undistorted competition'(p.45 and positive integration 'refers to the reconstruction of a system of economic regulation at the level of the larger economic unit' (p.45).

Therefore, a liberalised market in this sense refers to an integrated market. And integrated markets are often the result of negative and positive integration efforts.

Having defined the term further, it remains extremely difficult to measure the level of liberalisation within markets. Most studies determine the level of liberalisation by analysing and rating the actual state of liberalisation achieved in practice. Unfortunately, this approach cannot be used in the present thesis as I study pieces of legislation concluded only recently in various service sectors, and stop my analysis after the negotiations. Due to their novelty they often have not yet been transposed or have not yet had enough time for their effects to become visible by the time of analysis. A practical assessment of the level of liberalisation to measure the current level of liberalisation of that particular service sector is therefore not a viable option.

The reason I focus on recently concluded legislation is that this allows me to conduct interviews, something which is necessary when trying to understand the policy-making process, in particular the negotiations, in more detail. Although it is not impossible to conduct interviews on 'older' pieces of legislation, it does present more challenges. For example, due to career changes etc. it is generally more difficult to contact the people who were involved in the negotiations. Furthermore, due to the time that has passed, people may have forgotten the details of the negotiations. Recently concluded pieces of legislation generally tend to suffer less from these problems.

To overcome the problem of how to measure the level of liberalisation, I decided to use the precise content of the legislation as an indicator for the level of liberalisation that would likely be obtained in that service sector. As Member States are obliged to transpose European legislation into national law, the content of the legislation to a large extent determines the level of liberalisation after transposition. Acknowledging that this measure is imperfect[4], an analysis of the content of the legislation could function as a *proxy* for the level of liberalisation of a particular service sector.

In this thesis, I use the 'level of liberal legalisation' of legislative acts as proxy for the level of liberalisation that will result from transposition of the legislation. I base this definition on the work by Goldstein et al., who defined legalisation as the increasing application of law in the governance of institutions.[5] Where the term legalisation, as defined by Goldstein et al. covers all areas in which international institutions operate (i.e. all their activities)[6], I focus only on those pieces of European legislation that concern the liberalisation of the services market. Therefore, I add the term 'liberal' so as to indicate that I am only interested in those aspects of legalisation that are conducive to further liberalisation. The level of liberal legalisation is a continuous variable, ranging from high

[4] The legislative level of liberalisation after two of these processes, i.e. agenda setting and negotiations, is not guaranteed to be similar to the final practical level of liberalisation. First, the practical level of liberalisation observed at a point in time is the result of the complete legislative process which Abbott and Snidal (2009) summarize as ANIME (agenda setting, negotiation, implementation, monitoring, enforcement) (Source: Abbott, K. and D. Snidal, 'The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State', in Mattli and Woods (ed.) *The Politics of Global Regulation)*. Second, the level of liberalisation is often subject to external factors such as the extent to which Member States are defecting on implementation (see for research on why Member States defect, and differences in compliance (Haas, P.(1998), 'Compliance with EU directives: insights from international relations and comparative politics', *Journal of European Public Policy*; Börzel, T., M. Dudziak, T. Hofmann, D. Panke and C. Sprungk (2007), *Recalcitrance, Inefficiency and Support for European Integration: Why Member States Do (not) Comply with European Law*).

[5] Goldstein, J., M. Kahler, R. O. Keohane and A. Slaughter (2000), 'Introduction: Legalization and World Politics', *International Organization*, p.386.

[6] Ibid., p.387.

levels of liberal legalisation to low levels of liberal legalisation. High levels of liberal legalisation imply high levels of liberalisation in that service sector.

To assess a directive's level of liberal legalisation, it is necessary to specify which attributes of the legislation determine the 'liberal' nature of the legislation. What aspects foster liberalisation? I argue that there are three attributes of the legislation that are conducive to liberalisation. Legislation with a wide scope (i.e. addressing all aspects of the service market), with a strong degree of market integration and with a high level of delegation (i.e. high levels of delegation to independent agencies) will lead to high levels of liberalisation of the service sector at hand. I will elaborate on each of these attributes.

First, the scope of the legislation. Legislation that covers all aspects of service provision in a particular sector will lead to greater liberalisation of the services sector than legislation that only covers parts of the entire sector. As already elaborated on in Table I.2 of the introduction, service provision is not merely one activity; it can come in various forms. The more inclusive the legislation is of the range of activities constituting cross-border service provision in a particular sector, the larger the scope. Full liberalisation of a particular service sector therefore requires barriers to be removed for all four of these forms of cross-border movement. Simply addressing one activity within the entire spectrum of activities constituting cross-border service provision reduces the scope of the legislation and has negative implications for the liberalisation of that area.

Second, the directive's degree of market integration. This aspect of the legislation refers to the extent to which the directive can remove barriers to cross-border service provision. To successfully liberalise the services market, one should not only ensure removal of barriers preventing service providers from providing services across borders, but also ensure that the markets are well integrated.

The main reason that prohibits free service provision across borders is the diversity between countries. Where this diversity had traditionally been the result of physical barriers, today most barriers to cross-border service provision are legal.[7] The measure traditionally used to integrate markets is national treatment. This deals with diversity by agreeing on the use of the rules of the country where the activity takes place. The problem with this approach was, however, that it did not remove the barriers. Out of state service providers were still required to comply with the entire set of regulations specific to the host country.[8] National (regulatory) diversity continued to present a barrier to cross-border service provision.[9]

To overcome this diversity, the national legislation in place that hampers this movement should be addressed.[10] In addition, one needs new regulation or agreements covering this variation in existing regulation which specify how cross-border service provision is to be regulated and which apply similarly to all service providers.

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7 See: European Commission, *State of the Internal Market Report* (2002).

8 'Separate national legal regimes constitute the crucial source of transaction costs' of cross border service provision' (Source: Stone Sweet and Sandholtz (1998), p.11).

9 'Under national treatment markets remain separated by different regulations' (Schmidt, S. (2007) 'Mutual Recognition as a New Mode of Governance', *Journal of European Public Policy*, p.672).

10 In instances where competition had not been introduced (e.g. monopolies), this step of barrier removal is preceded by the requirement of abolishment of monopolies.

There are two measures that seem to deal effectively with this diversity and are capable of integrating previously distinct markets: harmonisation and mutual recognition. Harmonisation constitutes the classic Community method and had traditionally been used as the dominant means of integrating markets.[11] Harmonising measures substitute national plurality for EU homogeny, thereby overcoming diversity. It is a very effective measure, particularly when its scope grows wider. However, harmonisation also implies significant costs on the part of the Member States (i.e. high bargaining costs and a transfer of sovereignty away from the national to the supranational level).

Mutual recognition is the idea 'that goods [and services] being marketed according to the regulations of any Member States could be marketed in principle in all other Member States'.[12] Contrary to harmonisation, mutual recognition leaves national differences in place, but requires all states to acknowledge each others' regulations, thereby resolving that differences in national legislation can form a restriction to cross-border movement of services. Member States face a costly 'horizontal transfer of sovereignty'[13], but the advantage of this approach is that companies are not faced with adaptation costs and governments are not faced with bargaining costs. That said, mutual recognition does require a high level of trust between all Member States in order to function properly, which makes its success more dependent on the willingness of Member States than harmonisation would.

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11 See: Schmidt, S. (2007), p.671.

12 Ibid., p.667.

13 Ibid., p.672 quoting Nicolaïdis, K. (1993), *Mutual recognition among nations: the European Community and trade in services*, Ph.D. dissertation.

There are various forms of mutual recognition, varying by the degree to which the measure allows for exceptions to be made to the principle of mutually recognising out-of-state regulation. While full application of mutual recognition can be termed 'pure mutual recognition', 'managed mutual recognition' [14] on the other hand refers to mutual recognition which allows for exceptions to this rule (e.g. exceptions based on overriding concerns). This latter form is usually more acceptable to Member States as it allows them to individually determine where to re-regulate in areas of high sensitivity.[15]

Both measures leave little possibility for Member States to restrict cross-border movement on the basis of their specific national regulations, but their success in removing barriers depends on how they are used and how many exceptions to this principle the legislation allows for. The closer the directive's measure of barrier removal is to the benchmark of optimal market integration (i.e. full harmonisation and pure mutual recognition), the higher the directive's degree of market integration.

Third, the level of delegation measures the degree to which regulatory power is delegated away from Member States to e.g. independent regulatory agencies, the European Commission etc. Delegation of power to an external agency is beneficial for the level of liberalisation in a sector, as it reduces the possibility for Member States to defect on

[14] Nicolaïdis, K. (1997), 'Mutual Recognition of Regulatory Regimes: Some Lessons and Prospects', *Jean Monnet Working Papers*. See also: Nicolaïdis, K. and J. Trachtman (2000), 'From Policed Regulation to Managed Recognition in GATS', in Sauvé, P. and R. Stern (eds.), *GATS 2000: new directions in services trade liberalization*; Nicolaïdis, K. and G. Shaffer (2005), 'Transnational Mutual Recognition Regimes: Governance without Global Government', *Law & Contemporary Problems*; Nicolaïdis and Schmidt (2007).

[15] See: Hatzopoulos and Do (2006)

promises made at an earlier stage. At the same time, it leads to harmonisation of interpretation, hampers self-interested interpretation and increases the costs of reneging.[16]

The directive's level of liberal legalisation is thus the sum of all three aspects. In practical terms, this means that a directive with a high level of delegation, a wide scope and a high degree of market integration can be rated as a directive with a high level of liberal legalisation.

There is an important shortcoming in merely focusing on the *level of liberalisation* of the services market; one only focuses on those aspects of the directive that affect the directive's level of liberal legalisation. The result is that this research says less about the re-regulation of those aspects that do not affect the sectors' level of liberalisation but were designed, for example, to contribute to the public interest (e.g. enhanced consumer rights). Although this is not problematic for this research, as this thesis sought to explain the levels of liberalisation within the services market, I do feel it is important to at least mention these other aspects of the legislation in each of my case studies. While this discussion will be brief, it will provide a more thorough understanding of the content of each directive.

2.2 Existing theoretical frameworks

Having specified how to measure the level of liberalisation, I will now discuss how previous work can help explain the different levels of liberalisation observed. A useful model for explaining further integration is offered by Mattli's supply-demand model of

[16] Abbott and Snidal (2000).

regional integration.[17] Studying the question of why regional integration is successful in some instances and fails in others, Mattli argues that two sets of conditions need to be fulfilled in order to achieve successful regional integration. For Mattli, demand arises when 'the potential for economic gains from market exchange within a region [are] significant'.[18] However, demand in itself is not enough when legislators do not want to supply. Politicians should also be willing and capable of supplying integration. A major condition for successful supply, he argues, is the 'presence of a benevolent leading country within the region seeking integration'.[19] Successful regional integration can therefore be expected when 'a regional group stands to reap important gain from integration and … (i)s led by a country able [to] serve as an institutional focal point and regional paymaster'.[20]

The model I propose in this thesis to explain the levels of liberal legalisation obtained in various service sectors to some extent also considers both the demand and supply side. Although the aim of this thesis is not to outline conditions for successful integration – rather, I would like to explain the exact levels of liberal legalisation obtained – a satisfactory explanation also requires me to discuss the level of demand for the proposed legislation and explain the level of supply of the legislators.

I start, in line with traditional European integration theory, from the assumption that European integration, in this case the liberalisation of the services sector, starts when

17 Mattli, W. (1999), *The Logic of Regional Integration: Europe and Beyond*.
18 Ibid., p.42.
19 Ibid., p.42.
20 Ibid., p.65.

there is a discrepancy between efficiency and existing structures of authority.[21] These inefficiencies can be the product of changed (expected) economic benefits of cross-border trade or of enhanced supranational activity in a particular service sector and can lead to societal demand for legislative change. I will elaborate on each below.

The importance of changes in economic conditions has been illustrated by Stone Sweet and Sandholtz's theory of transnational exchange, where they argued that transnational activity 'has been the catalyst of European integration'.[22]

They point to a crucial driver of integration and give a convincing account of how this driver generates societal pressure for change. The higher the (expected) economic benefits of transnational exchange, the larger and stronger the lobby of positively affected businesses demanding such legislation. This leads to increased constraints on possible opponents to comply with further liberalisation. Although there are some exceptions of course (societal demand for legislative change can also result from e.g. a crisis), rationalist scholars generally hold that societal actors mobilise as a result of changed economic conditions. I therefore argue that a change in (expected) economic benefits constitutes an important driver for further integration, leading to enhanced societal pressures which will in turn exert pressure on legislators to supply European rules that facilitate cross-border trade.

[21] Hooghe and Marks (2009)
[22] Stone Sweet and Sandholtz (1998), p.4.

However, integration is not always the result of economic pressures, but can also be the result of supranational activism. There are two ways in which supranational activity can foster integration, namely by kick-starting integration and through activity in between negotiations of legislation.

Supranational institutions can kick-start integration when they experience an increase in autonomy allowing them to stimulate integration, sometimes even against the direct wishes of the Member States. This is often referred to as functional spill-over. This idea is 'based on the assumption that the different sectors of a modern industrial economy are highly interdependent and that any integrative action in one sector creates a situation in which the original goal can be assured only by taking further actions in related sectors, which in turn create a further condition and a need for more action, and so forth'.[23]

Pollack has shown that supranational institutions are confined in their ability to function as a driver by the consent and preferences of the Member States.[24] Being strategic actors, they are careful not to upset a majority of Member States. This explains why the Commission, who has been assigned various powers which would justify it in demanding further liberalisation, generally refrains from using this power when the Member States strongly oppose this.

The one actor who can still function as a true driver for integration in situations of Member State opposition is the European Court of Justice. Hiding behind a mask of

[23] Burley and Mattli (1993), p.55.
[24] Pollack (2003).

legalism[25], it can apply principles from the internal market to areas which had formerly not been subjected to these principles. The liberalisation of the healthcare sector is a perfect illustration of a development that is, more than anything else, the result of spill-over (i.e. the ECJ applying principles of the common market to healthcare) rather than the result of an existing problem in society leading to a demand for change.

The relative influence of this supranational activism as a driver depends on external factors, such as its level of societal demand and the level of contentiousness of the issue. The more contentious the issue and the larger the public opposition to this development, the less Member States will feel constrained by supranational actions. By acknowledging the independent influence of the ECJ and the Commission as potential drivers for integration, I diverge from e.g. Moravscik's notion that institutions are in place merely to ensure credible commitment and prevent actors from defecting on their responsibilities.

Another way in which supranational institutions can foster integration is by ensuring that Member States comply with the Treaty of Rome and with the freedoms specified in it. The Commission has a number of measures at its disposal to ensure this. It can apply competition law, start infringement procedures, table a directive which requires participation of all legislative actors and table a directive under Art. 90 (TEC) which only requires Commission approval. This latter article 90 is interesting as it attributes to the Commission the right to issue directives by itself in those cases where Member State

[25] Burley and Mattli (1993), p.72.

governments have endowed undertakings with rights conflicting with the Treaty's rules.[26] It possesses the right to start enquiries and infringement procedures against those countries that fail to comply with the rules. Its actions can lead to significant domestic change, or even unintended consequences, which can in turn affect actors' preferences by altering existing cost-benefit analyses.

This latter notion of unintended consequences relates to the historical institutionalist reasoning of path-dependency. Historical institutionalists reject the notion that politics can be separated from public administration. Past decisions can influence future legislative decisions as a result of unintended consequences and the presence of increased returns which can result from previously implemented policies by affecting legislators' preferences vis-à-vis further integration. These unintended consequences can even force legislators into outcomes they deem suboptimal. The explanation is that the costs of upsetting supranational institutions, the costs of adaptation leading to an increased return to pursuing new paths and the absence, generally, of a unanimous desire for reversal make it difficult for Member States to correct unintended consequences.[27] Although it remains incredibly difficult to show that preferences have changed as a result of long-term developments, rather than being the result of actual economic incentives, the work

[26] Although the European Commission can also act autonomously under Art. 90, the Commission's decision whether or not to use this right is conditional on 'conflicting preferences among member governments and above all the support of interest groups and the European Court of Justice' (Source: Pollack, M. (1998), 'The Engines of Integration? Supranational Autonomy and Influence in the European Union', in Alec Stone Sweet and Wayne Sandholtz (eds.) *European Integration and Supranational Governance*, p.232). For a practical analysis of the role of the Commission using Art. 90 in the case of the telecommunications market, see: Schneider, V. (2001), 'Institutional Reform in Telecommunications: The European Union in Transnational Policy Diffusion' in Cowles, M.G., J. Caporaso and T. Risse (eds.), *Transforming Europe: Europeanization and domestic change*, p.63.

[27] Pierson (1996); See for a general discussion: Farrell, H. and A. Héritier (2007) 'Introduction: Contested Competences in the European Union', *West European Politics*, p.232.

of historical institutionalists, such as Pierson, has illustrated how institutional activity in between negotiations can stimulate further integration.

In sum, there are thus two main driving forces stimulating further liberalisation: a functionalist demand for further liberalisation (mainly as a result of changed economic conditions) and demand for liberalisation as a result of the workings of the European supranational institutions over time (spill-over or path-dependency). Both drivers help to explain the demand from society for legislative change as well as the preferences of the legislators. The drivers of integration affect negotiations in the following manner. Economic conditions, and the subsequent societal demand resulting from them, and supranational activity preceding the negotiations can affect the level of liberal legalisation by constraining the range of policy options available (e.g. ECJ rulings constrain the range of policy options which actors have) and by affecting legislators' relative influence. I have attempted to summarise these insights schematically in Figure 2.1.

FIGURE 2.1: Theoretical model European integration



2.3 Proposed amended model

One shortcoming of the model as outlined now is the relatively limited attention paid to the independent effect of various societal groups, and particularly the influence of public opinion on the negotiations. Most theories, including those of European integration, acknowledge the influence of societal demand on policy-making but conceive of it as affecting EU policy-making through the preferences of the legislators. To that effect, societal demand is considered to have exerted its influence on EU policy-making prior to the negotiations.

As discussed in the previous chapter, scholars have increasingly pointed to the *independent* influence of public opinion on legislators' strategic positions.[28] As the EU is a multi-level polity, where policy is 'being shaped by an intense debate that has mobilized leaders, political parties, interest groups, social movements and, on occasion, the wider public',[29] this opens multiple points of access for interests[30] and means that policy-making often differs from the traditional state-centric model.

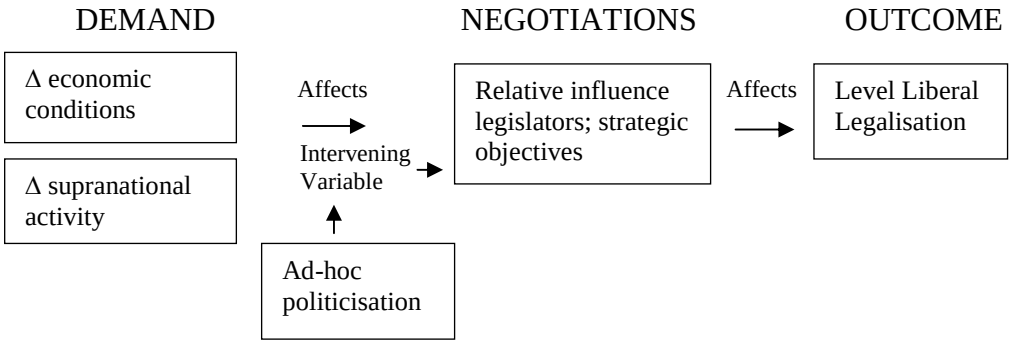
In particular, I see the need to focus in detail on the influence of public opinion on the negotiations leading to politicisation of the debate. The reason why the pivotal position of politicisation must be recognised lays in the large effect it has on the policy outcome. Due to the width of its support base, namely support by the general public, the political costs of ignoring its demand are extremely high. The research carried out on this so far

28 Hooghe and Marks (2009)
29 Hooghe and Marks (2001), p.141.
30 Ibid., p.28.

has provided ample grounds to substantiate the hunch that this factor could have a significant influence on service market liberalisation (see p. 49 of this thesis).

Given that politicisation is often paired with controversial issues, the negotiations on liberalisation of the services market are therefore very likely to have been subject to it. I focus in particular on the effect of *ad hoc politicisation*; i.e., the sporadic influence of politicisation present during negotiations. Taking preferences of legislators as stable during the negotiations, I expect politicisation to affect those aspects of the negotiations that can vary: i.e. actors' strategic objectives and relative influence. The model is therefore amended as follows:

FIGURE 2.2: Theoretical model European integration with inclusion of politicisation



Due to the complexity of the term 'politicisation', I will now explain how this will be defined for the purposes of this thesis and will outline the mechanisms through which I expect it to influence the legislative outcome.

2.3.1 Ad hoc politicisation

As discussed in the previous chapter, in recent years the term 'politicisation' has increasingly been referred to by scholars as a factor that has come to influence the European Union institutions, the EU decision-making processes and the general issues

addressed by the European Union.[31] Despite the fact that it is not a novel term, there is no consensus among scholars as to how this term should be defined.

Some scholars, such as De Wilde, have attempted to group the literature in three categories: i.e. politicisation as affecting institutions, decision-making processes and issues. In this thesis I focus on a specific effect of politicisation which corresponds to what De Wilde has defined as 'politicisation of issues'.[32] More specifically, I focus on *ad hoc politicisation* (from now on referred to as 'politicisation') of political debate, i.e. politicisation which 'takes place in bounded 'episodes of contention'' [33] during negotiations and its subsequent effect thereupon.

Please note that I thereby differ in focus from most other scholars who for example studied the long term trend of increasing influence of public organisations on policy making; a development that has also been defined as 'politicisation' by some scholars.[34] Politicisation of the debate refers to the phenomenon where public opinion mobilises and directly influences the political negotiations. It thus refers to a specific form of societal mobilisation in which the public opinion gets involved.

This means there is an important qualitative difference between interest group mobilisation and *ad hoc politicisation* as the latter refers to a specific form of societal mobilisation in which the public opinion directly gets involved during the negotiations.

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31 De Wilde (2011)

32 Ibid, p. 4-5.

33 Tilly and Tarrow (2007) as quoted in De Wilde (2011), p.5.

34 Some scholars have argued that the process of European integration is slowly getting more politicised. For a discussion, see: De Wilde (2011) and Hooghe & Marks (2009).

This means that the societal base of support is much wider than merely the support base of a particular interest group and explains why this phenomenon is so important to acknowledge. Knowing that policy makers are concerned about electoral rents, logical reasoning tells us that policy makers are inclined to supply to the general public opinion in the rare instance that the general public opinion mobilises in order to avoid high electoral costs. The result is that mobilisation of the general public opinion during negotiations, if it occurs, will always directly affect the negotiations and is therefore a factor to be acknowledged and understood.

The challenge here lies in how to methodologically distinguish between instances of mere interest group mobilisation and instances of direct involvement of the public opinion. To be able to distinguish between these two instances, it is important to spell out the conditions of politicisation (i.e. the public opinion mobilises and influences the political debate).

This is quite difficult when considering that politicisation is often the end product of a longer term process of interest group mobilisation. Similar to any (interest) group mobilisation, the general public suffers from a collective action problem where its mobilisation almost always starts with an interest group that fears to get negatively affected by the proposed legislation and subsequently tries to rally support for its demands. Therefore, when the public opinion gets mobilised, this is often the result of successful interest group mobilisation acting as an entrepreneur.

This entrepreneur can act autonomously or be activated and mobilised by political parties. The entrepreneur can be anyone, ranging from special interest organisations to political parties. Where some scholars hold that political parties are pivotal for determining whether an issue enters mass politics[35], I would thus argue more widely and allow for the autonomous effect of interest groups capable of mobilising the public on an issue which subsequently gets picked up by a political party. This way, I diverge from the unidirectional conception of politicisation and see two avenues through which politicisation can be achieved.

The conditions for politicisation of the debate were adequately summarised by De Wilde: (a) polarisation of opinion, (b) intensifying debate and (c) public resonance.[36] In a similar vein, Simon and Klandermans set out three conditions that need to be fulfilled in order for politicisation to be observed: (a) dissemination of information, (b) a shared grievance and (c) an entrepreneur to actively mobilise the community.[37] In this thesis, the conditions of De Wilde, specifying the need for 'public resonance' come closer to the definition of politicisation that will be used in this thesis than simply referring to 'mobilisation of community'. The former conditions are therefore more suitable to determine whether or not *ad-hoc politicisation* has occurred.

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35 Politicisation depends on 'whether a political party picks it up', (Source: Hooghe and Marks (2010), 'Politicization', in *Handbook on the European Union*, Erik Jones, Stephen Weatherill and Anand Menon (eds.),(forthcoming 2011), p.7).

36 De Wilde (2011), p.8.

37 Simon, B. and P.G. Klandermans (2001), 'Toward a Social Psychological Analysis of Politicized Collective Identity: Conceptualization, Antecedents, and Consequences', *The American Psychologist*, p. 319.

Whether or not an entrepreneur is successful in mobilising public opinion seems to increase when the issue discussed is non-technocratic, a condition that facilitates the dissemination of information, when it has the means (e.g. organisation, economic etc.) at its disposal and when the shared grievance is salient to a large proportion of society. The salience of an issue increases when it is tied to strong ideological beliefs or when the proposed legislation has high redistributive effects (e.g. significant costs for a large share of the population). Expected economic costs from further integration generally form a strong imperative behind mobilisation of public opinion[38] and may cause the collective action problem, which the public opinion faces, to be overcome. Following this reasoning, one can conclude that in instances where mass mobilisation does occur, there are (perceived) negative costs to the public at large leading the public to speak out against the proposed changes.

When interest groups prove successful in spreading their ideas, and when their ideas successfully manage to mobilise large groups of people wider than the support base of the interest group (i.e. mass mobilisation), the chances increase that general public opinion will be directly involved. When the general public opinion gets actively involved in the debate, politicisation of the debate has occurred.

Having set out the difference between mere interest group mobilisation and politicisation, and having spelled out the conditions for politicisation, the problem remains how to

[38] See: Gabel, M. and H. Palmer (1995), 'Understanding Variation in Public Support for European Integration', *European Journal of Political Research*; Gabel, M. (1998), *Interests and integration: market liberalization, public opinion and European Union.*

recognise politicisation when it occurs. A challenge in using a factor such as 'politicisation' lies in showing its presence during the policy-making process.

This is a difficult task, particularly since politicisation is a very rare occurrence and therefore leaves me with very few examples of it. The observation of the level of mass mobilisation is a good starting point to determine whether or not politicisation on a particular issue has taken place.

Mass mobilisation manifests itself often in the form of strikes. The degree of physical mobilisation of large groups of people on the issue at hand, in Brussels (and Strasbourg) and/or domestically, gives an indication whether mass mobilisation was present or not. The composition, rhetoric and demands coming from the striking groups help to assess whether the strikes represent the public opinion at large or not. In general it seems one can say that the larger, more diverse, and more widespread the mobilisation, the greater the chance that the group mobilised represents the wider general public opinion rather than simply being a form of interest group mobilisation. In addition, newspapers and magazines provide an additional source to determine whether the opposition has spread to reflect the general public opinion. Therefore, for politicisation to take place, the strikes do not need to fulfil certain criteria other than its manifestation reflecting and representing a general, wider public opinion.

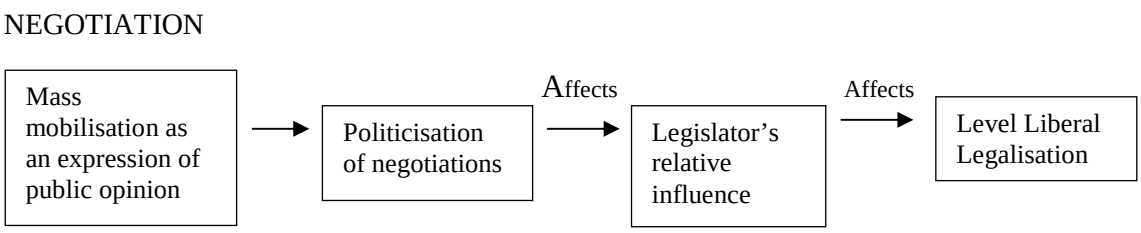
However, simply observing mass mobilisation does not suffice to show that politicisation has taken place. I argue that when politicisation has taken place, this shows by finding

traces of its influence on policy-makers' decisions. The reason is that, as was mentioned before, given the rare nature of politicisation to occur and considering the high level of electoral costs for policymakers when ignoring the demands, mobilisation of the general public is deemed to influence policy-making. Thus, in instances where politicisation has taken place one should be able to observe symptoms of its effects on the behaviour of legislators during the negotiation process in the form of (changed) policy positions and/or a change in relative influence.

Having briefly touched on the significant effect which politicisation can have on the decision making process, it is important to delve more deeply into this and outline how exactly politicisation influences the legislative process. The most significant effect of politicisation on the policy outcome is through its effect on legislators' relative influence. Although there are multiple factors that determine a legislator's relative influence (e.g. the level of societal support from interest organisations, economic reasons for liberalisation etc.), these factors usually tend to remain relatively stable throughout the negotiations. Ad hoc politicisation, on the other hand, is a factor that arises suddenly. As it represents the concerns of the public in general, those adopting these concerns will have an unprecedented support base trumping the influence of interest organisations not supported by general public opinion. This means that politicisation attributes a relatively high influence to those who communicate the concerns of the general public, and, through this effect on relative influence, significantly affect the legislation's level of liberalisation. Politicisation can also affect legislators' strategic objectives but its effect is

likely to be similar for all: i.e. all legislators will adjust their strategic objectives towards general public opinion so as to prevent high electoral costs.

Therefore when an issue gets politicised, one observes mass mobilisation and at the same time observes the effect of politicisation on the negotiations. This effect becomes visible when the negotiating actors start to take public opinion into account, as visible in their opinions or their arguments uttered during the negotiation process, or when those already supporting the demands of the public experience an increase in relative influence during the negotiations. This means that the presence of politicisation by definition implies an influence on the negotiations. A schematic overview of how politicisation influences the legislative outcome is given below:



With politicisation neither being simply the result of one well-defined action, nor does it always manifest itself in similar ways. Politicisation can be a very sudden occurrence, with very few signs of its mobilisation preceding full politicisation. If this happens, politicisation is likely to directly impact the negotiation stage of the legislation. Politicisation can affect policy-making in various manners and comes in various guises, but remains a phenomenon that is either present or not present.

However, the *possibility or likelihood* (these terms will be used interchangeably) of politicisation itself is another form of politicisation that can also impact the policy-making process. Considering that legislators and the European Commission generally prefer to avoid politicisation of negotiations, it is likely that as soon as the signs of possible politicisation become visible, they are to be addressed. This would mean a response in the early stages of the policy-making process, e.g. the agenda-setting stage or early on in the negotiations, so as to prevent full politicisation from occurring.

When legislators act in response to the possibility of politicisation, one could say that the negotiations have come to fall under the 'shadow of politicisation'. By this I mean that in absence of full politicisation materialising, the policy-making process was affected by a possibility or likelihood of politicisation.

It is difficult to establish whether or not a possibility of politicisation is present and if so, whether or not it influenced the policy making process. A possibility of politicisation needs to be shown by more than a mere theoretical expectation of politicisation materialising. There need to be grounds that lead one to conclude that the possibility of politicisation is *credible*. This is necessary, as in absence of doing so, every legislative proposal could in theory qualify as being subject to the pressure of possible politicisation as there are always potential losers to any proposed policy. The crux to establishing a 'credible' possibility for politicisation lies in the likelihood that the losers of the proposed policy will actually mobilise against the proposed legislation. A crucial condition for

establishing a possibility of politicisation is therefore that there is a demonstrable willingness of interest groups to actively mobilise against the proposal.[39]

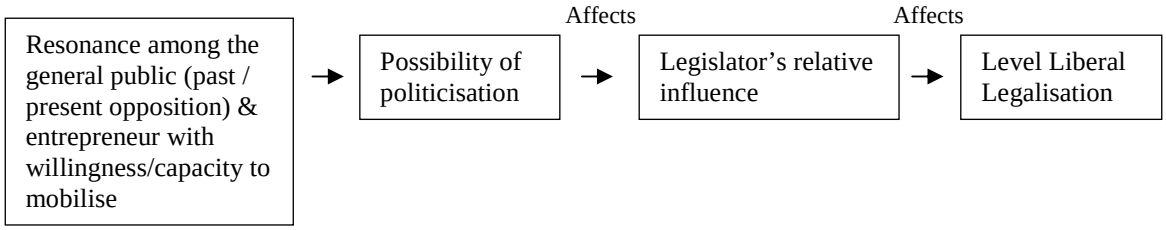
This demonstrable willingness can, for one, be deduced from the observation of actual politicisation of this issue during past negotiations. Alternatively, it can also be deduced from the active opposition of interest groups during the negotiations.

Beside there being a demonstrable willingness to mobilise, a second condition required to establish the presence of possible politicisation is the conclusion that the interest group, interested in mobilising demand, also has the means to function as an entrepreneur (i.e. financial, organisational and material means).

Similarly to actual politicisation, in case a credible possibility of politicisation is present this will have an effect on the legislators by either changing their positions and/or by changing their relative influence. The reason is similar to that given for actual politicisation, namely that the electoral loss of ignoring possible public sentiment is too high. A schematic overview of how the possibility of politicisation influences the legislative outcome is given below:

[39] This idea that perceptions result in actions with genuine consequences is captured by W.I. Thomas (1928) in what would later be known as the Thomas theorem in sociology (an assumption on how people construct reality): 'If men define situations as real, they are real in their consequences' (Thomas, W.I. and D. Swaine Thomas [1928] (1970), 'Situations Defined as Real are Real in their Consequences', in Stone, G. and H. Farberman (eds.), *Social Psychology Through Symbolic Interaction*, p.572).

In the shadow of politicisation



In this thesis, politicisation is primarily used as a binary variable; it either is present or is not present. When present, its form largely depends its level of influence. The 'level of politicisation' is assessed, in this thesis, as a factor of the nature of politicisation, i.e. actual or possible. This means that the level of politicisation is high when actual politicisation of the debate occurs and the level of politicisation is lower when a possibility of politicisation is present. In addition, each case study will try to shed more light on the exact effect of politicisation, or the possibility thereof, by discussing the exact amendments made to the legislation as a result of the presence of politicisation. As it is already difficult from a methodological point of view to show whether politicisation, or the possibility thereof, is present during negotiations, it is even more difficult to *measure* its exact level. This is why I have chosen to simplify this variable slightly so as to actually operationalise for the purpose of my case studies.

It should be noted that this thesis therefore does not aim to operationalise this variable in such a way that one can in detail compare levels of politicisation between the various case studies. Although this may be perceived as a shortcoming by some, it does not present problems for this thesis as the aim of this analysis is primarily to show and explain the effect of politicisation (actual or possible) on the negotiations rather than

trying to measure the exact level of politicisation. This would not only be extremely difficult as I have only one case study of full politicisation, but it would also not add much to this thesis as my primary interest is in providing evidence of the *influence of politicisation on the negotiations* when present.

Having explained what politicisation is, how it can be observed and in what forms it manifests itself, it is now interesting to briefly discuss how politicisation impacts the legislative process. The effect of politicisation, actual and possible, on the level of liberal legalisation is generally negative. This conclusion requires some explanation. It should be remembered that due to the inherent problems of collective action, the public, similar to normal interest mobilisation, will almost never mobilise to *demand change.*[40]

In line with this reasoning, the public voice will generally be opposed to further integration thereby exerting a 'constraining dissensus'.[41] Although these costs will be discussed in each case study, they do not need to be measured. If politicisation occurs, this means that the (perceived) costs were apparently high enough to lead to a mobilisation of the general public against the proposed policy.

It should be noted that politicisation, due to the many conditions that need to be fulfilled for it to occur, remains a rare phenomenon. First, politicisation is dependent on an entrepreneur capable of disseminating information and organising people. Considering that mobilisation is a costly activity, the financial means of the entrepreneur strongly

[40] Exceptions are for example situations of crisis.
[41] Marks and Hooghe (2009)

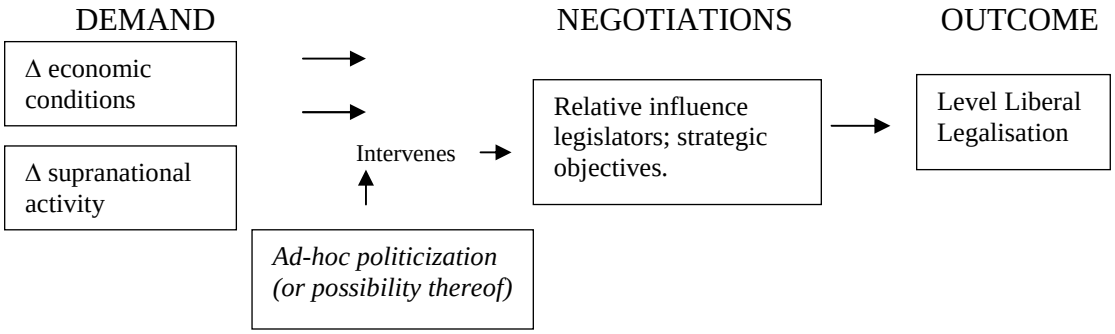
affect the likelihood that politicisation materialises. This is problematic for many public interest entrepreneurs, such as trade unions, who often suffer from a lack of financial means and/or people to organise a lobby. Second, as politicisation depends on mass involvement, and the public generally suffers from a short attention span, this sets up another hurdle.

That said, there are good reasons to expect that politicisation will increasingly come to influence policy-making in the future. Since legislation towards European integration has slowly moved away from purely technocratic issues of negative integration, i.e. Europe as a regulatory state[42], to more emotional issues directly affecting national welfare states with significant redistributive effects[43], the future issues discussed on EU level will be more likely to attract the interest of the public at large. This applies particularly to the services market, where the European Commission has increasingly put forward legislative proposals addressing service sectors which had not always been considered as being within the competencies of the European Union. This is why it is necessary to acknowledge that this policy-making can be affected by the level of politicisation of the debate. The theoretical model is therefore amended as follows:

[42] Majone, G. (1994), 'The Rise of the Regulatory State in Europe' in Wolfgang C. Müller and Vincent Wright (eds.), *The State in Western Europe: Retreat or Redefinition*?

[43] See also: Höpner and Schäfer (2007)

FIGURE 2.3: Full theoretical model of European integration (including politicisation)



To summarise, in this thesis I argue that the level of liberal legalisation can be explained by looking at the drivers of integration and that this should be complemented by the intervening influence of ad hoc politicisation. Politicisation, or the possibility thereof, will influence the level of liberal legalisation primarily by altering legislators' relative power. It is clear that in instances of high transnational economic benefits and multiple preceding pieces of liberalising legislation, legislators will be faced with a difficult decision when politicisation against the proposed legislation occurs. They will be torn between the costs of mass opposition on the one hand, and the implications of forfeiting economic gains and ignoring supranational activity on the other hand.

2.4 Methodology

This thesis, as mentioned above, applies a two-tiered approach to explain the current level of liberalisation obtained in each of the service sectors. In the first tier of the analysis, I examine the context in which the legislation was tabled; i.e. the demand for legislative change and the preferences of the actors.

To understand the context of the negotiations, I need to assess what initially started this change. I start by determining the benefits and costs of a liberalised market and how, if at all, they have changed over the years. To determine the level of economic benefits which the proposed measure would bring, I use figures from Commission documents, economic background reports by independent consultancies and position papers of industry and of interest organisations. I complement this with interviews to understand how the economic costs and benefits of the proposed policy are divided. Thus I provide the context for the legislative proposal, map out the preferences of all stakeholders involved and show how, if at all, they changed over the years.

In addition, it is necessary to assess the role of supranational institutions on the liberalisation of the sector at hand. As was discussed above, under certain conditions, supranational activity can act as a driver for integration through actions taken by the Commission or the European Court of Justice. As in-depth legal knowledge is required to form a judgement on this, I will base my assessment of whether the Court and/or the Commission behaved in an activist manner or not on research conducted by legal scholars rather than trying to assess this myself.

However, this activist role of kick-starting integration is rare. The positive effect of supranational institutions on further liberalisation lies predominantly in their ability to ensure implementation of legislative change between negotiations. This is particularly important when the proposed legislation is the result of an ongoing process of liberalisation (e.g. the 3rd Postal Directive and the 3rd Electricity Directive). It is crucial to

understand the activities pursued by the European institutions, particularly the European Commission in between each of the negotiations, on legislation as their implementation efforts may have constrained and shaped actors' preferences over time. By looking at the activity of the European Commission (e.g. the number of infringement procedures), the number of rulings by the Court and other initiatives taken by these institutions, it is possible to say something about the level of supranational activity preceding the legislative proposal. Overviews of Commission activity in the case of the postal and electricity cases are provided in tables that can be found in the appendix corresponding to that case study.

Both the level of economic benefits and supranational activity are long term factors and are unlikely to change during negotiations. The level of ad hoc politicisation is an input variable that can vary during negotiations Therefore, by determining the levels of these input variables present prior to the negotiations, it is possible to control for their influence on the negotiation process and assess the influence of politicisation of the legislative outcome.

At the same time, it is important to explain the preferences of each of the actors involved prior to the tabling of the legislation, so as to understand who stood to win and who stood to lose from further liberalisation. By conducting interviews and reading position papers, news articles and official documents, it is possible to get an idea of the preferences of each of the stakeholders in regard to the proposed legislation. In addition, I will use studies, such as the Commission's impact assessment, reports by industry and interest

organisations, academic reports and interviews to establish the individual levels of demand for the proposed legislation.

In the second tier of this analysis, I turn to the negotiations. I analyse the bargaining process between legislators (i.e. Member States in Council and the European Parliament) in detail. The aim is to observe the exact effect of variation of demand on the policy outcome and account for the possible influence of politicisation. Merely understanding where demand for change came from and knowing the preferences of each actor is insufficient in itself to explain the level of liberal legalisation of the legislation.

The starting point of this analysis is the tabling of a legislative proposal. Having discussed the preferences above, I now take preferences as exogenously given. To explain the negotiations, I use a method of process tracing. Process tracing is a research method in which the researcher 'examines histories, archival documents, interview transcripts and other sources to see whether the causal process a theory hypothesizes or implies …..[is] in fact evident in the sequence and values of the intervening variables in that case'.[44] The advantage of this approach is that it allows me to analyse what amendments were made and how they came to influence to final shape of the legislation. Through process-tracing, I can observe *how* politicisation, or the possibility thereof, influenced the negotiations and during what stage of the policy-making process this influence became visible.

[44] George, A. and A. Bennett (2005), *Case studies and theory development in the social sciences*, p.6.

For the analysis, I first need to establish whether politicisation, actual or potential, was present. This is a difficult task, as already elaborated on above, particularly since politicisation is a very rare occurrence and therefore leaves me with very few examples of it.

To show the presence of politicisation, or the possibility thereof, this thesis will use a dual strategy. First, I will determine the degree of physical mobilisation of large groups of people on the issue at hand; in Brussels (and Strasbourg) and/or domestically. To determine whether a credible possibility of politicisation was present, one should assess the willingness and capacity of the main interest groups to mobilise (i.e. to function as entrepreneur) and pair this with the resonance among the general public for this opposition. I will use newspaper articles and alternative media to assess the level of protest towards the proposed policy.

Second, to show the effect of politicisation on the negotiation, I complement this analysis with an indication of the symptoms of the effect of politicisation, or the possibility thereof, on the negotiations (through a change in legislator's strategic positions or a change in relative influence) as a mere focus on mass mobilisation itself is insufficient. It will be more difficult to show the effect of a possibility of politicisation than the effect of actual politicisation, as the symptoms of its effect are likely to be weaker in the case of the former. These symptoms can be observed by analysing position papers, official documents explaining the reasoning behind the drafted legislation, minutes of debates in Parliament and Council, newspaper articles referring to preferences and by conducting

interviews. These sources combined can answer the questions of what shaped actors' strategic objectives, their relative influence during the negotiations and the possible effect of politicisation thereupon.

However, to show the effects of politicisation on policy-making is a difficult task especially as there are severe limitations of interviews in assessing the effect of politicisation, or the possibility thereof. First, given that the term politicisation is ambiguous, different people may have a different perception of what this, or the possibility thereof, constitutes. Second, it demands from the interviewee a very thorough and critical analysis of the reasons that prompted him or her to amend in the way they did. This is something which, due to high workload and time constraints, has not always taken place. Third, the possibility of politicisation, more so than actual politicisation, is partly the product of people's subjective perceptions and may therefore significantly differ per person. Fourth, depending on the person, people may be more or less reluctant to share this information with me. Some actors may be reluctant to admit to social pressure; especially those whose ideology supports free market principles. As their stated reasons for amendments may differ from their actual reasons, this can reduce the usefulness of interviews in trying to assess the effect of politicisation on legislators.

These shortcomings make interviews ill-suited to establish the effect of politicisation, or its possibility, on the policy-making process. I therefore decided not to rely too heavily on interviews, and in addition used my own method of analysis using process-tracing to

establish what amendments were made by whom and with what effect for the final legislative outcome.

This consists of the following steps. Prior to discussing the negotiations, I rate the level of liberal legalisation of the Commission's draft directive. I first outline what aspects of the directive affect each of the three attributes of liberal legalisation (as discussed on page 68). I benchmark this against the optimal form of legalisation (i.e. wide scope, high level of delegation and a high degree of market integration) to determine the legislation's level of liberal legalisation (high-low). If the legislation was preceded by other legislative proposals, and is therefore partly the result of an ongoing process of liberalisation, I compare the legislative outcome to the legal status quo that was present prior to the negotiations. This is necessary in order to prevent distortions on the level of liberal legalisation I assign to each directive, and essential to avoid that my analysis assigns higher levels of legalisation than justified.

Knowing the directive's draft level of liberal legalisation, I turn to the negotiations (i.e. the amending stage). I analyse the negotiations by first focusing on the debate within Parliament and uncovering the main bones of contention. I base this judgement on my own analysis of the amendments tabled in Parliament and complement this with insights from interviews to confirm which issues proved most controversial and why. I then turn to the Council's negotiation process, and use a similar method to uncover what issues were crucial to their compromise. The primary sources here are less detailed than those available for the Parliament. At the same time, given the sensitive nature of the issues at

hand, the interviews I conducted were not always sufficient to understand the negotiations completely. I therefore complemented this analysis with newspaper articles. If present, I analysed the second reading in Parliament in a similar manner. This data is compiled in a table for each of the case studies and can be found in the corresponding appendix.

At each stage of the negotiations, I will indicate how the amendments affect the directive's level of liberal legalisation. This judgement is the result of a two-step process. Having established the level of liberal legalisation of the draft directive, I then trace the effect of the amendments made by Parliament and Council on this initial level of liberal legalisation. I present these changes in a table at each stage of the negotiations. This approach allows me to show not only what amendments were made but also their effect.

There are some shortcomings in the way in which the level of liberal legalisation is received at. One could argue that an estimation of the level of liberal legalisation requires a more in-depth analysis of the exact changes proposed by draft legislation at hand and compare this with the optimal level of delegation, scope and degree of market integration required to obtain a high level of liberalisation. Both would require an in-depth legal analysis of the legislative status quo and the proposed draft legislation. Granted that this approach would provide a more thorough and better substantiated conclusion of the directive's level of liberal legalisation, space and research constraints led me to decide that such an approach would not be possible or necessary for the purpose of this thesis. Firstly, such a comparison would require a high level of legal knowledge on both the part

of the directive and the legislative status quo. This would require much in-depth research not only regarding the legislation at hand but also with respect to the wider area of EU legislation in general – something which goes beyond the scope of this thesis. Secondly, as the focus of this thesis is primarily on the political aspect of policy making, such a detailed legal analysis is not required. The level of liberal legalisation should, for the purpose of this thesis, provide an indication of the level of liberalisation rather than an accurate legal judgement. The estimation which the current method allows for suffices, to my mind, for the purpose of this thesis.

After this process, I analyse how the amendments altered the directive's level of liberal legalisation and reassess this so to determine the final directive's level of liberal legalisation. I then discuss what amendments were crucial to this change and therefore which actors were dominant in altering the initial shape of the draft legislation. By analysing what amendments were dominant for the final shape of the legislation, I can say something about the relative influence of the legislators and the 'winners' and 'losers' of the amending process.

However, simply looking at the number of amendments a legislator successfully inserted does not suffice by itself. The *content* of an amendment is of pivotal importance to adequately determine the relative influence of the actor. Amending the directive on issues that do not affect its level of liberal legalisation does not necessarily equal a high relative influence. The relative influence of each of the legislators is determined by the extent to

which they were decisive in shaping the final outcome of those articles crucial to the directive's level of liberal legalisation.

In assessing the winners and losers of the negotiation process, I primarily use my analysis of assessing which amendments were determinant for the directive's shape – in particular its level of liberal legalisation. Pairing this with the insights of the negotiations within each legislator, this allows me to conclude which actors were most successful in amending the directive to fit their preferences. The reason I chose this approach, rather than relying heavily on interviews for example is that interviews again suffer from two shortcomings. First, interviews can offer a subjective judgement on the relative influence of actors with a tendency to overstate one's own influence. Second, it presupposes a thorough understanding and recollection on the part of the actors of the entire amending process. During my interviews, it became clear that time constraints, workload and personal memory are important factors that prevent interviewees from living up to these conditions. I therefore decided to base the conclusions about relative actor influence primarily on my own analysis and to supplement this with the general insights I obtained during the interviews.

Finally, I step back and analyse to what extent my model of integration is capable of explaining the level of liberalisation in each of the case studies and in what sense it is better at explaining this than existing models of integration.

2.5 Selection of cases

To test this model of liberalisation, I make use of case studies. The main reason for this is that case studies are better suited, as George and Bennett convincingly argue, to 'finding the conditions under which specified outcomes occur, and the mechanisms through which they occur, rather than uncovering the frequency with which those conditions and their outcomes arise'.[45] Large N-studies do not leave room for in-depth research into the preferences and the relative influence of the actors to the extent that case studies do.

In this thesis I select four directives in four different service areas which will serve as case studies for my research: the 3rd Postal Directive, the 3rd Electricity Market Directive[46], the Services Directive and the Patient Mobility Directive. The cases are selected with the idea of obtaining variation on the drivers of integration: variation in (expected) economic benefits and variation in supranational activity. All cases are characterised by high levels of at least one of the drivers of integration. At the same time, what all cases have in common is that they deal with theoretically difficult and contentious issues. I have selected them intentionally for precisely this reason, since negotiations in uncontested areas where the majority of the legislators agree with the proposed changes prior to the negotiations will not reveal much about the relative influence of the identified independent variables. This means that there is a higher likelihood of politicisation occurring and allows me to test my predictions about politicisation.

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45 George and Bennett (2005), p.31.

46 The latest directive on electricity liberalisation was part of a larger strategy, called the 3rd Energy Package. However, addressing the entire package of both electricity and gas market liberalisation goes beyond the scope of this thesis. Therefore, I decided to merely focus on the electricity market.

TABLE 2.1: Overview case studies

	Pressure from supranational institutions	
	ECJ activism (prior to negotiations)	Commission's activity (between negotiations)
High economic benefits	Services Directive (politicisation)	3rd Postal Directive (possibility of politicisation);
Low economic benefits	Patient Mobility Directive (possibility of politicisation)	3rd Electricity Directive

These cases also provide variation in public and private services, thereby overcoming the bias in cases which had dominated Smith's research.[47] This is useful as there are clear differences between the requirements for liberalising public and private services. Public services might, for example, require both the introduction of competition and subsequent removal of barriers, whereas liberalisation of private services only requires barrier removal. Furthermore, as the legislative debates I focus on have all been recently concluded, the negotiations were subject the same institutional decision rules. This allows me to keep this factor constant.

2.6 Data

The data needed to conduct the research include primary and secondary sources. The directives and their accompanying documents drawn up by the Commission, in combination with the reports of the Parliament and the Council, will provide information about the content of the initial proposal and about the amendments made. These sources provide me with an excellent overview of all legislative changes that were made and by whom they were made.

[47] Smith (2005).

An important limitation to using official primary sources is that actors' sincere preferences 'typically go unrecorded'.[48] In order to reveal the true preferences of actors, these sources need to be complemented with semi-structured in-depth interviews. For each case study, I tried to conduct interviews with all actors involved or related to the negotiations, meaning members of the European Parliament (MEPs), Commission officials, members of the Council working groups, businesses, labour and trade unions and interest organisations.

Due to the sensitive nature of the topics, I decided to agree to full confidentiality, without disclosure of names and without recording the interviews. This was for the large majority of my interviewees the only condition under which they agreed to speak with me. To prevent confusion and maintain continuity, I have decided to treat all my interviews confidentially and to refrain from citing anyone. This clearly weakened the data obtained as I cannot attribute statements to a particular person and am left only with the notes I took during the interviews.

That said, the interviews did reveal important information about true preferences of actors which I think can be communicated even without directly attributing these statements to a particular person. The interviews with legislators were useful to understand how a compromise was formed but often fell short in providing me with detailed information why certain specific amendments were made. The details could often not be remembered due to the time that had passed and due to the technicality of the amendments. I therefore used the interviews with MEPs to get a general idea of how

[48] Pollack (2003), p.70.

coalitions were formed rather than using them to explain the exact amendments made. In addition, due to the sensitivity of the issues I research, I conducted fewer interviews with MEPs than I would have liked.

Given the limitations of the interviews, particularly with regard to the possible effect of politicisation, I closely analysed the negotiations so as to try and uncover the main reasons behind the amendments made. I used formal documents, such as plenary minutes of Parliament and official statements, to determine the exact positions of a large number of MEPs. I complemented this with newspaper articles, press releases by businesses and interest organisations and policy papers to understand the various preferences of the actors involved in the negotiations and further discern the main bones of contention of the debate. By comparing the proposed amendments of the legislators at each step of the negotiations with the final text of the directive, I tried to obtain more insight in the relative influence of the actors during the negotiation process.

Finally, I used newspaper articles and press releases by Parliament and interest organisations to rate the level of public opinion involvement present during the debates. By combining this with my analysis of the symptoms of politicisation, or the possibility thereof, on the negotiations, I tried to provide the information that illustrates the influence of politicisation. As mentioned before, I did not rely on my interviews to illustrate this.

2.7 Possible criticism – shortcomings of the model

Pre-empting possible criticism, this research does have four important shortcomings. First, the confined focus of my research on the policy-making process of legislation has negative implications for the extent to which this model's findings can be generalised. Clearly the liberalisation of the services market is much more than the creation of legislation; it is also about implementation, enforcements and monitoring which, depending on the decision-making rules (e.g. delegation, comitology), allows for varied influence of the actors. At the same time, given that my model is only tested against case studies of service liberalisation, which is a particularly unique sector and is subject to certain institutional decision-making rules, it is hard to use the insights obtained in this thesis to make more general statements about the process of European integration.

That said, this sacrifice had to be made for both practical as well as research objective reasons. While a practical assessment of the liberalisation effect of these recently concluded pieces of legislation is not possible as it would take years to observe the practical effects, it was also not the main objective of this thesis. The main focus lies on the negotiation process so as to better understand this, show how politicisation can affect policy outcomes, and explain internal differences in levels of liberalisation of the services sector. Given that this requires precise insights into and information about the shape of the legislative outcome which can only be obtained by increasing specificity, this is a limitation that was unavoidable. Where the aim is to enhance the specificity of a model, the trade-off is inevitably a reduction in the broader applicability of the findings.

Second, the significance of focusing on the differences in legalisation may be lost on those who believe that long-term push factors, resulting from a European institutional design prone to further integration, will eventually lead to a conversion of the state of integration. I do not consider this objection problematic for my research, as even those who believe in long-term processes must admit that further integration can only be reached by conclusion of legislation. To understand how long-term factors influence the process of integration, it is therefore essential to have a good understanding of how negotiations work and what factors mediate the demand for change. This is the case especially since the cut-off point in time for each of the four service sectors is arbitrary and does not necessarily mean that the development of these sectors has come to an end. I do not aim to refute current theorising on how to explain the process of European integration, as I actually endorse these accounts. Rather, I aim to contribute to our understanding of the process of European integration by focusing in more detail on one aspect of policy-making, i.e. the political negotiations, so as to better account for the exact level of liberalisation that has been reached in each service sector.

Third, some critics might point to this thesis's lack of interest in formal institutional rules; a factor that may have also affected the legislative outcome. Although important changes have been made to institutional rules over the periods on which I focus (e.g. revision of the Second Comitology Decision in 2006; the ratification of the Lisbon Treaty in 2009),[49] I do not consider the formal rules to have any power to explain the differences

[49] For more information, see: Farrell and Héritier (2003), (2004), (2007); Héritier, A. (2007), *Explaining Institutional Change in Europe*; Héritier and Moury (2011); Blom-Hansen, J (2011), 'Interests, Instruments and Institutional Preferences in the EU Comitology System: The 2006 Comitology Reform', *European Law Journal*.

in legislative outcomes. As my research has a confined empirical focus (i.e. legislative acts covering the services sector), similar institutional decision-making rules apply to all my case studies; in this case co-decision. At the same time, I only focus on the legislative act, and not on the transposition and practical implementation of the directives by Member States. Granted that differences in formal institutional rules affected previously concluded legislation, something which is particularly important for the 3rd Postal and 3rd Electricity Directive (both the product of an ongoing process of liberalisation), I account for these differences when discussing the practical reality with which legislators were faced prior to the negotiations. Therefore, institutional rules themselves are not a variable factor for explaining the outcome, but were rather a constant over time and for that reason, to my mind, hold no explanatory value here.

Fourth, a final comment that can be made is that a systematic comparison between two service sectors at the time would have allowed for a better analysis of e.g. the influence of ad hoc politicisation on the legislative outcome by being able to control for the input variables. While it is probably true that one could have more systematically compared service sectors in this manner, the reason this approach was not adopted lies in the overall aim of this thesis, namely to primarily explain variations in levels of liberalisation rather than giving a systematic account of the influence of politicisation on policy making. This thesis aims to show how politicisation, as one factor in addition to the influence of the two long-term input variables, can influence policymaking thereby providing a more comprehensive explanation of the level of liberalisation.

3. Liberalisation of the Postal Market

"Postal services are a highly personal and highly political issue..(t)hey are different to other sectors.."
(MEP Brian Simpson (PES), European Parliament, Strasbourg -10 July'07)

In this chapter, I use the liberalisation of the postal sector as a first case study to test my model of liberalisation, and focus in detail on explaining the level of liberal legalisation of the 3rd Postal Directive. The process of postal liberalisation started in the early 90s, when a wave of privatisation and liberalisation on the domestic and European level affected various public service sectors. While liberalisation of telecommunications and securities had been agreed in the early '90s[1], the process of postal liberalisation proved slow and arduous. Eleven years after the 1st Postal Directive (97/67/EC) was tabled, January 2008 saw the conclusion of the 3rd Postal Directive 2008/6/EC; a directive that will remove the reserved area and fully liberalise the sector.

This chapter will show that the liberalisation of the postal market is a story of governments, initially faced with intense pressure from incumbent postal operators and labour unions against liberalisation, slowly becoming receptive to the prospects of liberalisation as economic pressures, resulting from the economic reality of a declining postal market, mounted. This then gradually created a group of proponents large enough to agree to a directive of full market opening.

[1] Thatcher (2007), p.7.

This high level of liberal legalisation is remarkable when the arduous and contentious process that had characterised liberalisation of the postal market up until 2006 is considered. The postal industry is a network industry, which means that supply of postal services requires an extensive physical network of, in this case, mail boxes, sorting centres etc. As postal services had traditionally been considered a public good in most countries and had been provided by state companies enjoying a monopoly, the network had traditionally also been owned by the monopoly provider. Liberalisation of the postal sector inevitably meant that this monopoly over the network and its exclusive rights (i.e. the reserved area) had to be removed.[2] Understandably, this elicited strong opposition from the incumbent postal operators, and also led to strong opposition from governments and the public at large. The negotiations of the first two postal directives turned out to be dominated by this opposition.

This staunch opposition stood in stark contrast to the relatively easy negotiations on the 3rd Postal Directive. This is a remarkable observation, going against many expectations that negotiations on the 3rd Postal Directive would again elicit large-scale opposition, particularly as this directive would address the most contested aspect of the postal market: i.e., the reserved area below 50 grams. The questions that arise are: what explains the process of postal market liberalisation, and in particular, the high level of liberal legalisation of the 3rd Postal Directive? How can one explain this sudden change, and whose interests does the final outcome reflect?

[2] Damien Geradin at keynote speech at CRNI conference in Brussels, 20 November 2009.

To answer these questions, I apply a two-tiered analytical approach. In the first tier, I explain the context in which the 3rd Postal Directive was tabled. I start this chapter by considering the complexities of postal services, discuss how their specific traits have impeded a swift liberalisation of the sector and explain the stakes of all actors involved. Then in the following sections, 3.2 and 3.3, I describe previous legislative steps taken to liberalise the postal markets and describe the societal developments that took place prior to the tabling of the 3rd Postal Directive in 2006. This analysis shows how expectations of increased economic benefits from liberalisation, due to a shrinking postal market, increasingly exerted pressure on governments and postal operators to liberalise. At the same time, it shows how the Commission's activity in implementing previously concluded legislation and actively applying competition law changed actors' preferences vis-à-vis full market opening. This broad analysis of the context constitutes the first tier of my approach to explaining the current levels of liberalisation of the postal market.

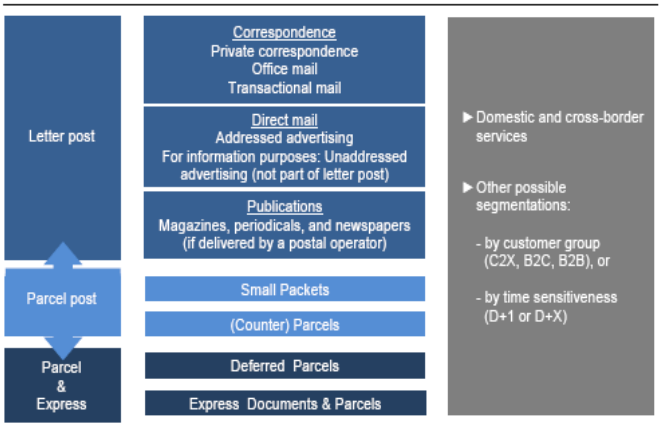
In the second tier, I turn to the negotiations on the 3rd Postal Directive. I analyse what amendments were decisive for the directive's final shape, and in particular for its level of liberal legalisation. This allows me to say something about the relative influence of the actors in determining the level of liberalisation within the postal sector. Although the initial analysis of the negotiations may perhaps give an impression of contestation, the majority of Parliament and Council were highly cooperative, supporting high levels of liberalisation. This cooperation was facilitated by an absence of actual or possible politicisation, the presence of which had exerted a threat on policy makers during the negotiations of the 2nd Postal Directive. Although the incentives for mass opposition

remained, as jobs would inevitably be lost, the changed preferences among the most influential postal operators in combination with an inability of labour unions to mobilise the public removed the possibility of politicisation in the case of the 3rd Postal Directive, and paved the way for legislators to agree to a directive with a high level of liberal legalisation.

3.1 Characteristics of the postal sector: what's at stake?

Postal services are the collective name for a variety of products, roughly to be divided into letter post, parcel post and parcel and express services (see figure 3.1). I will use the definition of 'letter post' as given by the 2009 ITA/WIK report meaning 'postal services for the collection and delivery of correspondence and printed matter'.[3]

FIGURE 3.1. Product segmentation of the delivery services market



(Source: ITA Consulting/WIK Consult, taken from WIK Report, page 7)

The postal sector consists of reserved and non-reserved services (parcels and express services). A significant share of all postal services outside the reserved area, most

[3] ITA Consulting GmbH and WIK Consult GmbH (2009), *The evolution of the European Postal Market since 1997*, p.7.

importantly the parcel post and parcel and express services[4], has been liberalised and is subject to competition. The letter post, however, has traditionally fallen under the reserved area. This chapter will focus in particular on the services that fall under the reserved area (i.e. the letter post) as they are the primary focus of the European postal directives.

The 3rd Postal Directive would fully open the postal market by abolishing the reserved area below 50 grams, and tighten the grounds under which authorisation may be requested. In practice this presents the challenge of introducing competition in a formerly monopolist sector (i.e. abolition of the reserved area) whilst opening up the network (i.e. its physical network of a.o. mailboxes and sorting centres) to competitors.

To understand the content of the 3rd Postal Directive, it is necessary to step back briefly and discuss the context in which it was tabled. What stakes did the various actors have in achieving full postal market opening?

Postal Operators

Postal services had traditionally been provided by state monopolists. To ensure that these postal providers would supply postal services throughout the country at similar cost, incumbent operators were awarded a monopoly covering all postal services (except express and carrier services) as a means to guarantee and finance its universal service

[4] The parcel market was fully liberalised in all Member States in 1992 and is therefore excluded from the reserved area (ITA/WIK (2009), p.12). The share of express services falling under the reserved area depended on the definition of the reserved area (i.e. content, weight and price criteria), but was significantly tightened by the two postal directives leaving only addressed correspondence under its scope (ITA/WIK (2009), p.13).

obligation (USO).[5] This allowed Universal Service Providers (USPs) to use its profitable services to subsidise the non-profitable services.

While some competitive postal operators had been supportive of full liberalisation of the market from the onset (e.g. Deutsche Post, TNT Post), the majority was very sceptical about the removal of its reserved area and of postal market liberalisation more generally. Considering that most companies were highly inefficient, and given that competition would inevitably chip away at the incumbent's profitable areas, liberalisation could financially endanger some postal operators.

In addition, very few competitors actually stood to benefit from full market opening. There are four reasons for this. First, although 'postal services in the EU handle an estimated 135 billion items per year, with an estimated turnover of € 88 billion – equivalent to about 1% of EU GDP'[6], the share of the market which is interesting for competitors is very limited. With 93% of all postal traffic in Europe being national[7], competition will only be possible around the profitable areas of the domestic mail market. Often, due to their position in the national market, USPs have an advantage over newcomers. Only the highly efficient operators, such as TNT Post and Deutsche Post, were pushing for full market opening so as to gain access to the letter post market in

[5] The universal service obligation (USO) requires operators to provide the same service at affordable prices for both national and cross-border services, against the same price for everyone. Depending on the country, a minimum standard is set regarding daily delivery and clearance and the number of delivery days per week.

[6] 'Postal services: open to competition by 2011 but subject to safeguards', *Press release European Parliament*, 28 January 2008.

[7] Thatcher (2007), p.235.

other countries. Niche players, however, were hardly interested in full letter post market opening.

Second, the postal market is a shrinking market where volume has been declining over the past years (i.e. declining revenues due to changing customer demand, automation/new technologies and electronic substitution).[8] This again reduced the incentives for operators to enter the market. Third, the most profitable areas, such as parcel and express services, had already been open to competition. Liberalisation of the letter post market would therefore not open up an economically interesting sector. Fourth, contrary to other services, postal services cannot be provided temporarily and their supply always requires the establishment of a branch or office in another Member State. The start-up costs are therefore rather high, which deters competitors from coming in to provide their services temporarily.

Despite all these objections, one advantage was that EU legislation would offer postal operators an excuse to pursue inevitable internal restructuring. In most countries, the postal operators had traditionally been the largest employers in the country. In contrast to telecoms and securities trading, postal institutions have generally employed a large number of people (more than 1.8 million in 2007).[9] The Commission estimated in 2008

[8] See: *Report from the Commission on the application of the Postal Directive,* European Commission, COM(2006), p.2.

[9] ITA/WIK (2009), p. XV.

that ‘around 5.2 million people were employed in postal services in the EU’[10], referring to those employed by USPs and those in jobs *related* to postal activities.[11]

Although the German and Dutch postal operators had pursued internal reform to enhance efficiency of production since the 1990s[12], most postal operators had not pursued such internal restructuring and proved very inefficient. These high levels of employment made up the largest pool of expenditures for postal operators. Therefore, in order to cope with competitive pressures and declining revenues, postal operators would inevitably be forced to restructure and lay off workers. A European directive would allow these operators to shift some of the blame to the European level, away from the company itself. That said, a majority of postal operators preferred no restructuring at all and saw mainly the costs of postal market liberalisation.

Labour Unions

The labour unions generally opposed the liberalisation of the postal market as they feared large-scale redundancies as a result of full postal market opening. These fears seem to have been substantiated by studies carried out by independent consultancies over the years. Where the 1997 study of Price Waterhouse Coopers already predicted that ‘in the year 2005, total employment among the EU PPOs [public postal operators] will be

[10] ‘Postal services: open to competition by 2011 but subject to safeguards’, *Press release European Parliament*, 28 January 2008.

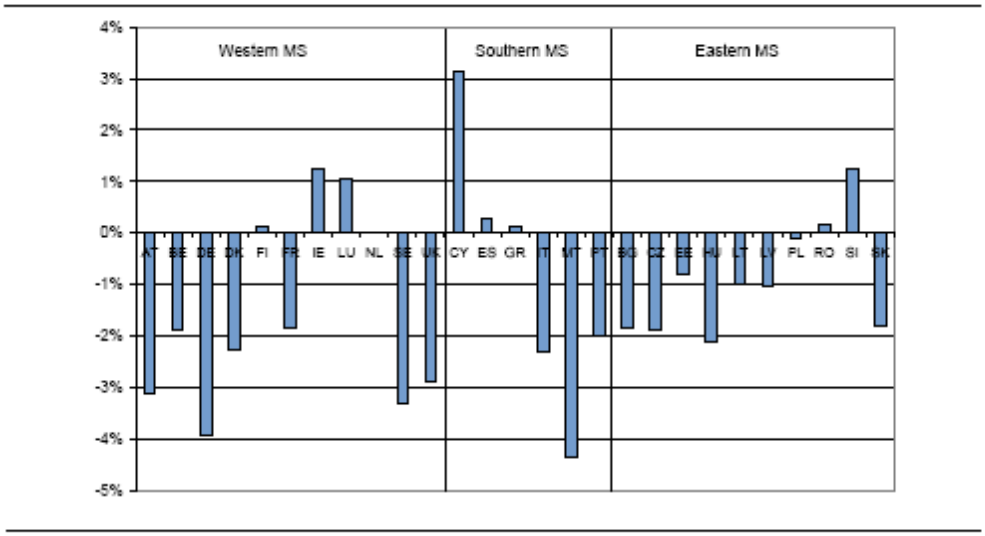
[11] Related jobs are defined by the Commission as: ‘directly dependent on, closely related to or induced by the postal sector’. See: *Report from the Commission on application of the Postal directive* (2006).

[12] The internal restructuring followed the privatisation of the incumbent postal operators PTT Post (now TNT Post) and Deutsche Post which took place in 1989 and 1995 respectively.

approximately 1.21 million … [a]bout 14 percent less than it was in 1995'[13], recent developments seem to have confirmed this prediction. The 2006 study by WIK showed that the majority of USPs has indeed decreased total employment.[14] It was estimated that Community USPs employed about 1.71 million persons in 2004; a total decrease by 0.7%.[15] This figure is actually flattering as it does not depict the high level of substitution of full employment by part-time employment; something which indirectly also means a loss of employment. This trend of substitution had increasingly become visible among privatised postal operators. The Scandinavian, Dutch and German USPs 'employ relatively more part-time workers than the other USPs'.[16] The WIK Report showed that there is a general trend of USPs replacing full-time employment by part-time employment.[17] For a general overview of the average growth rates in national employment, see Figure 3.2 below.

[13] Price Waterhouse Coopers (PWC), *Employment trends in the European postal sector*, May 1997, p. XI.
[14] WIK Consult (2006), *Main Developments in the Postal Sector (2004-2006) – Final Report*, p.182.
[15] Ibid., p.181.
[16] Ibid., p.187.
[17] Whilst part-time employment remained stable, full-time employment levels decreased by 3.5% between 2002 and 2004. See WIK Report (2006), p.182.

FIGURE 3.2. Average growth rates in national employment in the postal sector (headcount, CAGR 1998-2007)[18]



Source: ITA Consulting / WIK-Consult
Notes: AT, MT: CAGR 1999-2007; FI: CAGR 2000-2007; FR: CAGR 2001-2007; UK: CAGR: 2003-2007
FR and IT: Full-time equivalents;
National employment equates with company employment (instead of corporate employment): AT, DE, ES, FI, FR, PT.

The removal of the reserved area on employment levels will inevitably lead USPs to relax their rigid stand on postal personnel and lead to a general reduction of jobs.[19] Labour unions were therefore concerned about the effects of the postal directives on employment, and not particularly supportive of a directive on postal market liberalisation.

Member States

For most Member States, full market liberalisation would be both costly and profitable. It would be costly in electoral pay-off, as postal market liberalisation would inevitably make a large share of the workforce redundant. The recent trend of redundancy within USPs outlined above is likely to increase with the abolition of the reserved area, as this only enhances the financial strain on postal operators. As the postal sector is a strongly

[18] Table was taken from ITA/ WIK (2009), p.90.

[19] 'Postbedrijven in het verweer tegen liberalisering' (translated as: 'postal companies up in arms against liberalisation), by C. Vanschoubroek in *De Standaard*, 28 July 2006.

unionised sector, further liberalisation is likely to trigger opposition and could lead to public resistance, something which Member States generally try to prevent.

At the same time, governments did not want to jeopardise their incumbent operators. Internal reorganisation would take time, and a reduction of reserved revenue could, aside from being costly, even lead to internal problems for the USPs. In addition, governments worried about possible deterioration of the quality of postal services as a result of enhanced external pressure on domestic regulation. To avoid incumbent postal operators cherry picking and cream skimming[20], practices that would lead to some inhabitants having no access to postal services or facing more expensive services, and ensure a universal service for all, governments have generally regulated postal services according to the make-up of their country. A more liberalised postal market may generate downward pressures coming from those with lower standards onto those with higher standards (i.e. race to the bottom theory[21]).

Finally, the enhanced financial pressure of liberalisation on USPs, as a result of liberalisation, may lead to a deterioration of quality. In order to deal with increasing financial pressures, postal operators may be inclined to increase tariffs or to sober the

[20] The notions of 'cream skimming' and 'cherry picking' refer to a process where competitors enter only in attractive city markets and leave the universal service provider to provide services to more expensive remote regions. See: Finger, M. (2006), 'The postal network between competition and Universal Service provision', *CDM Working Papers Series.*

[21] According to the race-to-the bottom theory, increasing… [i]ntegration would lead to a reduction of redistributive policies (see: Mahler, V.(2004), 'Economic Globalization, Domestic Politics, and Income Inequality in the Developed Countries: A Cross-National Study', *Comparative Political Studies*, p.1027). However, this was disputed by others who have argued that an increase in capital mobility does not automatically lead to a reduction of the tax burden on capital or in overall government revenues. Benefits gained from other public goods, such as political stability might determine whether an investor will reallocate its factors of production or not (see: Boix, C.(1998), *Political parties, growth and equality: conservative and social democratic economic strategies in the world economy*, p. 11).

Universal Service as a means to cut costs. These effects, as a result of liberalisation, seem to have already taken place. Although the 2009 ITA/WIK report shows that 'in real terms, the tariffs have been fairly stable or even declining in most of the Western Member States (except for Denmark, Finland and UK), in most Southern Member States and in Estonia and Slovakia'[22] increases in tariffs have taken place in recent years.[23]

On the other hand, governments have clear economic incentives to pursue full market opening. Competition was seen to be 'a vital market mechanism to set...incentives to improve the efficiency and quality of postal operations'. [24] Inefficient incumbent operators would, in a declining postal market, increasingly put financial pressure on governments due to their need for additional financial assistance. In order for governments to be able to guarantee a universal postal service for their citizens that would not become disproportionally expensive, most Member States agreed that competition and full market opening would lead to the desired reform.[25]

The result is that the degree of support of each government was largely dependent on the state of the incumbent operator. Differences in internal reorganisation of incumbent operators (e.g. the Dutch and German postal operators had started internal restructuring prior to the discussions of the 1st Postal Directive) affected the preferences of each of the Member States. Given that a majority of incumbent operators was still very inefficient,

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22 ITA/WIK (2009), pp.99-100.

23 'The basic tariffs (20g letter) have considerably increased especially in Hungary and the Czech Republic' (source: ITA/WIK (2009), p 45 footnote 60) and in Italy (ITA/WIK (2009), p.47).

24 ITA/WIK (2009), p.XII.

25 This reasoning was also adopted by the Commission. See: *Prospective study on the impact on universal service of the full accomplishment of the postal internal market in 2009*, European Commission, COM(2006), p.6.

this explains why a majority of governments opposed very *rapid* liberalisation of the postal sector and rather supported a gradual process of liberalisation.

3.2 On the road to full liberalisation

The Commission's desire to complete the internal market and ensure its smooth functioning seems to have been the initial primary driver behind the process of liberalisation. The initial debate on the liberalisation of the reserved areas of the postal sector started in 1988 when the Commission decided to initiate a fundamental review of postal markets.

The Commission launched the idea of further liberalisation of the postal market in response to the problems that had continued to hamper free movement of postal services. The Commission's Green Paper on the development of the single market for postal services (COM/91/476) of 1992 had outlined some main problems: (a) the lack of harmonisation hampered mail passing across borders, leading to operational differences (i.e. problems of inter-operability due to differences in definition of Universal Service, lack of a harmonised norm for envelopes); (b) the differences in service performance for universal service between postal administrations hampered the workings of the internal single market; (c) the low quality of cross-border service performance compared to national services (i.e. cross-border mail takes 4 days on average as opposed to 1-2 days for national mail).[26]

[26] *Commission Green paper on the development of the single market for postal services*, European Commission (1991).

Member States realised that some form of change was necessary to ensure the viability of postal services and the maintenance of the Universal Service in a declining postal market. To that effect, the Council called on the Commission to propose measures to liberalise the sector.[27]

Still, the negotiations showed that despite the formulated needs for change, a majority of Member States remained sceptical towards a directive.[28] They feared the directive would liberalise the market too far at too fast a pace. As USPs would have to cut their largest source of expenses (i.e. employment of postal workers) to remain competitive in a liberalised market, for a majority of Member States postal market liberalisation would not only imply significant costs on the part of the incumbent operators but also on the part of society. Eager to prevent large-scale societal opposition, a majority of governments supported a slow, gradual transition.[29]

When the Commission tabled the 1st Postal directive (97/67/EC) in 1995, it was thus not surprising that only a minority of governments and postal operators actively supported postal liberalisation (SE[30], FI[31], NL, DE). The majority of postal operators and governments just saw problems for their incumbent operators and for general employment levels in case of speedy liberalisation.

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27 *Council Resolution of 7 February 1994 on the development of Community postal services*, Official Journal C 048, pp. 3-4.

28 For a discussion see: Smith (2005), pp.109-144.

29 Ibid. Confirmed during a telephone interview with a former cabinet member of Commissioner Bolkestein (Internal Market and Services) at the time, 1 December 2009.

30 Sweden liberalised its postal market in 1993.

31 Finland liberalised its postal market in 1994.

The Parliament was particularly cautious and hesitant to support fast paced liberalisation due to concerns about the possible negative effect on the quality of the USO, the postal operators and the effect on employment in the postal sector.[32]

The Commission refrained from taking an activist stance in this instance. Where the Commission had successfully stimulated liberalisation of the telecom sector, it was reluctant to start infringement procedures against postal operators[33] and afraid of public unrest. Due to the wide-spread resistance, it was difficult for the proponents (i.e. the Commission and a minority of countries including the Netherlands and Germany) to force this reluctant majority to agree to significant market opening. The result was a prudent 1st Postal Directive (97/67/EC) which provided for harmonisation of letter mail at 350 grams, set minimum requirements for universal service and created national regulatory bodies to ensure implementation.[34] It had a limited effect on the liberalisation of the postal market, liberalising only 3% of letter volumes and 5% of incumbent operators' revenues.[35]

The transposition of the 1st Postal Directive had a dual effect on domestic markets. On the one hand, it led to significant domestic change in a large number of Member States. Sweden and Finland eliminated their monopolies, the Netherlands opened direct mail to competition, Spain abolished the monopoly for local and direct mail and Italy placed

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[32] Smith (2005), pp. 132-133.

[33] The Commission had the opportunity to do this. Over the years, several complaints were brought to them. 'In all instances, the Commission proved reluctant in judging against the incumbent postal operators' (Derenne and Stockford (2002), p. 145-148).

[34] See: Van der Horst, M. (2005), 'Postal Liberalisation in the EU: A Small Step in Weights, a Giant Leap for the Market', in Michael A. Crew and Paul R. Kleindorfer (eds.), *Regulatory and Economic Challenges in the Postal and Delivery Sector*, p.319.

[35] 'Europe's last post', *The Economist*, 11 May 2000.

direct mail outside its monopoly.[36] Germany had prepared Deutsche Post for competition and was supportive of liberalisation[37], and the UK in 2000 transformed Royal Mail into a commercial entity with the state as its only stakeholder.[38]

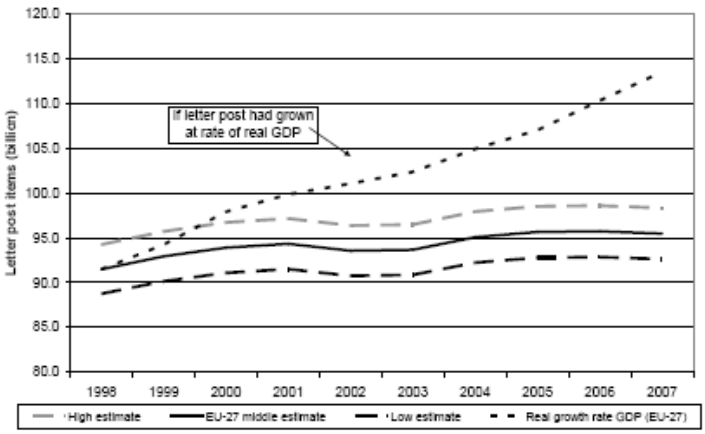
On the other hand, the directive suffered from transposition, particularly in those countries which preferred to first build up a strong incumbent operator before opening the market to competitors. France for example demanded more time for reform, 'fought doggedly against the Commission's efforts to speed up market opening'[39] and failed to establish an independent regulator.

The Commission forcefully pursued its infringement cases in instances where Member States failed to comply with the Directive. DG Competition actively applied competition law in the postal sector (see Table 3 in Appendix 2) and DG Markt similarly started infringement procedures against those countries not complying (see Table 2 in Appendix 2). [40] Despite these efforts, large differences remained. This was worsened by the Parliament that in 1999 adopted a resolution which urged the Commission to slow down the liberalisation.[41] This was a response to the negative effects which postal market opening had had on national employment.

36 Smith (2005), p.111-112
37 Ibid.
38 'Europe's Last Post', *The Economist* 11 May 2000.
39 'Pulling the envelope', *The Economist*, 20 January 2005.
40 Derenne and Stockford (2002), p.145.
41 Smith (2005), p.134.

However, the problems of maintaining the status quo increasingly started to come to the fore. The negative economic effects on the revenue of postal operators as a result of the economic slowdown of the postal market led all postal operators all around Europe to see a reduction in their volumes as a result of technological innovation in alternative communication mechanisms, providing cheap substitutes to traditional postal services. The flattening growth in letter post is illustrated by figure 3.3 below.

FIGURE 3.3. EU domestic letter post, 1998-2007

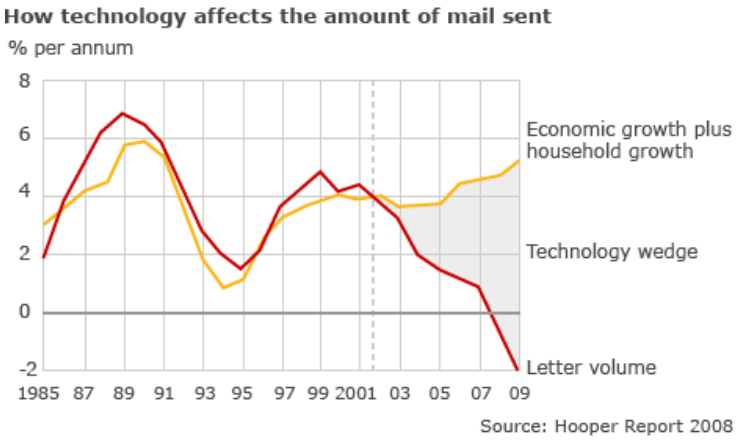


Source: ITA Consulting/WIK Consult (2009), p.36.

The rapid liberalisation of telecommunications had negative effects on the postal sector, as telecommunications had traditionally cross-subsidised possible losses within the postal market. [42] In addition, this general trend of substitution of letter post with electronic communication mechanisms was worsened by the enhanced application of E-Government, leading to a further reduction of mail volumes. [43] A good example is provided by Figure 3.4 which shows the effect of technology on mail in the UK.

42 Thatcher (2007), p.242.
43 See: ITA/WIK (2009), pp. 52-59.

FIGURE 3.4. Growth in letters, compared with economic growth, 1984-2007[44]



Furthermore, the inadequacies from which the postal market suffered became clear once more. The Commission's 2002 report on the application of the 1st Postal Directive revealed that postal services were 'primarily delivered through loss-making and sometimes inefficient public sector monopolies providing standard commodity services of a widely variable quality and efficiency'.[45] This variability created distortions in sectors dependent on postal services. At the same time, although volumes of letter mail items had been growing in absolute terms, they grew at a rate 'significantly below that for other communications and distribution sectors'.[46]

In addition, the USPs saw their volume in traditional products reduced and saw a reduction of market share in other segments of the market (e.g. parcel services). These losses and remaining problems had significant implications for the preferences of incumbent postal operators and governments. They agreed that the only solution to

[44] This is the original title as used in Hooper, R., Dame D. Hutton and I.R. Smith (2008), *Modernise or Decline – Policies to maintain the universal postal service in the United Kingdom – An Independent review of the UK postal service sector*, (generally referred to as 'Hooper Report'), p.9. This table was copied from BBC News article, 'What is happening to the Royal Mail', 8 March 2010.

[45] *Report on the application of the Postal directive (97/67/EC Directive*), European Commission, COM(2002), p.3.

[46] Ibid., p.3.

counter this development was to enhance efficiency, or else the costs of the universal service would continue to increase and governments would end up quite literally paying the price.

The result was that by May 2000, when the Commission proposed the 2nd Postal Directive which would reduce the reserved area to 50 grams, costing less than 2.5 times the basic tariff, liberalise direct mail and outbound cross-border mail[47], there were two strong groups opposing each other. There were 'those countries supporting rapid liberalisation (SE, FI, NL, DE, DK, BE, AT) unwilling to back a minimalist proposal endorsed by the Parliament and those countries advocating greater caution (FA, UK[48], ES, PO, IT, GR, LU, IE) blocking a more ambitious approach'.[49]

The national postal service providers were again the main lobbyists against postal market liberalisation.[50] This is not surprising, considering that the calculated losses of a reduction of the reserved area to 150 grams already would lead to an expected loss of £100m over a three-year period.[51] One can imagine that a reduction to 50 grams, as initially proposed by Commissioner Bolkestein, would even be costlier. France's La Poste, facing strong

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47 These proposed measures would 'open 27% of incumbent operator's revenues to free competition. By far the biggest impact would come from the reduction of the letter monopoly to 50 grams (16% of revenues), and direct mail (8%)' (source: 'Europe's Last post', *The Economist*, 11 May 2000).

48 The inclusion of the UK here is curious, as it ideologically tends to favour market liberalisation. The explanation is that Royal Mail simply was not competitive enough yet at the time. Source: interview head of multilateral ICT policy at the Department for Business, Innovation, and Skills (BIS), London 30 October 2009.

49 Smith (2005), p.113.

50 'For those governments resistant to liberalisation, national postal service providers were the core force behind their protectionist positions' (Source: Smith (2005), p.131).

51 Mr. John Roberts (chief executive of Britain's Post Office) as quoted in 'Europe's last Post', *The Economist*, 11 May 2000.

public opposition and pressure to 'maintain its...high employment levels'[52], was the strongest opponent. It even pursued an active independent lobby against postal market liberalisation by directly lobbying the Belgian Parliament under the Belgian presidency.[53]

The group of hesitant postal operators proved very successful in their lobby. Smith even argued that the incumbent postal operators hesitant towards full market liberalisation were 'the single most important force in domestic political debates and…[e]ncountered relatively little countervailing pressure in favour of liberalisation'.[54] This *dominance* of the opponents over the proponents requires explaining, as this outcome is far from self-explanatory. As mentioned before, both groups (pro and anti) were similar in size. Although the opponents had strong economic arguments for not pursuing fast liberalisation, the proponents also possessed strong economic arguments in favour of fast market opening. The proponents even found themselves supported by previous rhetoric as the Council had in 2000 explicitly expressed its commitment to full postal market opening.[55] In line with Smith, it seemed the 'time was ripe for substantial liberalisation of this sector'.[56] Nonetheless, the 2nd Postal Directive did not lead to full market opening. Why did the opponents have such a significant influence on the outcome?

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52 'Europe's last post', *The Economist*, 11 May 2000. The Belgian presidency ran from July-Dec. 2001.

53 See Eppink, D. (2007), *Life of a European Mandarin: Inside the Commission*, p.198.

54 Smith (2005), p. 134.

55 To achieve their wish to make the European Union the most competitive economy of the world, they demanded that liberalising efforts would be stimulated in areas such as gas, electricity and postal services ('FT. Liberalisering in Europa heeft weinig vaart' (translated as: 'Slow liberalisation in Europe'), *De Standaard*, 6 December 2001).

56 'There was a growing recognition among political elites of the potential economic impact of postal services liberalisation, a mounting set of challenges to the restrictive practices of national providers from private sector competitors, and the development of a more favourable constellation of national positions in the Council of Ministers as governments independently modernized their national postal services and put them on a more competitive footing' (Smith (2005), p.110).

According to Smith, the private sector lobby was 'very modest'[57] and 'slow to organise themselves'.[58] Although this could be a plausible explanation, it seems to me that there is one additional factor that explains why the opponents were more influential than the opponents: namely the influence of a possibility of politicisation during the negotiations of the 2nd Postal Directive. I argue that the 2nd Postal Directive was negotiated under *the shadow of politicisation*.

As explained above on page 88, a possibility of politicisation should be determined by assessing the willingness and capacity of the main interest groups to mobilise (i.e. function as entrepreneur) and pair this with the resonance among the general public (i.e. likelihood for mass mobilization or not). In trying to establish the resonance among the general public, and therefore assess whether there are grounds for expecting the losers of the proposed policy to actually mobilise against the proposed legislation, I first examine the level of active opposition of the interest groups against the proposed legislation during the negotiations – opposition that often manifested itself in strikes.

As a result of the 1st Postal Directive, actual domestic reform had taken place and had shown the negative impact of postal market liberalisation on domestic employment. This led to public opposition and resulted in a number of postal strikes, largely confined to domestic protests (e.g. large scale postal strikes materialised in Belgium on 25 September 2000 organised by two large Unions (ACOD (Algemene Centrale der Openbare Diensten) and CVCC (Christelijke Vakbond van Communicatiemiddelen en Cultuur)).

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57 Smith (2005), p.135.

58 Bunse (2009), p. 185.

With the condition of public resonance fulfilled, the second condition could also be met as there was an entrepreneur capable of disseminating information to large groups. Although its efforts did not lead to politicisation of the debate, France's La Poste did seem to have the means available to mobilise the general public if it felt the need to do so and, at the time, already functioned as an important entrepreneur for the successful mobilisation of the trade unions. This was confirmed by the leader of the British postal union.[59] The opposing postal operators benefited from the opposition of trade and labour unions, such as UNI-Europe, whose lobbying efforts against rapid postal market liberalisation they supported. Although it should be noted that the direct interests of the postal operators and the trade unions differed[60], they reinforced each other's influence by stimulating public opposition.

To show that this possibility of politicisation also influenced the legislators, symptoms of its influence during the negotiations of the 2nd Postal Directive need to be identified. To that end, I used secondary sources describing the negotiations of the 2nd Postal Directive and paired these with the interviews of individuals who had been involved directly in the negotiations on the 2nd Postal Directive.

Although there are, at least as far as this author is concerned, not many secondary sources that describe the negotiations of the 2nd Postal Directive in detail and explain the exact

[59] He 'acknowledged La Poste to be a useful partner in the battle against the Postal directive' (Eppink (2007), p.191).

[60] The interests of the postal operators and the labour unions differed significantly, only overlapping on some issues. Where the trade and labour unions were mainly concerned with maintaining high levels of employment and good working conditions, the postal operators were mainly concerned about maintaining the revenue of the reserved area.

underlying reasons for the amendments made, there are some useful accounts.[61] According to Eppink, a member of the cabinet of former Commissioner Bolkestein at the time, there was a general concern about possible escalation of the debate in case the labour unions would not be appeased.[62] In his account of the negotiations on the 2nd Postal Directive, he argued that they (i.e. the unions) are 'stirring up the entire Parliament. At the moment, there are majorities against liberalisation on both the left and right. If we make no overtures to the unions, it will be precisely the same during the second reading. *They might even go on strike*'.[63] In addition, the interviews seemed to confirm that legislators were concerned about the opposition of the labour unions at the time – a concern that was kept in mind when drafting the compromise of the 2nd Postal Directive.[64]

The likelihood of politicisation seemed to have strengthened the voice of the opposition during the negotiations on the 2nd Postal Directive. The Party of European Socialists (PES), particularly shadow rapporteur Brian Simpson, 'was effectively a spokesman in Parliament for the British National Union of Postal Workers'[65] as he took up these concerns and acted as a political entrepreneur.

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61 The accounts given by Bunse (2009), Eppink (2007) and Smith (2005) are the most detailed accounts of the negotiations I could find.

62 Eppink (2007).

63 Ibid., p.189 (italics added).

64 Telephone interview with former cabinet member of Commissioner Bolkestein, 1 December 2009; Interview with British MEP (PES) involved in the negotiations during the 2nd Postal Directive and member of the Parliamentary Transport and Tourism committee (TRAN), Brussels 17 November 2009; Telephone interview with German MEP (EPP-ED) involved in the negotiations during the 2nd Postal Directive, 2 March 2010. Due to both time and financial constraints my interviews were limited to only three people who had been directly involved in the negotiations on the 2nd Postal Directive.

65 Eppink (2007), p.183.

This possibility of politicisation coming from domestic unrest in France and the UK[66] affected the Council and made those governments faced with strong domestic opposition concerned about further liberalisation.[67] The reluctance of France and the UK weighed particularly heavily in the Council.[68] To appreciate this, it should be remembered that under the old composition of the European Union (EU15), French support was even more crucial than it is today.[69]

The Commission, facing this opposition, had no other choice but to accept these amendments if any directive was going to be passed at all. The Commission's primary goal was to ensure that future steps would be taken towards further liberalisation; something which this directive would achieve.

The effect of the dominance of the opponents was that the liberalising effect of the 2nd Postal Directive (2002/39/EC)[70] was limited to opening up 11% of the letters business in the EU to competition[71], completely in line with the wishes of the protective postal operators and, to some extent, the trade unions. The reserved area was 'reduced to correspondence weighing less than 100 grams or costing less than three times the basic

66 'British postal unions predicted up to 50,000 job losses as a result of the Commission proposal. With a general election looming, the government seemed reluctant to side with the liberal camp' (Bunse (2009), pp. 185-186). The interview with the head of multilateral ICT policy at BIS, London on 30 October 2009, confirmed that this fear had influenced the position of the UK government.

67 Telephone interview with former cabinet member of Commissioner Bolkestein, 1 December 2009

68 Ibid.

69 'If the French are against it, you'll never succeed' (Eppink (2007), p.173).

70 *Directive 2002/39/EC of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services* (i.e. 2nd Postal Directive), Official Journal, 5 July 2002.

71 'Pulling the Envelope', *The Economist*, 20 January 2005.

tariff'.[72] This would be reduced to 50 grams or 2.5 times the basic tariff in 2006. Derogations from the obligation to reduce the reserved area to 100 grams by 1 January 2003 and 50 grams by 1 January 2006 were made for Greece, Spain, Luxembourg, Italy, Portugal, Ireland and France, who claimed this monopoly was needed for the provision of universal service.[73] It excluded direct mail from competition and refrained from specifying a final date for full liberalisation (the tentative date of full market opening was 1 January 2009).[74]

The compromise thus allowed the incumbent operators to maintain their most important share of the revenue (i.e. the reserved area below 50 grams). It seems that the effective lobby of incumbent operators against the directive, strengthened by the underlying possibility of politicisation, explains why the compromise leaned more towards the opponents despite the fact that both opponents and proponents were of equal size.

In sum, considering the liberalisation of the postal market as it stood in 2002, it becomes clear that the previous two postal directives had been driven largely by supranational activism on the part of the European Commission, and by the changing economic conditions of a declining postal market. Although the economic conditions of the market had remained more or less stable, seeing a continuing decline in letter volumes, the Commission had enhanced its efforts to ensure postal market opening after conclusion of the 2nd Postal Directive (see Table 2 and 3 in Appendix 2). This practical change had an

72 ITA/WIK Consult (2009), p.16.
73 Van der Horst (2005), p.320.
74 Smith (2005), p.129.

important effect on actors' preferences vis-à-vis full market liberalisation, particularly as the costs of going the extra mile became lower as integration proceeded.

The small role which the ECJ played in this process is quite remarkable. Its role remained limited to establishing the right of competition in the postal sector.[75] Legal research has shown that the Court was partly reluctant, due to the strong governmental opposition, and partly unable, due to the limited number of cases brought forward, to take on an activist role in the process of postal sector liberalisation.[76] The cases that appeared before the Court were mostly brought by private postal operators in the express market, e.g. *'International Express Carriers Conference'* (IECC), *Syndicat français de l'Express international'* (SFEI) and UPS and DHL, on the basis of unfair competition. Important as they were, they did not affect the letter post market.

3.3 Contextual changes favouring full liberalisation

When the issue of postal market liberalisation rose to the fore for the third time in 2006[77], there were fears that history would repeat itself, particularly as the 3rd Postal Directive would remove the most contentious aspect of the postal market, the reserved area below

[75] Pivotal was its ruling in the *Corbeau* (C-320/91) case where the Court specified that the postal market is open to competitors for those services which the incumbent operators do not provide.

[76] Bishop, W. and King's College (1998), *Liberalising postal services: on the limits of competition policy intervention*, p.29. See also: Smith (2005), Geradin and Humpe (2002).

[77] This was a direct lock-in effect of Art. 1(3) of the 2nd Postal Directive (2002/39/EC). The sunset clause of the 2nd Postal Directive had assigned the Commission the task to reassess the date for full market opening, and to propose the legislation required to obtain this goal. The result was that the draft 3rd Postal Directive was tabled on 18 October 2006.

50 grams.[78] Many such as Eppink therefore predicted that 'no doubt all the old arguments will be dusted off and given another airing...[N]ot surprisingly, the European Parliament will also be an opposition force to be reckoned with once again'.[79]

Contrary to everyone's expectations, the 3rd Postal Directive was adopted in 2008 without any significant problems. This is certainly remarkable, as fears about unemployment, universal service provision, financing of universal service and quality remained as problematic as they had been during previous negotiations. To explain this, it is important to discuss the conditions under which the 3rd Directive was tabled, especially as changes over time had created an environment slightly more conducive towards full liberalisation. Attention to structural changes and changes in preferences of the main actors helps to explain why the negotiations on the 3rd Postal Directive were so much easier than expected.

Two structural changes in the make-up of the European Union, (a) the diminished presence of the Party of European Socialists in Parliament (the party most susceptible to labour unions and postal operator concerns) and (b) the enlargement of the Union (EU 27), made the legislators generally more favourable towards full liberalisation. The elections for the European Parliament in 2007 had significantly diminished the seats in Parliament of the PES. As Table 3.1 below shows, the European People's and European Democrats Party (EPP-ED) and the Alliance of Liberals and Democrats for Europe

[78] The letter mail under 50 grams, which made up the bulk (65.2%) of the market with an estimated value of 53 million euros, had until then been part of the reserved area. Sources: Van der Horst (2005), p.320; ITA/WIK (2009), p.25.

[79] Eppink (2007), p.207.

(ALDE), ideologically close, largely maintained their seats. This made them a powerful coalition only 19 seats short of a Parliamentary majority, ideologically supporting full postal market liberalisation.

TABLE 3.1. Result European elections 1999-2009 (by political party)

Parties	1999	2004	2007	2009
EPP-ED	233	268	265	265
S&D (former PES)[80]	180	200	184	184
ALDE (former ELDR)	50	88	85	84
Greens-EFA[81]	48	42	55	55
GUE/NGL[82]	42	41	35	35
ECR (since 2007)[83]	-	-	54	54
TOTAL	626	732	736	736

Source: Table composed by author.

At the same time, the 2004 and 2007 enlargements supplied the Council with 12 new Member States. Except for their reluctance to the 2009 deadline, which was easily appeased by an extension of the deadline, they were largely in favour of the proposed directive. The generally pro-liberal stance of the eastern European Member States helped to dilute the impact of the strongest opponents of postal liberalisation (FA, BEL, LU, HU).[84]

Apart from these structural changes, the interim period between the conclusion of the 2nd Postal Directive and the tabling of the 3rd Directive had seen a change in preferences among some pivotal Member States and societal actors. As the economic incentives for

[80] The party changed its name into 'Progressive Alliance of Socialists and Democrats' (S&D) after the 2009 parliamentary elections.

[81] Greens - European Free Alliance.

[82] European United Left Nordic Green Left.

[83] European Conservatives and Reformists.

[84] The Belgian, Luxembourg and Hungarian postal operators remained ineffectively organised, meaning they required more time to comply with the proposed measures. The Belgian 'La Poste', with five different sorting centres, was particularly inefficient. France was less starkly opposed and primarily wanted sufficient financing options and additional time to restructure. Telephone interview representative France's La Poste in Brussels, 8 December 2009.

full market liberalisation became increasingly clearer, the French and British opposition weakened.

The economic reality of a declining market, the need for internal reform and the inevitability of practical change[85] had made the most sceptical postal operator (i.e. France's La Poste) supportive of full market liberalisation. Mr. Bailly (CEO of La Poste) declared on 18 October 2006 that France was not opposed to liberalisation of the postal sector.[86] This was complemented by the positive stance of the French state secretary for trade and enterprise, Mr. Hervé Novelli.[87] This stood in sharp contrast to the earlier declaration of the French Minister of Post who had still declared in 2000 that 'there will never be liberalisation of the post office in France, *jamais, jamais, jamais!*…[w]e will never accept a complete liberalisation of this great national institution'.[88]

Similarly to France, the UK had also openly embraced market liberalisation after the conclusion of the 2nd Postal Directive.[89] The UK had since the passing of the 2nd Postal Directive begun to actively implement the agreed upon changes and had set up a very powerful and independent national regulatory agency. This had led to domestic changes within Royal Mail. Although this may seem contradictory to the UK's earlier opposition during the negotiations preceding the 2nd Postal Directive, this past opposition should not

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85 Through its infringement procedures, the Commission ensured the implementation of EU law and the establishment of national regulatory authorities.

86 Two factors explain this change of La Poste: (a) reduced public opposition due to ongoing domestic changes in the postal sector and (b) the election results of 2007 which put the UMP (ideologically much more supportive of liberalisation), in power. Source: 'La libéralisation totale des services postaux lancée' (translated as: Launch of full liberalisation of postal services), *L'Humanité*, 19 October 2006.

87 Ibid.

88 Eppink (2007), p.170. (italics present in original text).

89 Interview with the head of multilateral ICT policy at BIS, London on 30 October 2009.

be mistaken for outright refusal of the principle of full market liberalisation. As postal liberalisation was politically too sensitive for the UK to agree to, given the strong domestic opposition of the labour unions, the UK had publicly opposed postal market liberalisation even though it ideologically supported full market liberalisation.[90] It therefore decided to set up a very strong regulator (Postcomm) in 2000, which is said to have lobbied hard for a truly liberalised postal market ever since.[91]

These changes in between negotiations also removed the possibility of politicisation. First, the traditional support which the labour unions had experienced from the incumbent postal operators, especially La Poste, had faded.[92] The increasing economic benefits of a fully liberalised market had reduced the group of postal operators interested in mobilising the public in opposition to the proposed directive. The active group of opponents was reduced mainly to concerned postal workers. Thus, where France's La Poste in previous negotiations had played a pivotal role in mobilising the public, it had changed its position prior to the negotiations on the 3rd Postal Directive.[93] Its only major opposition was towards the final date of implementation.[94]

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90 Ibid.

91 Interview British MEP (PES) member of the leading parliamentary Transport and Tourism (TRAN) committee, Brussels 17 November 2009.

92 The preferences and aims of the entrepreneur and the public opinion were not necessarily based on similar concerns. Those sceptical of full market liberalisation had used the high levels of public opinion to their advantage to add weight to their own demands, i.e. delay of liberalisation, partly under the pretence of supporting the concerns made by the labour unions regarding employees working conditions and job security.

93 This was confirmed during a telephone interview with the representative of France's La Poste in Brussels, 8 December 2009.

94 See: 'France and Germany clash on mail liberalisation', *Euractiv*, 8 June 2007.

Although this cooperative stance may seem to contradict the letter sent by the nine postal operators urging legislators not to fully liberalise the postal market[95], it should be noted that this letter only concerned the time frame of full market liberalisation, and concerned neither the other aspects of the directive nor the general question of whether or not full liberalisation should be pursued. The result was that the labour unions were left as the primary group most fervently opposed to full postal market opening.

Second, the inability of labour unions to mobilise public support was the main reason for the failure of the opposition campaign.[96] According to many of my interviewees, the labour unions simply woke up too late, and failed to see the impact of this directive on their working conditions.[97] The main organisation responsible for mobilisation of public opinion, i.e. UNI Europe (Global Union dealing a.o. with postal services), seemed unable to organise itself on such short notice. For a while, it laboured under the false assumption that the debate would inevitably lead to much opposition from the traditional opponents (e.g. France) on which they could then capitalise, particularly as many actors at the time still assumed that full liberalisation would simply never happen.[98] As this anticipated opposition did not occur, it left UNI Europe inadequately prepared to mobilise its

[95] A mutual press statement was released by the incumbent postal operators of Belgium, Cyprus, France, Greece, Italy, Hungary, Luxembourg, Poland and Spain opposing full liberalisation of the postal market, urging the European Union to 'be very careful when reforming the postal services in 2009' ('Postbedrijven in het verweer tegen liberalisering' (translated as: Postal companies up in arms against liberalisation), by Christoph Vanschoubroek in *De Standaard*, 28 July 2006). See also: 'EU pushes through postal services liberalisation', *Euractiv*, 2 October 2007).

[96] Interview policy officer of Uni Europe, Brussels 19 November 2009.

[97] Interview representative TNT Post Brussels office, Brussels 18 November 2009; Interview representative of Belgium's La Poste, Brussels 16 November 2009; Telephone interview representative France's La Poste in Brussels, 8 December 2009.

[98] Interview representative Belgium's La Poste, Brussels 16 November 2009.

members prior to the negotiations.[99] It also lacked the financial and organisational means to organise a successful campaign. Some argued that the individual problems of domestic resistance prevented labour unions from protesting against the directive.[100] This is understandable considering that many USPs had just gone through severe restructuring. Many postal operators had been faced with necessary job cuts, such as France's La Poste[101], UK's Royal Mail[102], and Belgium's La Poste.

Some large scale strikes by postal workers did take place in France on 18 January 2005, supported by 65% of the population according to French Unions[103], and subsequent ones occurred in the UK in June and July 2007.[104] That said, it proved impossible for UNI Europe to organise European-wide protests. Attempts were made to set up a European-wide strike on 6 June 2007, but this did not seem to materialise. UNI Europe Post & Logistics organised another postal demonstration for the plenary vote in Strasbourg on 6 July 2007. Again, its effect was extremely limited.

The postal strikes and campaigns on maintaining employment which have recently manifested themselves, i.e. after the conclusion of the 3rd Postal Directive, seem to support this argument of miscalculation and bad planning. Consider for example the recent strikes in France and the UK. In response to La Poste's drift toward competition

99 Interview policy officer of UNI Europe, Brussels 19 November 2009.

100 Interview representative Belgium's La Poste, Brussels 16 November 2009.

101 'Les réductions d'emplois minent le climat social a La Poste' (translated as: The job cuts are undermining the social climate at La Poste), *Le Monde*, 22 April 2004.

102 'Staffing cuts are inevitable' says Royal Mail in *BBC News*, 'Q&A: Royal Mail Dispute', 5 November 2009.

103 'Public Sector strikes hit France', *BBC News website*, 18 January 2005. Also see: 'Stamped Out' *The Economist*, 6 November 2003.

104 'Postal workers set date for first strike', *The Guardian*, 22 July 2007; 'Union hails postal strike support', *BBC News*, 29 June 2009; 'Postal union calls second one-day strike', *The Guardian*, 6 July 2007.

and privatisation, postal unions staged a nationwide strike on 23 September 2008. According to company management, the demonstration involved 27 percent of La Poste workers.[105] On 17 July 2009, more than 12,000 UK postal workers went on strike in a row over jobs, pay and services.[106]

To summarise, there was no possibility of politicisation during the negotiations on the 3rd Postal Directive due to a lack of business support and the inability of the labour unions to mobilise public support. Therefore, where the possibility of politicisation had been of major importance during the negotiations on the 2nd Postal Directive, it was absent during the 3rd Postal Directive.

3.4 Content of the draft 3rd Postal Directive [107]

To explain the exact shape of the 3rd Postal Directive, I now turn to the second tier of my explanation: i.e., the detailed analysis of the negotiations. By using a method of process tracing, I try to show which actors were responsible for the exact level of liberal legalisation of the 3rd Postal Directive. Let me first explain the content of the 3rd Postal Directive in detail.

Its main target was the letter post below 50 grams which makes up the largest share of domestic mail revenue.[108] As this directive is an amending directive, similar to the

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105 Consumer Postal Council, 'Index of Postal Freedom – France', see: http://www.postalconsumers.org/postal_reform_index/France_La_Poste.shtml

106 'UK facing largest Post Office strike in years', by Julia Kollewe in *The Guardian*, 14 July 2009.

107 *Proposal for a directive amending directive 97/67/EC concerning the full accomplishment of the internal market of Community postal services*, (COM (2006) 594 final), Brussels, 18 October 2006. Hereafter referred to as 'draft 3rd Postal Directive'.

2002/39/EC directive, it is difficult to understand its content at a glance. Therefore, I outline the most important changes envisioned by the Commission's draft directive in Table 3.2 below. Table 1 in Appendix 2 gives a full overview of the legislative process, outlining the status quo, the initial proposal, the proposed changes and the final adopted changes. The articles referred to in this subsection correspond to the draft 3rd Postal Directive.

TABLE 3.2. Most significant changes as proposed by the draft 2008/6/EC directive (compared to the status quo)

Relevant Article(s)	Content
Art. 3	Maintains original definition of the USO; specifies that express and courier services do not fall under USO.
Art. 7	Abolishes the reserved area
Arts. 4, 7	Increase the available financing mechanisms to finance the universal service
Art. 9	Restricts the available grounds for authorisation requirements
Art. 7	Enhances possibilities for guaranteeing universal service provision
Art. 14	Tightens accounting rules for universal costs
Arts.12,16, 18	Enhance consumer protection on prices and quality
Arts. 22, 22a	Strengthen NRAs' powers

The scope of this draft was wide. Article 1a defined postal services as 'services involving the clearance, sorting, transport and distribution of postal items'. By abolishing the reserved area (through Art. 7), the monopoly which postal operators used to have on postal items under 50 grams was removed. The directive's scope is therefore inclusive of all aspects of the postal sector.

At the same time, the directive's level of delegation is quite high. Through article 22 it strengthened the power of the National Regulatory Agencies (NRAs). Although these agencies had already been created by the previous two directives, large differences in

[108] See: Figure 'Weighing up the mail', created by the European Commission as listed in 'Europe's Last Post', *The Economist*, 11 May 2000.

practical implementation between countries remained. The previous directive had left the delegation of tasks to the NRA as a national decision, without clearly defining its tasks.[109] This meant that the concrete impact of NRAs depended on the degree of influence each government was willing to delegate to the NRAs. Consequently, some countries failed to establish a regulator (e.g. France), or set up a weak (not always independent) institution (e.g. Belgium). In other cases, the NRAs were established as a strong independent regulator, such as Postcomm in the UK.[110] By delegating more power to NRAs and by specifying more clearly how these NRAs should function, this directive ensured the strength and independence of these agencies.

The draft's degree of market integration was also quite high. The main barriers remaining in the postal sector were the monopoly (reserved area below 50 grams) and the grounds on which authorisation could be demanded prior to entering another postal market (Art. 9). The directive used the removal of exclusive rights of incumbent operators to remove the monopoly, envisaging full postal market opening by 01 January 2009. In addition, it tightened the grounds on which authorisation could be demanded. This limited the possibilities for national governments to prevent free cross border movement of postal services. Furthermore, it harmonised the definition of the USO so differences in definition between countries could not function as barriers.

[109] Article 22 of Directive 97/67/EC required the establishment of a national regulatory authority but its requirements and powers were minimal.

[110] Postcomm is one of the strongest NRAs in the postal market in Europe. See: WIK Consult (2009), *The Role of Regulators in a More Competitive Postal Market*, p.58.

TABLE 3.3: Level of liberal legalisation of initial Commission proposal

	Scope	Delegation	Degree of market integration
Commission Proposal	Wide: inclusion of all postal services.	High: strengthened delegation of power to NRAs.	High: Limited ground for authorisation, removal of monopoly introducing full competition and harmonisation of USOs.

3.5 Negotiations

As explained under 3.3., the context of the negotiations was one that fostered agreement on full liberalisation of the postal sector. It is therefore less surprising to discover that the negotiations between Parliament and Council were characterised by high levels of cooperation centring on the conditions under which the market would be opened, rather than debating the desirability of abolition of the reserved area. The political debate was mainly a technical one with primary focus on the date of full market opening.[111]

Parliamentary Agreement[112]

With some exceptions, the majority of MEPs supported full market opening,[113] which led the negotiations in Parliament to mainly centre on the *conditions* of full market opening. Similarly, the majority of postal operators supported full market opening but remained concerned about the conditions under which the market would be opened.[114]

111 Interview with the head of multilateral ICT policy at BIS, London on 30 October 2009.

112 From here, the article numbers correspond to the article numbers used in the final 3rd Postal Directive 2008/6/EC unless stated otherwise.

113 A minority of EPP-ED MEPs asked for a delay in opening of the market (i.e. Christine de Veyrac (EPP-ED) of France, Rodi Kratsa-Tsagaropoulou (EPP-ED) of Greece, Gabriele Albertini (EPP-ED) of Italy). See: Plenary Parliamentary debate Tuesday, 10 July 2007 – Strasbourg, Procedure : 2006/0196(COD). Available from: http://www.europarl.europa.eu/.

114 This conclusion can be drawn from the interviews I conducted with the postal stakeholders: Belgian La Poste (Brussels 16 November 2009), France's La Poste (Telephone 8 December 2009) and TNT Post (Brussels 18 November 2009).

ALDE completely supported the Commission's draft (with exception of the date).[115] The EPP-ED faced some internal discussion, with some opposition coming from those who agreed with the concerns of the labour unions.[116] Markus Ferber (EPP-ED), the rapporteur of this directive, was however very supportive of the Commission's draft and aimed at keeping the amendments to a minimum. The PES, on the other hand, adopted the concerns vented by the labour unions. Interestingly, the shadow rapporteur, Mr. Simpson (PES), seemed more supportive of the directive than the rest of its group.[117]

The main discussion within Parliament centred on six issues: (a) the demand for guidance on net cost calculation of the universal service[118], (b) the available grounds for authorisation requirements, (c) the demarcation of the financing mechanisms[119], (d) the extension of the date for full market opening, (e) the inclusion of the social guarantee and (f) the reciprocity clause.[120] Although some had wanted to tighten the USO definition (for example the Dutch TNT Post), the Commission had made it clear that this definition would not be negotiable as it was essential if any compromise was to be reached.[121] Whilst agreement on the other issues was necessary for the overall success of the directive, only the amendments made to the first three issues affected the directive's level of liberal legalisation.

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115 Interview Belgian MEP (ALDE) member of TRAN committee, Brussels 16 February 2010.

116 Interview German MEP (EPP) member of TRAN committee, Telephone interview 2 March 2010.

117 Ibid.

118 Amendments to recital 28 and Art. 23(a) on guidance of net cost calculation.

119 The Common position of Parliament specified in Art. 9(3): "Member States may allow these undertakings to choose between an obligation to contribute to the sharing mechanism or to comply with universal service obligations". This amendment was later removed by the Council.

120 During my interviews on the 3rd Postal Directive, these issues consistently came up as being the most important. News media confirm this. See for example: 'Postal services liberalization', *Euractiv,* 1 February 2007.

121 Interview functionary at DG Internal Market and Services (DG Markt) (postal Unit), Brussels 16 November 2009; Interview representative TNT Post , Brussels 18 November 2009.

In order to assure a level playing field, the operators incurring net costs had to be compensated. The draft directive of the Commission had delegated this task to the Member States and to the national regulatory agencies in particular.[122]

Various MEPs demanded the inclusion of detailed rules on how these costs were to be calculated. It seems these demands reflect the successful lobby of the organised group of 15 postal operators who had asked for clear guidance on net cost calculation.[123] In response, the Parliament adopted recital 28 which read: 'in order to avoid legal uncertainty and to ensure a level playing field, the Commission should issue detailed guidance as to how the net cost of the universal service is to be calculated'. In addition, the Parliament demanded clear guidance from the Commission with regard to net cost calculation. This would give postal operators the guarantee of compensation for any net costs incurred as a result of the abolition of the reserved area and strengthened the level of delegation slightly. This strengthened the directive's level of liberal legalisation.

The changes made to the financing mechanisms slightly weakened the directive's degree of market integration. The draft by the Commission had, compared to the previous directives, extended the number of available financing mechanisms.[124] Partly due to the complaints of France's La Poste, the Parliament amended Art. 7(2) to allow for additional financing mechanisms, such as the ones which required competitors to pay (pay or play

[122] See recital 20 and Art. 14.

[123] A variety of MEPs from PES, EPP-ED and ALDE asked for these amendment. See European Parliament, TRAN Committee, *Amendments 25-360*, Brussels, 4 May 2007.

[124] Besides allowing for a compensation fund, the Commission also allowed for: public compensation through state subsidies and through public procurement procedures.

system).[125] This amendment was supported and pressed for by 9 postal operators.[126] Although some feared that such a system could erect significant hurdles for competitors who wanted to enter the market[127], a majority in Parliament was in favour.

Similarly, the Parliament widened the range of services that are eligible for subjection to authorisation (Art.9 (2)). Where the Commission's draft had aimed at tightening the grounds on which this would be allowed, MEPs from the EPP-ED, the PES and some ALDE members opposed this (see Table 4 in Appendix 2). By adding services (e.g. including services considered to be a possible substitute), by adding grounds justifying authorisation requirements and by removing provisions from Art. 9(2(3)) that outlined those instances under which authorisations could not be demanded, a significant group of MEPs tried to weaken Art. 9 and widen the grounds on which Member States can demand authorisation.[128] This weakened the directive's degree of market integration as it reduced level of harmonisation.

To obtain agreement within Parliament, three other amendments were necessary. First, a majority of countries insisted on a delay in the formal date of market opening so as to

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[125] The significance of this amendment for France's La Poste was highlighted during the telephone interview with the representative of France's La Poste in Brussels, 8 December 2009.

[126] I.e.: Belgium, Cyprus, France, Greece, Italy, Hungary, Luxembourg, Malta and Poland. (Source : 'Il faut lever les incertitudes sur le financement du service universel postal' (translated as: One should resolve the uncertainties in the financing of universal postal services), *BPost - Belgium's La Poste website*, 27 January 2007).

[127] Deutsche Post Chief Executive Klaus Zumwinkel argued that the provisions on the universal service obligation are the real weak point of the new proposal, because they could lead to hurdles so high - such as making new market entrants choose between 'pay or play' - that liberalisation will remain purely theoretical. Source: 'Postal services liberalisation', *Euractiv*, 1 February 2007. The Commission opposed this as well.

[128] See: European Parliament, *Community Postal Services - Final Text adopted on 11 July 2007 in Strasbourg*, available from: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2007-0336

grant operators more time. This was of particular importance to France and Belgium. This meant that the final date of full market opening was extended to 31 December 2010. In addition, the new Member States had realised that the implementation of the 2nd Postal Directive and preparation for the 3rd Postal Directive actually required more time than anticipated. [129] MEPs acknowledged the existing geographical problems and the preparatory arrears which the new Member States faced which meant the issue was easily overcome by an amendment of the directive's date of implementation to 31 December 2012 for the new Member States.[130]

Second, the PES and Green MEPs were concerned about the social implications of the abolition of the reserved area for consumers and for postal workers, and about its effect on the quality and maintenance of the USO.[131] To this end, they proposed several amendments to workers' rights and consumer protection.[132] The result was that the Parliament's common position amended the directive on several points, mainly aimed at enhancing Member State duties on EU level, increasing Commission involvement and ensuring good working conditions. It should be noted though that these demands came

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129 The example of Slovenská Pošta illustrates the strains of postal market liberalisation, sometimes even leading to enhanced protectionism. This country amended Slovakian law on 15 February 2008 to reserve the delivery of hybrid mail to the incumbent postal operator, Slovenská Pošta, in an attempt to re-monopolise business activities. See: 'Antitrust: Commission requests Slovakia to re-open competition in the hybrid mail sector', *Press Release European Parliament*, Brussels 7 October 2008.

130 An additional transitional period was allowed for countries with a difficult geographical organisation (31 December 2012 at the latest). Telephone interview German MEP (EPP-ED) member of TRAN committee, 2 March 2010.

131 Eva Lichtenberger (Greens) and Said El Khadraoui (PES) e.g. proposed to delay full abolition of the reserved area and wait for more extensive research MEP. Remarkable was the vision of French MEPs, who, despite their party affinity, remained sceptical of full market opening. French MEP Jean-Louis Bourlanges (ALDE) for example demanded extension of full market opening and pleaded for a review in 2009 instead of opening the postal market fully with this directive. See: *European Parliament Community Postal Services – Debates 11 July 2007 in Strasbourg* (CRE 10/07/2007 – 5).

132 The majority of these amendments came from the PES (i.e. Lichtenberger (Greens), El Khadraoui (PES), Simpson (PES) and Jorgensen (PES). See: *European Parliament Community Postal Services – Debates 11 July 2007 in Strasbourg* (CRE 10/07/2007 – 5).

from a minority group, and that the concessions were made primarily to foster overall compromise in Parliament.[133]

A final amendment which proved crucial for the compromise was the reciprocity clause. The support of the minority group of SE, NL, DE, FI, and UK, who had generally been supportive of the directive during the negotiations on the 3rd Postal Directive, was conditional on this clause being adopted. They proposed an amendment which would allow those Member States opening their market before 31 December 2012 to refuse authorisation to postal operators who still enjoyed a reserved area in their home country. This would prevent a situation where incumbent operators of closed markets would gain an unfair advantage by being allowed to operate in fully opened markets. The EPP-ED and ALDE supported this and this led to the inclusion of Article 3(3) in Annex II of the directive. An overview of the amendments made to the draft directive can be found in Table 1 in Appendix 2. Table 4 in Appendix 2 summarises the Parliament's most important amendments to this directive.[134]

TABLE 3.4: Effect of Parliamentary amendments on the directive's level of liberal legalisation

	Scope	Delegation	Degree of market integration
Parliament's Amendments	Wide: no changes.	Strengthened: delegating more powers to Commission (guidelines net cost calculation).	Decreased: Widened grounds for authorisation and enlarged the range of financing mechanisms.

The Parliament's amendments to a great extent reflect the concerns of the group of 15 incumbent postal operators. This seems confirmed by the reaction of 12 postal operators (i.e. Belgium, Cyprus, France, Greece, Italy, Hungary, Luxembourg, Malta, Poland,

[133] Telephone interview German MEP (EPP-ED) member of TRAN committee, 2 March 2010.

[134] See also: *European Parliament Community Postal Services - Final Text adopted on 11 July 2007 in Strasbourg.*

Austria, Latvia and Slovakia) who 'welcomed Parliament's "substantial improvements" to the initial proposal'.[135] Their main concern was the question of financing for the USO. The Parliament's common position accommodates much of this concern. In addition, this group had pleaded for more liberty in financing mechanisms (this was a precondition for France's La Poste) and a widening of the grounds for authorisation. They had demanded clear guidance for net cost calculation and due to some remaining inefficiencies, they had demanded an extension of the date for full market opening so as to have more time to prepare the incumbent operator. All these issues were addressed by Parliament in first reading.

Council Agreement

The Council was supportive of the directive as amended by the Parliament, and relatively few changes were made. Limited as they may be, some of these changes were significant for the directive's level of liberal legalisation.

Whilst leaving its scope untouched, the Council restored the directive's original degree of market integration by removing Parliamentary amendments that had broadened the grounds on which Member States were allowed to refuse authorisation to a competitor (Art. 9). Where the Parliament had made the authorisation rules apply to both universal services and 'services considered to be possible substitutes'[136], the Council argued that a

135 'Parliament votes to delay postal liberalisation', *Euractiv*, 12 July 2007.

136 Amendment made to Art.9(2).

widening of authorisation rules would merely construct more barriers to trade and therefore removed these changes.[137]

In addition, the Council specified in Article 9 (2) that 'obligations and requirements referred to in the first indent and in Article 3 may only be imposed on designated universal service providers'. The Council thus reiterated the fact that USO obligations are only to be imposed on the *universal service provider*. This amendment is of great significance to the forcefulness of the directive. Knowing that competition will only emerge in the postal sector if incoming competitors can compete on the basis of costs, a full USO requirement on incoming operators would have deterred any competition. The Council's amendment clearly prohibited Member States from subjecting incoming competitors to the exact same requirements and obligations as the incumbent USO operator (as had been done in the Finish postal market). An effective lobby by the German and Dutch postal operators seems to have been at the root of this amendment.[138] This same group inspired the Council to explicitly endorse the Commission's reading of the USO.[139] This inclusion was required to secure a dropping of the demand coming from some countries that had, in an attempt to protect their incumbent operators, tried to regain these services under USO definition.

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137 *Draft statement of the Council's Reasons*, Interinstitutional File (2006/0196), Brussels, 29 October 2007, p.13.

138 Interview with a representative of Belgium's La Poste, Brussels16 November 2009.

139 During the Council meeting on 5 Nov. 2007, the Commission, referring to directive 97/67/EC and the Court's ruling in *Corbeau*, confirmed that 'express and courier services constitute specific services that are characterised by being essentially different from universal postal services'. Source: *Adoption of the Common Position and of the Statement of the Council's reason*, Interinstitutional File (2006/0196), Brussels, 5 November 2007.

The Council's amendments generally weakened the directive's level of delegation. It removed recital 28 and included an Annex which was to be used as 'Guidance on calculating the net cost, if any, of universal service' (Annex 1, directive 2008/6/EC). This specified how the Commission was to assist the Member States in calculating the net costs of the USO. Rather than providing clear calculations, the Council insisted that the Commission would merely provide advice and guidance.[140] This was done to appease the Parliament for whom this inclusion had been particularly important.[141]

Finally, it removed the Parliament's inclusion of detailed Member State duties. For example, the Parliament had added to Art. 12 that 'Member States shall publish the rules and criteria for ensuring affordability at national level' and 'Member States shall ensure the provision of a free postal service for blind and partially sighted persons'. The Council removed these amendments and brought the text in line with the Commission's original proposal.[142]

The Council faced some internal disagreement, mainly between France, Italy, Spain and the Eastern European countries (who wanted more freedom on financing mechanisms and more guarantees regarding USO net cost calculation) and Germany, Netherlands, Sweden, and Finland (who supported an unrestrained open market).[143] The compromise reflects

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[140] This disappointed La Poste as they, and other postal operators, had wanted clear guidance on calculation of net costs. Telephone interview representative France's La Poste in Brussels, 8 December 2009.

[141] The Parliament had demanded detailed guidance from the Commission (Art. 23 and 23a). However, the Council opposed high Commission involvement.

[142] Similarly, Parliament's amendment regarding the requirement on Member States to guarantee the financing of universal service Art. 7(2) was removed (See: *European Parliament Community Postal Services - Final Text adopted on 11 July 2007 in Strasbourg).* See also Table 1 in Appendix 2.

[143] Interview Dutch MEP (EPP-ED), member of TRAN committee, Brussels 11 February 2008.

these tensions by accepting, to some degree, the Parliament's amendments regarding financing mechanisms and guidance of net cost calculation but at the same time insisting on maintaining the USO definition, offsetting changes to Art. 9 and agreeing to increased Commission involvement. In the end, only Belgium abstained and only Luxembourg voted against (Luxembourg preferred to maintain a reserved area).[144]

There was a striking absence of the Parliament's initial regulatory and social amendments[145] (see Table 5 in Appendix 2) in the Council's position. The Council opposed the Parliament's amendments and offered a new Annex 1 on net cost calculation, the inclusion of a social guarantee under Art. 9 and the inclusion of an extension of the final date of postal market opening, in return for these rejections. As it turned out, these compromises successfully appeased the Parliament and in particular the minority of PES, GUE and Green MEPs who had demanded the changes.[146]

This is remarkable when turning to the actual substance of these 'compromises', particularly when considering that the social guarantee Article (i.e. Art. 9(2)) has few practical implications. Although it was created to prevent a race to the bottom, in practice it would fail to ensure this. Currently, national labour conditions already apply when an outside business establishes itself in another country. The national laws of a country determine the level of social protection and any amendments to them remain a national

144 *Addendum to 'I/A' Item Note*, Council of Ministers, Interinstitutional File (2006/0196), 5 November 2007.

145 I.e. its proposed amendments to tighten the obligations of Member States on an EU level (proposed amendments to Art. 7(2) and Art. 12) and to guarantee the rights of consumers and workers in the postal sector (proposed amendments to Art. 9(5), Art. 23, Art. 23(a)).

146 Interview with functionary of the DG Markt (Unit Postal services), Brussels 16 November 2009.

competency. Only in instances of temporary service provision could this be different. Therefore, no amount of social guarantees will influence or shape national legislation. Only by creating a European social model, with harmonised working conditions etc. could such a guarantee be credible.

The reason the PES agreed to this was that it perceived these compromises as the highest achievement possible.[147] Realising that full market opening was inevitable, and that the costs of going back were too high, the PES agreed to this compromise.[148] As UK socialist Brian Simpson said, 'for this last stage, we had the choice between simply letting it go ahead or negotiating strong social protection rules'.[149]

Both the EPP-ED and ALDE were also willing to agree to this compromise on social guarantees offered by the Council. Where this is understandable for ALDE, as it supported the draft from the outset, it is somewhat remarkable that the EPP-ED agreed to the Council's proposal. Clearly, the Council's amendments also appeased those EPP-ED members who had been sceptical about full market opening. An important factor seems to be Mr Ferber's success in convincing its members to agree to this compromise. Himself a strong supporter of this proposal, he was keen to prevent the Parliament from entering into conciliation with the Council.[150] In the end, a majority of the Parliament was in favour of going down the road of liberalisation.

147 Interview British MEP (PES) member of TRAN committee, Brussels 17 November 2009.
148 Ibid.; interview member of PES secretariat, Brussels 19 November 2009.
149 'Parliament votes to delay postal liberalisation', *Euractiv*, 12 July 2007.
150 This was supported by the telephone interview with a German MEP (EPP-ED) member of TRAN committee, 2 March 2010.

TABLE 3.5: Effect of Council's amendments on the directive's level of liberal legalisation

	Scope	Delegation	Degree of market integration
Council's Amendments	Wide: no changes.	High: removal of Parliament's delegating amendments back to Commission proposal.	Slightly increased: bring authorisation Art. 9 back to Commission proposal; reduce harmonisation (removal Parliament's amendments specifying Member State duties); maintain enlarged range of financing mechanisms.

The Commission supported this final compromise agreed by the Council, which in their words 'fully reflects the key elements of its initial proposal'.[151] The Parliament subsequently adopted the Council's common position without any amendments in second reading on 31 January 2008. With this, the 3rd Postal Directive became fact.

3.6 The level of liberal legalisation of the 3rd Postal Directive

The level of liberal legalisation of the draft directive was high and remained high in the final outcome. The scope of the directive was not amended and remained wide. The level of delegation increased in Directive 2008/06/EC compared to Directive 2002/39/EC. The new Art. 22 specified the obligations of Member states in regard to the establishment of NRAs in more detail.[152] At the same time, the directive added a clause (in Art. 22a) on the provision of information of postal operators to the NRA. This article provided the NRA with a legal basis, allowing it to demand information from postal operators and thereby further enhancing its power. Although the level of delegation could have been even higher if the Parliamentary amendments had been adopted, the final outcome still

[151] *Commission Communication pursuant to the second subparagraph of Article 251(2) of the EC Treaty*, COM(2007) 695 final, Brussels 9 November 2007. The interview with a functionary of DG Markt (Unit Postal Services) confirmed the Commission's willingness to agree to the Council's and Parliamentary amendments.

[152] Art. 22 foresees a structural separation of regulatory functions and ownership/control of postal operator

foresees a high level of delegation as the proposals of the Commission were almost entirely adopted without changes.[153]

Finally, the degree of market integration of the directive is medium to high. The grounds for authorisation are tight, the USO definition has been maintained and the reserved areas have been removed. The range of financing mechanisms was enlarged, which led to a slight weakening of the degree of market integration. Considering that the scope of the final directive is large, that the level of delegation is high and that the degree of market integration of the directive is medium to high, this directive has a rather high level of liberal legalisation. The estimates are schematically outlined in Table 3.6 below.

TABLE 3.6: Overview of all amendments made to the directive's level of liberal legalisation

Issue	Commission	Parliament	Council	Final outcome
Scope	Wide: inclusion of all postal services.	Wide: no changes.	Wide: no changes.	Wide: no changes.
Delegation	High: strengthened delegation of power to NRAs.	Strengthened: more delegation of powers to Commission (guidelines net cost calculation).	High: removal Parliament's delegating amendments back to Commission proposal.	High: in line with Commission's proposal.
Degree of market integration	High: Limited grounds for authorisation and removal of monopoly introducing full competition.	Reduced: Widened grounds for authorisation and enlarged the range of financing mechanisms.	Slightly increased: Bring authorisation Art. 9 back to Commission proposal; maintained enlarged range of financing mechanisms.	Medium to high: enlarged range of financing mechanisms, authorisation as Commission proposed, full abolition of reserved area.

[153] See proposed Art. 22 and 22a in the draft 3rd Postal directive and the final 3rd Postal Directive 2008/6/EC. These articles are nearly identical, with changes that are stylistic rather than content based. The removal of Art. 22a(3) and (4) from the final directive hardly affect that.

3.7 The winners and losers of the 3rd Postal Directive

At first sight, it seems the Council had relatively more influence in shaping this directive than the EP. The Council was generally in favour of removing barriers to industry but was very sceptical about agreeing to higher levels of reregulation on a European level, as this would inevitably lead to a delegation of power away to the supranational institutions (particularly the European Commission).

Throughout the negotiations, the Council had favoured a high level of liberal legalisation. To this end, it had removed Parliamentary amendments which would have granted postal operators wider grounds on which to demand authorisation from competitor postal providers (See Table 4 in Appendix 2). The Council weakened the directive's level of liberal legalisation by partly offsetting the Parliamentary amendments which would have delegated power away from Member States to e.g. the European Commission[154], opposing the amendments that outlined Member State duties and removing the Parliament's amendments on higher levels of delegation to the European Commission. It compromised with the Parliament by including guidance on the USOs' net cost calculation, a measure that positively affected the directive's level of liberal legalisation, and accepted Parliament's amendments on financing mechanisms.

The 3rd Postal Directive thus contains all amendments where Parliament and Council agreed (i.e. financing mechanisms, extension date and reciprocity clause). Where the Parliament and Council did not agree, i.e. on issues specifying clear Member State duties,

[154] The acceptance of Council amendments automatically means the refusal of Parliamentary amendments on issues such as enhanced Member State duties and increased Commission powers.

social provisions for postal workers and higher involvement of the Commission, the Parliament either agreed to watered-down versions of its initial amendments (e.g. social provisions, net cost calculation) or had to accept rejection. The question then arises: why was the Council more powerful than the Parliament in shaping the directive's outcome?

The answer can be found in a closer analysis of the distinction between the Parliament and the Council, and in the false first impression, when comparing amendments, that there are stark preferential differences between them. The Parliament was not a homogenous group. The majority of MEPs agreed with the Council and favoured a liberalised postal market with very little grounds for Member States to refuse competitors access. The concerns about social rights for workers and the wish to actively protect them through this directive were explicitly demanded by a minority of MEPs (PES, GUE and Greens).[155] There was thus a greater difference between the ALDE/EPP-ED and the PES/GUE/Greens than between the ALDE/EPP-ED and the Council. It seems that the EPP-ED, ALDE and a majority of the Council actually held similar ideas and did not actually support some of the amendments which the Parliament's common position contained. Similarly, both the majority in Parliament and Council proved susceptible to the demands of the postal operators[156]; in particular the demand for more time for full market opening.[157]

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[155] Interview British MEP (PES) member of TRAN committee, 17 November 2009. See also: *European Parliament Community Postal Services – Debates 11 July 2007 in Strasbourg*, (CRE 10/07/2007 – 5).

[156] I.e.: inclusion of additional financing mechanisms, reciprocity clause and extension final date of liberalisation, Annex of net cost calculation and a slight widening of grounds for authorisation.

[157] The proponents of rapid full market opening (Germany, Netherlands, Finland and Sweden) suffered from unwillingness to cooperate, partly as they are clear competitors in the internal market. Telephone interview with the representative of France's La Poste in Brussels, 8 December 2009.

The differences in common positions were thus largely the result of the amendments Parliament had to make to appease its internal minority opposition (PES, Greens, GUE). The relative ease with which the labour unions and the PES could be appeased, removing their initial amendments and substituting it for one single change to Art. 9(2)[158], reveals the relative weakness of this minority opposition and shows the relative lack of interest of ALDE/EPP-ED in this particular issue.

The explanation for the PES, GUE and Green's relative weakness lies in its limited size (due to the loss at the European Parliamentary elections of 2007) and support base. Whereas during earlier negotiations the concern for workers could be tied to the successful opposition of the French postal operator to full market opening, leading to a possibility of politicisation of the negotiations, this time explicit support for these regulatory and social amendments only came from a small group, made up of labour unions and the Belgian and Luxembourg postal operators and governments.

As the majority of MEPs and the Council simply agreed on most issues (e.g. extension of deadline, reciprocity clause, financing mechanisms and authorisation requirements), it may thus be more appropriate to say that the 3rd Postal Directive was the result of cooperation between ALDE/EPP and the majority of Council, rather than a dominance of the Council over the Parliament.

[158] Art. 9(2): 'where appropriate, be made subject to or impose an obligation to respect working conditions laid down by national legislation'.

3.8 Explaining full postal market liberalisation – testing the model

In this chapter, I tried to explain the liberalisation of the postal market, and in particular the level of liberal legalisation of the 3rd Postal Directive. A satisfactory explanation requires the clarification of how the supporters of full liberalisation managed to obtain a majority. I considered first what the main drivers of integration were and how these shaped the preferences of the actors. Second, I focused in detail on the negotiations so as to be able to explain in detail who shaped the legislative outcome and what explains this influence.

The predominant driver behind the 1st Postal Directive seems to have been the European Commission's proposal of an initial attempt at the liberalisation of the postal sector. Faced with the inefficiencies of cross-border postal service provision, the Commission launched a strategy to overcome these problems and proposed harmonising measures and initial steps towards harmonisation of the reserved area. However, these measures implied high costs for the incumbent operators and would have impacted negatively on the level of employment in the sector. The result was strong opposition from Member States, labour union and incumbent operators leading to a directive with a low level of liberal legalisation.

Turning to the 2nd Postal Directive, the main drivers behind its tabling here were a clear combination of changes in the expected economic benefits from market liberalisation and continued Commission activity. The technological innovations in communications increasingly resulted in a reduction of letter volumes and thereby increased the costs of

maintaining the status quo. This provided governments with stronger incentives to adopt measures to reform the sector. Similarly, incumbent postal operators started to realise that the restructuring of the sector was inevitable and saw potential economic opportunities in accessing larger markets.

In addition, domestic change as a result of transposition of the 1st Postal Directive had affected actors' preferences. The European Commission had played a crucial role in ensuring the implementation of the 1st and 2nd Postal Directives during interim periods. Through infringement procedures and the application of competition law, the Commission had ensured practical reform. This practical change slowly weakened the opposition of the labour unions and the general public. At the same time, practical changes fostered path-dependent pressures by increasing returns. This altered the preferences among governments and postal operators with some becoming more supportive whilst others remained sceptical.

The economic conditions between the 2nd and 3rd Postal Directive remained constant (i.e. steady decline) whilst the Commission actively tried to ensure the implementation of the 2nd Postal Directive. The result was that the returns of full liberalisation, particularly for governments and postal operators, increased even further and contributed to a majority of actors, most importantly France's La Poste, becoming supportive of full market liberalisation. This resulted in the majority of actors required to pass the 3rd Postal Directive of full market opening.

This analysis showed that the drivers of integration had been crucial in stimulating integration throughout this process. Whilst varying in significance (i.e. the activity of the Commission seems to have been a dominant motor behind integration from start to finish), both drivers contributed to shaping preferences leading actors to increasingly become supportive of full market integration.

However, to explain the high level of liberal legalisation that was achieved by the 3rd Postal Directive, and in particular the relative ease with which this was done, a thorough explanation of the outcome also required an in-depth analysis of the negotiations. In particular, I compared the recent negotiations with the negotiations on the 2nd Postal Directive so as to explain the discrepancy in contestation between the two. This shows that the level of liberal legalisation at various points in time is not merely the result of the level of demand for change, but is also shaped by the level of political contestation during the negotiations.

Contrary to the contentious negotiations on the 2nd Postal Directive, the negotiations on the 3rd Postal Directive were relatively easy. This is remarkable, given that the latter directive liberalised the most contentious aspect of the postal market. Although some contextual changes, such as the enlargement of the European Union and the Parliamentary elections of 2004 (i.e. PES losing), had contributed to a generally more favourable composition of Council and Parliament regarding full market liberalisation, this alone cannot explain the striking absence of opposition from society during the negotiations on this directive.

To account for this, I argued that one should also look at the mediating influence of possible politicisation on the negotiations. In this chapter, I attempted to show how the possibility of politicisation intervened and negatively affected the directive's level of liberal legalisation during the negotiations of the 2nd Postal directive. This shadow of politicisation enhanced the relative influence of the 'opposition' camp in Council, strengthening the PES/Greens/GUE demands in Parliament and weakened the proponents.

However, this shadow of politicisation was completely absent during the negotiations on the 3rd Postal Directive due to the absence of a strong entrepreneur and the inadequate preparations on the part of the labour unions. Taken together, legislative change over time and the continued pressure of a declining postal market led a majority of actors to support further postal market liberalisation. Paired with an absence of possible politicisation, this explains the ease with which the 3rd Postal Directive was concluded. This absence not only weakened the influence of the minority group of opponents, it also allowed all those in favour to agree with the directive without the constraints of the threat of public opinion rallying against the outcome.

3.9 Conclusion

The liberalisation of the postal market has been a long-term process that started in 1996 and seems to have concluded in 2008. Whether the 3rd Postal Directive will truly lead to full liberalisation of the postal market remains to be seen. It should be noted that the directive leaves some issues *related* to the postal market, and able to distort postal market competition, unaddressed. First, international mailing is excluded from its scope. Second,

different VAT regimes for universal service providers continue to distort postal markets.[159] This privileges incumbent operators who enjoy lower VAT rates. To generate a true level playing field among operators and competitors, it is necessary to equalise VAT rates on postal services. Third, social provision, such as minimal wage legislation, could hamper a swift opening of the market. A good example was the debate between the Dutch postal operator TNT post and the German government, who in December 2007 introduced minimum wage provisions for the postal sector. Fourth, possibilities always remain for governments to introduce 'creative market barriers under the pretext of safeguarding the universal service'[160]; again a factor that may hamper liberalisation of the sector. To resolve these issues, one will in future inevitably see more cases being directed to the ECJ to provide clarity on what this liberalisation actually means. For now, we can say that the level of liberal legalisation in theory is high which means we can expect high levels of liberalisation within the postal market.

[159] WIK Consult (2009), p.96.

[160] Quote from Commissioner McCreevy in 'Court overrules Commission on illegal postal aid', *Euractiv*, 2 July 2008.

4. Liberalisation of the Electricity Market

Where the previous chapter dealt with postal market liberalisation, the current chapter similarly discusses the liberalisation of a network industry, namely the electricity market. Full liberalisation of the electricity market was not self-evident. Although the Treaty of Rome had set out the aim of liberalisation for all commodity markets, energy included, electricity services had long been considered a public service and fundamentally the remit of the state.

In addition to this, there was little external demand for change. The level of technological innovation was low and there was little global pressure from the wider electricity market demanding that Europe liberalise its market. The costs of electricity market liberalisation for incumbent electricity companies and governments were rather high, and explain the strong opposition towards initial steps to liberalise the market. To some extent, the successful opening of this market to competition is quite remarkable in itself.

That said, despite these costs, the conditions of the time (early ‘90s) convinced actors to pursue electricity market liberalisation. The early 1990s saw the re-launching of the internal market with the 1992 programme, which was the European Union’s reaction to a changing world of declining US hegemony, increasing Japanese influence and a generally more globalised world. Such an interconnected world posed problems which, the Member States agreed, would be better dealt with cooperatively, and particularly by creating a strong internal market.

Electricity market liberalisation therefore seemed, in a similar manner to postal market liberalisation, to have been initiated by the European Commission, the latter driven by the wish to complete the internal market.[1] Amongst all EU policies, market integration had obtained a central position 'and acted as a catalyst for the initiative to liberalise the network-bound energies, a move that was also justified by the precedents that other sectors, such as telecommunications, had set'.[2] This unquestioned belief in market integration, which has long been the dominant economic policy doctrine and 'the backbone of European integration'[3] more generally, convinced Member States of the economic benefits liberalisation could bring (lower prices) and of the solution it would present to ongoing problems (underinvestment in networks, security of supply). Initial legislative steps to liberalise the electricity market were taken in 1996, by adopting the 1st European Electricity Directive, followed by the 2nd Directive in 2003 and finally leading to the conclusion of the 3rd Electricity Directive, part of the larger Energy Package[4], in 2009.

Although ideologically supporting liberalisation, many governments were concerned about the possible costs (i.e. security of supply, competitive pressures on incumbent operators). Paired with an absence of strong demand for electricity market liberalisation

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1 'From the late 1980s onward, it [i.e. the European Commission] greatly intensified its work on the Internal Energy Market and finally designed an ambitious proposal for the liberalisation of the network-bound energies. The Commission's main point of reference was the Internal Market Programme. …[B]ecause of the central role played by market integration, the Member States were unable to oppose the initiative entirely even if most of them displayed a great resistance against it. Moreover, they could not challenge the validity of market integration as a leading norm in the EU system per se' (Source: Eising (2002), pp.102-103).

2 Eising (2002), p.102

3 Ibid., 102.

4 The 3rd Energy package covers both the electricity and gas market. Due to restraints of space and scope in this thesis, I focus only on one energy sector: electricity. The reason is that the negotiations on the electricity market were more difficult than gas and therefore more interesting for the purpose of this thesis.

from society, it was clear that successful market opening required a genuine change in preferences of those directly involved in the electricity market. The Commission's role was pivotal here. It applied a strategy of incrementally generating practical change over time, thereby enlarging the group of proponents of further market liberalisation.

The road towards market liberalisation did not proceed without contestation. This again became very clear in the most recent discussions of the 3rd Electricity Directive. The debate, like the debate on the 3rd Postal Directive, proved to be a struggle about the conditions of market opening between those countries that had already opened their market and those that had not. Whilst the Commission was rather confident that a third directive would obtain large support, not the least because a large group of Member States had already gone beyond the provisions of the 2nd Directive and the Commission had actively been pursuing those that were lagging behind (both on the basis of previous legislation as well as on competition law), the negotiations were captured by a sceptical minority in Council.

This stood in stark contrast to the large-scale support which the Parliament expressed for the Commission's draft proposal. The result was that the directive's level of liberal legalisation was lower than expected. The interesting questions now are: what explains the relative influence of this minority in Council, and to what extent did it shape the directive's level of liberal legalisation?

In this chapter, I will again apply a two-tiered approach to explain the process of the liberalisation of the electricity market and the level of liberal legalisation of the 3rd Electricity Directive in particular. In the first tier, I will explain the context. This chapter will start by explaining electricity as a service and by touching on the particularities of the electricity market that hamper swift liberalisation. I then outline the developments from 1995 up until the point that the 3rd Electricity Directive was introduced.

In the second tier of the explanations, I focus in detail on the negotiations. The chapter then turns to outlining the main aspects of the 3rd Electricity Directive and I rate its level of liberal legalisation. To understand its final shape, I apply a method of process tracing to understand the negotiations and to determine the relative influence of all actors involved. Crucial to the relative influence of the blocking minority was the direct involvement of significant political actors which took place early during the negotiations. This influence did have its limits, allowing the Parliament to still significantly amend the directive in second reading.

4.1. Electricity market: its particularities

The electricity market is a complicated market. It is not a market simply made up of consumers and producers. Electricity provision is comprised of four different activities: generation, transmission, distribution and supply. Besides producers (i.e. companies generating the actual good) and consumers, various intermediaries are involved to regulate its supply and demand.

Electricity is a good that is difficult and costly to store. It is therefore essential to get it to the consumer immediately. As demand for electricity fluctuates, and storage is costly, this market needs regulation to pair fluctuating demand with supply. This is where the transmission system operators (TSOs) come in. These companies transmit electricity to all parts of the country at very high voltage, using 'grids' for their transport. The distribution system operators (DSOs), which are usually multiple actors divided by region, then deliver the electricity to the consumers, i.e. homes and businesses. They take the electricity off the large transmission grid and place it on their individual distribution network. Where the TSOs are thus responsible for distributing electricity across the country, the DSOs are responsible for distributing incoming electricity on a local level. Finally, the suppliers sell the electricity to the end consumers and organise the financial aspects of individual supply. They do not own any infrastructure (e.g. power stations or wires) but rather buy electricity from power stations, pay the transmission and distribution companies to transport electricity to consumers, and bill customers for the electricity used.[5]

When these various steps are considered, it becomes clear that the consumption of electricity is both the consumption of a good (i.e. generated electricity) and of a service (i.e. transmission and distribution services). Whereas in the past, supply of electricity was considered a service of general economic interest and consequently not subject to the normal rules of competition as established by the EU treaties, even confirmed by the

[5] Website EBICO: https://www.ebico.org.uk/energy-advice/how-the-electric-market-works

European Court of Justice[6], this has changed in recent years. European legislation, in the form of EU directives, began to separate the two. This led to the separate legal treatment of the commodity electricity and the supply of electricity, which resulted in electricity services falling under the market principles applying to free movement of services.

In order to guarantee free movement of electricity services, the Union was required to liberalise the market, so as to ensure actors could exercise their freedom of establishment (mode 1), freedom of trade (mode 3) and the freedom of choice (mode 4).[7] In concrete terms, the liberalisation of the electricity market meant ensuring a level playing field for competitors (i.e. removal of monopolies and non-discriminatory access to the network) and a high degree of harmonisation to overcome regulatory differences.

Various studies have been conducted on electricity markets, resulting in a number of recommendations on how to overcome these problems and obtain true liberalisation of this market. A crucial step, as mentioned before, is the abolition of monopolies (i.e. negative integration). This can be done in various ways: legal unbundling, administrative unbundling, ownership unbundling. This should be paired with active re-regulation of the sector to ensure a level playing field (positive integration). The main steps towards liberalisation of the electricity market, as proposed by e.g. Jamasb and Pollitt[8], are displayed in Table 4.1.

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[6] The Court ruled on several occasions that electricity is only a good. Source: Meeus, L., K. Purchala and R. Belmans (2005), 'Development of the Internal Electricity Market in Europe', *Elsevier*, p.26.

[7] This refers to the modes of service liberalisation as defined in Table I.2 – The GATS modes of service supply in the introduction of this thesis.

[8] Jamasb, T. and M. G. Pollitt (2005), 'Electricity Market Reform in the European Union: Review of Progress towards Liberalization & Integration', *The Energy Journal*.

TABLE 4.1: Main steps in electricity reform[9]

Restructuring	- Vertical unbundling of generation, transmission, distribution, and supply activities - Horizontal splitting of generation and supply
Competition and Markets	-Wholesale market and retail competition - Allowing new entry into generation and supply
Regulation	- Establishing an independent regulator - Provision of third-party network access - Incentive regulation of transmission and distribution networks
Ownership	- Allowing new private actors - Privatising the existing publicly owned businesses

(Source: Jamasb and Pollitt (2005)).

However, there are three aspects of the electricity market that render the implementation of these measures difficult. First, the electricity market had traditionally been dominated by monopolies, leading its operator to generally hold exclusive ownership over the electricity networks. The underlying reason was that this was necessary to ensure security of supply and public service to all citizens. To that effect, governments awarded electricity companies, often state-owned companies, a monopoly similar to the reserved area in the postal sector. This made them the owners of the network (electricity transmission systems and distribution systems) besides electricity providers – so-called vertically integrated companies. As networks are a natural monopoly, this led these companies to dominate a significant share of market power in the wholesale and sometimes the retail market.[10]

To clarify this, allow me briefly to explain the importance of the network to electricity companies. In essence, the success of an electricity company depends on its access to the

[9] Similar steps were proposed by Joskow, P.L.(2009), 'Foreword: US vs. EU electricity reforms achievement', in Glachant, J.M. and F. Lévêque (2009), *Electricity Reform in Europe: towards a single energy market*, pp.xvi-xviii.

[10] *Impact Assessment accompanying the legislative package on the internal market for electricity and gas*, European Commission SEC (2007), p.14.

network and how well this network caters to its demands. Given that different companies have different needs, the operator of these networks is required to make investment decisions and maintenance decisions that serve the interest of the electricity companies in general. However, vertically integrated companies, opposed to the rising competition and owners of the network, have skewed incentives when it comes to controlling networks.[11] Given that their interest does not lie in expanding and developing the network to facilitate the entry of new market players, but rather in limiting investments that would benefit competitors, the network will not be optimal.[12] As studies have shown, vertically integrated companies have hindered competition by cross-subsidising their generation activities (i.e. cross-subsidising generation losses with high transmission fees): they have been shown to impose discriminatory requirements, they have charged disproportional access prices and service fees and have been proven to invest too little in new transmission capacity.[13] Similarly, the multiplicity of Transmission System Operators (TSOs), a direct result of all vertically integrated companies, has led to a lack of coordination and integration of national networks into European grids.[14] Considering that competitors require 'non-discriminatory access to transmission and distribution, unbundled cost-based tariffs for their use and no informational advantages to the

[11] 'British, US and German experiences demonstrate that vertical integration is a major impediment to efficient market access and also to inter-TSO trade' (Source: Glachant, J.M. and F. Lévêque (2009), *Electricity Reform in Europe: towards a single energy market*, p. 56).

[12] *Proposal for a Directive amending Directive 2003/54/EC concerning common rules for the internal market in electricity*, COM (2007) 528 final, Brussels 19 September 2007 (hereafter referred to as: draft 3rd Electricity Directive).

[13] Van Koten, S. and A. Ortmann (2007), 'The unbundling regime for electricity utilities in the EU: a case of legislative and regulatory capture?', *Working Paper Series CERGE-EI*, p.3-4.

[14] Vasconcelos, J (2009), 'Postface: design and regulation of EU energy markets – between competition policy and common energy policy' in Glachant and Lévêque, *Electricity Reform in Europe: towards a single energy market*, p.334

incumbent'[15], the current set-up creates a very uneven playing field, something which is unlikely to foster competition.

Where a simple removal of monopoly sufficed to introduce competition into the postal sector, this is clearly more complicated in the electricity market. It is not just about opening up a network to competitors, but also about ensuring that this network is operated and maintained in a manner that is conducive to creating a level playing field. To ensure this, the operation and management of these natural monopolies (i.e. networks) also needs to be regulated.

The solution, as proposed by the Commission, resides in effective separation of transmission system operators from generation (to safeguard effective wholesale competition) and the legal separation of distribution network operators from supply (to ensure retail competition).[16] This, they argue, will prevent incumbent generators from displaying anti-competitive behaviour and will ensure non-discriminatory network access to others'[17], something which vertically integrated companies, given their current preferential position, will likely oppose (i.e. implying removal of control over the network).

There are some additional characteristics of the electricity market that make liberalisation difficult. First, the electricity market is a highly regulated sector but is subject to a high level of regulatory fragmentation. These high levels of regulation are necessary to ensure

15 Glachant and Lévêque (2009), p.56.
16 Jamasb and Pollitt (2005), p.10.
17 Ibid., p.3.

a.o. electricity security and nationwide supply and to safeguard reasonable prices. In addition, regulation is necessary as transportation of electricity is economically feasible only over limited distances. There is strong interdependence within regions which requires good coordination within markets to assure demand and supply match. Finally, related policies such as climate change policies again enhance the regulatory fragmentation of the electricity market. To ensure real liberalisation of the electricity market, i.e. a truly integrated market, a degree of harmonisation of these national regulations is required.

Second, there are infrastructural barriers between electricity markets which impede easy liberalisation. The UK and Ireland, due to their insular situation, are limited in their interconnection with the rest of Europe. Similarly, the Iberian Peninsula is isolated, partly due to physical interconnection but also due to underutilization.[18] As good network access is an essential prerequisite for a truly internal market, additional investment in the existing infrastructure is required.

4.2 What's at stake?

Having discussed what aspects of the electricity market hamper speedy liberalisation, I now turn to the stakes which each actor has in liberalising the electricity market, particularly as a result of the latest piece of legislation: the 3rd Electricity Directive.

[18] Delgado, J.(2008), 'European Energy Markets: Moving in a Common Direction', *Bruegel, Policy Brief*, p.3.

The 3rd Electricity Directive would mainly change the management and operation of networks by demanding full ownership unbundling, meaning that electricity companies would not be allowed to own transmission system operators. To ensure a level playing field, this directive would require all non-EU countries to comply with the EU's unbundling requirements prior to certification to operate in the EU's internal electricity market. In addition, this directive would set up a regulatory framework, composed of newly created independent regulatory agencies, and would strengthen existing national regulatory agencies (NRAs) so as to enhance cooperation between TSOs, ensure interconnectivity of grids and coordinate regulation between countries. I will now consider the stakes of the most important actors involved in the negotiations on electricity market opening.

Member States

Although ideologically supporting the interconnectedness of the electricity sector, most Member States have generally proven reluctant to implement liberalisation directives, mainly out of fear of what competition could do to the viability of their incumbent electricity operators. Some governments are particularly concerned about the incumbent operator as they have economic stakes in these energy companies, whilst others worry about the effect of liberalisation on security of supply. Currently, providers of electricity are strongly regulated to ensure they comply with set standards. Most Member States were eager to maintain these nationally determined levels of regulation in a liberalised market. At the same time, they favoured an increase in competition and the potential benefits this may bring. This led Member States to be torn between 'the desire for

efficient, competitive and unregulated wholesale and retail markets and the long-term investment and security of supply'.[19]

However, there are clear ideological differences between Member States in how best to go about integrating the electricity market. Some countries, such as France and Germany, favour building up large national champions before opening the market. This decision is influenced by the characteristics of their market. Germany, for instance, is a market dominated by vertically integrated companies and characterised by a multiplicity of DSOs. Clearly, the proposed policies of unbundling would significantly impact German electricity market operators and result in strong domestic opposition. Countries such as Spain, the Netherlands and several Scandinavian countries, on the other hand, tend to favour full market liberalisation as a means of stimulating competition among companies. This has led the Netherlands and Spain, for example, to implement full ownership unbundling long before this was demanded by EU legislation, with the idea of gaining a competitive advantage. They hoped that by pursuing these changes early on, their companies would be ahead of the game when full ownership unbundling was required from the rest.[20]

Finally, some countries were worried about the effects of liberalisation on their market prices, especially those who own relatively cheap energy sources (e.g. nuclear energy in France). As this allows them to sell electricity at low prices, these countries fear that market integration might lead to an increase in energy prices.

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[19] Newbery, D. M. (2002), 'Regulatory challenges to European electricity liberalisation', *Swedish Economic Policy Review*, p.25.

[20] Interview public affairs manager of EnergieNed, The Hague 19 February 2010.

Electricity companies

For a large proportion of the incumbent electricity companies, a majority of which tend to be vertically integrated, liberalisation of the electricity market would not imply economic benefits as unbundling and increasing competition would inevitably mean a loss of their guaranteed market share. Liberalisation of the market would require electricity companies to give up their monopoly position and would reduce control over their electricity networks – a costly adjustment. Competitors interested in entering the electricity markets, on the other hand, would stand to gain from further liberalisation as they would obtain equal access to larger markets and better interconnectedness of networks and grids. However, as a majority of electricity companies remained vertically integrated [21], there were no direct economic benefits of market liberalisation for a majority of electricity companies.

These varying preferences explain the nuanced position of Eurelectric (the Union of the Electric Industry), the organisation lobbying for the general electricity industry, vis-à-vis the 3rd Electricity Directive. Eurelectric supports the directive's proposal regarding a strengthening of regulators and enhanced European cooperation, even supporting higher levels of regulation, whilst at the same time asking for a more balanced division of power between regulatory institutions, Commission and industry.[22]

[21] *Impact Assessment accompanying the legislative package on the internal market for electricity and gas*, European Commission SEC (2007), p.14

[22] Eurelectric, 'Eurelectric's Position Paper on the 3rd Energy Package', written by Drafting Group on the Energy Package, December 2007.

Consumers

Further liberalisation of the electricity market is argued, especially by the Commission, to benefit the public at large. Private household consumers as well as business consumers would benefit from the better service, lower prices and greater choice which enhanced competition would theoretically bring.

There are currently large inefficiencies in the electricity market. For example, the European Commission's Sector Inquiry (2007)[23] reports that in 2004, 40 percent of the hours of interconnection capacity between Germany and the Netherlands were allocated in the direction Germany-to-Netherlands, even if prices in Germany where higher than in the Netherlands.[24] Higher, improved interconnectedness could increase efficiency and could lead to a reduction of prices.

However, household consumers have been sceptical about electricity market liberalisation. The Californian energy crisis and the occurrence of several blackouts in Europe and the US had led to sincere doubts regarding the performance of liberalised markets.[25] Since 2003, electricity prices have risen and several blackouts occurred in the summer of 2003.[26] This made people inclined to think that liberalisation was at the root

[23] *Inquiry pursuant to article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors*, European Commission COM (2006), Brussels 10 January 2007. Hereafter referred to as: Sector Inquiry (2007).

[24] Delgado, J. (2008), p.3

[25] Künneke, R.W. and T.W. Fens (2007), 'Ownership unbundling in electricity distribution: The case of The Netherlands', *Energy Policy*, p.1927.

[26] Vasconcelos, J.(2009), p.331.

of this, even though research has shown that despite an increase in nominal prices, electricity prices actually *declined* between 1995 and 2005 in real terms.[27]

This scepticism was paired with the fact that research could not offer a conclusive answer to the level of net benefits, if any, which liberalisation of the electricity market could bring.[28] More importantly even, individual private home consumers did not seem interested in larger consumer choice. Although they are aware of the prices, electricity consumers generally do not respond to price changes.[29] The switching rates are still typically very low (0–3 percent in most EU countries, with the highest switching rate in the UK, at 19 percent).[30] According to a Eurobarometer survey conducted in 2008 where 6 out of 10 people reported that in the period considered their electricity prices had increased,[31] there was only an 8% EU average of switches.[32] This despite the fact that, according to a UK dominated average, 70 percent of those who did switch supplier obtained a cheaper price.[33] Therefore, although consumers were theoretically one of the primary groups that stood to benefit from electricity market liberalisation, they proved largely uninterested, and perhaps even sceptical, towards electricity market liberalisation.

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27 'Electricity Markets: Getting the Picture Straight and Boosting Market Integration', *Eurelectric*, 28 March 2006.

28 See: Ringel, M.(2003), 'Liberalising European electricity markets: opportunities and risks for a sustainable power sector', *Renewable and Sustainable Energy Reviews*; Newbery (2003); Jamasb and Pollitt (2005).

29 This conclusion is based on the low level of switches by consumers since the liberalisation of the consumer market in 2007. Source: European Energy Regulators (2009), *2008 Annual Report of the European Energy Regulators*, p.10.

30 European Energy Regulators (2009), *2008 Annual Report of the European Energy Regulators*, Appendix 1 on page 28.

31 Eurobarometer (2009), *Consumers' views on switching service providers – Analytical Report, Fieldwork: June-July 2008*, p.111.

32 Ibid., p.108.

33 Ibid., p.109.

Large Scale Electricity Users

The large scale electricity users (i.e. businesses) are more responsive and involved consumers in the electricity market. The European Regulators' Group for Electricity and Gas (ERGEG), keen to see cooperation on regulation and the integration of national grids, the UEAPME (the European SME employers' organisation), hopeful that this proposal would enhance competition and the range of suppliers, and the Alliance of Energy Intensive Industries, supportive of measures to ensure a more integrated, stable market with enhanced competition to bring down prices, were all strongly supportive of this directive.[34] They expected that a liberalised market with more competitors would lead to better service, enhance security of supply and possibly lead to lower prices.

For some, liberalisation was a double-edged sword. Where some large-scale electricity users already benefited from low prices through bilaterally negotiated agreements, this meant these users could potentially stand to lose these deals due to termination of these agreements in a liberalised market. That said, the majority of businesses cooperating under the Alliance of Energy-Intensive Industries strongly supported the proposal as liberalisation would foster competition, could reduce prices and could lead to a more secure energy supply. A secure energy supply at competitive long-term prices is, in the end, crucial to all.[35]

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[34] See: 'Energy and Climate Change: Towards an integrated EU policy', *Euractiv*, 8 January 2009. See: 'EC roadmap on energy is an ambitious but much needed step forward', *Press Release UEAPME*, Brussels 10 January 2007; 'ERGEG's response to the European Commission's Communication "An Energy Policy for Europe"', *ERGEG*, 6 February 2007; 'Contribution to the EU Energy Strategic Review – Urgent measures are required to improve the functioning of electricity and gas markets', *Alliance of Energy-Intensive Industries*, Brussels 22 September 2006.

[35] 'Contribution to the EU Energy Strategic Review – Urgent measures are required to improve the functioning of electricity and gas markets', *Alliance of Energy-Intensive Industries*, Brussels 22 September 2006.

4.3. Developments to date

The reform of the electricity market began in the early 1990s. This happened at a time when the European Union, led by the European Commission, was recasting the European market.[36] Under this renewed interest in integrating the internal market, 'liberalization of the electricity supply industry was part and parcel of the EU Internal Market Programme'[37], not the least because it was rooted in the founding treaties.

Some have argued[38] that the Commission was the main driver behind the re-launching of the 1992 Internal Market programme and the initiatives towards liberalisation of the electricity market more specifically. The Commission had, in theory, ample measures at its disposal to do so. As Eising has outlined, it could 'have applied the EU competition rules of Article 85, 86 EEC-Treaty against the utilities; it was entitled to initiate infringement procedures according to Article 169 EEC against the Member States; it had the formal power to unilaterally formulate a Commission directive based on Article 90 (3) EEC and on the basis of Article 100a EEC-Treaty it was able to propose a directive that would allow other EU bodies to participate in the liberalization process'.[39]

That said, there were some concerns about the proposed liberalisation of the electricity market, the main concern being security of supply and the question of whether or not this formerly publicly provided service could be provided by private, or semi-private,

[36] Sandholtz and Zysman (1989).
[37] Eising (2002), p.102.
[38] See Eising (2002) on electricity market; see Sandholtz and Zysman (1989) on the general role of the European Commission in fostering renewed activity on European market integration.
[39] Eising (2002), p.104.

companies. The reassuring examples of successful liberalisation[40], and the general 'reduced political concern over security of energy supply'[41] which is said to have dominated political leaders at the time, helps explain how these concerns failed to outweigh the arguments in favour of market integration. This led to the adoption of a first directive in 1996.

This directive introduced competition in generation and supply by requesting management and accounting unbundling[42] (i.e. administrative unbundling) of the various functions that had traditionally been performed by vertically-integrated companies. In addition, it demanded that Member States create independent authorities to settle disputes relating to contracts and to regulate the sector.[43]

Although transmission and distribution activities remained monopolistic[44], the directive set out non-discriminatory rules regarding access to DSO and TSO networks. The Commission's initial proposal outlined two options on how Member States could comply with its requirement to ensure third-party access: either being negotiated between network operators and its users (negotiated third-party access (nTPA)[45] or being

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40 The privatisation of the British electricity market, which had started in 1990, had an important demonstration effect, showing that security of supply could remain guaranteed in a competitive market (Eising (2002), pp. 112-113).

41 Jamasb and Pollitt (2005), p.6

42 This means that generation, transmission and distribution be carried out by separately managed units producing separate sets of accounts (Source: Hancher, L. (1997), 'Slow and Not So Sure: Europe's Long March to Electricity Market Liberalization', *The Electricity Journal*, p.97).

43 Trevino, L. (2008), 'Large industrials and electricity sourcing during the process of liberalisation – Power sourcing strategies according to different market structures', *CDM Working Paper Series*, p.5.

44 Ibid., p.4.

45 Access is negotiated when the conditions are directly determined by the users of the network.

regulated by a public authority (regulated third-party access (rTPA)[46]) through tariffs. Although the Commission had favoured only these options, this strategy elicited strong opposition especially from Parliament.[47] This is why a third option was included, proposed by the French government: the Single Buyer access model.[48] The French favoured this option, as it would allow their incumbents to maintain their strategic position. The 'Single Buyer' could continue to be the main generator, transporter and distributor of electricity.

Furthermore, the new suppliers of the market had to be regulated so as to ensure security of supply. To this end, the directive specified who was legally eligible to contract volumes of electricity from any supplier. These consumers were defined as 'eligible consumers'. Strong disagreement between the French, supported by the Spanish, Irish and Italians, and the coalition of the British and Germans, who opposed the inclusion of 'large consumers' in the definition of 'eligible consumers', resulted in a directive which left its exact definition up to each Member State.[49]

The result was that the level of liberal legalisation of the 1st Directive (96/92/EC) was extremely low[50], leaving Member States a substantial degree of choice in how to

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46 Access is regulated when the main contractual and rate-setting provisions are set by a supervisory public body.

47 Parliament 'proved highly receptive to industry critics' (source: Hancher, L.(1997), p.94).

48 'This concept, modelled loosely on the Northern Ireland system, allows certain categories of customer to contract with a supplier of their choice, and for the Single Buyer – defined as the organization responsible for power procurement and/or transmission system operation – then to purchase the power and deliver it on to the customer at a price equivalent to its own domestic tariff for that category of customer, less the cost of transmission' (source: Hancher, L. (1997), pp. 94-95).

49 Ibid., p.98.

50 Although the aim of directive 96/92/EC had been to create an internal market, the measure resulted in '15 more of less fragmented markets, each liberalised to a different degree' (Source: Boisseleau,

introduce competition, how to regulate their markets and what sort of bodies to establish to do this. The explanation for this low level of liberalisation lies in the relative absence of stimuli demanding liberalisation of the electricity market.[51] As Cameron argues, the rate of technical innovation in the electricity industry is slow and the impact of globalisation or international competition is minimal.[52]

It became clear that in absence of societal actors demanding change, liberalisation of the electricity market could only be obtained through incremental change which would then slowly generate a group of proponents demanding and supporting further liberalisation. The Commission understood this, and actively tried to create a group of proponents by installing an independent EU level institution, the Florence Policy Forum.[53] This institution would help 'structure the new EU energy policy field'[54] and become a constituency supportive of further electricity market integration. At the same time, the Commission ensured adequate implementation of the 1st Directive, using infringement procedures where necessary. Moreover, specialised interest organisations started entering the debate, favouring further liberalisation, such as the European Regulators Group for Electricity and Gas (ERGEG), Eurelectric (industry group representing generators and suppliers), ETSO (transmission system operators) and IFIEC (consumers).[55]

F. and R. Hakvoort (2003), 'The liberalization of the European Electricity Market(s): An Unstructured Restructuring process?', in: J. Myslives, I. Benes, A.D. Owen and A. Plourde (eds.) (2003), *Proceedings of the 26th Annual Conference International Association Energy Economics (IAEE): New Challenges for Energy Decision Makers*, p.1). Hancher, L. (1997) terms it 'a framework in the loosest sense of the word' (p.95).

51 Cameron, P. (2005), 'Creating an Internal Market in Energy: How Can the Tools be More Effective?', *Policy Papers – Florence School of Regulation, Robert Schuman Centre.*

52 Ibid.

53 Eberlein, B. (2008), p.79.

54 Ibid., p.79.

55 See: Meeus et al. (2005), p.27.

The Court's role in assisting the Commission in this has been contested. Eberlein on the one hand concludes that the Court did not prove very helpful and in some sense was even counterproductive in furthering liberalisation, due to the ECJ modifying its 'pro-competition position to give much greater weight to public service obligations in energy supply'.[56] This made it difficult for the Commission to pursue its reforms and generate a group favourable to electricity market liberalisation. Talus on the other hand holds a more nuanced opinion, arguing that although the ECJ was initially very prudent in its rulings, the Court came to effectively contribute to the market opening efforts of the Community.[57] It seems that the answer lies somewhere in the middle, with the Court indeed initially reluctant to get involved, but taking a more pro-active stance as more and more EU legislation was adopted. This clearly is not a pro-active Court going against the wishes of the Member States, but rather a Court operating in those areas where it has been explicitly given the power to do so.

The inadequacy of the 1st Directive led the Commission to the table the 2nd Electricity Directive (2003/54/EC). It foresaw a fully liberalised market by July 2007 and addressed those aspects which the 1st Electricity Directive had not yet addressed or failed to overcome. It was supported by demand from competitors to address these problems.

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[56] Eberlein, B. (2008), p.77 where he is quoting Hancher, L. (1998), 'Delimitation of Energy Law Jurisdiction. The EU and Its Member States: From Organisational to Regulatory Conflicts', *Journal of Energy and Natural Resources Law*. Eberlein (2008) continues: 'the Court had explicitly rebuked the Commission for its strategy of instrumentalising infringement procedures to press for far-reaching policy reforms…(T)hese reforms, the Court argued, required political deliberation and decision and should not be made by itself' (p.77).

[57] Talus, K. (2007), 'Role of the European Court of Justice in the Opening of Energy Markets', *ERA Forum*, p.438. Talus continues: 'At a time when the Commission was the only institution advocating and fighting for an internal market, the Court adopted a careful approach…(W)ith the emergence of secondary legislation … the Court has now adopted a more radical approach and has shown its willingness to go against to the opinion of (many) Member States'(p.448).

One such issue was the definition of 'eligible consumer'. Due to the narrow definition of this term under the 1st Directive, a fully liberalised market for all consumers had not been possible. Therefore the 2nd Directive specified that from 1 July 2004, all non-household customers were eligible to contract volumes of electricity from any supplier. It would then extend this right to *all* consumers by 1 July 2007.[58] The directive also reduced the third-party access options to one: i.e., only regulated third party access (rTPA), as the multiplicity of third-party access options had led to differences in access and tariff regimes and had hampered competition of supply.[59]

Furthermore, the measure of barrier removal (i.e. administrative unbundling), simply obliging companies to present a balance sheet for each activity, had proven an inefficient means to obtain effective separation of TSOs and DSOs. The 2nd Directive therefore required either legal unbundling or ownership unbundling of TSOs and DSOs. Finally, it strengthened the role of the regulator[60], to overcome the shortcomings of the 1st Directive which had allowed reluctant Member States to install extremely weak regulators.

Obtaining political agreement on this directive was again difficult, mainly due to the opposition of France and Germany. France initially opposed the draft due to concerns about the effects of liberalisation, arguing it was 'too early to conclude that liberalisation had been a success'.[61] Germany, on the other hand, opposed the directive's requirements

[58] Meeus et al. (2005), p.27.

[59] According to Meeus et al. (2005) this multiplicity of options had proven to have been one of the main obstacles to the creation of an internal electricity market (p.27).

[60] The regulator was required to approve tariffs, monitor congestion management, and act as a dispute settlement authority (Ibid., p.27).

[61] Newbery (2002), p.18.

of an independent regulator and for ex ante regulation.[62] Despite this opposition, the outcome was quite significant. Except for some changes to the deadlines, the key elements of the Commission's initial proposal were clearly retained in the Commission's Common Position.[63] When transposed, it would allow industrial consumers and household markets to freely choose their supplier as of July 2004 and July 2007 respectively.

4.4 The 3rd Electricity Directive (2009/72/EC)

The internal energy market again rose to the political agenda in 2005. The sector inquiry of DG Competition into the state of the internal electricity market[64] had revealed some 'serious malfunctions' in the market for industrial consumers.[65] The main problems that hampered the creation of a truly internal market were market concentration and vertical foreclosure, both negatively affecting network integration.[66] As Glachant and Lévêque describe it, referring to a comment by Leigh Hancher, 'the First Directive allowed nearly everything, except…an integrated internal market...[and] the Second Directive…[m]anaged to reduce the scope of this diversity, but not to eliminate it'.[67]

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62 Ibid., p.18.

63 Website International Law Office (ILO), 'Council Adopts Common Position on Amendments to Electricity Directive', by Robert Lane, 31 March 2003.

64 *Sector Inquiry*, European Commission (2007).

65 'Liberalising the EU Energy Sector', *Euractiv*, 05 May 2008.

66 For more detailed information see: *Prospects for the Internal Gas and Electricity Market*, Commission Communication, COM (2006), Brussels 10 January 2007, p.6. See Table 1 in Appendix 3 for an overview of the main failures within the electricity market per country.

67 Glachant and Lévêque (eds.) (2009), p.4.

Whilst some of the causes underlying these problems were technical in nature, the root of the problem seemed to be political unwillingness on the part of the Member States to establish a true internal market (see Table 5 in Appendix 3 for an overview of countries failing to comply with EU directives). As the Commission argued, 'many Member States have failed to implement the basic requirements of management and account unbundling that are already required'[68] and by March 2005, 'no less than ten Member States (including Germany and Spain) had still failed to transpose one or both of the directives'.[69] Although the Commission had, on the basis of EU competition law, actively pursued the liberalisation of the electricity market (this activity is illustrated by Tables 5-7 in Appendix 3), some Member States kept lagging behind and problems remained.[70]

The Commission's reaction was to introduce a 3rd Energy Package on 19 September 2007, aimed at resolving these problems (see Table 2 in Appendix 3 for the Commission's proposed solutions to the main problems). The 3rd Energy Package fit in with both the wider aim of creating an internal market and the Lisbon Strategy (competitiveness and sustainability). Three pieces of legislation were tabled to liberalise the electricity sector: the draft 3rd Electricity Directive (COM (2007) 528 final)[71], Regulation 714/2009 on conditions for access to the network for cross-border exchanges

[68] Centraal Plan Bureau (CPB) (2006), *Liberalisation of European energy markets: challenges and policy options*, p.15 referring to page 80 in the Technical Annexes of the European Commission's 2005 *Report on Progress in Creating the Internal Gas and Electricity Market*.

[69] Cameron (2005).

[70] For an overview of the main problems per country in the electricity market in 2006, see Table 1 in Appendix 3.

[71] *Draft 3rd Electricity Directive*.

in electricity[72]and Regulation 713/2009 establishing an Agency for the Cooperation of Energy Regulators.[73] In its renewed attempt to liberalise the electricity market, the Commission this time applied a dual strategy of barrier removal (negative integration) on the one hand and enhanced EU regulation (positive integration) on the other hand.

The scope of the 2009 directive was wide and included most aspects of the electricity market. However, it failed to re-address DSOs. The reason for this exclusion was that the deadline for the unbundling of DSOs, as specified in the 2nd Electricity Directive (Art. 30(2)), was 1 July 2007 and had not yet passed at the time the directive was drafted. It was therefore not felt to be appropriate or possible to suggest changes in this area.[74] To this end, I rate the scope of this directive as medium-high.

Turning to the degree of market integration, the draft proposed a strong measure, i.e. full ownership unbundling. By enforcing complete separation of ownership between transmission networks and generation/supply interests (full ownership unbundling), the Commission tried to overcome market concentration and vertical foreclosure.

Previous directives had shown that legal unbundling had not been an effective means of overcoming problems resulting from vertically integrated companies. There are two

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72 *Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1128/2003.*

73 *Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators.*

74 The Commission's *Impact assessment accompanying the legislative package on the internal market for electricity and gas*, Brussels (2007) argues against further measures of DSO unbundling by stating that 'the benefits from further unbundling at the distribution level are not overwhelmingly higher than costs. Due to the recent entry into force of the last liberalisation date in a number of Member States, it would seem to be disproportionate to go a step further in forcing unbundling in this activity' (p.4).

reasons for this. First, legal unbundling does not necessarily resolve the incentive of TSOs in vertically integrated companies to treat their affiliated company better than others. Whilst the TSO is required to grant non-discriminatory access to competitors, incentives remain to defect from this. Second, in a similar vein, non-discriminatory access to information cannot be guaranteed under the current situation of mere legal separation. Although most of the problems resulting from vertically integrated companies could also be overcome by enhanced regulation, ownership unbundling is a measure with a higher guarantee of success given that it is not susceptible to Member State interpretation.

To facilitate true competition, the Commission argued that it was necessary that network investments and access to networks should be placed under the management of an independent organisation. The Commission therefore proposed full ownership unbundling to overcome problems regarding distorted network investments and discriminatory access. This is not an uncommon approach in the electricity market and, as Table 4.2 below shows, had already been widely applied in a large number of European countries.

TABLE 4.2: Unbundling models of energy distribution networks in several European countries

	TSO	DSO
Accounting unbundling	-	Finland, Germany, Norway Portugal
Management unbundling	Luxembourg	France, Ireland, Luxembourg
Legal unbundling	Austria, Belgium, Denmark, France, Germany, Greece, Ireland.	Austria, Belgium, Denmark, Italy, Netherlands, Spain, Sweden, United Kingdom
Ownership unbundling	Finland, Italy, Netherlands, Portugal, Spain, Sweden, United Kingdom, Norway	-

(Source: CPB Report (2005), *Vertical separation of the energy-distribution industry: an assessment of several options for unbundling*, p.15; Jamasb and Pollitt (2005), p.10).

Ownership unbundling, however, is not a perfect solution to the problems posed by vertically integrated companies. The reason was that this inevitably leads to costs and benefits, but that there is no consensus on whether or not the benefits outweigh the costs. Where some economists have formulated their reservations against ownership unbundling[75], others such as Jamasb and Pollitt argue that despite these costs, ownership unbundling does actually result in net benefits. Acknowledging this uncertainty about its actual effects, it seems it can reasonably be accepted that ownership unbundling functions better than legal unbundling in overcoming the main barriers within the internal electricity market (i.e. vertically integrated companies)[76] and can therefore be taken as a strong measure of liberalisation.

[75] For example, the UK regulator Ofgem recently questioned 'whether the current regulatory arrangements will continue to provide sufficient incentives to invest in efficient levels of new interconnection' (see: Ofgem, 'Open Letter on next steps from Ofgem's consultation on electricity interconnector policy'. Available from: http://www.ofgem.gov.uk/). Also, see the vast amount of research referred to by Pielow, J.C., G. Brunekreeft and E. Ehlers (2009), 'Legal and economic aspects of ownership unbundling in the EU', *Journal of World Energy Law& Business* in footnote 8 on page 97 of that article.

[76] As was elaborated on before, there is good reason to assume that vertically integrated companies are 'the biggest', problem in constructing a truly European grid. See: Vasconcelos (2009), pp. 333-334.

Aside from full ownership unbundling, the Commission also allowed for an alternative option on how to comply with unbundling requirements: an Independent System Operator. Under this option, companies involved in electricity production and supply were allowed to retain their network assets but had to shift the commercial and investment decisions to an independent company (ISO) designated by national governments.[77] To ensure the application of this barrier removal measure, it made certification (Art. 8) completely dependent on compliance with this measure. This means that certification may not be given to TSOs if companies fail to comply with the rules on unbundling (Art. 8b). Together they constitute the directive's degree of market integration.

At the same time, the Commission established an elaborate regulatory framework. The past two directives had led the Commission to realise it had made a fundamental ideological error in assuming that liberalisation merely through negative integration, i.e. barrier removal, would lead to the desired form of market integration (i.e. competition, innovation and security of supply). The Commission realised that 'a more proactive regulatory approach'[78] was needed. To that end it proposed a largely supranational regulatory framework, based on high levels of delegation, that would regulate TSOs, DSOs, foster higher levels of cooperation between countries and contribute to better interconnectedness and a true level playing field within the electricity market.

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[77] Given the problems involved with this option, this is more of a symbolic compromise rather than a feasible alternative to ownership unbundling. See: Torriti, J. (2008), 'Does the Impact Assessment on the 'Third Package' provide the correct economic forecast for the liberalisation of the EU energy markets?', *EUI Working Papers*, pp. 7-9

[78] Interview functionary at DG Transport and Energy (DG TREN), Brussels 17 February 2010. See also: Vasconcelos (2009), p.331.

The level of delegation in this directive is extremely high. This was chosen so as to ensure fair access, good maintenance of the network and guaranteed transposition of legislation. The directive would enhance the power and independence of the national regulators (Arts. 35-37) and create an independent body designed to enhance cooperation between TSOs. Where cooperation between TSOs had previously been organised on a voluntary basis under the 2nd Electricity Directive, the Commission proposed (under Regulation 714/2009)[79] that this should be formally regulated by a new organisation: ENTSO-E.[80] This body would be endowed with the task of harmonising standards regarding companies' access to grids, ensuring coordination to allow multiple network operators and co-ordinating and planning network investments.[81]

To reduce differences in regulatory practice in the European Union and settle cross-border disputes between regulators, the Commission established a European regulatory authority (through Regulation No. 713/2009): the Agency for the Cooperation of Energy Regulators (ACER). This agency was endowed with the power to review decisions by national regulators on a case by case basis. Its role would be preparatory and advisory, as its power to act would mainly lie with the European Commission.

Power was also delegated to the Commission, which had been given the task of examining notifications provided by Member States (8(b)) regarding the certification of a TSO, to initiate proceedings and raise objections to the decisions made by regulatory

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79 *Regulation (EC) No 714/2009*

80 European Network of Transmission System Operators for Electricity. Established by *Regulation (EC) No 714/2009.*

81 For more information see *Regulation (EC) No 713/2009* . Also see European Commission's *Explanatory Memorandum to 3rd Energy Package,* Brussels (2007), p.11-12.

authorities. The most important point here is that all powers delegated to the Commission will be executed under comitology procedure (Art. 46(2) refers to Decision 1999/468/EC); a procedure which, academic research has shown, tends to favour the influence of the European Commission.[82] In sum, the wide scope of the directive, the high level of delegation and the medium-high degree of market integration led me to conclude that the draft directive's level of liberal legalisation is rather high.

TABLE 4.3: Level of liberal legalisation of initial Commission proposal

	Scope	Delegation	Degree of market integration
Commission Proposal	Wide: all aspects of electricity market; DSOs remain excluded	High: strengthened delegation of power to NRAs; creation of two new independent bodies: ENTSO-E (cooperation TSOs) and ACER (Agency for the Cooperation of Energy Regulators).	Medium to high: Ownership unbundling: full ownership unbundling or ISO (Independent System Operator).

4.5 Negotiating the 3rd Electricity Directive

The initial view of the Commission was that a directive calling for ownership unbundling would not elicit too much opposition. After all, during the Council meeting in May 2007, the Member States had agreed on a European Action Plan (2007-2009) which had called for full implementation of existing internal market legislation, effective separation of supply and production activities from network operations (unbundling)[83] and further harmonisation of the powers and independence of national energy regulators.[84] A majority of Member States had proceeded with unbundling and 16 of them would in 2008

82 See: Blom-Hansen (2008).

83 It should be noted that the Council called for 'unbundling' in general, not specifically for 'ownership unbundling'.

84 *Conclusions Council Meeting - Brussels 7 and 8 March 2007*, 2 May 2007.

already go beyond the requirements of legal and functional unbundling of Directive 2003/54/EC, having fully implemented ownership unbundling.[85]

Nevertheless, despite the fact that a majority of countries favoured this directive and were supportive of ownership unbundling, a stalemate in Council occurred prior to the tabling of the directive when France and Germany openly opposed the directive. The two issues that were at the core of this opposition were: (a) ownership unbundling and (b) the directive's provisions on third-country access.[86]

Where the Netherlands and Spain were strong proponents of full ownership unbundling, the French and the Germans were strongly opposed as their energy giants (i.e. RWE and EDF respectively) 'remained vehemently opposed to the breaking up of their assets through unbundling'.[87] They claimed this would not necessarily lead to lower prices, rather to *market* prices. At the same time Germany, supported by Austria, argued that ownership unbundling would be unconstitutional as it would go against property rights.[88]

Germany was most strongly opposed to ownership unbundling. Due to the high presence of vertically integrated companies in the country, its industry heavily opposed ownership

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85 *DG TREN Staff Working Document – Report on Progress in Creating the Internal Gas and Electricity Market*, COM (2009) 115, Brussels 11 March 2009. This report showed that ownership unbundling had in 2008 been implemented in: Denmark, Finland, Ireland, Italy, Netherlands, Portugal, Spain, Sweden, United Kingdom, Norway, Lithuania, Poland, Czech Republic. Romania, Slovakia, Slovenia. See also: Milciuviene, S. and A. Tikniute (2009), 'The Ownership Unbundling of Electricity Transmission System Operators: The European Union Policy and the Case in Lithuania', *Engineering Economics.*

86 Interview German energy counsellor at German Permanent Representation, Brussels 11 February 2010; interview French energy counsellor at French Permanent Representation, Brussels 18 February 2010.

87 See : 'Liberalising the EU Energy Sector', *Euractiv*, 5 May 2008.

88 Interview German energy counsellor, Brussels 11 February 2010.

unbundling. It therefore proposed enhanced regulation to tackle the problems at hand rather than using ownership unbundling for this.[89]

The Commission had tried to break Member States' – in particular Germany's – resistance to ownership unbundling in the years preceding the proposal through infringement procedures on the basis of competition law.[90] The Commission was operating on three fronts. First, DG Transport and Energy (DG TREN) ensured implementation of directives. Second, DG Competition was pursuing liberalisation in the electricity market on the basis of state aid and, thirdly, on the basis of anti-trust law (see Tables 5-7 in Appendix 3). Its activities slowly changed the practice on the ground and helped reduce resistance towards energy market liberalisation, turning opposition into support.

More recently, the Commission increased its activities through antitrust cases against German electricity companies (e.g. E.ON, RWE)[91] following inspections carried out in the German electricity sector in December 2006. Although this led the German energy company E.ON to sell-off its high voltage electricity grid to settle ongoing EU antitrust inquiries, it did not weaken the German government's opposition to ownership unbundling.[92]

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89 Ibid.

90 Interview functionary of DG Transport and Energy (TREN), Brussels 17 February 2010.

91 This led E.ON to settle the ongoing antitrust cases in the electricity sector by committing to sell its electricity transmission system network to another operator on 28 February 2008. (Source: 'Memo/08/132: Antitrust: Commission welcomes E.ON proposals for structural remedies to increase competition in German electricity market', *Press Release European Parliament*, 28 February 2008).

92 It led Germany's position to stiffen. This was confirmed during an interview with the German energy counsellor, Brussels 11 February 2010.

The fact that France joined this opposition came as a surprise to the Commission.[93] They had assumed France would not oppose the directive on grounds of ownership unbundling, as in France the network operators and the supply and production activities are legally separated in different ministries. What was overlooked, however, was the fact that President Sarkozy is legally the head of both. As such, France would not comply with the Commission's provisions of unbundling as set out in the draft directive. In addition, France was generally concerned about the effect of full liberalisation on its electricity prices. As has already been said, national regulation had led to lower electricity prices in France compared to the rest of Europe.[94] This opposition became formalised when a group of eight Member States (FA, DE, AT, BG, GR, LV, LU, SK) sent a letter expressing opposition to full ownership unbundling to the Commission.[95]

Aside from these concerns, France and Germany also opposed the directive's protectionist provisions on third-country access.[96] Where the Eastern European countries were very concerned about security of supply, supporting a protectionist stance, Germany and France (this time supported by the UK[97]) were again fervently opposed, fearing that this would harm the relationship with their suppliers (esp. Germany feared upsetting its relationship with Gazprom).

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93 Interview German energy counsellor, Brussels 11 February 2010; Interview functionary at DG TREN, Brussels 17 February 2010.

94 The reason is that France obtains a large share of its electricity from nuclear power (approx. 75%) (source: http://www.world-nuclear.org/info/inf40.html). Whilst producing cheap energy now, the initial investments were high and were paid for with taxes, making French politicians reluctant to share this cheap energy source with out-of state consumers.

95 'Commission set for climb-down on 'ownership unbundling'', *Euractiv*, 3 September 2007.

96 Interview German energy counsellor, Brussels 11 February 2010.

97 The UK did not want Commission involvement regarding energy agreements which the British government would conclude (for example with Gazprom). Interview British energy counsellor, Brussels 18 February 2010.

While these initial reactions made it clear that the resistance to the legislative proposals had been underestimated by the Commission, this opposition became particularly problematic for the prospects of the directive when powerful national political actors of France (President Sarkozy) and Germany (Chancellor Merkel) directly interfered with the negotiations.

Chancellor Merkel openly decided against the package in January 2008. This gave Germany credible veto power in Council. Chancellor Merkel was supported in this position by the German Commissioner Verheugen (former Commissioner for Enterprise) and the French President Sarkozy, who all preferred the status quo over a new package.[98] Germany's resistance was said to have been furthered by Commissioner Kroes's presentation of the 3rd Energy Package, where she referred to examples taken from the German market to illustrate ongoing failures in the electricity market.[99] In a similar vein, the public statement of rapporteur Eluned Morgan (PES) made after first reading in Parliament, highlighting the fact that Germany and France were outvoted[100] did not help soften the German position either. Rather, Germany's position stiffened.

The effect of this direct involvement was significant as Presidents and Chancellors are generally not inclined to involve themselves directly in European-level negotiations at

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98 See: 'Commission set for climb-down on 'ownership unbundling', *Euractiv*, 3 September 2007. In addition, Germany's power within the Commission was said to have been even larger when Chancellor Merkel informally threatened to oppose re-election of Commission President Manuel Barosso (source: interview German energy counsellor, Brussels 11 February 2010). Although no hard proof can be provided for this theory, it seems plausible that this threat made the President more inclined to accommodate Germany's wishes.

99 Interview German energy counsellor, Brussels 11 February 2010.

100 '3rd energy package: after electricity, Industry MEPs turn on Gas', *Press Release European Parliament*, 15 May 2008.

such an early point in the negotiations. While acknowledging that this direct involvement is in no way similar to the mass mobilisation of the general public, it is interesting to note that the effect of this direct involvement was slightly akin to the effect of politicisation: it led to a strengthening of the relative influence of the German and French voice in Council. The result was a clear stalemate in Council where France and Germany, supported by Austria, Bulgaria, Cyprus, Greece, Latvia, Luxembourg and Slovakia, created a blocking minority. It also drove the Commission to slightly change its proposal prior to the tabling on 19 September 2007 (i.e. inclusion of ISO option and a reciprocity clause (Art. 11)).[101]

First Reading in Parliament[102]

The majority of Parliament stood positively to this directive, mainly based on expectations of lower electricity prices for consumers and higher security of supply.[103] The Parliament amended the directive on some points (see Table 4 in Appendix 3 for an overview of the amendments proposed by Parliament), with the majority of its amendments concerning consumer protection, fighting energy poverty, strengthening of

[101] To maintain a level playing field, and prevent situations where actors of third countries, without the requirement of unbundling, could buy networks in Europe, the Commission included a clause (Art.11) which specified that companies from a third country will have to 'demonstrably and unequivocally comply with the same unbundling requirements as EU companies'. The direct implications of this article are that national competence in this area are removed and that any bilateral agreements with third countries will be dealt with exclusively at Community level.

[102] The articles referred to here correspond to the articles of the final directive 2009/172/EC unless otherwise stated.

[103] However, a lowering of prices is by no means guaranteed. As the EU affairs manager of the German electricity company RWE in an interview on 23 February 2010 in Brussels pointed out, market liberalisation will not necessarily lead to lower prices – it will lead to *market prices*.

national regulators and ACER and ensuring security of supply.[104] On none of these issues did Parliament face strong internal differences.[105]

The issue of ownership unbundling, however, divided the Parliament. It was a division along national lines rather than ideological party lines. As MEP Alejo Vidal-Quadras (EPP-ED) had rightly predicted prior to the vote[106], of all MEPs that supported the third way proposal, 'nearly all hail from Member States opposed to breaking up energy firms'.[107] However, Parliament agreed on maintaining the Commission's proposal on this issue.

The Parliament even rejected the inclusion of alternatives to ownership unbundling and wished to revert to the Commission's initial idea of full ownership unbundling as the only unbundling option. This strengthened the directive's degree of market integration. This amendment regarding ownership unbundling was remarkable given the compromise reached by the Council on 6 June 2008. It illustrated the Parliament's commitment to maintaining a strong article on ownership unbundling. Rapporteur Morgan accused the Commission of bending to the will of a minority of Member States by including the ISO option, claiming: 'You've backtracked. We haven't'.[108] It should be noted, though, that this decision to oppose the French/German 'third way' was only supported by a narrow

[104] For an overview, *European Parliament Community Internal Market in Electricity - Final Text adopted on 17 June 2008 in Strasbourg*.

[105] Telephone interview British MEP (PES), member of the leading Industry Research and Energy (ITRE) committee, 6 April 2011.

[106] 'The national element will have considerable weight in this vote', says MEP Vidal-Quadras in a Euractiv interview. Source: 'MEPs back EU plans to dismantle energy behemoths', *Euractiv*, 7 May 2008.

[107] See: 'MEPs back EU plans to dismantle energy behemoths', *Euractiv*, 7 May 2008.

[108] 'Parliament insists on Splitting energy giants', *Euractiv*, 19 June 2008.

majority in the leading ITRE committee (26 MEPs voted against it, while 22 were in favour and 3 abstained).

In addition, the Parliament aimed to increase the level of harmonisation through e.g. the amendments ensuring the compatibility of technical rules, standardised rules on management congestion and between distributors and metering system operators, and amendments to coordinate network codes (Art. 5; 6(2); Art. 36; Art. 38 (2b); (2c)). These amendments strengthened the directive's degree of market integration by enhancing harmonisation and removing possible barriers resulting from regulatory differences.

The Parliament slightly widened the scope by including more specific provisions on the issue of regulated prices. The 2nd Electricity Directive (2003/54/EC) had allowed 'Member States to implement regulated price schemes, provided that they are clearly defined, transparent, non discriminatory, verifiable, guarantee EU energy companies equal access to national consumers and do not impede the opening of the market'.[109] The Parliament hoped to overcome existing problems in this area by specifying duties for Member States, companies and regulatory authorities. Although these amendments address real problems, it should be noted that the main problems concerning regulated prices which currently hamper cross-border trade are actually the result of inadequate

[109] Website EU Business, 'EC infringement exercise concerning cross-border energy network access and regulated prices – briefing', posted 25 June 2009 (http://www.eubusiness.com/topics/energy/network-access.01/)

implementation of existing EU directives.[110] Mere transposition of legislation would already resolve many existing problems.

Finally, the Parliament enhanced the level of delegation by assigning more powers to the NRAs, and specified more duties for the Member States as a means of enhancing public service obligation and consumer protection (Art. 3). The Parliament set out enhanced policy objectives, extra duties and extra powers for NRAs regarding congestion management.

A final issue which proved important to the Parliament, but which does not directly affect the directive's level of liberal legalisation, was the issue of customer rights. The Parliament's approach towards ensuring customer rights was to include specific rights consumers were entitled to (such as the right to information, the right to change supplier and the right to redress options) and to specify what NRAs, electricity companies and Member States should guarantee (smart metering, consumer complaint procedures, same conditions for all users). For a complete overview of Parliament's most important amendments, see Table 4 in Appendix 3.

[110] In 2006, the Commission sent letters of formal notice to six countries (Estonia, France, Ireland, Italy, Latvia and Spain) on the basis of regulated prices (Source: 'Memo/06/152 - Infringement procedures opened in the gas and electricity market sector, by Member State', *EU Press Room*, Brussels, 4 April 2006). In 2009, Greece, Lithuania and Romania did not comply with the EU regulations on regulated prices in the electricity market, which led the Commission to send them a letter of formal notice (Source: 'Memo/09/296 - Energy infringements. Country Fact sheets', *EU Press Room*, Brussels, 25 June 2009). See also Table 5 in Appendix 3.

TABLE 4.4: Effect of Parliamentary amendments on the directive's level of liberal legalisation

	Scope	Delegation	Degree of market integration
Parliament's Amendments	Wider: include regulated prices.	Strengthened: powers of NRAs.	Increased: only one option (i.e. ownership unbundling); common standards (increased harmonisation).

A sizeable majority in Parliament supported the amendments of the Morgan report in first reading on 18 June 2008 (449 votes in favour and 204 votes against). The Parliament amended the directive in a way that would allow for higher levels of liberal legalisation than originally proposed. Its common position, as amended and adopted on 18 June 2008, widened the directive's scope, enhanced delegation and strengthened its degree of market integration.

Council's amendments

Whereas the internal disagreement in Parliament was overcome by simple majority voting, the Council had to face and appease its blocking minority. Several changes were necessary to reach internal agreement within the Council, most of which weakened the directive's level of liberal legalisation. First, the Council agreed on the inclusion of a third unbundling option in the directive (Art. 17-23): the independent transmission operator (ITO) option. The most significant aspect of this model was that it allowed supply companies to *own* and *operate* the network, but required that 'the management of the network must be done by a subsidiary of the parent company which can make all financial, technical and other decisions independently from the parent company'.[111] This option was drafted by the main opponents of ownership unbundling, i.e. France and

[111] 'Memo/11/125: Questions and Answers on the third legislative package for an Internal EU gas and electricity market', *EU Press Room*, Brussels 2 March 2011.

Germany[112], and would free large German and French vertically integrated companies from the obligation of ownership unbundling. Under the Slovenian presidency, the Member States informally agreed on a third unbundling option: the Independent Transmission Operator option (ITO).[113] Inclusion of the ITO model weakened the directive's degree of market integration, as it allowed for vertically integrated companies to stay in place.

In exchange for this, the proponents of ownership unbundling, countries such as the Netherlands, Denmark, Spain, Portugal and Poland, obtained the so-called reciprocity clause (Art.9 (12)). They argued this Article was necessary to prevent energy producers who had not complied with the unbundling rules from buying up transmission businesses of energy companies where full unbundling had already been introduced, thereby in a simple way ensuring that a level playing field was maintained.[114]

Second, the Council further weakened the directive's degree of market integration by adding derogations to the unbundling principle basically appeasing all that were against.[115] It included the 'Scottish Clause' (Art.9(9)) which determined that unbundling measures and ISO measures do not apply when arrangements are in place which guarantee a more effective independence of the transmission system operator than the ITO regime. In a similar vein, derogations from Art. 9 were outlined for emergent or

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112 This option was tabled by E.ON and subsequently supported by the Germans, the French and the Austrians. Interview regulatory affairs manager E.ON office Brussels, 9 February 2010.

113 'Press Release - 2875th Council Meeting – Transport Telecommunications and Energy', *Press Release European Parliament*, Luxembourg 6 June 2008

114 Interview German energy counsellor, Brussels 11 February 2010. See also: 'Energy Ministers clinch deal on liberalisation', *Euractiv*, 13 October 2008.

115 Interview functionary of DG TREN, Brussels 17 February 2010.

isolated markets (Cyprus, Malta and Luxembourg) in Art. 44. Finally, an adjustment was made that exempted joint ventures in Finland from the unbundling provisions.[116] These exceptions inevitably further weakened the original unbundling measure.

Third, the Council loosened the guarantees which the Commission had incorporated to regulate third-country access to transmission operators and networks (the so-called Gazprom clause, Art. 11). This was the direct result of strong UK and German opposition to the initial proposal of the Commission.[117] Under the 2003 directive, Member States had been able to negotiate bilateral investment clauses individually. The draft 3rd Electricity Directive, however, would have increased the role of the Commission in deciding on who should be granted access to the market. It 'would have acted as a sort of "EU investment veto", preventing companies in third countries like Russia from acquiring European transmission assets unless they grant EU firms the same legal certainty and market-access rights as those enjoyed by foreign firms operating on EU soil'.[118]

Especially small countries who might find it difficult to oppose strong third country pressures favoured the involvement of the Commission in deciding whether the take-overs were allowed or not. Germany, on the other hand, was particularly concerned about the effect this would have on its relationship with Gazprom, its main gas provider.

116 Ibid.

117 Interview energy counsellor at the British Permanent Representation, Brussels 18 February 2010; interview German energy counsellor, Brussels 11 February 2010.

118 'Energy Ministers clinch deal on liberalisation', *Euractiv*, 13 October 2008.

According to a German official, Germany in no way wanted to disturb relations with Russia on this issue, as their dependence on Russian energy is so high.[119]

The Council's common position, to the disappointment of the Baltic States and Poland, reflected Germany's and the UK's concerns.[120] The Council agreed that TSOs of third countries have to respect the same unbundling rules as Community TSOs. However, it stipulated that this decision primarily lies with the *Member States* rather than the Commission (as Parliament had wanted). Only a bilateral political agreement will be required, allowing Member States to negotiate bilateral investment clauses individually, rather than involving the European Commission.[121] The effect of this amendment on the level of liberal legalisation was positive, as it facilitated the access of third-country actors to the European market.

That said, one should acknowledge that, as the analysis by Herbert and Smith shows, although the third country clause was softened, the initial *principle* of 'the application of the unbundling regime to non-EU companies and tight controls over third country investments in EU transmission system operators remained firmly established'.[122] Authorisation can be refused if out-of-state companies have not complied with the unbundling requirements or when their 'market entry would jeopardise the Member

119 Interview German energy counsellor, Brussels 11 February 2010.
120 'Energy Ministers clinch deal on liberalisation', *Euractiv*, 13 October 2008.
121 Ibid.
122 'The EU's Third Energy Package: tighter control over Europe's transmission network businesses', by Haigh, L., M. Newberry and S. Goldberg, *Herbert Smith LLP*, 12 May 2009.

State's of the EU's security of supply'.[123] Therefore, the spirit of the article was largely kept.

Finally, a general change which the Council made to the directive concerned the wording used when delegating power to the Commission. Where the directive had initially specified that the Commission would 'initiate proceedings', the Commission will now 'examine the case further' (Art. 37), thereby slightly weakening the role of the Commission in establishing the electricity market. As these changes were only minor, I argue that the overall level of delegation was unaffected and remained high.

Crucial to obtaining agreement, but not affecting the directive's level of liberal legalisation, was the inclusion of a level playing field clause (Art.43). This was pushed for mainly by the Netherlands and Spain, who were concerned about foreign, not unbundled companies buying up unbundled transmission networks in their country.[124] Even though Art. 11 (certification in relation to third countries, a.k.a. 'Gazprom clause') and Art. 9(12)[125] already ensured that third country companies abide by the same rules as EU companies[126], this did not alleviate Dutch and Spanish concerns. It led to the inclusion a 'level playing field' article (Art.43), which would allow Member States to take measures to ensure a level playing field.

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123 Ibid.

124 Heated debates in the Dutch Parliament had put pressure on the Dutch minister of Economic Affairs (Van Der Hoeven) to obtain a safeguarding clause in the directive which would prevent vertically integrated companies from acquiring in an unbundled market such as the Netherlands. This proved legally impossible to guarantee. The Spanish were similarly concerned that their transmission systems would be taken over by French EDF. Interview with functionary at DG TREN, Brussels 17 February 2010.

125 This states that undertakings performing any of the functions of generation or supply shall not be able to take control of a TSO from a Member State that has opted for full ownership unbundling

126 This means unbundled networks in the European market cannot be taken over by non unbundled third country companies.

Important as this amendment was for obtaining overall compromise, the legal implications of this article, in the way that the Dutch and Spanish had envisaged, can be questioned.[127] Given that ownership unbundling, ISO and ITO options all qualify as a legal form of unbundling as defined in the directive, the level playing field clause cannot prevent companies that are not ownership unbundled (but *are* ISO or ITO unbundled) from acquiring assets from *ownership unbundled* companies. Even when national law does not allow for alternative options besides ownership unbundling (e.g. this is the case in the Netherlands), it still seems legally impossible to block outside companies from buying assets, as this would violate the free movement of capital. According to a German official, this was the reason why all members of the Council could agree to this amendment; its practical implications would be negligible.[128] Art. 43 was therefore more of a symbolic victory than a significant alteration of the directive, but crucial for gaining Dutch and Spanish support for the compromise.

It should be noted that aside from these amendments, the Council also rejected a large number of Parliamentary amendments on delegation. The Council refuted the Parliament's amendments [129] on regulated prices and its amendments specifying companies' duties (e.g. amendment 3(9b)) to spend electricity revenues from household customers on energy efficiency programmes; the proposed amendment on the need for electricity generators to take account of the EU emission trading scheme Art. 6(b(ib)) was

[127] 'Minister Responds to Debate on Ownership Unbundling and Privatization', by Max Oosterhuis and Roland de Vlam, *International Law Office (ILO)*, 19 January 2009.

[128] Interview with German energy counsellor, Brussels 11 February 2010; interview deputy head of unit DG TREN, Brussels 23 February 2010.

[129] The article numbering referred to in this paragraph corresponds to the numbering used in the *European Parliament legislative resolution of 18 June 2008 on the proposal for a directive of the European Parliament and of the Council amending Directive 2003/54/EC concerning common rules for the internal market in electricity*, COM(2007), Strasbourg, 18 June 2008.

refuted, which, according to the Council, went too far in regulating electricity companies. Similarly, the Council opposed the general tendency of the Parliament to harmonise regulation. Therefore, rather than agreeing to the wording 'harmonisation', it changed this into either 'integration' or 'ensuring compatibility' (e.g. Art.6 on regional cooperation; proposed amendment to Art. 9(f); Art 38 (2b) & (2c) on regulatory regime for cross-border issues). The general trend towards the amendments on consumer rights was that the Council rejected the amendments that detailed specific Member State responsibilities (proposed amendments to Art.3 (6); 3(7); 3(9b); 21(2A) & (2B)), but accepted those on universal rights, smart-metering, single points of contact, ombudsman and instalment of complaint procedures. In total, out of the 156 amendments adopted by the Parliament the Council rejected 106. This is a substantial amount, and explains why the Parliament was eager to reintroduce a large number in second reading.

In sum, the changes made resolved the opposition within the Council. Germany remained sceptical, but was alone in this strong opposition. It had even lost the support of the French, who had been satisfied by the changes made. Added to this was France's eagerness to conclude this dossier under their upcoming presidency (July-Dec 2008). At the same time, the proponents of the initial draft saw the inevitability of these changes if any agreement was to be reached at all.[130] To that end, the Commission accepted all these changes.[131]

[130] Interview British energy counsellor, Brussels 18 February 2010 ; interview Dutch MEP (EPP-ED) member of the ITRE committee, Brussels 17 February 2010.
[131] Interview functionary DG TREN, Brussels 17 February 2010.

TABLE 4.5: Effect of Council's amendments on the directive's level of liberal legalisation

	Scope	Delegation	Degree of market integration
Council's Amendments	No change*: it opposed the EP's inclusion of regulated prices.	Slightly weakened: reduced power of Commission (certification TSOs).	Reduced: additional third unbundling option (ITO), Scottish clause, 'Finnish' clause, exceptions Cyprus, Malta and Luxembourg. Strengthened: changes to third-country access provisions

* this means the text corresponds to that proposed by the Commission

Second reading in Parliament – final compromise

To prevent a conciliation procedure, many trialogue meetings were organised during second reading. A breakthrough was made when the Parliament finally decided to accept changes to ownership unbundling.[132] Although the Parliament had staunchly opposed any changes to the unbundling principle, it also knew that the issue was crucial to the fragile common position of the Council.

By weakening its stance on this particular issue, the Parliament managed to obtain significant bargaining power to get many other amendments accepted (see Table 4 in Appendix 3 for a complete overview of Parliament's accepted amendments in second reading).[133] Whether this was purposefully done or not remains unsure. The fact is that by taking a fierce stance on an issue which they knew was impossible to maintain, they 'bought' leverage vis-à-vis the Council to obtain acceptance on those issues important to the Parliament: customer rights, harmonisation, strengthening powers of NRAs and task of DSOs.

Where the Council had initially rejected a large majority of the Parliament's amendments, it proved very successful in amending the directive in second reading. It

[132] Interview Dutch MEP (EPP-ED) member of the ITRE committee, Brussels 17 February 2010.
[133] Telephone interview British MEP (PES), member of the ITRE committee, 6 April 2011.

reintroduced a majority of its initial amendments but phrased them in a more balanced way by changing 'Member States' into 'the regulatory authorities where Member States have so provided, or Member States'.

The Parliament also successfully enhanced customer rights.[134] Although the initial idea of a Consumer Charter was removed, the Parliament's amendments ensured the right for energy customers to change suppliers within three weeks free of charge, it enhanced access to information and compensation for service failures and set up complaint procedures.[135] Moreover, the text now requires Member States to guarantee universal service to all household customers. The Parliament amended Annex 1 of the Directive so as to install complaint procedures and detail the powers of NRAs regarding smart meters. The Parliament included the requirement of smart metering systems to be fitted to 80% of homes by 2020. This would allow consumers to better monitor their energy use.

Parliament successfully amended the directive by further strengthening the powers of NRAs, albeit in a weaker manner than initially envisioned[136], and managed to obtain the supervisory rights over the agency. This made ACER accountable to the Parliament. The deal-breaker for Parliament was the guarantee of a truly independent and strengthened national regulator.[137] Although particularly unwelcome for Germany, who would have

134 This even led some to argue that Parliament 'strengthened consumer rights at the expense of full ownership unbundling' (source: EU strikes deal on energy market liberalisation, *Euractiv*, 25 March 2009).

135 EU strikes deal on energy market liberalisation, *Euractiv*, 25 March 2009

136 The compromise changes the status quo by sharing previously purely Member State competences with regulatory agencies 'where Member States have so provided'.

137 EU strikes deal on energy market liberalisation, *Euractiv*, 25 March 2009

preferred to see lower levels of European regulation on the electricity market[138], the Parliament succeeded in securing its amendments (see Table 4 in Appendix 3). This enhanced the level of delegation, and thereby positively contributed to the directive's level of liberal legalisation.

The Parliament failed only on two points. First, it failed to address the issue of regulated prices, an issue which remains problematic. Second, as already explained previously, the general level of harmonisation which the directive would achieve was lower than that initially desired by the Parliament. Rather than obtaining harmonisation of rules and standards, Parliament had to accept a less forceful measure, replacing the words 'harmonised' with 'ensuring compatibility'.

Turning then to the final shape of the Electricity Directive, the level of liberal legalisation is lower than initially proposed. Where the scope of the directive remained wide (the level of delegation was even strengthened on certain points) significant changes were made to the directive's degree of market integration. Where the initial proposal had only allowed for ownership unbundling and ISO, a third ITO option was included in addition to many exceptions to the ownership unbundling requirements (i.e. state-owned companies, Finnish model, Scottish clause).

That said, these amendments should not lead to the conclusion that the directive's degree of market integration is low. Recollect that the directive's degree of market integration is

[138] A good illustration of this opposition is Germany's reluctance to installing a national regulator. Ironically, this reluctance towards national regulatory power on the one hand seems to contradict Germany's plea for enhanced regulation as a substitute for ownership unbundling on the other hand.

based on two combined strategies: unbundling and regulation. Of equal significance is therefore the legal supranational regulatory framework set out by the directive, which is designed to regulate future problems of electricity market integration; a form of positive integration that had completely been absent from the previous two directives. This regulatory framework was significantly amended and was indeed strengthened on certain aspects due to Parliament's amendments. Therefore, with a wide scope, a high level of delegation and a medium degree of market integration, I rate the overall level of liberal legalisation as medium-high.

TABLE 4.6: Overview of all amendments made to the directive's level of liberal legalisation

Issue	Commission	Parliament	Council	Final outcome
Scope	Wide: most aspects of electricity market; DSOs remain excluded	Wider: include regulated prices.	No change: it opposed the EP's inclusion of regulated prices.	Wide: no change
Delegation	High: strengthened delegation of power to NRA's; creation of two new independent bodies: ENTSO-E (cooperation TSOs) and ACER (Agency for the Cooperation of Energy Regulators).	Strengthened: powers of NRAs.	Slightly weakened: reduced power Commission (regarding certification TSOs).	High: Strengthened by Parliament in second reading. NRAs, ENTSO-E, ACER, Commission (authorisation 3rd country TSOs)
Degree of market integration	Medium to high: Ownership unbundling: full ownership unbundling or ISO (Independent System Operator).	Increased: solely one option (i.e. ownership unbundling); common standards (increased harmonisation).	Reduced: additional third unbundling option (ITO), Scottish clause, 'Finnish' clause, exceptions Cyprus, Malta and Luxembourg. Strengthened: changes to third-country access provisions	Medium: inclusion of third unbundling option (ITO); Scottish clause; exceptions for Cyprus, Malta and Luxembourg, 'Finnish' clause.

4.6 Assessing the negotiations: who shaped the outcome?

Having discussed all changes made, it is important to now step back and analyse more closely how exactly each of the actors influenced the content of the directive, and in

particular the directive's level of liberal legalisation. What do these changes tell us about the relative influence of each of the actors, and how can this relative influence be explained?

To some extent, the changes made to the unbundling provision and the inclusion of the 'Gazprom-clause' are a direct reflection of the influence of the blocking minority in Council. These are significant changes in the sense that they directly influence the directive's level of liberal legalisation, as explained above. Considering the various preferences held among the legislative actors, it is remarkable that this minority group, representing largely minority preferences, managed to succeed in including so many compromises on the issue of unbundling (ITO, Finish clause, Scottish clause) – particularly when remembering this was a blocking minority facing strong opposition. The Commission, the entire Parliament and a majority of Member States in Council favoured ownership unbundling. The Parliament had almost made it a matter of principle not to compromise on this. How, then, do we explain the relative influence of this minority?

Mere internal overpowering seems to account for the inclusion of the Gazprom clause in the directive. In this instance, the UK supported France and Germany. This was exceptional, as the UK's policy positions on this directive generally differed from the French-German axis. On this issue, however, the UK, France and Germany cooperated and pushed for the Gazprom clause, while the smaller, economically less powerful Member States who welcomed the provisions of the directive and opposed the inclusion

of the Gazprom clause had to agree to some changes demanded by this powerful ally. Free third-country access would, to their dismay, remain the rule.

However, merely acknowledging that the French-German axis is generally quite powerful does not seem sufficient to explain the minority's 'victory' on the ownership unbundling issue. Whereas they were largely strengthened in their opposition by their domestic industry, which could potentially face large economic costs, they faced an opposition of powerful economies that could make similar economic arguments. The UK, Spain, the Netherlands etc., could lose out from not seeing the French and German electricity companies ownership unbundled.[139] They would continue to be faced with the problems that are related to vertically integrated companies. Given that a majority of countries had already ownership unbundled, and were unable to reverse this[140], a majority of countries were even placed at a disadvantage over vertically integrated companies. Enough reasons, therefore, to strongly oppose the French/German opposition.

To explain this dominance, I have argued one should also recognise the effect of Germany's credible veto against this directive as a whole; a direct result of the influence of Chancellor Merkel's opposition to this issue. This had shown that Germany would prefer the status quo over any directive that would necessitate ownership unbundling. The direct personal involvement of the French President Sarkozy added weight to the minority's opposition, showing that this issue was a matter of personal concern to the

[139] Interview Dutch MEP (EPP-ED) member of the ITRE committee, Brussels 17 February 2010.

[140] The directive does not allow those companies which have already ownership unbundled to change back to the ISO or ITO option.

political elite and thereby of such importance that insufficient compromises would not be accepted.

At the same time, it should be noted that the argumentation of the proponents of ownership unbundling, particularly the argumentation of the Commission, suffered from inadequacies.[141] The Commission's impact assessment had been widely criticised and was, according to industry and even an official of the European Commission, 'not up to speed'.[142] Previous academic research, in particular that conducted by economists, was also unable to provide proponents with indisputable proof of the positive effects of the measure.[143] Understandably, this weakened the Commission's plea for full ownership unbundling.

Having explained the influence of this minority in Council, this does not mean it was dominant overall in shaping the level of liberal legalisation. Whilst at first sight it might seem that France and Germany 'won' the debate, as they got their way on the unbundling issue and, to a great extent, on the Gazprom issue, it should be noted their influence was largely confined to these areas.

The Parliament had a significant influence on the level of liberal legalisation. As shown, it managed to strengthen the level of delegation by strengthening the power of the

[141] This was confirmed during interviews: interview regulatory affairs manager E.ON office Brussels, 9 February 2010; interview EU affairs manager RWE Brussels, 23 February 2010 and interview French energy counsellor, Brussels 18 February 2010.

[142] Interview functionary of DG TREN, Brussels 17 February 2010.

[143] See the vast amount of research referred to by Pielow et al. (2009) in footnote 8 on page 97 of that article.

national regulatory agencies, and enhanced EU regulation through all its included provisions on consumer rights. It is remarkable how many competencies have been delegated away from Member States to the Commission (directly and indirectly through comitology procedure) and to independent regulators, which the Council did not object to in 2nd reading (although a minority would have clearly preferred to oppose this).[144] It is interesting to analyse what gave Parliament this relative influence that ensured their success in second reading.

Two factors seemed to have contributed to this. Firstly, Parliament's approach of strongly opposing the most fundamental issue of the Directive and then compromising on this very issue seems to have been a successful strategy in getting amendments on different issues (regulatory power, consumer rights) accepted, particularly those issues which were accepted in second reading. The Parliament succeeded in including provisions on customer rights, in particular on intelligent metering which had been a difficult issue for most large electricity companies, and most importantly strengthened regulatory rights.

Secondly, it should be noted that almost all issues which the Parliament successfully amended in second reading had been 'approved' and supported by the Commission.[145] The reason the Commission was able to form an alliance with the Parliament against the Council, something which it had been unable to do in e.g. the postal sector, was due to the lack of strong influence of the opponents. The reason was simply that the minority

144 Remember that the Council rejected 106 out of 156 amendments of Parliament after 1st reading.

145 Approved in Commission's Common position which it had drawn up after the Council had adopted its common position. See: *Communication from the Commission to the Parliament regarding directive 2009/72/EC*, European Commission COM(2008), Brussels 12 January 2009.

had to pick its battles.[146] Therefore, the Parliament's strategy of using ownership unbundling, which functioned as a tool to strengthen its bargaining power vis-à-vis the Council, and its support from the European Commission allowed it to significantly amend the directive in second reading.

In sum, where Parliament amended the directive's level of liberal legalisation by strengthening delegation, strengthening regulatory agencies and enhancing consumer protection, the Council minority shaped the directive's level of liberal legalisation by amending its degree of market integration (i.e. unbundling principles and its Gazprom clause).

4.7 Explaining electricity market liberalisation – testing the model

Liberalisation of the electricity market, as this chapter has shown, has not been an easy, self-evident development. The low levels of technological innovation in the sector and the weak global pressure on the electricity market led to a relative absence of any direct expected economic benefits of market liberalisation.[147] Additional worries about security of supply and lack of economic evidence for liberalisation paired with the resistance of incumbent electricity companies towards enhanced competition made prospects even bleaker. The process of electricity market liberalisation had originally been kick-started by the Commission in an attempt to integrate the electricity market as part of the

[146] It seemed that industry was also largely unaware about this effect as most electricity companies focused on this one issue of ownership unbundling (source: interview with EU affairs manager of RWE in Brussels on 23 February 2010). This observation was shared by a functionary of DG TREN who stated that the polarisation of the debate was partly a blessing for the Commission as it took away the attention to the legal framework this directive would put in place (interview functionary DG TREN, Brussels 10 February 2010).

[147] Eberlein (2008) confirms this: 'technological change and global competition were not significant drivers of market reform in electricity' (p.75).

completion of the European internal market. It was acting under the 'mandate' granted to it by the 1992 Single Market programme of completing integration of the internal market.

The limited progress that was made by the conclusion of the 1st Electricity Directive, however, showed that if full liberalisation of the electricity sector was ever to take place, this could not be achieved by mere supranational activity. The Commission realised, early on, that full market liberalisation would require the creation of a strong constituency among incumbent electricity companies and governments genuinely willing to support market opening.[148] Remember that the process of postal market liberalisation had followed a similar path, and that increasing liberalisation of the postal market had corresponded to an increasing group of actors (i.e. governments, incumbent operators and the general public) coming to support postal market opening.

A key actor in ensuring implementation was the European Commission. From the moment the ECJ clarified electricity as both a good and a service, the Commission had been active in ensuring compliance with the rights of free movement of services in this network sector. It used its competencies granted by competition law to break the harmful practices of large electricity companies and to address remaining barriers by proposing new legislation. Domestic change, as a result of the implementation of previous directives, led to an incremental enlargement of the group of proponents genuinely supporting further market opening. Enhanced societal demand for change, as a result of the Commission's active involvement in practical implementation of the 1st Electricity

[148] As Eberlein (2008) states, there was no possibility to further liberalisation in the electricity market by supranational activity; 'liberalisation would require a genuine change in actors' positions' (pp. 82-83).

Directive, formed an important driver behind the process of further electricity market opening in the 2nd Directive.

At the same time, increased economic benefits from further liberalisation had inspired competitors to demand further liberalisation. The transposition of the 1st Electricity Directive had removed the monopoly and opened up the possibility of benefiting economically from competing in the electricity market. This increased the group of electricity companies eager now to enter other markets, and enhanced the societal demand for further market liberalisation in the 2nd Electricity Directive. Nonetheless, due to concerns of the incumbent operators, only some incremental changes were made by the 2nd Electricity Directive.

The 3rd Electricity Directive was the direct product of an ongoing process towards further electricity market liberalisation. Changes over time had increased the group of people supporting further liberalisation of the sector; partly as a result of enhanced opportunities for competitors to benefit economically from a larger market, and partly simply as a result of path-dependency which had led to increased returns.

An interesting aspect of these developments is that the entire process was largely a technocratic process, with a striking absence of any strong influence from societal interest groups.[149] This makes this case study different from the others, as there was no politicisation, or possibility thereof, at any time during the negotiations. Due to the general public lack of interest in electricity prices, the level of active public involvement

[149] Telephone interview British MEP (PES) member of the ITRE committee, 6 April 2011.

in the debate on electricity liberalisation has traditionally been extremely low. This was confirmed by a Socialist MEP, closely involved throughout the negotiations, who explained that the Parliament had to proactively approach the consumer and energy poverty groups in an attempt to get support for their proposal.[150] In clear contrast to industry (i.e. particularly the large electricity companies), who were very well organised, these organisations failed to mobilise themselves and were not engaged in the debate.

Although the 3rd Directive was largely the result of path-dependent factors and increased returns, as a result of significant domestic changes towards further market opening (independent regulators, removal of monopolies etc.), it fell short of full liberalisation. This is puzzling, especially when going back to the initial preferences of the actors prior to the start of the negotiations, where it had become clear that a majority of countries stood favourably towards ownership unbundling. A directive with a higher level of liberal legalisation could have been expected.

In providing an explanation for why this did not occur, I have argued that the answer can be found in the negotiations, and in particular in the strong resistance of a Council minority (made up primarily of France and Germany) against the proposed level of liberal legalisation. Actions on the part of the Commission to pursue far-reaching practical change in Germany and France on the basis of competition law, in a deliberate attempt to reduce the resistance of these countries, had failed to eradicate all opposition.[151]

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150 Ibid.

151 It should be noted that German opposition was stronger than French opposition.

This change in relative influence of this minority during the negotiations explains why, given that a majority of legislators supported further electricity market opening, the directive's level of liberal legalisation was lower than what the majority had wanted or what could have been expected based on the conditions prior to the negotiations. The direct involvement of the highest political actors from France and Germany changed the bargaining dynamics within Council during the negotiations. It enhanced the relative influence of the blocking minority by establishing a credible threat to veto. This explains why this minority in Council was so successful in their wishes to amend the issue of ownership unbundling and more generally weaken the overall level of liberal legalisation. That said, this influence should not be overrated. It was largely confined to these issues and despite the opposition of this minority to the Parliament's provisions on consumer rights and higher levels of delegation to the regulatory agencies, it was forced to concede these in the end.

4.8 Conclusion

The EU programme to reform the electricity market is unique in kind, and remains 'unmatched in scale and depth in any other major region of the world'.[152] Where alternative regional projects have been characterised by disruptions or deadlock, the EU, although having faced and continuing to be faced with strong resistance from Member States, has managed to continue the liberalisation efforts of its electricity and gas markets. Combining new legislative efforts from DG TREN with the determination of

[152] Pollitt, M.G. (2009), 'Electricity Liberalisation in the European Union: A Progress Report', *Cambridge Working Paper in Economics*, p.1.

DG Competition to apply competition law into this area, much progress towards a truly integrated electricity market has been made to date.

Although the final outcome was partly weakened, the 3rd Electricity Directive signifies an important agreement to stimulate further liberalisation of the electricity market. By putting in place a strong regulatory framework for future regulation of this market, future problems may more easily be resolved without depending too heavily on Member State consent.

Nonetheless, the true effect of the legislation, as always, depends on its transposition into national law. As this directive still allows for 'significant divergences of policy on electricity liberalisation, even within a generally supportive EU framework' [153], something which is a direct effect of the national commitment to a competitive energy market, national differences in extent of liberalisation and the levels of competition will continue to vary. The Commission, DG TREN and DG Competition will therefore be required to continue to monitor the transposition of this directive into national law. Moreover, the process has not been finalised. Future problems will come up and remaining issues, such as the present structuring of DSOs, will need to be addressed at some point. The 3rd Electricity Directive, although imperfect, has allowed for effective tools to be put in place to ensure further liberalisation and address problems that may arise.

153 Ibid., p.26.

5. Services Directive

Having discussed the liberalisation process of two public good services in the two preceding chapters, this chapter focuses on the liberalisation of a wide range of private services, ranging from hairdressers and plumbers to management consultants. The 2002 'State of the Internal Market for Services' report had shown that previous internal market programmes had effectively removed physical and technical barriers, but that 'these had been replaced by legal barriers, arising from national, regional and local regulation'.[1] The service sectors that suffered most were those that did not constitute a large group individually (mainly small and medium enterprises such as hairdressers, plumbers, tourist organisations etc.,) but together made up a significant share of the service sector. Partly due to a lack of information, and partly due to their modest size which limited their lobbying success, the result was that a significant share of the services market in 2004 still faced significant barriers to cross-border trade.

Many of these legal barriers had, however, been deemed illegal by the ECJ. This discrepancy between the interpretations of the ECJ and the practical reality led to uncertainty for service providers about the interpretations of the two main legal underpinnings of the internal market in services: freedom of establishment (Arts. 49-55) and free movement of services (Arts. 56-62). For the Member States to complete the internal market, something which they had again committed to during the Lisbon Summit

[1] *Report on the State of the Internal Market for Services* (2002), p.7.

in 2000[2], this legal uncertainty therefore had to be addressed. To this end, the Commission tabled the 'Services Directive'; a directive mainly addressing private sector services.

The negotiations turned out to be an example of one of the most politicised debates in the history of the internal market. This is curious, as the Commission had initially expected broad support for this directive. First, it mainly addressed the liberalisation of private services; services which are generally less likely to generate mass resistance due to the absence of monopolies and strong state involvement. Second, it would simply ensure transposition of ECJ rulings into practice. In theory, the market was already more liberalised than was the case in practice. Therefore, the directive would merely resolve this remaining legal uncertainty. Third, the Commission expected that the positive economic prospects of further liberalisation of the services market would make governments and the business community supportive of the directive.

In light of the expected positive economic prospects of further integration and the general initial support of the Member States for a directive on service liberalisation, how can this sudden opposition towards the directive be explained? It seems one factor that had not been accounted for by the Commission was the influence of the general public, which mobilised against the directive due to concerns about the directive's negative impact on the domestic labour force. I will show that the inclusion of public opinion in the debate led to ad hoc politicisation, generally termed 'politicisation', of the negotiations. This

[2] During this Summit, the European Council had set itself the goal to make 'the EU the most competitive and dynamic knowledge-based economy in the world by 2010' (source: *Presidency Conclusions – Lisbon European Council 23 and 24 March 2000*, paragraph 5).

politicisation led some Member States to change their strategic objectives, but primarily caused internal deadlock in Council. At the same time, it strengthened the relative influence of the Parliament, who became the dominant actor in amending the content of the directive through their position as the legislator able to overcome internal disagreement.

I will again adopt a two-tiered approach to explain the outcome. In the first tier, I start by discussing the context in which the Services Directive was tabled. Contrary to the previous two sectors, this directive was the first legislative proposal of its sort. I will first discuss the stakes of the actors regarding a Services Directive which aimed at liberalising a larger share of small and medium business services. Then I will step back and analyse how the directive came to be proposed. This analysis will show that the prior rulings of the ECJ functioned as drivers for change. The European Court of Justice, through its rulings, partly 'created' the need for a directive. The main beneficiaries, i.e. the small and medium businesses for whom this directive was drafted, did not seem to have organised an influential lobby demanding legislative change.

Under the second tier, I turn to the negotiations to explain the precise content of the directive. I will first explain the content of the draft directive and determine its level of liberal legalisation. Continuing, I will explain the process of negotiations and particularly focus on the level of politicisation that occurred during the negotiations. This is necessary in order to understand the sudden public and political outcry against the directive. I then show how this influenced the negotiations between the legislators and illustrate the

Parliament's pivotal role in hammering out a compromise. To explain this relative influence of the Parliament, I will again turn to the level of politicisation and show how this enhanced the Parliament's relative power and through this enhancement affected the directive's level of liberal legalisation.

5.1 Legal reality vs. practical reality – the need for the Services Directive

The services market, as the Commission's 2002 report showed, was still hampered by significant barriers at the turn of the century.[3] The main barriers to cross-border service provision can generally be divided in legal and non-legal barriers. Legal barriers hamper every aspect of service provision, posing difficulties to the establishment of service providers, the use of inputs for the provision of services, the promotion, distribution, sale and after-sale of services. Non-legal barriers, on the other hand, refer to a lack of information and to cultural/language barriers. Examples of barriers are the number of authorisations required, the length and complexity of administrative formalities, discretionary powers of local authorities, the fact that businesses are often asked to comply with multiple formalities already complied with in country of origin, and the difficulty of obtaining exact information on the regulatory framework, competent authorities and procedures applicable in other Member States.[4] A good overview of the various sorts of barriers that have hampered the services sector can be found in Table 1 in Appendix 4.

[3] See Table 1 in Appendix 4 for an overview of the main barriers to free movement of services.

[4] 'Internal Market: barriers to the free movement of services mean businesses and consumers still get a raw deal', *Press Release European Parliament*, 31 July 2002.

These legal barriers have not gone unnoticed, especially not by the ECJ. In the last ten years, the Court has provided interpretations concerning the free movement of services. It displayed particular activism in the time period between 2000 and 2005, where it went from 'deciding 40 cases in the five year period between 1995–1999 to deciding over 140 cases based on Article 49 EC[5] between 2000–2005'.[6] The amount of Court decisions on services has been constantly on the rise[7], with an increasing number of cases being decided under Articles 49 and 50 EC.[8]

The Court increasingly displayed an interest in the service *providers* and in what would facilitate a larger internal market for services. This increase is largely fostered by the 'idea that Article 49 EC is not limited to striking down discriminatory measures but extends to the elimination of *all* hindrances to the free provision of services'.[9] Over the years, the Court has become increasingly restrictive towards non-discriminatory national regulations on establishment and services and argued that restrictions on the freedom to provide services and the freedom of establishment will be prohibited unless justified. The most significant development was the Court's stipulation that national regulations may be deemed prohibitive when functioning as a barrier to cross-border trade. The result is that the Court has seemingly reduced the importance of national concerns compared to

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5 Here the Treaty article refers to the *Consolidated Version of the Treaty Establishing the European Community* (Treaty of Rome, as amended), Official Journal of the European Union, C 325, 24 December 2002.

6 Hatzopoulos and Do (2006), p.923.

7 Hatzopoulos, V.G.(2000), 'Recent Developments of the Case Law of the ECJ in the Field of Services', *Common Market Law Review*, p.43.

8 The trend which has become visible, of the Court actively trying to further liberalise the services market, was outlined in Krapels, G.E.A.M. (2007), *The Fourth Freedom – Liberalisation of the European Services Market* , Master Thesis. Articles refer to numbering in: *Consolidated Version of the Treaty Establishing the European Community* (Treaty of Rome, as amended), Official Journal of the European Union, C 325, 24 December 2002.

9 Hatzopoulos (2000), p.43 (italics added).

consumer concerns. More generally, we can see that the Court has widened the scope of the applicability of Articles 49 and 56[10], has increasingly prohibited non-discriminatory national regulations and has widened its application of the home state principle.[11]

Legal scholars seem to agree that the Court has functioned as a progressive motor behind the liberalisation of the services market.[12] It has done this in a period during which the Member States were only addressing certain particular service sectors whilst neglecting others. Although the direct effect of EU law in principle requires all countries with similar situations to change its legislation accordingly, this did not happen in practice. This led to a growing gap between the legal and practical reality of service providers in the internal market. The 2004 draft Services Directive[13] by the European Commission was a concrete reaction intended to resolve this legal uncertainty.

5.2 The Services Directive – what's at stake?

The Services Directive's aim is to remove barriers to all service sectors which have remained hampered in their wish to provide cross-border services. The Commission defined a barrier as 'any measure which is liable to prohibit, impede, render more costly or onerous or otherwise render less advantageous service provision between Member

[10] TFEU Treaty, *Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union: Charter of Fundamental Rights of the European Union (2010/C 83/01)*, March 2010.

[11] This only applies to temporary service provision. In the case of establishment, the out-of-state provider must always comply with host state regulations.

[12] See Krapels (2007) for a more detailed analysis of the legal literature and a closer analysis of the Court's role in furthering liberalisation.

[13] '*Proposal for a Directive on services in the internal market'*, COM(2004), Brussels 5 March 2004. Hereafter referred to as 'draft Services Directive'.

States'.[14] This definition is extremely wide, and includes not only discriminatory measures but also non-discriminatory measures (i.e. those which apply equally to both in- and out-of-state service providers).[15]

The primary approach, with which the Commission set out to remove these barriers, was to focus on addressing illegal, barrier-enhancing national regulations and prohibiting national non-discriminatory requirements and regulation unless their need can be successfully proven. Remembering that service providers derive their legal rights mainly from two sets of articles in the Treaty, the directive addresses both activities separately.

Through enhanced harmonisation of regulation, administrative cooperation and simplification, curtailing the grounds for authorisation and by implementing mutual recognition of national regulatory measures, the directive would remove legal and administrative barriers to allow free cross-border movement of services in all four modes of cross-border service provision (see Table I.2 in the Introduction). The stakes vary for each of the actors involved.

Member States

The stakes for the Member States are high. On the one hand, there are significant economic benefits from further liberalisation of the services market. Services are the largest sector in the European economy and account, in most Member States, for around

[14] 'MEMO/02/178 - Report on the Internal Market Strategy for Services - frequently asked questions', *Press Release European Parliament*, 31 July 2002.

[15] The Commission follows the line of the ECJs jurisprudence here.

70% of GDP and total employment.[16] The Commission showed that in the decade after the completion of the first Single Market Program in 1993, 2.5 million extra jobs were created and an increase in wealth of nearly 900 billion euros was achieved as a result of barrier removal.[17]

In our present-day economy, services are still considered the main driver behind the European economy. In 2003, services accounted for 58% of business sector value added, 68% of total employment and two-thirds of total output.[18] They are said to drive economic growth and are pivotal in job creation. The Commission showed that between 2000 and 2005, 'total employment in the EU increased by over 8.5 million, mainly driven by strong net employment creation of almost 11.5 million in the services sector'.[19] At the same time, services are also the main driver of foreign direct investment (FDI). In Western Europe, services provide 60% of new FDI jobs, compared to 40% for industrial activities[20], and will be significant in future job creation. A simplification of the regulatory framework and the lifting of barriers to foreign service providers is likely to lead to innovation and to increased investment.

The study by the Dutch Planning Bureau (CPB) confirms this and estimates that 'bilateral trade in commercial services may increase by 30-60%, or when we express it as an

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16 Source: Eurostat as quoted in 'Economic Benefits of the Services Directive', Explanatory note by DG Markt, Brussels 20 May 2009.

17 'The Services Directive: Accomplishing the EU Single Market for services', Explanatory note by DG Markt.

18 OECD paper (2005), 'The EU's single market: at your service?', p.4

19 *Employment in Europe 2006*, DG Employment, Social Affairs and Equal Opportunities, Brussels October 2006.

20 Ernst & Young (2008), 'An open world – Ernst & Young's 2008 European attractiveness survey'. Although these figures were taken from a recent report, it illustrates the general difference between the two activities.

increase of total intra-EU trade (i.e. including trade in goods) by 2 to 5%. For foreign direct investment in commercial services the EU proposal may lead to an increase by 20% to 35%'.[21] Bilateral trade and investment is currently severely hampered by heterogeneity in regulation. The European Commission estimated that the Services Directive, by addressing these issues, would result in 'economic gains between 60-140 billion euros, representing a growth potential of + 0.6-1.5% of GDP, using conservative estimates'.[22] In a similar vein, the Copenhagen Economics report predicted that this directive would lead EU Gross Value Added to increase by 0.8% at a conservative estimate, and that net employment is expected to increase by 0.3% (up to 600.000 jobs) through enhanced productivity, higher employment, increased wages and lower prices.[23] Therefore, each Member State stood to potentially benefit from tapping into this untouched economic potential.

Another significant benefit for Member States is that this directive would remove the legal uncertainty now prevailing in the internal services market. By removing this uncertainty, competition is likely to increase, stimulating innovation, enhancing consumer choice and reducing prices. Finally, the Services Directive would be significantly conducive to obtaining a real internal market and contribute to the goals set out in the Lisbon Strategy.

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[21] Centraal Plan Bureau (CPB) Report (2004), *The Free movement of services within the EU,* by H. Kox, A. Lejour and R. Montizaan.

[22] 'Economic Benefits of the Services Directive', DG Markt.

[23] Copenhagen Economics (2005), *Economic Assessment of the Barriers to the Internal Market for Services – Final report.*

On the other hand, these benefits would not come without costs for the Member States. As the majority of barriers to a truly internal services market are regulatory[24], the costs to the Member States would be the need to relinquish national legislation regulating out-of-state service providers and/or accept the Commission's demand to mutually recognise each other's regulatory requirements. As this directive would place the control of the out-of-state temporary service provider with the country of origin, the host country would have to rely on the adequacy of the country of origin to execute this task. This directive would thereby reduce Member States' own regulatory oversight and demand a high level of trust and cooperation between Member States.

Service providers

The main beneficiaries of this directive are the service providers, and in particular the SMEs. [25] Though individually constituting a small sector, combined they constitute the vast majority of service providers. The current barriers create high legal uncertainty for foreign service providers, and the heterogeneity of national regulations negatively affects cross-border trade by increasing the trade and investment costs paired with cross-border trade.[26] As these costs are independent of company size, they disproportionately affect small and medium enterprises. Given that the majority of service providers are SMEs[27], this group stands to benefit greatly from this directive.

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[24] CPB Report (2004), pp. 17-19; Copenhagen Economics (2005).

[25] Large service sectors have, in a majority of cases, already been addressed by separate vertical directives.

[26] CPB Report (2004), p.9.

[27] Ibid., p.21.

Consumers

Another large group of beneficiaries of the directive are the consumers. Currently 'consumers are prevented from easy access to out-of-state services, have to pay a high price or lack confidence to buy from other Member States'.[28] A liberalised market for services is likely to lead to a larger number of service providers. Following the reasoning of economic theory, this will most likely enhance consumer's choices in what services to obtain[29], will result in lower prices from enhanced competition[30] and is likely to lead to a higher quality of products as a result of economies of scale and enhanced innovation. At the same time, the directive's agreements regarding regulatory oversight, quality etc. will ensure transparent standards and are likely to enhance consumers' confidence in cross-border service provision.

Workers

Whilst initially one would expect workers in the service sector to benefit from further market liberalisation, this development proves a two-edged sword for those working in the sector. On the one hand, it offers them the opportunity to access a larger market more easily. Enhanced competition is also likely to stimulate job creation. Copenhagen Economics estimated that 'net employment may increase by up to 600 000 jobs across the European Union'.[31] On the other hand, a more liberalised market implies increased competition from other service providers who might offer cheaper and higher quality

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28 *State of the Internal Market Report* (2002), p.5.

29 This will be the result of intensified trade in services, resulting from a more integrated market.

30 As the Copenhagen Economics report (2005) argues, 'stronger competition will reduce artificially inflated prices and less waste of resources will lead to lower costs of services provision' (p.7).

31 Ibid., p.8

services compared to the incumbent service provider.[32] Due to differences in welfare systems and economic prosperity, this would put workers from richer countries in a comparatively less advantageous position than workers from poorer (i.e. Eastern European) countries who may obtain a comparative advantage from asking lower prices.

5.3 Explaining the content of the Services Directive

Having discussed the context and the preferences of the actors, I will now proceed to the content of the Services Directive. The draft directive can roughly be divided into three parts: those provisions removing barriers to freedom of establishment (Arts. 5-15), those removing barriers to freedom of service provision (Arts. 16-25) and those on quality and supervision of services (Arts. 26-38).[33]

The scope of this directive is extremely wide. Rather than a vertical directive, addressing one specific sector, the Services Directive is a horizontal directive addressing a wide range of services.[34] This is an uncommon approach for the Commission, as different sectors often require different regulation. However, as most of the remaining service sectors faced similar obstacles, a horizontal directive was thought to be the most effective

[32] The Copenhagen Economics report (2005) argued that 'productivity improvements and reallocation of labour mean that employment will fall in some sectors' (p.8).

[33] The numbering of the articles corresponds to the numbering of the draft Services Directive.

[34] Art 2 (1): 'this directive shall apply to services supplied by providers established in a member State', which is then followed by some excluded sectors. Examples of the services covered are: business services such as management consultancy, certification and testing, facilities management (including office maintenance and security), advertising, recruitment services and healthcare services. The Commission estimated that the services covered by this directive account for around 60% of employment and 50% of GDP. Source: website European Commission – DG Markt – Frequently asked questions on the proposed Directive on Services in the internal market (http://ec.europa.eu/internal_market/services/services-dir/faq/200410-faq-point01_en.htm#13).

approach to addressing all of these barriers at once whilst preventing overregulation.[35] The scope of the directive excluded public services of a non-economic nature, financial and transport services and in principle also excluded electronic communication services.

The directive's degree of market integration was rather high. Its strength resided in the fact that it prohibited *non-discriminatory* requirements as well as discriminatory requirements, and, contrary to previous legislation, placed the burden of proof to maintain national regulation on the Member States (where it had initially been with the service provider).[36] Due to the dual nature of the directive (addressing both freedom of establishment and freedom of service provision), this directive had two distinct approaches to remove barriers.

To remove barriers *to freedom of establishment*, the directive applied three measures. First, it simplified the administrative procedures and formalities which are required when one wants to establish oneself in another Member State. This meant that Member States were to accept 'any document…which serves an equivalent purpose or from which it is clear that the requirement in question has been satisfied'.[37] Single points of contact should be set up to facilitate access and exercise of service activities.[38] Second, the directive reduced possible hindrances which could occur as a result of authorisation

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35 Sociaal Economische Raad (SER), *Advisory Report: The Directive on Services in the Internal Market*, July 2005, p.56.

36 For a comprehensive and detailed legal overview of the content of the draft Services Directive, as well as a discussion of its final content, please see: Barnard, C. (2008), 'Unravelling the Services Directive', *Common Market Law Review*.

37 *Draft Services Directive*, Art. 5(2)

38 Ibid., Art. 6. Art. 6 allows service providers to be able to complete all formalities and requirements that are attached to exercising a service activity through one body and provides them with the relevant information. Article 8 specifies that Member States have to make sure that all procedures can be completed by electronic means

schemes.[39] By specifying the conditions under which authorisation can be demanded, the possibility of using them as measures to keep service providers out was reduced. Third, the directive specified what host-state requirements are prohibited when outside service providers want to establish themselves. This limits the grounds Member States have at their disposal to ward off outside service providers. Art. 14 prohibits different national requirements which only apply to out-of-state providers[40] (i.e. 'black' list) whilst Art. 15 specified which non-discriminatory requirements[41] (i.e. 'grey' list) should be subjected to a screening operation. By limiting the application of national requirements on out–of-state service providers (although not eliminating it altogether) and by facilitating compliance with the ones that remain, barriers to cross-border establishment will be reduced.

These measures, which facilitate establishment and tighten the authorisation grounds and the host-state requirements, together address the main barriers that currently exist in regard to freedom of establishment. Given the limited grounds they leave for refusal, these measures seem strong and capable of removing barriers. The degree of market integration of this directive on the issue of freedom of establishment is therefore high.

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[39] Service activities should not be made subject to authorisation schemes unless the authorisation scheme (a) does not discriminate against the provider, (b) is objectively justified by an overriding reason relating to the public interest and (c) is proportionate (Art.9(1b)). It also set out criteria to prevent arbitrary or discretionary assessment. For example Art. 10 (2) and 10 (3) prevent duplication by obliging Member States to take requirements into account, which the service provider has already been subject to in its own country, when granting authorisation for a new establishment.

[40] Examples of these prohibited requirements are nationality requirements or denial of access as a result of a service provider having establishments in more than one Member State

[41] *Draft Services Directive,* Art. 15. The grey list entails among others the prohibition of quantitative or territorial restrictions.

To remove barriers to *the free movement of services*, the Commission formulated three actions to be taken. First, it adopted the Country of Origin Principle (Art. 16) to overcome differences in national regulation. This principle obliged Member States to recognise each other's regulatory frameworks and accept them as suitable for temporary service provision in their home state. This means it prevents Member States from imposing specific requirements on the service provider or from subjecting service providers to duplicate requirements.

The CoOP is a form of 'pure mutual recognition' which differs in one important respect from the more 'managed' form of mutual recognition advocated by the Court in its rulings.[42] Although the proponents of the CoOP have consistently argued that the principle of mutual recognition was widely supported by ECJ rulings and thus constituted a 'legal' means to barrier removal, this principle actually proved considerably stricter than the Court's case law.[43] Contrary to the case law, the CoOP excluded the possibility of justification on the basis of 'protection of the environment'[44], it excluded the 'rule of reason exceptions recognised by the Court'[45] and it limited the possibility of using

[42] Nicolaïdis and Schmidt (2007).

[43] The Court, in *Webb*, set out that there are many grounds which would justify specific national requirements with regard to temporary agents. Therefore, subjecting temporary agents to the CoOP would have resulted in the initial Directive having gone beyond the Court's case law. Source: Bruun, N. (2006), 'The Proposed Directive on Services and Labour Law', in Roger Blanpain (ed.), *Freedom of services in the European Union : labour and social security law : the Bolkestein initiative*, p.27.

[44] Art.17(16).

[45] Rule of reasons exceptions contain for example the protection of workers and cultural policy. See: Berend Jan Drijber in Committee on the Internal Market consumer protection and Committee on Employment and Social Affairs (IMCO), *Public Hearing: on the proposal for a directive on services in the Internal market*, Brussels 11 November 2004, p.48.

specific national requirements to derogate from the CoOP.[46] Since the CoOP thus only allowed for limited grounds of derogation, it is a form of 'pure mutual recognition'.

Second, to better ensure that temporary service providers are not hampered, the directive made the home state of temporary service providers responsible for supervision when they operate in another Member State (Art. 16(2)). Added to this is a list of requirements which host states may not impose on an out-of-state temporary service provider (Art. 16(3)). Article 24 further reduced Member State influence by prohibiting them from making a posted worker or a provider of services subject to burdensome requirements.[47] Due to these principles, the directive allowed for very few instances in which Member States may refuse out-of-state service providers access to their markets. The only exceptions are those provided for in Art. 17, exempting a number of services from the CoOP.[48] Although this slightly weakened the CoOP, this barrier-removal measure remains strong.

Added to these two measures, the directive applies a third measure to overcome current problems related to shortage of information and a lack of mutual trust. It hopes to facilitate access to information for consumers, by e.g. installing Single Points of Contact and making Member States responsible for controlling the information provided by

[46] Art. 17(17). This article states that requirements should be 'directly linked to the particular characteristics of the place where the service is provided and with which compliance is indispensable for reasons of public policy or public security or for the protection of public health or the environment'

[47] For example, requiring service providers to have a representative in the host state or requiring them to hold and keep employment documents in the host state which have to fulfil host state conditions

[48] A.o.: postal, electricity, gas, water, services covered by previously agreed directives such as Posting of Worker's Directive (Directive 97/71/EC) and services that can only be provided by national governments. Art. 18 and Art.19 also provide for derogations from the CoOP. These derogations do not weaken the CoOP to such a great extent, as Art. 18 concerns transitional derogations (i.e. temporary) and Art. 19 allows for limited case-by-case derogations.

services providers to recipients[49], and enhances mutual trust between service recipient and provider as well as between Member States.[50] In addition, Member States have to safeguard professional insurance[51], after-sales guarantees[52], the quality of services[53] and codes of conduct.[54] These measures help overcome the remaining problems resulting from a lack of trust, information and control. Adding this to two already forceful measures of barrier-removal leads me to rate the degree of market integration on the issue of free movement of services as high. Pairing the strong measure of freedom of establishment with the strong measures of freedom to provide services, I rate the directive's degree of market integration as high.

Finally, considering the level of delegation, the directive does not delegate any power away to an independent agency. Under the so-called 'screening operations' (Arts. 14 & 15), Member States are obliged to investigate what national regulations are not compatible with the directive. Instead of waiting for enforcement proceedings to be brought against them on an ad hoc basis, states are under an obligation to review all of their legislation by a deadline[55] placing the burden of proof on each Member State when justifying its continued existence. The Commission subsequently would check whether all requirements have been met. There is some involvement of the Commission with regard to the implementation of the directive's provisions under the comitology method (see Table 2 in Appendix 4). However, it seems this delegation is simply in line with

49 *Draft Services Directive*, Art. 26.
50 Ibid, Art. 35 – 37.
51 Ibid., Art. 27.
52 Ibid., Art. 28.
53 Ibid., Art. 31; more generally Art. 26 - 33.
54 Ibid, Art. 39.
55 Barnard (2008), p.393.

what the Commission is expected to do as a supranational institution. The directive is therefore not assigning it additional powers, something which the directive's level of liberal legalisation could have potentially benefited, which is why I rate the level of delegation as very low.

TABLE 5.1: Level of liberal legalisation of initial Commission proposal

	Scope	Delegation	Degree of market integration
Commission Proposal	Wide: horizontal directive with wide scope	Very low	High: Establishment (harmonised principles for regulation, administrative simplification, harmonised conditions for authorisation); Temporary service provision (CoOP; strong assistance of Member States to consumers, measures to stimulate cooperation, administrative assistance and enhance trust).

5.4 Politicisation materialises

Initially, a majority of Member States supported the proposed Services Directive. The United Kingdom, the Netherlands and the ten new Eastern European countries, the latter who generally 'favour U.S.-inspired neo-liberal economic measures'[56], were largely supportive. Even those usually more sceptical, such as France and Germany, initially supported the principles of the directive. The Commission, as said before, initially had not expected large-scale opposition to this directive as it viewed it as merely proposing a solution to a genuine problem. More importantly, in the years preceding the tabling of the Services Directive, the Parliament and Member States had continuously indicated they were supportive of such a proposal.[57]

[56] Zielonka, J. (2004), "Europe Moves Eastward, Challenges of EU Enlargement", *Journal of Democracy*, p. 26.

[57] In the conclusions of the European Council in Lisbon in 2000 all countries agreed that by the end of 2000 'a strategy for the removal of barriers to services' should be concluded and supported the draft directive. The draft proposal 'received the full approval of the relevant French government representatives' and of the German government. This statement was reiterated at a number of Council meetings. (source: Rojot, J.(2006), 'The Implementation of the Proposed Directive on Services in the Internal Market – a French perspective', in Roger Blanpain (ed.), *Freedom of services in the European Union : labour and social security law : the Bolkestein initiative,* p.73. See also: Gros, D. (2005), 'The Services Directive:

However, things changed radically in 2005. The French President Chirac, who in 2004 had approved the directive in Council, demanded just a year later that the directive 'should be given a total overhaul'.[58] He was supported by the French Prime Minister Raffarin, who stated that France 'would take every measure to oppose it'.[59] Similarly, German Chancellor Schröder changed position demanding a complete rewriting of the proposal. Belgium, Austria and Sweden also became very sceptical towards the proposal and suddenly the directive's prospects looked extremely bleak. What had happened? This change was the result of a sudden mass mobilisation leading to politicisation of the debate early on in the negotiations.

The reason for the sudden politicisation of the Services Directive, according to Loder, was the result of a failure of policy-makers to include a wide range of domestic service industries, regulatory agencies and social groups in the drafting process from the outset.[60] This allowed for the large discrepancies in preferences between society and policy-makers to occur. Although the true source of the opposition to the Services Directive remains debated, according to some it seems to have started with the Belgian trade unions early 2005.[61] They initiated a campaign to create awareness about the content of the directive and obtain support against the directive. According to the trade unions, the

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Frankenstein or Lightening Rod?', *Centre for European Policy studies Commentary*; *Draft Services Directive*, pp. 6-8).

58 'Chirac s'attire les foudres des libéraux' (translated as 'Chirac incurs the wrath of the liberals'), *Le Nouvel Observateur*, 16 March 2005; 'France wants full review of Services Directive', *Euractiv*, 3 February 2005.

59 'Raffarin and Schroder challenge Services Directive', *Euractiv*, 11 February 2005.

60 Loder, J.(2011), 'The Lisbon Strategy and the politicization of EU policy-making: the case of the Services Directive', *Journal of European Public Policy*, p 578.

61 Interview cabinet member of Commissioner McCreevy, Brussels 15 December 2006.

directive proved a direct threat to the 'European Social model' and would lead to a reduction of quality of public services.

The trade unions, all across Europe, managed to mobilise a great number of people against the directive. Rather than being confined to a single Member State, there were demonstrations in various countries as well as on an EU level, meaning physically present in Brussels and Strasbourg. The public display of dissatisfaction during these demonstrations was diverse, mainly coming from French, German, Belgian, Italian and Dutch protesters.[62]

One of the first large-scale demonstrations was organised by Belgian trade unions on 4 June 2004, attended by 5000 people. The demonstration was supported by a broad coalition of left-wing political parties[63], non-governmental organisations (NGOs) and led by the two largest trade union confederations – the Confederation of Christian Trade Unions[64] and the Belgian General Federation of Labour[65], who also drafted a manifesto against the proposed directive.[66] A second large-scale protest was organised on 19 March 2005 by the European Trade Union Confederation (ETUC) ahead of the Spring European

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62 'Bolkestein denounces French protest against services directive', by Elitsa Vucheva, *Euobserver.com*, 21 March 2005.

63 Political parties supporting the unions' manifesto included the Humanist Democratic Centre (Centre démocrate humaniste, CDH), the Christian Democratic Party of Flanders (Christen-Democratische en Vlaamse politieke, CD&V), Ecolo (French-speaking environmentalists), Groen! (Flemish environmentalists), the (French-speaking) Socialist Party (Parti Socialiste, PS) and the (Flemish-speaking) Progressive Social Alternative (Sociaal Progressief Alternatief, SP.A).

64 Confédération des Sundicats Chrétiens/Algemeen Christelijk Vakverbond (CSC/ACV)

65 Fédération Générale du Travail de Belgique/Algemeen Belgisch Vakverbond (FGTB/ABVV).

66 The third main union organisation, the Federation of Liberal Trade Unions of Belgium (Centrale Générale des Syndicats Libéraux de Belgique/Algemene Centrale der Liberale Vakbonden van Belgie, CGSLB/ACLVB) did not sign the CSC/ACV and FGTB/ABVV manifesto.

Council meeting of 22-23 March, where over 75.000 people demonstrated against the proposed directive.[67]

The European Trade Union Confederation (ETUC) was concerned that socialist policies would become more difficult to pursue under the Services Directive.[68] They feared a 'massive breakdown of regulation' because of competitive pressure by those countries with low levels of regulation.[69] Catelene Passchier, confederal secretary of the ETUC, stated:

> *'Application of the country of origin principle to cross border service providers is an open invitation for abuse and manipulation …countries with higher standards of protection will feel obliged to lower them, in order to stay competitive.'*[70]

5.4.1 The directive's main bones of contention

To understand how politicisation was possible, it is important to understand the directive's main bones of contention. For most Member States, the most contentious aspect was the directive's Country of Origin Principle (CoOP).[71] Although the Council had in 2004 declared that 'Member States supported the CoOP as an essential element of the proposed Directive and could accept …it as a starting point for discussions'[72], it became clear early in 2005 that the CoOP, in its original form, was politically not feasible and would come with costly side-effects. The CoOP's high level of mutual recognition,

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67 'Bolkestein denounces French protest against Services Directive', *euobserver.com*, 21 March 2005.

68 They followed the reasoning of the race to the bottom theory.

69 Website European industrial Relations observatory on-line, 'Unions Protest Against Draft EU Services Directive'. <http://www.eurofound.europa.eu/eiro/2004/06/feature/be0406302f.htm>.

70 Catelene Passchier on behalf of ETUC, in Committee on the Internal Market consumer protection and Committee on Employment and Social Affairs, *Public Hearing: on the proposal for a directive on services in the Internal market*, p.105.

71 Ibid.; interview functionary DG Markt (Unit Services), Brussels 15 December 2006.

72 *Minutes Council meeting of 25 November 2004*, Legislative Observatory.

which made it resemble a form of pure mutual recognition rather than the usual form of 'managed mutual recognition'[73], aroused fears of social dumping and of mounting downward pressures on individual welfare systems to the lowest European standards. The fear existed that the application of the CoOP would undermine labour standards and lead to a race to the bottom.[74] In addition, the inability of the host state to control out-of-state service providers (Art. 16(2)) aroused many concerns. [75]

For some, the effect of the CoOP's effect on national labour standards also provided ground for worry. Particularly Germany, Denmark and Sweden were concerned about the directive's effect on national labour standards. Although the Posting of Worker's Directive (PWD)[76] safeguards a minimum set of labour standards for temporary service providers, which are respected by the Services Directive through exemption from its scope by Art. 17(5), this did not offer a watertight guarantee that the provisions of the Services Directive, in particular the CoOP, would not apply to national labour conditions in certain instances.

This is the direct result of inadequacies of the PWD, as it fails to cover all forms of temporary employment. For example, the PWD requires compliance with the national minimum wage and, in absence of minimum wage, compliance with collective agreements. However, the PWD only exempts collective agreements from the CoOP

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73 See: Nicolaïdis and Schmidt (2007).

74 A fear repeatedly expressed by the ETUC. See: Catelene Passchier in *Public Hearing: on the proposal for a directive on services in the Internal market*, p.105.

75 Member States were concerned whether national administrator would have any incentive to check up on the activities of the service providers in other Member States.

76 *Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services*, Official Journal, 21January 1997.

when they satisfy the requirement of a 'universally applicable agreement'.[77] A problem thus arises when collective agreements are in place that do not satisfy the requirements of the PWD. This is the case in Germany, for example, where no formal minimum wage exists. Germany was concerned that the Directive would therefore not be able to protect German workers against cheap labour from outside and feared this would result in wage dumping.

Aside from concerns about the CoOP, there were alternative grounds for Member States to oppose the draft directive. There was a fear of crumbling Member State control over posted workers. Although the directive specified that the provisions of the PWD continued to regulate the temporary posting of workers, Article 24 touched on the administrative requirements at host states' disposal to control whether out-of-state providers have complied with the PWD.[78] It would abolish 'authorization, licenses and registration'[79], thereby seriously hindering the Member State of posting in enforcing its own legislation.

A similar problem arose with regard to the 'self-employed'; i.e. service providers working alone without any people working for them. Since the PWD only applies to 'posted workers', and to the self-employed who individually provide a temporary service abroad, this group is not subject to the rules that apply to 'workers' or 'employers' as set

77 Bruun (2006), p12.
78 *Draft Services Directive*, article 24 'Specific provisions on the posting of workers'.
79 Catelene Passchier in *Public Hearing: on the proposal for a directive on services in the Internal market*, p.108.

out under the European Union social policy protections.[80] In these instances, the CoOP or the principle of the free choice of law[81] applies. This means that the CoOP *can* indirectly apply to the labour standards of the self-employed person whilst preventing Member States from imposing local labour law on foreign non-established providers. The fact that the Directive therefore indirectly affects national labour law, and according to some is said to even interfere with Rome I[82], is conspicuous and clearly contradicts consideration 58 of the draft directive which states that this directive will not apply to labour law. Understandably, these conclusions led to opposition among Member States.

It should be noted, however, that not all of these concerns were entirely based on facts, and that the general debate on the Services Directive was partly based on false fears. To understand this false debate, one should look at the term 'European Social Model' which was frequently used but only ill-defined.[83] It is not clear what policies or rules fall under the European Social Model and therefore what is meant when people refer to this concept.[84] The result is that the debate is non-transparent, which causes people to fear

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80 Neal, A.(2006), 'The Country of Origin Principle and Labour Law in the Framework of the European Social Model', in Roger Blanpain (ed.), *Freedom of services in the European Union : labour and social security law : the Bolkestein initiative*, p.70.

81 *Draft Services Directive*, Art. 17(20).

82 Rome Convention on law applicable to contractual obligations (Rome I). Rome I holds that the contract of employment is governed, when it is not subject to the PWD, either 'by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country or, if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated'. In these cases, Rome I allows for the host country labour law to apply when the employee does not habitually work in his country of origin. See: Council Document, *Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on services in the internal market*, OJ C221/113, 8 September 2005.

83 Interview cabinet member Commissioner McCreevy, Brussels 15 December 2006.

84 Some attempts have been made by e.g. Diamantopoulou (2003) who argues that the European Social Model refers to social policies, such as welfare, healthcare, labour market rules, equality rules etc. She places employment policy also under this concept, arguing that this is 'the cornerstone' of the European Social Model. Source: Diamantopoulou, A. (2003), *The European Social Model – Myth or*

that the directive will have negative implications on the 'European Social Model', without specifying the causal relationship between directive and European Social Model.

In a similar vein, many fears about e.g. lowering wages and working conditions often had 'nothing to do with Bolkestein'[85] but rather resulted from faults in other legislation, such as the PWD. The absence of e.g. minimum wage legislation in Germany, Denmark and Sweden renders 'the host-country control principle of the Posted Workers Directive to be meaningless in those countries'.[86] Although it is true that these issues could lead to undesirable side effects, they are not principally the fault of the Services Directive. Suffice it to say that the public's view came to be shaped by a debate where facts and reality did not always match.

The ETUC as entrepreneur

The main entrepreneur behind this politicisation was the ETUC. Afraid of being viewed as protectionists and hostile towards the Eastern European countries, the ETUC decided to ask for a complete overhaul of the directive rather than opposing the directive itself.[87] They demanded the removal of the CoOp, its effect on national labour law, a narrowed scope and the preservation of the Posting of Workers Directive.[88] They forcefully opposed the provisions outlined in Art. 24, arguing that this article would 'have virtually

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Reality?.Address at the fringe meeting organized by the European Commission's Representation in the UK within the Framework of the Labour Party Conference, p.3.

85 Chang, M., D. Hanf and J. Pelkmans (2010), 'The Services Directive: Trojan Horse or White Knight?', *Journal of European Integration*, p.105.

86 Ibid., p.104.

87 Dølvik, J.E. and A.M. Ødegaard (2010), 'The Struggle over the Services Directive: A case study of inter-institutional decision-making in the EU', *Paper presented at Arena Centre for European Studies*, p.8.

88 Ibid., p.8.

destroyed the host country's scope to monitor compliance with the stipulated conditions for posted workers'.[89] They feared that these changes[90] would 'reduce the effectiveness of essential mechanisms needed to secure the implementation and enforcement of obligations relating to employment and working conditions'.[91]

Increased public awareness about the content of the draft directive and fears about possible negative effects of the directive on social rights of workers in countries with higher standards (called 'social dumping') enabled the ETUC to successfully spark off a public debate about the directive's effect on the European Social Model.

The protests organised by European trade unions were very successful and unprecedented in scale. Fears were not just expressed by NGOs, political parties and national governments, but captured the European public debate.[92] It seemed that this mass mobilisation against the directive was more than a simple successful lobby by an interest

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89 Barnard (2008), p.329

90 The Commission wanted to amend some administrative procedures, which it felt were unnecessarily burdensome for businesses, through articles 24 and 25 of the initial Directive (source: the Commission's *Extended Impact Assessment of Proposal for a Directive on Services in the Internal Market* (2004), p.21). In justifying these changes the Commission pointed to the jurisprudence of the Court of Justice. According to these rulings, particular administrative requirements, imposed in order to ensure an 'a priori control', should be deemed disproportionate if there are possibilities to ensure efficient 'ex-post' control. The Commission held that the abolition of these particular administrative measures would not impact the Posting of Worker's Directive (PWD) directly as it only deals with the *interpretation* of the PWD by the Member States. Others have argued, however, that the directive would encroach on the PWD since it would change the means available to check whether the conditions set out in the PWD were adhered to. Leaving a judgement on who is correct aside, the most important thing to note is that these articles were removed from the initial draft directive during first reading.

91 Niklas Bruun on behalf of National Institute of Working Life, in Committee on the Internal Market consumer protection and Committee on Employment and Social Affairs, *Public Hearing: on the proposal for a directive on services in the Internal market*, p.98.

92 This becomes clear from articles such as: 'Uber 85000 Menschen demonstrieren für ein soziales Europa' (translated as: 'Over 85000 people demonstrate for a social Europe'), website IG-Metall (http://www.igmetall.de), 21 February 2006 ; 'Even scarier than Kilroy', by George Monbiot, *The Guardian*, 8 March 2005; 'Non a la Directive Bolkestein!' (translated as: 'No to the Bolkestein Directive') by Henri Emmanuelli and Béatrice Patrie, *Libération*, 20 January 2005.

group. Rather, the main entrepreneur of the opposition (i.e. the ETUC) had managed to make the public aware and involved. The ETUC functioned as 'spokesperson' and 'representative' of the workers' interests, and later as spokesperson for the large scale public protests, and was remarkably successful in influencing the negotiations as the voice of the trade union members.

The reason the general public mobilised was largely the result of the ETUC's successful approach of appealing to the concerns underlying the public sentiment. However, this statement requires differentiation. The public sentiment here refers mainly to the public sentiment of a majority of Western European Member States as there was an *absence* of mass mobilisation in the Central and Eastern European countries. The concerns of the general public in the Western European countries were mainly about fears of possible negative effects of the directive on employment and social welfare models. To the opponents, the Polish plumber became the icon of the threat posed by the Services Directive; a worker from a country with a lower welfare system, labouring for lower wages, and competing under these terms in the rest of Europe.[93] These concerns were exacerbated by existing concerns about the growing influx of low cost service providers from the new Central and Eastern European Member States which had joined in 2004.

At the same time, more general concerns about the development in the EU started to interfere with the negotiations and in turn also led larger groups of people to mobilise, albeit for different reasons. It seems that the protests in France were fuelled largely by

[93] Interview cabinet member Commissioner McCreevy, Brussels 11 February 2008; Interview Dutch MEP (EPP-ED) member of the leading IMCO committee, Strasbourg 14 December 2006; Interview former Commissioner of Internal Market, Amsterdam 6 April 2007.

concerns about the Constitutional Treaty discussed at the same time. With the French referendum due to take place on 29 May 2005, opponents of the Constitutional Treaty successfully coupled the negative sentiment towards the Services Directive with the Treaty. In addition, the rhetoric of the trade unions and labour union seemed to reveal a general dislike of the ongoing process of neoliberal integration of the European Union.[94] The directive acted as a catalyst, drawing opponents of this ideological movement into the protests against the Services Directive.

It should be noted that this debate and the opposition were partly driven by facts but also partly by unfounded fears. The reasons given for protest by some participants illustrate how distorted the debate was and how many of the protesters' fears were factually not a result of the content of the directive.[95] This was a characteristic of the public debate, and would to some extent also characterise the political debate in Parliament and Council.

In sum, although some opposition was based on facts, at other times 'it was the perceived dilution of the provisions on posted workers, accompanied by the Country of Origin Principle, that led many to argue that the Services Directive paved the way for social dumping'.[96] Contrary to BusinessEurope[97], who suffered from strong internal division,

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[94] See: Henning, D. (2005), 'Brussels: Workers from East and West Demonstrate for a 'Social' Europe', *World Socialist website (www.wsws.org)*, 21 March 2005. For a discussion see: Storey, A. (2006), 'The Struggle for Europe: resistance to neoliberalism, *IPEG Paper in Global Political Economy no 22*.

[95] 'Some Germans carried banners protesting against Schroeder's reforms of the last year and there were many signs about 'social dumping'. Some French unionists said they were protecting their trains from privatisation, even though the Services Directive doesn't affect transport'. Source: BBC News, 'Europe Diary: Services Directive', by Mark Mardell, 16 February 2006.

[96] Barnard (2008), p.329

[97] BusinessEurope is the organisation that represents the interests of the small and medium businesses on a European level.

the ETUC was able to overcome this internal disagreement and speak with one voice. [98] It even seemed to benefit both from the factually correct and incorrect debates as it proved a successful means to enhance the level of public involvement.[99] This partly explains its great influence on the negotiations.

5.4.2 Explaining the effect of politicisation on Member States

This mobilisation seemed to have had two important effects. First, although Member States had obviously been aware that this directive would imply some costs, the mass mobilisation had generated more insight into what exactly the costs of this directive would be. A large majority of Member States seemed unaware of the precise implications of this directive, in particular on domestic employment, national labour law and their welfare model. It is therefore not remarkable that the Parliament, in response to this large-scale mobilisation, organised a Public Hearing[100] of experts which had to clarify the exact implications of the various aspects of the directive. Second, it had enhanced the relative concern which Member States had attached to the costs of the directive. The large scale mobilisation of the general public meant that a simple disregard of these concerns would be very costly.

The result of large mass mobilisation against the directive was that a great number of countries changed, and stiffened, their initial strategic positions.[101] It also heightened the

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98 Dølvik and Ødegaard (2010), p.9.

99 Ibid., p.8.

100 Committee on the Internal Market consumer protection and Committee on Employment and Social Affairs, *Public Hearing: on the proposal for a directive on services in the Internal market*, European Parliament Brussels, 11 November 2004.

101 Interview Dutch MEP (EPP-ED) member of IMCO committee, Strasbourg 14 December 2006. Interview member of PES secretariat, Strasbourg 13 December 2006.

general political inclination to satisfy public demand, and, more concretely, listen to the ETUC's demands. One of the first political parties to pick up this concern was the 'Parti Socialiste' (PS) in Belgium, who openly advocated against the Services Directive during the EU elections.[102]

France, Germany and Italy were particularly susceptible to the trade unions' critique.[103] In Germany 'high labour costs and rigidities … contributed to intolerable unemployment'[104] in 2005. The prospects of the Services Directive led to unrest in Germany because of the fear that the stereotypical Polish plumber would take away German jobs. This led Chancellor Schröder to argue that 'we can't allow freedom in services to open the door to social dumping'.[105] President Chirac was under similar pressure in France. The French economy experienced difficulties in 2005, as 'all business sectors in 2005 experienced slower growth, as [well as] the French economy as a whole'.[106] This put the French labour market under pressure.

Added to this was both countries' concern about the effects of Eastern enlargement on reform of pensions and labour markets[107], particularly as the French and German labour markets were already under pressure. At the same time, both and suffered from relatively

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102 Interview cabinet member of Commissioner McCreevy, Brussels 15 December 2006.

103 Perhaps not surprising considering Chancellor Schröder and President Chirac are both socialist politicians.

104 International Monetary Fund (IMF) website, *Germany – 2005 Article IV Consultation Concluding Statement of the Mission*, 28 June 2005 (www.imf.org)

105 'Schröder slams EU services sector plan', *Deutsche Welle*, 18 March 2005.

106 Institut National de la Statistique et des Études Économique (INSEE), 'Business Slowdown in 2005', *Newsletter of INSEE No. 1079*, by J.Y. Fournier, J. Prévot and V. Vicaire.

107 Pelkmans, (2007).

high levels of unemployment[108] and little to no economic growth. The fears about enlargement coupled with high national unemployment rates, the unknown effects of the Services Directive on the European Social model, and the general discontent with the Constitutional Treaty made it politically impossible for President Chirac and Chancellor Schröder to maintain their initial standpoints. The political impasse was complete when the directive's idea of mutual recognition became 'embroiled in larger political debates about the Constitutional Treaty and the future direction of the EU'.[109] Similarly, Italy and Belgium changed their positions.[110] The politicisation of the debate had become a fact.

The result of the high level of politicisation was that the Member States were divided, their positions stiffened and a stalemate resulted in Council in early 2005.[111] Where France, supported by Germany, Sweden, Belgium, Denmark and Luxembourg, had argued that the proposal was 'unacceptable' and seemed unwilling to ever support this initiative[112], there was another group of six countries strongly supporting the directive. The strong support of these countries for the Services Directive even prompted the economy and foreign ministers of the six Member States to send a letter to President Barosso on 11 February 2006, a couple of days prior to the Parliament's first reading, explicitly supporting the initial draft of the Services Directive. In this letter, the Netherlands, the United Kingdom, Spain, the Czech Republic, Hungary and Poland, demanded 'that the Services Directive…should avoid excluding large sectors of the EU

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108 France had an unemployment rate of 10% in 2005. Source: *OECD Economic Survey of France 2005*, published 16 June 2005 (www.oecd.org).

109 Barnard (2008), p.323.

110 Interview cabinet member of Commissioner McCreevy, Brussels 15 December 2006.

111 Ibid.

112 This is particularly disingenuous when considering that the President Chirac and Chancellor Schröder are among the few survivors from Lisbon and had explicitly supported the initiative before. See: Gros (2005).

economy'[113] and called on it 'to avoid watering down the articles on cross-border service provision'.[114] This stalemate constituted the background against which the Parliament negotiated its first compromise.

5.5 Towards a compromise in Parliament and Council

Three aspects of this directive formed the main bones of contention during the debate in Parliament. First, the scope of the directive proved problematic, especially the inclusion of healthcare services and services of general interest. Second, the measure of mutual recognition that was used to liberalise temporary service providers resulted in much opposition. Third, the (possible) effect of the directive on national labour law elicited opposition.[115]

First reading in Parliament

These conditions were far from ideal for a successful conclusion of the directive. Politicisation had led to a strong internal division in Parliament as well. Contrary to the dominant ideological divisions in Parliament[116], the Parliament's political groups were internally divided along national lines, roughly resembling an 'old' vs. 'new' Europe distinction, rather than left-right dimensions.[117] These national differences would later be

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113 'EU six defend bill to open services market' by George Parker, *Financial Times*, 11 February 2006.

114 Ibid.

115 These issues came up consistently during the interviews I conducted with MEPs from various parties, Strasbourg 13 and 14 December 2006. See Appendix 1.

116 Hix, S., A. Kreppel and A. Noury (2003), 'The Party System in the European Parliament: collusive or competitive?', *Journal of Common Market Studies*. See also: Hix, S., A. Noury and G. Roland (2006), 'Dimensions of Politics in the European Parliament', *American Journal of Political Science*.

117 Interview Dutch MEP (ALDE) member of the leading parliamentary IMCO committee, Strasbourg 13 December 2006; interview member PES secretariat, Strasbourg 13 December 2006; interview Dutch MEP (EPP-ED) member of IMCO committee, Strasbourg 14 December 2006.

reflected in the vote in plenary where the French liberals (UDF), part of the ALDE group, supported the standpoints of the PES.[118] In the EPP-ED, the draft directive was supported by the North European, Dutch, British and Spanish parties.[119] The French, Belgian, German and some Italian parties were sceptical about the draft directive. The PES was similarly divided, with a large division between the Hungarian, Polish and Czech parties favouring the draft, and the French and German parties which were more sceptical.[120] A similar division was found in the ALDE group, which saw a division between the French, Spanish, Italian and Belgian parties opposing the directive on the one hand, and the Dutch and British supported by the new Member States[121] on the other hand. The strong national divisions made it difficult for party groups to reach agreement internally, let alone compromise between them.

Despite the challenges, the Parliament managed to overcome strong national divisions by fostering agreement within each political party, which then allowed for agreement between parties. It realised that if its compromise was to be accepted by the Commission and the Council, it had to obtain the support of a solid majority in Parliament.[122] The most successful coalition able to generate a comfortable majority was an EPP-ED and PES coalition (together total 468 seats out of 732). This explains why the ideologically more straightforward coalitions of EPP-ED and ALDE (minority of 356) or a leftist coalition did not work.

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118 *European Parliament adopted Services in the Internal Market on 15 November 2006 in Strasbourg* (P6_TC2-COD(2004)0001).

119 Interview Dutch MEP (EPP-ED) member of the IMCO committee, Strasbourg 14 December 2006.

120 Telephone interview Belgian MEP (PES) member of the IMCO committee, 2 March 2007.

121 Interview Dutch MEP (ALDE) member of the IMCO committee, Strasbourg 13 December 2006.

122 Interview cabinet member Commissioner McCreevy, Brussels 15 December 2006.

The positions of the EPP-ED and ALDE were much closer to the original Commission proposal. Whilst the PES proposed a total reform of the CoOP and exclusion of public services as well as services of general interest[123], the EPP-ED and ALDE proposed to maintain the CoOP and the scope, but suggested to respect national public law in areas such as health, environment, security and safety. The result was that the IMCO vote of 22 November 2005 maintained the disputed CoOP and services of general interest, and did not water the draft down as much as rapporteur Gebhardt (PES) had wanted. This compromise led to much societal discontent; the ETUC considered it 'totally unacceptable' and declared it would keep protesting. This indeed occurred, resulting in two large-scale demonstrations in Strasbourg on the 12th and 14th of February 2006.

This mass protest put pressure on the informal agreement (reached on the 14th of February 2006) between the PES and the EPP-ED in the leading IMCO committee. Subsequently, the Parliament as a whole opposed the compromise reached by the IMCO committee.[124] The members of the EPP-ED blamed shadow rapporteur Malcolm Harbour (EPP-ED) for compromising too much, whilst the PES kept increasing their demands in return for their support of the directive. Finally, the Parliament adopted its compromise in first reading on 15 November 2006 (see Table 2 in Appendix 4 for an overview of amendments made to the Services Directive).

123 For example audiovisual services, postal, water, electricity and gas services.

124 It is not remarkable that this compromise text was largely altered in the plenary meeting on 16 February 2006. The leading IMCO committee's vote, being just one of 10 committees concerned with the Services Directive, stood in sharp contrast to the larger scale opposition in other committees. This already hinted at a perhaps different general Parliamentary wide sentiment towards the directive than the one displayed by the IMCO committee.

A reduction of the scope of the directive was essential for a compromise.[125] Nine additional sectors and cross-cutting areas were removed, namely: services of general interest, services of temporary work agencies, healthcare service, audiovisual services, gambling services, activities connected with the exercise of official authority, social services, private security services and services provided by notaries and bailiffs[126] and the full exclusion of the field of taxation in general.[127]

Particularly difficult was the issue of healthcare services. This led even the British government, generally a proponent of the directive, to be concerned about the directive, fearing it would e.g. allow foreign nurses to carry out abortions in the UK under their own laws.[128] The PES strongly opposed inclusion of healthcare services in the directive and proposed addressing this in a sectoral directive. They feared that its inclusion would make healthcare services 'subject to pressure to deregulate (e.g. Articles 14 and 15)'[129], and proposed addressing healthcare services through a sectoral directive instead. On the other side, ALDE was in favour of keeping both private and public healthcare services under the scope of the initial directive. Whilst the EPP-ED was initially in favour of making a distinction between public and private healthcare services, this option did not

125 Interview functionary DG Markt (unit services), Brussels 15 December 2006.

126 Art. 2(2) of *Directive 2006/123/EC on Services in the Internal Market*, Official Journal, 27 December 2006 (hereafter referred to as directive 2006/123/EC). All subsequent references to article numbers will correspond to directive 2006/123/EC.

127 Art. 2(3).

128 The British government feared instances where nurses coming as service providers to the UK, a country where abortions have to be carried out by a doctor, would be allowed to provide abortions in the UK under the provisions of the CoOP (source: Barnard (2008), p.362.)

129 European Trade Union Confederation, 'The Draft Services Directive: Europe needs quality services that meet the need of its people', 30 January 2006. Available from: <http://www.etuc.org/IMG/pdf/depliant_A4_EN_LOW-2.pdf>.

prove viable as drawing this distinction proved too difficult.[130] This was partly the result of large concerns within its own party and partly due to the political sensitivity of the debate in general.[131]Therefore the EPP-ED decided to side with the PES and support the exclusion of Article 23.[132] Similarly, temporary work agencies were excluded from the scope of the directive. Although the PES had in addition wanted to exclude services of general economic interest from the scope of the directive, this was rejected by a majority of EPP-ED and ALDE MEPs.[133]

Furthermore, Article 24 on posting of workers was removed. The concerns of the trade unions regarding further deregulation of posting of workers were shared by the PES and EPP-ED, and led the Parliament to exclude this article from the directive.[134] All these amendments reduced the scope of the directive.

Turning to the directive's degree of market integration, a discrepancy becomes clear between the amendments made to the chapter on establishment and the chapter on freedom of services. Whilst there was general agreement on the barrier-removal measures which the directive had proposed to ensure freedom of establishment, there was massive

130 Interview with member of the PES secretariat, Strasbourg 13 December 2006.

131 Interview Dutch MEP (EPP-ED) member of the IMCO committee, Strasbourg 14 December 2006. See also: Hatzopoulos and Do (2006), p.941.

132 It was decided to address this issue separately through a vertical directive – the later to be adopted Patient Mobility Directive.

133 Interview Dutch MEP (EPP-ED) member of IMCO committee, Strasbourg 14 December 2006; interview Dutch MEP (ALDE) member of IMCO committee, Strasbourg 13 December 2006.

134 Interview Dutch MEP (EPP-ED) member of IMCO committee, Strasbourg 14 December 2006; telephone interview Belgian MEP (PES) member of IMCO committee, 2 March 2007.

opposition towards the proposed measures to ensure freedom of services. The CoOP proved the culprit of the disagreement within Parliament.[135]

A compromise text, said to be drafted by the EPP-ED, offered a solution to the contentious CoOP. This compromise changed Article 16 into 'freedom to provide services', meaning that its positive content (outlining rights) was altered into negatively specifying what is prohibited. Through this amendment, it would widen the grounds for derogation from the principle. At the same time, it would add 'protection of the environment' and 'rules on employment conditions' to the grounds which justify exceptions from Articles 16(1) and 16(2).[136] The Parliament also removed the provision which had made home states responsible for oversight of 'their' service providers in host states. In a sense, it changed the CoOP of pure mutual recognition into a measure of managed mutual recognition.

According to some, the underlying factor enabling this agreement between the EPP-ED and PES was the German coalition agreement of 11 November 2005 between the CDU-CSU and the SPD.[137] This national agreement between the German Socialists and German Christian Democrats opened up room for compromise between both parties on EU level, as the German EPP-ED and PES members were now able to agree. By means

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135 Interview cabinet member Commissioner McCreevy, Brussels 15 December 2006.

136 Art. 16(13). The latter seems confusing when bearing in mind that article 1(6) argues that 'this Directive does not affect labour law, (meaning) … any legal or contractual provision *concerning employment conditions*' (italics added).

137 The German coalition agreement of 8 February 2006 stated that: 'We will only agree with the Directive on a European level when it is socially balanced, when it safeguards access to public goods … and prohibits violations against the order of the labour market'. Translated abstract from German Coalition agreement, *Gemeinsam für Deutschland – mit Mut und Menschlichkeit*, Koalitionsvertrag zwischen CDU, CSU und SPD, 11 November 2005, line 982-985.

of a high-level working group, a compromise was reached between the EPP-ED and the PES on 16 February 2006.[138] Although it seems plausible to assume that the German coalition agreement influenced the negotiations in the Parliament in certain ways, considering that this theory was supported by the members of the ALDE group[139], its direct effect on the compromise remains debated.

The extent to which Article 16 was radically altered also remains a matter of debate[140], but it is clear that the original CoOP was weakened. If not through amendments to Art. 16 itself, it was done by maintaining Article 17 largely in its original form. This meant that a weaker Article 16 is paired with an almost unchanged list of derogations (Art. 17). The Parliament, as a result of PES amendments, included 'overriding reasons relating to the public interest' (Art. 4(8)) as a general ground for exceptions to be made to this principle[141] and added consumer protection as an 'overriding reason of public interest'.

The main initiator of these changes was the PES, the actor who had pushed for removal of Art. 24, preservation of the original Art. 17 and the inclusion of Art. 4(8).[142] These

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138 Interview Dutch MEP (EPP/ED) member of the IMCO committee, Strasbourg 14 December 2006.

139 This was confirmed in the interview with a Dutch MEP (ALDE) member of the IMCO committee, Strasbourg 13 December 2006. In addition, Graham Watson (ALDE), stated that 'regrettably, a coalition of conservatives and socialists last week conspired to introduce an array of 'get-out' clauses and exemptions that drastically reduces the benefits for Europe's economy' (Source: 'EU Services Directive: MEPs comment', comment by Graham Watson, *EU Politix*, 21 February 2006). Then again, the objectivity of MEPs from a party which had been excluded from participating in forming the compromise text on this issue, can perhaps be questioned.

140 Barnard (2008), for instance, argues that the difference between the two might be more on emphasis than on substance, partly also because elements of the country of origin principle can still be found elsewhere in the directive (e.g. Art. 29) (see Barnard (2008) p.362).

141 This means 'overriding reasons of general interest' can justify: an exception to the requirement for simplification of administrative procedures as outlined in Art. 5(3); it can allow for the application of authorisation schemes (Art. 9(1B)) and it can prove a valid reason for Member States not to grant authorisation under Arts. 10(2B), 10(4), 11(1B), 11(3) and 13(4)).

142 Interview member PES secretariat, Strasbourg 13 December 2006.

changes had significant implications for Member States' ability to regulate and control out-of-state service providers. By giving power back to the Member States to control the in- and outflow of temporary service providers, something which the initial directive had substantially reduced, the barrier-removal measure was weakened. The directive's measure of barrier removal moved from (pure) mutual recognition to a form of managed mutual recognition.[143] The result was that the degree of market integration was slightly reduced.

A final change necessary to reach internal agreement concerned Article 1. Here, the controversy goes right to the heart of the neo-liberal, market-opening nature of the directive; i.e. its focus on deregulation (country of origin principle) and tightening of Member States regulation whilst hardly complementing this with EU wide re-regulation.[144] The underlying concern was: how to balance the European Social Model (i.e. keep national regulation) with the goal of a free internal market for services (i.e. removing barriers to trade)? Due to concerns of the PES and the ETUC about a possible 'competition to the bottom between rules of the different Member States'[145], Art. 1 now explicitly states that the directive will not affect national criminal and/or labour law, will not abolish monopolies and will not enforce privatisation.[146]

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143 Nicolaïdis and Schmidt (2007), p.719.

144 Barnard (2008), p.361.

145 Van Lancker, A.(2006), 'The Services Directive needs to be "Socially" adjusted – a political view from the European Parliament', in Roger Blanpain (ed.), *Freedom of services in the European Union : labour and social security law : the Bolkestein initiative*, p.160.

146 Obviously, the changes to Art. 1 and Art. 16 will not resolve the problems that are a direct result of inadequacies of the PWD (i.e. inability to protect the self-employed and guarantee labour standards for countries who do not comply with the directive's requirements) and are therefore likely to remain.

The compromise in itself is astonishing when considering the internal disagreement that had initially dominated the debate, a division that had largely deadlocked the Council but which the Parliament managed to overcome. This outcome was basically an EPP-ED and PES agreement. The EPP-ED and PES groups managed to have all of the compromise amendments adopted whilst the Greens, GUE and ALDE did not succeed with any of them.[147] The PES had a particularly large influence. This made the compromise difficult for the EPP-ED to accept, especially as its Eastern European MEPs heavily criticised the compromise for having given in too much to the PES.[148] The directive was accepted in Parliament on 16 February 2006, receiving 394 'yes' votes in Parliament – 70 fewer than the two big groups combined. The resistance group was almost completely made up of MEPs from the new Member States[149] which had joined in 2004 and would have preferred a more liberal directive.

TABLE 5.2: Effect of Parliamentary amendments on the directive's level of liberal legalisation

	Scope	Delegation	Degree of market integration
Parliament's Amendments	Medium: excl. nine service sectors	Very low	Medium: Establishment (no changes); Temporary service provision (CoOP replaced by freedom to provide services; widened grounds for derogation from principle Art. 16)

Council Agreement

The Member States had actively tried to participate throughout the Parliament's negotiations to try and steer the Parliament's compromise text. As the stark inner divisions made it difficult for the Council as a whole to amend the directive, it was in the interest of each Council member to try and bring the Parliament's compromise text in line

147 'Conservatives and Socialists vote Services Directive through', *Euractiv*, 16 February 2006.

148 'Europe diary: Services Directive', by Mark Mardell, *BBC News*, 16 February 2006.

149 This number corresponds roughly to two thirds of all central and southern European MEPs within the EPP-ED and PES that had joined the EU in 2004. Source: 'Conservatives and Socialists vote Services Directive through', *Euractiv*, 16 February 2006.

with their wishes. As most MEPs tend to be susceptible to the position of their national governments, as the alleged influence of German coalition agreement on Parliament's compromise illustrated, this allowed governments to indirectly influence the compromise through their MEPs.

After the Commission had largely accepted the Parliament's compromise text[150], the text went to the Council, who only made minor changes. The Council slightly widened the scope of the directive by opposing the Parliament's amendment excluding legal services from the scope of the directive.[151] At the same time, it included rules on 'tacit rejection'; rules which could be used by a Member State in cases of overriding reasons relating to the public interest, thereby widening the grounds for authorisation. Moreover, it introduced a new chapter 'Convergence Programme' (Chapter 7 of the directive), whereby Member States had to provide the Commission with information regarding national measures taken and which invited the Commission to propose measures to encourage the drawing up of codes of conduct (Art. 37) and to submit proposals for harmonisation instruments (Art. 38) – a very mild form of delegation. The Council believed that this measure 'will act as a useful monitoring tool as well as preventing the build-up of national obstacles'.[152] Furthermore, the Council again extended the deadline of implementation from two to three years. Important as they may have been for internal

[150] The main 'disagreement' between the Commission and the Parliament concerned the directive's deadline where the Commission opted for a two year deadline for transposition of the directive rather than the three year deadline proposed by the Parliament.

[151] The reason for this was that Art. 3 specifically states that in cases of conflict, sectoral legislation (which exists for this service sector) will prevail over this more general service Directive.

[152] *Council Position of 24 July 2006*, COD/2004/0001, Legislative Observatory.

Council agreement, these changes did not significantly influence the directive's level of liberal legalisation.

The Parliament accepted this common position, which was fragile and even termed 'untouchable'[153] by some, entirely in second reading.

TABLE 5.3: Effect of Council's amendments on the directive's level of liberal legalisation

	Scope	Delegation	Degree of market integration
Council Amendments	Medium-wide: no sign. change (incl. legal services)	Low (slight increase of delegation to Commission by inclusion of Ch.7)	Medium: Establishment (no changes); Temporary service provision (slight widening of grounds for authorisation).

Given the strong reluctance towards the directive of a large number of Member States, the question arises why they did not decide to simply oppose the entire directive. Four factors help explain general Member States' willingness to reach a successful outcome. First, a clear need for a directive had been established by the discrepancy between the content of the Court's case law and the practical state of the services market. The directive was therefore partly a functionalist outcome; the problem simply had to be addressed. The final compromise stays close to the ECJ's case law which illustrated how it served as a useful basis for agreement. Second, the clear commitments of all Member States to the Lisbon strategy, and their explicit willingness to contribute to completion of the internal market, put pressure on even the most sceptical countries (e.g. France) to make the negotiations work.[154] Third, the Parliament's compromise greatly helped the Council to agree internally. Fourth, a successful compromise was seen as a means to

153 Dølvik and Ødegaard (2010).

154 Part of the pressure on the ministers in the European Council resulted from the fact that the Directive seemed to tag along on the importance of the Lisbon strategy (source: Drijber, B.J.,'De Bezems van Bolkestein', *Nederlands Tijdschrift voor Europees Recht*, p.113).

drain the "poison" from a debate that had created tensions between new EU members in Central and Eastern Europe and social protectionist countries such as France and Germany.[155] The great divide between the old, Western Member States and the newly joined Eastern Member States was stark and the distrust between them high. A compromise on the Directive was needed to reduce the tensions between the different countries.

5.6 The final level of liberal legalisation

Assessing the level of liberal legalisation of the Services Directive, I conclude its level is medium. This is the result of a medium-wide scope, a medium degree of market integration and a low level of delegation.

As mentioned before, no delegation to independent agencies was foreseen, and only a very low level of power was delegated to the Commission by inclusion of chapter 7 in the Services Directive. As the incentive for the Member States to default remained and had even increased by the high level of 'legislative wooliness' of the directive denying the internal market a reliable basis,[156] delegation to an independent agency would have been preferable. With the present design, this directive inevitably invites the ECJ back in to adjudicate[157]; something which this directive had principally sought to resolve.

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155 'EU six defend bill to open services market', by George Parker, Financial Times, 11 February 2006.

156 Weatherill, S. (2007), 'Promoting the Consumer Interest in an Integrated Services Market', *Europa Institute Mitchell Working Papers*, p.18.

157 Barnard (2008), p.324-325.

The scope of the directive had been reduced through the inclusion of additional exceptions in Art. 2 and the exclusion of nine additional service sectors. That said, considering that the draft directive had an exceptionally large scope to begin with, I argue the directive's scope remained medium to wide.[158]

Finally, assessing the directive's degree of market integration is slightly more complicated. As previously explained, the directive consists basically of two separate parts (i.e. freedom of services and freedom of establishment), for both of which this directive devised measures to remove remaining barriers. The assessment of the strength of both of these sets of measures together constitutes the directive's degree of market integration.

However, it should be noted that each part has a different weighted impact on the liberalisation of the service sector. The removal of barriers to the right of establishment has bigger implications for the overall liberalisation of the services sector than the removal of barriers to temporary service provision. The reason is that cross-border establishment constitutes the majority of cross-border service activity.[159] Granted that the practical implications of the directive have, throughout this thesis, been subordinate to the theoretical shape of the directive (i.e. this is why I focus on the level of liberal legalisation), these exceptional differences in their effect on the liberalisation of the

[158] Consideration 33 of directive 2006/123/EC lists the services that fall under the final version of the directive.

[159] Another Copenhagen Economics report (2005) *The Importance of the CoOP in the proposed services directive – final report*, by Klaus Kasterberg Nielsen et al., has shown that the removal of the CoOP is expected to reduce the total welfare gain, which was estimated to be 37 billion, by 2-4 billion per annum across the EU. This seems to show that the main economic gains come from the directive's effect on establishment – an area that was hardly amended.

services market in practice should be included in the overall consideration of the 'strength' of the Services Directive.

The measures used to ensure freedom of establishment (i.e. administrative simplification through harmonisation, harmonisation of authorisations[160] and mutual recognition of requirements prohibited or subject to evaluation) were almost completely maintained and remained strong. The measures used to ensure the freedom of services (i.e. CoOP, harmonisation of rights of recipients of service and limited grounds to demand authorisation) on the other hand were severely weakened.

Although the practical changes to Article 16 may have been more stylistic than content-based[161], the measure's strength suffered most from the expanded grounds of derogation. As Article 17 was largely kept in its original form, the result is a weaker Article 16, paired with a list of derogations similar to the list of derogations which had applied to the initial Article 16. At the same time, by removal of Art. 24 the acceptable grounds for national administrative control were widened. Finally, the legal uncertainty created as a result of the amendments made to the free movement of services weakened the directive's measure of liberalisation.[162] I conclude that the measure of liberalisation for the freedom of service provision therefore is low.

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160 As was indicated above, the inclusion of 'consumer protection' as constituting an overriding reason relating to the public interest, did broaden the conditions which Member States have at their disposal to refuse granting authorisation to an out of state service provider wanting to establish in another Member State. The result is that the strength of this article was slightly weakened. This inclusion, however, is fully in line with the ECJ case law (see considerations 47 and 56 of directive 2006/123/EC).

161 See Barnard 2008.

162 Legal uncertainty resulted from a number of changes. The replacement of the mutual recognition rule (CoOP) by a collection of exceptions, which make up the 'freedom to provide services', reduced legal security. The inclusion of articles referring to employment conditions (Art. 1(6), 16(3)) did not help to

The weakening effects of the changes made to the 'freedom of services' chapter were partly offset by the lack of any substantial changes made to the establishment chapter. Overall, combining both sets of measures leads me to conclude that the directive's degree of market integration is medium.

TABLE 5.4: Overview of all amendments made to directive's level of liberal legalisation

Issue	Commission	Parliament	Council	Final outcome
Scope	Wide: in principle all services (excl. financial, electronic communication, field of taxation)	Medium-wide: excl. nine service sectors from freedom to provide services	Medium-wide: no sign. change (only incl. legal services)	Medium-wide: in principle all services (with substantial exceptions)
Delegation	Very low	Very low	Low (some to Commission through Ch.7)	Low
Degree of market integration	High: Establishment (strong); Temporary service provision (strong)	Medium: Establishment (no changes); Temporary service provision (CoOP replaced by freedom to provide services; widened grounds for derogation from Art. 16)	Medium: Establishment (no changes); Temporary service provision (slight widening of grounds for authorisation).	Medium: Establishment (no changes); Temporary service provision (weakened by widening the grounds for authorisation).

This assessment of the directive's level of liberal legalisation might appear surprising given the abundance of negative judgements about the final content of the Services Directive. Pronouncements such as a 'mere shell', 'mere codification of case law', or an endeavour to make a 'molehill out of a mountain'[163] would perhaps make one more inclined to scepticism. Some scholars even went as far as to conclude that the impact of

resolve the question whether or not this directive dealt with employment conditions. In addition, legal uncertainty is enhanced as a result of the exclusion of some service sectors. This means that the Court's case law still stands until new sectoral directives are adopted. Adding to this, the Directive is a *lex generalis*. This means it is put aside in case it conflicts with other sector specific directives, such as Regulation 1408/71 regarding social security, the Television without Frontiers Directive [89/552/EEC] or the Posting of Workers Directive [96/71/EC]. These sectoral directives are exempted from the Services Directive, which again reduce its the legal clarity.

[163] Weatherill (2007), p.1.

the directive on the development of the internal market was reduced to 'practically zero, if not even to a negative effect'.[164]

Most of these negative comments, however, come from legal scholars who rate the success of the directive by its degree of legal novelty.[165] Indeed, if one holds the view that a directive is merely novel when it furthers and develops principles already set out by the Court, then one must conclude that this directive does not present a legal breakthrough.[166] It hardly provides for rights not already set out by the Court before. In addition, it even fails to codify an important part of its case law (i.e. regarding health care services, temporary agents and gambling).

That said, it should be remembered that 'legal novelty' is not the interest of this thesis. I focus on the level of liberal legalisation as a proxy for liberalisation of the services market. Therefore, although the legal rights had indeed already been established by the Court, they had not been enforced. Given that this directive will enforce these rights, the practical implications of this directive, I argue, will be large. This contributes positively to the liberalisation of the services market and explains why I argue that the *level of liberal legalisation* should be rated as medium.

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164 Editorial Comments (2006), 'The Services Directive proposal: Striking a balance between the promotion of the internal market and preserving the European social model?', *Common Market Law Review*, p.308.

165 For a comprehensive and detailed legal overview of the content of the draft Services Directive, as well as a discussion of its final content, please see Barnard (2008).

166 For a more detailed analysis, see Krapels (2007).

5.7 Winners and losers – testing the model

The case of the Services Directive is a good illustration of the suitability of my framework in accounting for the level of liberalisation in the services sector. While the final outcome of this directive can partly be explained by the increasing economic benefits of opening the services market, particularly since services are increasingly forming a larger share of the European economy, and although the rulings by the ECJ had established a clear practical need for a Services Directive over the years, these considerations alone cannot help explain why the Parliament's relative influence, and particularly the influence of the PES, was so much higher than the Council's influence. The Parliament's pivotal role during the negotiations of the Services Directive was 'unprecedented'[167] and had, according to some, been 'responsible for hammering out the final compromise on the two most important items of legislation to come out of the European Union for a long time'.[168]

This requires more than a simple analysis of the formal power divisions between actors during negotiations. To explain the exceptional position of the Parliament, one needs to turn to the politicisation of the debate. Although politicisation, to some extent, changed the strategic positions of legislators, it also internally divided them. It even deadlocked the Council. The Parliament, however, was able to overcome internal disagreement and table a common position. This gave Parliament a drafting advantage over the Council.

[167] Dølvik and Ødegaard, (2010), p.17.

[168] The 'legislation', mentioned in this quote refers to the Services Directive and the legislation regarding regulating chemicals (source: 'Not Normal: the European Parliament has yet to fill the democratic deficit', *The Economist*, 20 January 2007).

Unable to reach a common position, Council was 'more reactive than proactive…[w]ith little coordinated action'.[169]

The reason the Parliament was able to overcome these divisions lies in its structure. As discussed in chapter 1, the structure of the Parliament seems to facilitate compromise. Due to their party discipline and majority voting, parliamentary groups were able to overcome internal party division, something which the Council was unable to do. This made it possible for the largest party groups, the EPP-ED and PES, to reach agreement on a compromise text.

Looking at the outcome in greater detail, it seems that the PES has played an exceptionally large role in shaping the outcome. Whilst the influence of the EPP-ED had been visible in the new 'freedom to provide services' principle, the PES succeeded in widening the grounds on which national requirements could be justified (Art. 16(3)), enhancing application of national authorisation procedures (removal Art. 24) and excluding a number of service sectors which were contested (e.g. healthcare services). This is remarkable, given that it faced some strong opposition from EPP-ED and ALDE members on these points, and considering that the PES was not even the largest party in Parliament.

However, the PES had the largest support base. It took on the concerns of the ETUC and the public at large. Although the concerns were not unique to this party,[170] the PES did

169 Chang et al. (2010), p.110.

become the main political representative of the concerns of the public at large and the workers more specifically. It felt itself supported in its amendments by the public mobilisation against the directive. Working in close cooperation with the ETUC, the 'representative' of the protesting workers, the PES benefited from the politicisation through an increase in relative influence. Together, the PES and ETUC succeeded in having a great share of the proposed amendments adopted.

The reason ETUC managed to influence the final outcome lay in its successful strategy of obtaining support from public opinion. ETUC pursued a successful dual strategy of generating public opposition (more than 75,000 people on 19 March 2005 in Brussels and around 50,000 people on 14 February 2006)[171] whilst at the same time operating as a mediator during the Parliamentary negotiations. By proving to be 'highly effective in conveying its concerns about the effect of the Services Directive on national labour law to a largely sympathetic European Parliament at the negotiation stage'[172], ETUC secured its political entrepreneur.

When comparing the ETUC's concerns to the amendments made by Parliament, this similarity and influence become somewhat visible. The ETUC strongly opposed the CoOP, fearing a lack of Member State supervision of the application of national rules protecting the public interest[173], it advocated an explicit exclusion of labour law from the

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170 A large share of EPP-ED members supported the PES amendments as they were equally concerned about the negative effects of the directive on the European Social Model.

171 Website ETUC, 'The in-depth modification of the Services Directive is a success but the ETUC will continue its action to improve certain areas', published 15 November 2006.

172 Barnard (2008), p.368.

173 Website ETUC, 'The in-depth modification of the Services Directive is a success but the ETUC will continue its action to improve certain areas', published 15 November 2006.

directive (in particular the posting of workers), it demanded clearer rules about workers' rights under collective bargaining and opposed the inclusion of services of general interest and general economic interest (e.g. healthcare, temporary work agencies). As shown under 5.5, almost all of these concerns were met. Whether the ETUC influenced the Parliament or whether the Parliament's wishes simply corresponded with the ETUC's remains a bit of a puzzle. Most likely it was a combination of both. In all likelihood the Parliament was already highly predisposed to concerns of the general public, with the politicisation forcing those who might have taken a different position to change their strategic objectives.

On the other hand, the proponents of the directive, mainly members of the EPP-ED and ALDE supported by BusinessEurope and the Commission, suffered from a lack of solid economic proof supporting the proclaimed benefits.[174] As Chang et al. argue, 'there was a yawning gap between the great ambitions of Lisbon for the EU in 2010 and the analytical economic underpinnings as far as services were concerned'.[175] In addition to that, BusinessEurope itself suffered from strong internal division which hampered their efforts to pursue a successful lobby.[176]

The high level of politicisation in this directive seems to have benefited the Parliament's influence. When taking the view, as some do, that the Parliament is the most democratic

[174] The Commission elaborated on the economic implications of remaining barriers to the services sector in its *State of the Internal Market Report* (2002) on pages 55-65 and in its *Impact Assessment for a Directive on Services in the Internal Market* on page 36. However, it failed in both instances to support these claims with any economic studies, calculations or figures.

[175] Chang et al. (2010), p.100.

[176] Interview representative of Business Europe, Brussels 15 February 2010.

institution in EU policy-making, this may mean that democratic representation works best when citizens are actively involved. This great degree of parliamentary influence stands in sharp contrast to the relatively modest role of the Council and the Commission. The Council had to stand by idle from time to time, due to its inability to make alterations given its strong internal divisions.[177] The Commission found itself in a similar position, prepared to make far-reaching compromises in an attempt to achieve a successful conclusion of the Services Directive.[178]

5.8 Conclusion

'*But while the left claims a victory, the right says it [i.e. removal of CoOP] doesn't matter because that's implicit anyway …[i]ts like that cat in the box – is it alive or is it dead? You don't know until you open the box …[u]ntil the courts and business test out the new rules, ambiguity will prevail'*.[179]

Mark Mardell summarises the main weakness of this directive very well. The amendments in Parliament and Council had led to a high level of legal uncertainty which means this compromise does not allow for very accurate predictions about its actual effect on the liberalisation of the services market. That said, despite its watered-down content, its high level of legal uncertainty and lack of legal novelty, I do not agree with some legal scholars that this directive is void of significance. Rather, I have argued that despite the significant amendments made, the directive contained a medium level of liberal legalisation. This will no doubt have an important effect on the liberalisation of the services market. In addition, there are three alternative reasons which make this directive into an important piece of legislation.

177 Interview cabinet member of Commissioner McCreevy, Brussels 15 December 2006.
178 Ibid.
179 'Europe Diary: Services Directive' by Mark Mardell, *BBC News*, 16 February 2006.

First, the horizontal nature of the Services Directive renders this directive a considerably more ambitious tool for liberalisation than its sectoral forebears. Successful conclusion of a horizontal directive could be an indication that Member States are willing to break with the conventional methods used to liberalise the European services market.[180] At the same time, it illustrates the willingness of Member States to apply the most adequate means (i.e. horizontal directive) for completion of the single market despite its controversial nature. This provides positive prospects for further liberalisation of the services market.

Second, an agreement reached on such a contentious issue as the Services Directive, the first directive to address the part of the services sector which had remained untouched until 2004, has a large symbolic value for the future prospects of European integration. The increased fears among the old Member States as a result of the enlargement in 2004, the crisis surrounding the European Constitution due to the French 'non' and the Dutch 'nee' in 2005 and the ongoing debates among Member States with regard to the Iraq war at the time had rendered the prospects of European integration bleak. A failure to conclude agreement on this Directive, a proposal which is a concrete product of the Lisbon Summit, would have negatively affected the process of European integration.

[180] Gekiere, W. (2006) 'The Proposal of the European Commission for a Directive on Services in the Internal Market: an overview of its main features and critical reflections' in Roger Blanpain (ed.), *Freedom of services in the European Union: labour and social security law : the Bolkestein initiative* terms this approach 'revolutionary' as it 'breaks with the tradition of sector-specific internal market instruments' (p.10) which have been applied to a number of services in the past.

This symbolic value was underscored by Commissioner McCreevy, who claimed that the directive was 'a milestone in the history of the European Parliament'[181], and by Members of Parliament, such as Ms. Jäätteenmäki (ALDE), who claimed that the 'adoption of the controversial Directive on services in the internal Market by the Parliament is an achievement in itself'.[182]

Third, the directive's high level of codification of ECJ rulings will have significant practical implications for small and medium sized companies, in particular in the area of establishment. Although the rights had already been outlined by the Court, Member States had failed to amend their national legislation accordingly, resulting in absence of practical change. Therefore, whilst the directive may have failed to introduce novel legal provisions, it will substantially alter the practical state of the services market by actually enforcing the ECJ's rulings.

Another characteristic of this directive which makes it valuable to consider is its perfect illustration of how external ad hoc politicisation can influence a directive's level of liberal legalisation. It refutes the notion once and for all that internal market integration is a purely technical endeavour. This case study illustrates the effect that the public can have on the final shape of a legislative proposal and illustrates *how* this influence affects the legislative outcome.

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181 'European Commissioner for Internal Market and Services Commissioner Charlie McCreevy's Statement on the vote in the European Parliament on the Services Directive European Parliament Plenary Session Strasbourg', *Press Service European Parliament*, 15 November 2006.

182 'EP Compromise on Services: Liberals and Democrats backed', *Newsletter ALDE on Strasbourg Plenary session 13-16 February 2006*, 17 February 2006.

The ability of the Parliament to overcome national differences offers good prospects for further liberalisation of the services market; the Parliament has shown its ability to manage a contentious political debate, which means that further integration cannot be stalled single-handedly by an internally divided Council and its receptiveness to the general public. This is good news for those who support further integration of the services market.

6. Patient Mobility Directive

In this chapter I will research the liberalisation of the healthcare sector by focusing on a directive that aims to facilitate free cross-border movement of patients (directive 2011/24/EU). This is the fourth case study of my research into the liberalisation of the services market. The reason this area has been chosen lies in the novelty of the development, i.e. the first step towards freer movement of patients in the European Union, and in the many tensions that are involved in the process of healthcare market opening.

Although European citizens have always been free to cross borders and receive healthcare abroad, few have actually done so. The current share of patients travelling abroad to obtain healthcare services is extremely small. The estimate is that only 1% of public healthcare expenditure is spent on cross-border care. Most of this cross-border healthcare seems to take place within regional initiatives, such that exist among BENELUX countries[1], rather than as the result of personal initiatives. Considering that the Member States currently spend 7.6% (967 billion euros) of GDP on public healthcare, cross-border healthcare equals approximately 9.7 billion euros.[2]

[1] Palm, W. and I. Glinos(2010), 'Enabling patient mobility in the EU: between free movement and coordination', in Mossialos et al. (eds.) *Health Systems Governance in Europe: The Role of EU Law and Policy*.

[2] Eurostat (2007), *Europe in Figures – Eurostat Yearbook 2006-2007* as quoted in the Commission's *Impact assessment accompanying the Directive on the application of patient's rights in cross-border healthcare,* SEC (2008), Brussels 2 July 2008.

It seems there is a relative lack of interest among patients in cross-border treatment. The 2007 Eurobarometer study[3] has shown that only half of European citizens would be interested in travelling abroad to obtain healthcare services. Considering this low demand for cross-border healthcare services, one might wonder why a Patient Mobility Directive rose to the political agenda. What was the need for such a directive?

It seems that the need had been 'created' by the legal uncertainty that had dominated this particular service sector. A discrepancy had been created between the content of the ECJ rulings and the practical legislative domestic reality, which had led to a situation where patients in theory had more rights than they in practice enjoyed. This legal uncertainty for patients created the need for an EU legislative directive providing a solution.[4]

The Commission had initially offered a solution by including healthcare services under the scope of the Services Directive, see previous chapter; a strategy which had triggered unprecedented opposition. In a second attempt, the Commission, in July 2008, tabled the Patient Mobility Directive. The final directive as accepted on 9 March 2011, had a low level of liberal legalisation. Given that the Parliament had called for a directive on Healthcare after the exclusion of this issue from the Services Directive, and given that the Council had been supportive of resolving legal uncertainty, what explains this very low level of liberal legalisation?

[3] Eurobarometer (2007), *Cross-border health services in the EU – Analytical Report*.

[4] Palm and Glinos (2010): 'the Member States (sudden) willingness to engage in political debates on health care should be seen in the context of the increasing pressure on national governments to accept the application of internal market rules in national health systems'(p.522).

This chapter will show that the relative absence of economic benefits of enhanced patient mobility for industry in combination with a possibility of politicisation, present prior to the tabling of the draft, negatively affected the directive's level of liberal legalisation. To substantiate this claim, I need to explain both the context in which the legislation was drafted and the process of negotiations. I again apply a two-tiered approach.

In the first tier I discuss the stakes all actors had in a directive on patient mobility. In particular, I focus on the agenda-setting stage and on the changes made to the shape of the directive prior to being tabled by the Commission. It is here that the directive's level of liberal legalisation was largely decided.

In the second tier, I explain the exact negotiations and test whether these arguments actually hold. I describe the debate, its level of contestation, and analyse how each of the amendments affected the directive's initial level of liberal legalisation. At the end, I rate the final directive's level of liberal legalisation and explain the differences in relative influence. I conclude this chapter by assessing to what extent my framework is able to account for this outcome, and try to distil what general conclusions can be drawn about the process of liberalisation.

6.1 Demand for the Patient Mobility Directive

The demand for a directive on patient mobility had already been present for a long time.[5] Although legislation to ensure that the free movement of people is not hampered by national healthcare requirements had already been agreed on years ago (e.g. Regulation 1408/71 as amended by Regulation 883),[6] there was an absence of EU legislation that acknowledged the rights which the Court had granted patients who travel abroad for the sole purpose of obtaining healthcare. This body of law had been developed by the Court, which had since the late 1970s been actively involved in the field of health. Through its rulings, it had created a legal framework defining the conditions under which patient mobility should operate. Thereby, it had provided a second avenue through which patients were allowed to obtain cross-border healthcare provision, based on the freedom of services principle; something which the existing legislation did not provide for.

Scholars who have studied the role of the Court in this area have drawn attention to its role in expanding EU competencies in this particular field, leading them to argue that the Court has functioned as a pivotal motor behind the developments within the healthcare

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[5] The health ministers had already, 'invited the Commission to explore how legal certainty in the field of cross-border care could be improved following the Court of Justice jurisprudence concerning the right of patients' in 2003. Source: *High Level Process of Reflection on patient mobility and healthcare developments in the European Union and the Commission Communication on the follow-up to the high level reflection process on patient mobility and healthcare developments in the European Union*, COM(2004) 301 final, 20 April 2004. Quote taken from *Proposal for a Directive on the Application of Patient's Rights in Cross-Border Healthcare*, COM(2008), Brussels 2 July 2008, p.2.

[6] *Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems*, Official Journal, 30 April 2004 guarantees that healthcare services can be received abroad in case of emergencies or when prior authorisation by the competent fund in the home state is obtained. Patients are treated as nationals and are entitled to the same healthcare benefits and obligations as the nationals of the Member State in which the patient in residing. It differs greatly from the Directive on Patient Mobility, which starts from the premise that patients' entitlements are defined by the state of affiliation, rather than the state in which the healthcare service is obtained (as Regulation 883/2004 does). (Source: Sunol R., P. Garel and J. Jacquerye (2009), 'Cross-border care and healthcare quality improvement in Europe: the MARQuIS research project', *Quality and Safety in Health Care*).

sector.[7] The main idea here is that through spill-over of principles of the internal market onto the healthcare sector, the Court went beyond the original intentions of the government in liberalising the healthcare sector.[8] This observation supports the more general insights of scholarly work on European integration in health areas. Greer even argues that the literature is clear on the fact that 'European integration in areas such as health proceeds by lawsuits'.[9] That said, not everyone shares this opinion. Some scholars, such as Hervey for example, point to the pivotal role of Open Method of Coordination (OMC) on the development of the healthcare sector. [10]

Whether or not the Court has gone beyond its initial mandate remains unclear. Although the relative support of the Member States for the codification of the Court's principles may on the one hand perhaps provide some indication that the Court remained within the boundaries deemed acceptable by the Member States, on the other hand past Court

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[7] According to a Director of Directorate General for Health and Consumers (SANCO), there was no clear demand from society for this legislative proposal. The Court was the main driver behind this legislative change. Interview director involved with the Patient Mobility Directive at DG SANCO, Brussels 1 December 2010. For more information about the Court's role in the area of healthcare see: Hervey, T.K. and J.V. McHale (2004), *Health Law and the European Union*, Sunol et al. (2009), Lamping, W.(2005), 'European integration and health policy: a peculiar relationship', in Monika Steffen (eds.), *Health Governance in Europe – Issues, challenges and theories*; Martinsen, D. S.(2005), 'Towards an internal health market with the European Court', *West European Politics*; Greer, S. (2006), 'Uninvited Europeanisation: Neofunctionalism and the EU in health', *Journal of European Public Policy*; Greer (2009); Jarman, H. and S.L. Greer (2010), 'Cross border trade in health services: Lessons from the European laboratory', *Health Policy*.

[8] As Jarman and Greer (2010) argue: 'one of the most striking facts is that no EU Member State sought an EU health policy and there is no justification for current policies in the health chapters of the EU treaties. EU health policy was developed by the Court of Justice and latterly the Commission…(f)ar beyond the original intent of the governments that agreed the treaties. EU scholars call this "spillover" and there is no reason not to expect it in the case of trade in services' (p. 162).

[9] Greer 2011, p.138. Conclusion based on work by: Kelemen, R.D. (2006), 'Suing for Europe', *Comparative Political Studies*; Kelemen, R.D. (2009), 'The Strength of Weak States: Adversarial Legalism in the US and the EU', *Paper presented at The European Union Studies Association 11th Biennial International Conference*; Conant, L.(2002), *Justice Contained: Law and Politics in the European Union*; Smith (2005).

[10] Hervey, T. K. (2008), The European Union's governance of health care and the welfare modernization agenda', *Regulation & Governance.*

rulings in this area have often elicited strong Member State opposition.[11] Leaving this debate unresolved, what is most important to note here is that the rulings of the Court created demand for legislative change.

6.2 Patient Mobility – what's at stake?

Having discussed the main driver behind this development, I will now outline the stakes of all actors in the Patient Mobility Directive so as to better understand the process that led to this final legislative outcome. The Patient Mobility Directive would change the status quo by laying down harmonised principles for reimbursement of healthcare costs incurred in a Member State other than where the patient normally lives, by defining the scope of healthcare to which patients would be entitled and by defining the grounds on which Member States could make reimbursement conditional; i.e. require prior authorisation from patients. This directive was designed to enhance legal clarity for patients by establishing when they would be allowed to obtain healthcare abroad and for which treatments they would be entitled to reimbursement. At the same time, it would bind Member States to a set of harmonised guidelines which would specify how cross-border movement of patients should be regulated and what rights patients have.

[11] During the *Peerbooms* case, ten governments went through great lengths to show that health care services should be excluded from Art. 49. See: Martinsen, D.S. (2009), 'Conflict and Conflict Management in the Cross-border Provision of Healthcare Services', *West European Politics*, p. 799; Hatzopoulos, V. (2002), 'Killing National Health and Insurance Systems but Healing Patients? The European Market for Health Care Services after the Judgments of the ECJ in Vanbraekel and Peerbooms', *Common Market Law Review*, p.693. The Court still ruled against these Member States.

Member States

For Member States, discussion of healthcare liberalisation was by definition controversial. Particularly when the Treaty of Amsterdam[12] reiterated that health systems were a matter for national governments. As healthcare systems often have deep ideological underpinnings, e.g. public and/or private healthcare providers, had traditionally been considered the sole responsibility of the Member States and given the varying experiences with patient mobility in recent years[13] , discussions about liberalisation of this sector aroused some concerns.

The main reason for this is that a European directive would directly lead to a reduction of national sovereignty in this area and would open the door to a further weakening of this sovereignty, without benefiting from electoral revenue by resolving and overcoming existing problems or responding to societal demand for change.

Let me explain. Currently, Member States generally experience very little problems in the organisation of their healthcare market. Although a theoretical benefit of enhanced cross-border healthcare services could materialise in e.g. a more efficient allocation of healthcare, it should be noted that no such inefficiencies actually existed. Efficiency optimisation had already successfully taken place through various regional initiatives. By

[12] *Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts*, Official Journal C 340, 10 November 1997.

[13] For an overview of individual country experiences see: Rosenmöller, M., M. McKee and R. Baeten (eds.), *Patient Mobility in the European Union Learning from experience*.

buying a number of operations from a hospital in another country, healthcare providers have been able to address the differences in national supply and demand.[14]

The possible costs of a Patient Mobility Directive for the Member States were significant. First, the most significant costs of this directive would be a loss of Member State sovereignty over this particular service sector. Although this sovereignty had, in principle, already been lost as a result of the ECJ's rulings, a European directive would actually formalise this. At the same time, it would open the possibility for a further reduction of sovereignty. Initial steps towards liberalisation could set Member States' influence on the national health sector on a slippery slope. This is not an unfounded fear. By accepting that healthcare is a service in an economic sense, healthcare services will become subjected to Treaty rules on public procurement, competition and state aid.[15] This could, in theory, have negative side effects, leading to situations where insurance companies or cost-cutting governments would be inclined to 'force' patients to travel to low-cost healthcare providers.[16]

Second, as the healthcare market is a highly regulated and polymorphic market, Member States may fear that external (de-regulatory) pressures would change their current regulatory set-up of the healthcare sector. As national regulation is both a means of protecting the viability of the healthcare system but could also be viewed as a barrier to free movement of patients, a directive on patients' rights will inevitably exert pressure to

14 See: Palm and Glinos (2010).

15 This would mean that a government would not be allowed to financially assist a loss making hospital, for reasons of fair distribution of healthcare facilities, as this would place a disadvantage over private initiatives.

16 Greer (2005), p.16.

remove or harmonise these differences. These changes to national regulation will undoubtedly be costly (in administrative terms) for the Member States, as different healthcare systems operate different ways of financing their healthcare.

Third, a Patient Mobility Directive would require new regulation. To accommodate cross-border patient mobility, systems are required to reimburse out-of-state healthcare services. To set up such a system of reimbursement, Member States need to outline the costs for each treatment which may, depending on the financing systems, be more or less difficult.[17]

Member States use various systems to organise their healthcare provision. The main typology used to distinguish healthcare systems is by classifying them into models, of which the two major types are the Bismarck and the Beveridge model. The Bismarck model refers to a social insurance system which insures people through 'their participation in some professional group, organization, industry or firm'. This implies that the health system is financed by multiple funds. This model was adopted in Austria, France, Germany and the BENELUX countries. The 'Beveridge model', on the other hand, insures people by virtue of citizenship as well as through their physical presence on national territory. The funding for healthcare services comes from a single fund which is financed by the state by means of taxes and other direct and indirect contributions. This

[17] For example, this is more difficult in systems where patients are reimbursed in kind. The director of the NHS European Office in Brussels pointed this out as being particularly problematic. Interview with director of the NHS European Office, Brussels 29 November 2010.

model is dominant in the UK, Ireland, Denmark, Finland, Sweden, Spain, Portugal, Italy and Greece.[18]

There are significant differences between these models in how each regulates its healthcare markets. An important difference lies in the operating of gate keeping systems. Beveridge models often operate a system where healthcare is conditional upon certain factors. For example, patients are only allowed to receive reimbursement if they obtain their healthcare from a contracted provider[19], something which usually does not apply to those Member States operating on a cost reimbursement basis.[20] Other differences exist on issues such as the scope of social healthcare (by which is meant the quality of the service available), the generosity of remuneration, patient choice and accessibility of care in general.[21] To ensure the free movement of patients in practice, a directive would have to establish practical systems of quality control and reimbursement. However, the differences between these systems in organisation, financing and reimbursement will make this a difficult and costly task.[22]

Fourth, a theoretical concern which Member States may have is that enhanced patient mobility could lead to additional costs. As healthcare is a service paired with high fixed

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[18] See: Sieveking, K. (2007), 'ECJ Rulings on Health Care Services and Their Effects on the Freedom of Cross-Border Patient Mobility in the EU', *European Journal of Migration and Law*, p.29.

[19] In the case of reimbursement through benefits in kind, patients either have a choice of practitioners determined by their sickness funds, as is the case in Germany and Austria, or are required to accept treatment at the institutions which are closest to their domicile, which applies in the case of the UK, Sweden and Denmark. This means that their service is 'free', as long as they use a provider with whom the sickness fund has an agreement. See: Sieveking (2007), p.30.

[20] The Bismarck system allows for patient choice with regard to practitioners and, to a more limited extent, hospitals and is used in Belgium, Luxembourg and France.

[21] Sieveking (2007), p.29.

[22] See Busse R., M. Wismar and P.C. Berman (eds.) (2002), *The European Union and health services: the impact of the single market on Member States*.

expenditures, it is costly to respond to an increase or decrease in demand.[23] Despite these theoretical problems, research had indicated that the increase of patients obtaining healthcare abroad will be negligible.[24] This explains why this concern did not carry much weight in the negotiations.

This directive, however, would not simply lead to costs on the part of the Member States but would also have benefits. The main benefits of this directive for Member States are: (a) a solution to the legal uncertainty of patients' rights and (b) the ability for Member States to assert influence over the development of the healthcare sector again by taking these decisions out of the Court's hands. Then again, these benefits lose some of their appeal in the face of the costs they come with. In sum, given the problems and costs that Member States are likely to face, Member States[25] are likely to be sceptical towards a European directive on patient mobility and would be inclined to agree on merely the bare necessities; i.e. codification of ECJ case law.

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[23] Previous research has illustrated the difficulties of engineering a system that reaps the benefits of competition in health care whilst assuring not to undermine solidarity, efficiency or cost containment. See: Evans, R.G. (2002), 'Financing health care: taxation and the alternative' in Mossialos E., A. Dixon, J. Figueras and J. Kutzin (eds.) (2010), *Funding Health Care: Options for Europe*; Paulus, A., S. Evers, F. Fecher, J. Van Der Made and A. Boonen (2002), 'Cross Border Health Care: An Analysis of Recent ECJ Rulings', *European Journal of Law and Economic*.

[24] Mossialos et al (2010): 'There is little to suggest that the currently miniscule number of individuals affected by, or likely to make use of, easier cross-border access to health care will increase dramatically with the new legislation' (p.81). My interview with the health counsellors working at the Permanent Representations of the UK, Sweden, France, Netherlands and Spain confirmed that this issue was not perceived as a serious concern. Interviews conducted in Brussels from 29 November until 2 December 2010.

[25] Obviously, there are differences in levels of opposition towards this directive between Member States. Sweden, for example, is ideologically and politically more favourable towards the directive than the majority of countries. See: Blomqvist, P. and J. Larsson (2009), 'Towards common European health policies – what are the implications for the Nordic countries?', *Working Paper/Institute for Futures Studies*. This was confirmed during an interview with the health counsellor at the Swedish Permanent Representation, Brussels 30 November 2010.

Industry

The Patient Mobility Directive is unlikely to have economic benefits for industry. Non-profit, public or private hospitals are not allowed to make profits according to most national legislation. Therefore an extra inflow of out-of-state patients would not result in higher revenues and an increase of patients would not generate additional profits. Whilst specialised hospitals could benefit from increased patient mobility[26], there was no additional benefit to be gained from this directive as the current situation already seemed to allow patients to travel to centres of excellence.[27] Finally, other potential stakeholders, such as insurance companies, remained out of the debate[28] due to the expected marginal increase only of cross-border movement of patients. Therefore, there was no reason to fear possible negative cost implications.

Patients

Patients are generally the ones that would stand to gain most from this directive. A directive on patient mobility would provide legal certainty about the rights of patients and would ensure reimbursement for healthcare treatment obtained abroad. By granting patients access to all European healthcare markets, patients would be entitled to the best treatment and able to obtain the best quality of care they can.

[26] Specialised hospitals which are trying to establish themselves as centres of excellence could benefit from an increase in patients. Their status of excellence could be strengthened with an increase of patients receiving treatment.

[27] Interview representative of the European Union of Private Hospitals, Telephone interview 9 December 2010.

[28] Interview director DG SANCO, Brussels 1 December 2010.

Having said this, the reality is that patients do not seem to attach much value to enhanced rights to cross-border healthcare. Eurobarometer studies have indicated that only a small majority of EU citizens (53%) would be interested in obtaining healthcare abroad.[29] In 91% of cases, the main reason for out-of-state healthcare consumption is to obtain healthcare which is unavailable at home.[30] Of those not interested in obtaining healthcare abroad, 83% was generally satisfied with the current organisation of healthcare in their country. [31] Regional initiatives which have materialised over the years may have contributed to this by resolving problems such as waiting lists, increasing costs etc.[32] Therefore, given that only a small majority is interested in cross-border healthcare and given that the directive as it shaped up to be focused primarily on patients' rights, is very unlikely that the negotiations of this directive will trigger a response from the general public.

6.3 Drafting the Patient Mobility Directive[33]

Although the Patient Mobility Directive, as it was tabled, did not give any reason for the general public to mobilise against it, I argue that this was not self-evident when the discussion of a healthcare directive was reopened in 2007. In theory, the term 'cross-border healthcare' encompasses four different activities. Together, they constitute the full concept of cross-border health service provision: (a) patient mobility, (b) cross-border provision of services, (c) temporary mobility of health professionals and (d) permanent establishment of healthcare providers in other Member States. A directive on cross-

29 *Cross-border health services in the EU – Analytical Report*, Eurobarometer, June 2007, p.8.
30 Ibid., p.11.
31 Ibid., p.18.
32 On regional and bilateral agreements, see: Palm and Glinos (2010); Busse, R. (2002).
33 Article numbers under 6.3 correspond to the article numbers of the draft Patient Mobility Directive.

border healthcare would address all, or at least some, of the four modes of service provision that constitute cross-border healthcare (see also Table I.2 in the Introduction). Each of these activities implies a different level of controversy. The free movement of services providers, as became clear during the Services Directive, had proven to be a rather controversial issue.

Chapter 2 noted that a possibility of politicisation requires firstly a resonance among the general public for this opposition, and secondly the willingness and capacity of the main interest groups to mobilise (i.e. to function as entrepreneur). The fact that full politicisation had already occurred before, partly as a result of proposed liberalisation of healthcare services, meant there was general public resonance concerning cross-border healthcare. The grounds that had previously given rise to mass mobilisation during the Services Directive (i.e. concerns of quality and viability of national healthcare systems) continued to be present prior to the tabling of the Patient Mobility Directive simply because there was no certainty about the scope or content of the directive that would be proposed. Thus, the first condition to establish the possibility of politicisation was satisfied.

Turning to the second condition, i.e. the availability of entrepreneurs, I argue these were present in abundance as well. In the first place, the national governments, similar to the general public, remained utterly sceptical vis-à-vis a directive liberalising cross-border healthcare. Added to this are the many interest organisations related to national healthcare sectors that have an interest in maintaining a monopoly and prefer to avoid

out-of-state healthcare service providers. This does not mean that there would be no actors in favour of such a development, there would be of course, but this argument is merely made to show that there were entrepreneurs in place with incentives to disseminate information and to mobilise public opinion as a basis of support.

The possibility of politicisation seems to have influenced the Patient Mobility Directive by affecting the Commission's decisions to propose a directive with a low level of liberal legalisation. For this to become clear, it is important to look at both the agenda-setting stage and the negotiation stage when trying to explain the Patient Mobility Directive. Where in previous directives the negotiations largely determined the directive's level of liberal legalisation, I argue that in this instance changes made during the agenda-setting stage were crucial for the directive's level of liberal legalisation (in particular its scope).[34]

Since 2007, several unofficial versions of the draft directive had circulated around Brussels. When comparing the Commission's unofficial proposal with the officially tabled proposal, it seems that in an attempt to prevent another mobilisation of the public against a European initiative on healthcare, the Commission decided to change its rhetoric and drafted a directive with its principal focus on patient rights as opposed to the more neo-liberal goal of creating a single market for health services. It shifted its focus from explicitly liberalising the healthcare market to ensuring *patient's rights*; a decision which seems to have been inspired by the fear of potential politicisation on this topic.

[34] These changes become clear when comparing the unofficial Commission's *Proposal for a Directive of the European Parliament and of the Council on safe, high-quality and efficient cross-border healthcare'*, Brussels, XX.XX.2007, with the officially tabled *Proposal for a Directive on the Application of Patient's Rights in Cross-Border Healthcare*, COM(2008) 414 final, Brussels 2 July 2008.

In addition, the possibility of politicisation seems to have also added weight to the demands of the Member States to amend the directive prior to it being tabled. Due to close involvement of the Member States during that time, several changes were made to the directive prior to the official tabling of the directive. The most important were: a reduction of the directive's ambiguity[35], a limitation of Commission influence[36] and a greater acknowledgement of the sovereignty of Member States in regulating the domestic healthcare sector.[37] The possibility of politicisation seems to have partly reduced the directive's level of liberal legalisation by strengthening the relative influence of the most sceptical Member States during the agenda-setting stage.

Nevertheless, some uncertainty remains about the underlying cause of the Commission's actions. It may also have been possible of course, considering the recent politicisation of the Services Directive, that the Commission had *purposefully* designed its drafting process this way so as to obtain feedback from the Member States, reduce possible resistance and test the waters prior to officially tabling the draft – not the least as there was fear within the Commission that this directive could jeopardise an even more important project, namely the ratification of the Lisbon Treaty. Regardless of which explanation is closest to the 'truth' of the matter, in either case the result is that the

[35] By defining hospital care, spelling out all conditions for prior authorisation (Art. 8(3-5)) and by outlining the objectives of European reference networks (Art. 15)

[36] A result of the removal of Art. 9(3) (Commission involvement to stimulate cooperation), Art. 15 (Commission involvement with regards to criteria of healthcare providers) and Art. 18 and Art. 17(3) (Commission's task to ensure cooperation on statistical data and measures of data collection).

[37] Changes to Art. 5 confirmed that Member States are to be granted the authority to ensure compliance with common principles for healthcare as opposed to authorities of the Member States. Similarly, changes to Art. 18 reasserted that Member States, rather than the Commission, were responsible for adopting measures to facilitate cooperation on statistical data of cross border healthcare.

Commission decided to amend the directive in line with Member State wishes and by narrowing the scope, completely eradicated any grounds of possible politicisation.

To show this influence of possible politicisation on the legislative outcome, I focus on symptoms of its influence. These symptoms can be found in the communication and behaviour of the European Commission. The justification for the drafting of this directive, and its strategy of focusing completely on patient's rights, seem to have been at least partly the result of the possibility of politicisation. The Commission, in the explanatory memorandum on the draft Patient Mobility Directive, indicated that one of the main reasons for the failure of the approach taken during the Services Directive was that it was felt the specificities of health services and the '*sensitivity for public opinion*' were not sufficiently taken into account.[38]

Although I would have liked to substantiate this claim with insights from my interviews, this was unfortunately not possible. At the time of my research, negotiations on this directive were still ongoing and most actors directly involved in the process, especially on the part of the Commission and the Parliament, were unable to speak to me about this directive. The interviews I did conduct unfortunately did not shed light on the potential influence of the possibility of politicisation, which I argue was present during the agenda-setting stage.

Whether the changes made during the agenda-setting stage were the result of Member State pressure or the direct result of the Commission's own considerations remains

[38] *Draft Proposal Patient Mobility Directive*, COM(2008), p.2.

unclear. That said, I think the communications from the Commission and their behaviour prior to the tabling of the directive show symptoms of being affected by the possibility of politicisation. The argumentation of the Commission seems to suggest clearly that its actions were a direct response to avoid politicisation from occurring once again. This, to my mind, shows that the Patient Mobility Directive was drafted in the shadow of politicisation.

6.4 Content of the Patient Mobility Directive[39]

The official draft directive on Patients' Rights was tabled by DG Health and Consumers (SANCO) on 2 July 2008. To ensure patients' rights, the first pivotal step according to the Commission was to codify the Court's case law; jurisprudence that had outlined the rights of patients. However, merely outlining rights would not suffice. The directive should also put in place the practical requirements to ensure reimbursement, to harmonise the definitions of the issues at stake (e.g. 'healthcare') and to strengthen cooperation between Member States. The Commission argued that this could be achieved by a combination of measures of negative integration, removing national protectionist measures such as the wide applicability of prior authorisation, paired with measures of positive integration, such as harmonisation (procedures, definitions) and enhanced cooperation. This, they argued, would remove practical differences between Member States that could function as barriers to cross-border patient mobility. In sum, the directive established a general framework of quality standards of healthcare and

[39] The article numbers referred to from 6.4 onwards correspond to the article numbers of the final Patient Mobility Directive (2011/24/EU) unless otherwise stated.

prohibitive restrictions to cross-border movement with which Member States should comply.

To determine the draft directive's level of liberal legalisation, let me discuss its content according to its scope, degree of market integration and level of delegation and rate each accordingly.

Starting with scope, the title of the directive, 'Patient Mobility', already illustrates that this directive is limited to addressing just one aspect of the total definition of cross-border healthcare: patient mobility. Of this subsection, the directive is all-inclusive with regard to the healthcare services it covers (i.e. all healthcare services).[40]

Turning to the directive's degree of market integration, the strength of this depends on the extent to which the solution of this directive can overcome the main barriers to cross-border movement of healthcare, in this instance: (a) variety between healthcare systems and (b) lack of clarity about responsibilities of authorities.[41] This variation can best be overcome, as explained in chapter 2, by applying a strong measure capable of removing barriers: i.e. harmonisation (e.g. coordination, reregulation etc.) or mutual recognition (managed or pure). The stronger the measure, the stronger the directive's degree of market integration.

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[40] *Draft Proposal Patient Mobility Directive*, COM(2008) states that this directive applies to 'all healthcare provision, regardless of how it is organised, delivered or financed', p.10.

[41] Explanatory Memorandum in *Draft Proposal Patient Mobility Directive*, COM(2008), p.10.

The Commission proposed three solutions that together constitute the directive's degree of market integration. First, it argued that a system of common principles for healthcare should be specified to resolve uncertainties about reimbursement (a form of harmonisation). The directive's starting principle is that barriers to cross-border movement (e.g. prior authorisation) are not allowed. Following the Court's rulings, the directive prohibits all national administrative procedures and decisions affecting access of patients to cross-border service provision to healthcare (hospital and non-hospital care), viewing this as an obstacle to the free movement of services. It allows Member States to use a system of prior authorisation for reimbursement only when two conditions have been satisfied: first, the care could have been provided within a *reasonable time* and be reimbursed in home country and second, if the outflow of patients is such that it poses a risk to either the finances of the national social security systems or the planning of hospital capacity.[42] Exceptions are allowed for regulations that are objectively justified, necessary and proportionate. This measure allows only for limited exceptions, and provides legal clarity on *access* to out-of state treatment.

At the same time, common principles on the right of financial reimbursement had to be established. The directive takes a harmonising approach and grants all patients the right to be reimbursed for the costs of out-of state treatments. To determine one's entitlements, this directive respects national differences. This means patients are entitled to all the treatments to which they are entitled at home up to the amount it would have cost at

[42] EU faces 'long row' over cross-border healthcare, *Euractiv*, 17 July 2008

home. The Commission closely followed the line of the Court in this, and made sure not to 'create any new entitlements for patients'.[43]

Second, the directive foresaw the implementing of general rules on entitlements of patients to receive healthcare (i.e. harmonisation of cost reimbursement) as a solution to the variation between healthcare systems. The directive makes the *authorities of Member State of treatment* responsible for ensuring that common principles[44] are met in instances of cross-border movement. Member States have to ensure similar levels of quality for patients, information provision to patients and redress possibilities in case of harm.[45] To this effect the definitions of 'healthcare' and 'hospital care' were harmonised, which would prevent differences in definition from causing refusal of reimbursement.

Third, to overcome practical problems to patients wishing to cross borders to obtain healthcare, the Commission specified that a practical system should be set up which guarantees quality of care, information to patients and systems of redress. Again, sufficient measures seem to have been included to guarantee this (national contact points, recognition of prescriptions and, to some extent, E-Health).[46]

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43 *Draft Proposal Patient Mobility Directive*, COM(2008), p.13.

44 The definition of these 'common principles' was based completely on the *Council's conclusions on Common values and principles in the European Union Health Systems* of June 2006.

45 Member States have to comply with the following standards: ensure that the fundamental elements for quality and safety of healthcare are in place, provision to patients of key medical, financial and practical information about healthcare being sought, transfer of relevant health data, set up of procedures and systems to be used in case of harm and the principle of non-discrimination.

46 E-Health is an initiative which is also being developed separately from this directive on a domestic and European level (see directive 2000/31/EC).

The directive's measure to overcome diversity is largely one of harmonisation: harmonisation of standards (on quality, information, instances of harm) and harmonising the legal framework for reimbursement. The exact manner in which Member States comply with these requirements is left up to the discretion of each of the Member States (respecting Art. 168 TFEU (ex. Art. 152(2) TEC)). Therefore, considering this high level of harmonisation, in combination with a high level of discretion left to the Member States, I rate the directive's degree of market integration as medium.

Finally, the directive's level of delegation seems to be medium. The directive delegates some power to the Commission under the rules of the comitology procedure (Decision 1999/468/EC) to (a) update the list of treatments that may fall under auspices of 'hospital care'; (b) define categories of medicinal products that are excluded from recognition of prescriptions; (c) define a list of criteria and conditions European reference networks must fulfil, and set up a procedure to establish European reference networks. In addition to this, the Commission will need to develop guidelines which facilitate the implementation of common principles, contribute to information provision among national contact points and facilitate cooperation on E-Health. However, as much of this power is delegated to the Commission, i.e. not to an independent agency, and with the purpose of implementing what had already been decided upon in this directive, the degree of freedom which the delegated party will obtain is rather low.

That said, the directive's chapter on cooperation (Chapter IV) does outline two additional forms of power delegation (i.e. European Reference Network and a network connecting

national authorities or bodies responsible for health technology assessment). Whereas the aim of delegation to these networks is partly to enhance the quality of healthcare (through innovation, economies of scale, best practice etc.) it also ensures cooperation between healthcare providers to contribute to the free movement of patients (see e.g. Art.15 (2b) and Art. 15(2f)).[47] These networks are mainly about enhancing cooperation between existing authorities and bodies. The directive specifies that Member States shall facilitate the development of both and assigns the Commission the task of establishing and managing these networks. Therefore, as the level of delegation is largely dependent on the Member States and the proposals of the Commission, this concerns a mild form of delegation and does not change my overall judgment of the directive's level of delegation (i.e. medium). See Table 6.1 below for a summary.

TABLE 6.1: Level of liberal legalisation of initial Commission proposal

	Scope	Delegation	Degree of market integration
Commission Proposal	Narrow: only patient mobility. In this subsection, directive covers all healthcare services.	Medium: delegation to Commission under comitology[A]; Networks for cooperation	Medium: Limited ground for prior authorisation paired with legal right to reimbursement for all services to which entitled at home; information provision, quality guarantees and redress option to practically assist patients; harmonisation of definition of 'healthcare' and 'hospital care'. High degree of discretion for Member States.

A: i.e. articles (5(3); Art. 10(3); Art. 12(3); Art. 14(2); Art. 15(3); Art. 16; Art. 17(4) of the Patient Mobility Directive.

6.5 The negotiations

The negotiations, as could have been inferred from the elaboration of each of the actors' preferences, were difficult, both internally, particularly within the Council, and between

[47] These measures help ensure that patients with special diseases can obtain treatment, even when it is not available in their own home state. Cooperation here is needed to ensure a true free movement of healthcare services. The numbers of the articles correspond to the numbering of the final Patient Mobility Directive (2011/24/EU) unless otherwise stated.

the Parliament and the Council. I will discuss the issues that were most difficult to reach internal agreement on and how these negotiations affected the directive's level of liberal legalisation.

The Parliament's amendments[48]

The Parliament was generally positively disposed towards the Commission's proposal. Past initiatives and reports show the Parliament has always been committed to patients' rights and has actively contributed to the ongoing debates.[49] The Parliament, contrary to the Council who had traditionally enjoyed sole responsibility over national healthcare systems, would stand to gain influence over this sector through this directive.

The Parliament was committed to ensuring better patients' rights and that these rights could be used. Parliament was therefore not interested in amending the Commission's proposal, but was rather a proponent of further strengthening its provisions on patients' rights. In doing this, it was criticised for placing the importance of patients' rights above any resulting practical problems.[50]

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[48] For a complete overview of the parliamentary amendments, please see Table 1 in Appendix 5. It should be noted that as a result of ongoing negotiations at the time of my interviews, I was able to conduct a very limited number of interviews with MEPs on the negotiations. As a result, I based my analysis primarily on primary sources, such as minutes of Parliamentary debates preceding the plenary votes.

[49] In April 2005, the Parliament adopted a report on patient mobility and healthcare development in the EU, in March 2007 it accepted a resolution on Community action on the provision of cross-border healthcare, and in May 2007 it adopted another report on the impact and consequences of the exclusion of health services from the Services DirectiveA6-0173/2007 final. Source: *Draft Proposal Patient Mobility Directive*, COM(2008), p.2.

[50] The Parliament got criticised, especially by members of the Council, for completely being detached from reality by amending the directive with the sole aim of ensuring patient's rights. Interview health counsellor at the Dutch Permanent Representation, Brussels, 30 November 2010.

The Parliament was hardly lobbied by interest groups during the negotiations.[51] Many industry lobbies seemed to have mobilised too late and where interest groups did mobilise at an early stage, they seemed to contradict each other.[52] Where e.g. patients organisations were supportive of the directive, some consumer organisations were concerned about the inequalities which this directive would maintain.[53] Therefore, the Parliament seemed able to amend the directive without too many societal demands and constraints.

The practical coalition of parties that cooperated in Parliament to amend the draft directive was made up of the EPP[54] and ALDE parties in a majority of cases.[55] The directive's degree of market integration increased through a tightening of the grounds for prior authorisation and through a set of amendments practically facilitating cross-border movement for patients. The grounds for prior authorisation were tightened after heated debate in Parliament between the S&D party (hereafter referred to as 'the Socialists')[56] and the EPP & ALDE coalition.[57] The issue arose as the Socialists were concerned that the directive would prohibit the necessary mechanisms (i.e. prior authorisation) to ensure the viability of domestic healthcare systems. It proposed an extended applicability of

[51] The director of DG SANCO during an interview confirmed that there were no organised lobby groups involved in the debate on this directive, Brussels 1 December 2010.

[52] Interview British MEP (EPP) member of the leading parliamentary Environment, Public Health and Food Safety (ENVI) committee, London 12 January 2011.

[53] As reimbursement of costs is only granted up to the level of costs applicable to the home country, this puts patients from 'low-cost treatment' countries, such as Eastern European countries, at a disadvantage when wanting to obtain treatment abroad. In those cases, these patients will always have to pay additional costs for their treatment which in practise means not all patients are equally free to travel towards the best healthcare.

[54] The EPP-ED changed its name into EPP after the European Parliament's elections in June 2009.

[55] Interview British MEP (EPP) member of the ENVI committee, London 12 January 2011.

[56] The PES changed its name into S&D (Group of the Progressive Alliance of Socialists & Democrats in the European Parliament) after the European Parliament's elections in June 2009.

[57] Interview British MEP (EPP) member of the ENVI committee, London 12 January 2011.

prior authorisation for healthcare providers (Art. 8(3)).[58] However, a majority of MEPs held the view that these measures would function as mere barriers to patients who wanted to exercise their right of free movement of services.[59] Instead, the Parliament adopted amendments which slightly tightened the grounds on which prior authorisation might be required (Art. 8 and Art. 9)[60], thereby marginally strengthening the directive's degree of market integration.

The directive's degree of market integration also increased as a result of the amendments made to practically facilitate patient movement, such as assistance in reimbursement[61], adequate information provision to patients[62], ensuring assistance in redress and the possibility of prior notification.[63] These amendments had a harmonising nature, laying down the rights to which patients would be entitled.

The positive effect of these amendments on the directive's degree of market integration were slightly offset by the Parliament's decision to leave the definition on what

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58 The article on prior authorisation, according to MEP Anne van Lancker (S&D), was too restricted under the directive. Statement made during *European Parliament Debates on patient's rights in cross-border healthcare on 23 April 2009 in Strasbourg*, Procedure 2008/0142(COD). Most S&D members who spoke during the Parliament's plenary debate of 23 April 2009 highlighted this concern.

59 Some MEPs accused the PES of using concerns about quality of healthcare markets to keep cross-border movement closed. MEP Christofer Fjellner (EPP-ED): 'You Social Democrats want to force people to request prior authorisation.... (W)hy are you doing this? So that you will be able to say 'no', of course!'. Speech made during parliamentary debate prior to plenary vote on 23 April 2009. The Commission also opposed any changes to the initial articles on prior authorisation. Commissioner Vassiliou stated: 'the intention of this proposal is not to promote patient mobility....(W)e all know that patient mobility will remain a very limited phenomenon'. *European Parliament Debates on patient's rights in cross-border healthcare on 23 April 2009 in Strasbourg*, Procedure 2008/0142(COD).

60 The recitals and articles in this paragraph correspond to the Parliament's *Consolidated Version First Reading* of 26 April 2009.

61 See recitals 27, 32.

62 See recital 45 and Art. 5(1)

63 This allows patients to obtain a written confirmation of the maximum amount that will be paid (Art. 10).

healthcare services were to be reimbursed to the discretion of each Member State.[64] Where the Commission had initially requested that a list of healthcare services be drawn up to enhance the clarity for patients, many Beveridge model healthcare systems had difficulties complying with this requirement. This had negative implications for the level of liberal legalisation, as the general level of harmonisation was reduced. Differences in definitions could enhance legal uncertainty.[65]

Although the Commission relied on Member States to apply and ensure implementation of the rights set out in this directive[66], the Parliament also created new institutions and agencies to ensure proper implementation. This benefited the directive's level of delegation. Good examples are the 'European Patients Ombudsman'[67] to assist during complaints, and a 'clearing house' that would facilitate the reimbursement of costs under this directive.[68] It strengthened the Commission's influence by empowering the Commission to adopt measures towards common security levels of health data (Art.5) and to facilitate the establishment of networks connecting national authorities regarding health technologies (Art. 20). This somewhat strengthened the directive's level of delegation. The Parliament also foresaw a strengthening of stakeholder involvement in

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64 The NHS, for example, had lobbied for this. Interview with director of the NHS European Office, Brussels 29 November 2010. The British health counsellor confirmed the importance of this issue for the UK. Interview health counsellor at the British Permanent Representation, Brussels 30 November 2010.

65 In Italy and Spain, decentralised regions define what healthcare services will be reimbursed by the healthcare providers. In the UK, each regional NHS centre defines the treatments which patients are entitled to. Source: Interview with director of the NHS European Office, Brussels 29 November 2010

66 Art. 5 (responsibilities of authorities of the Member State of treatment) and Art. 6 (responsibilities of authorities of Member State of affiliation) outlined Member States' responsibilities to ensure complaint procedures, quality and safety of treatments etc.

67 An institution that can mediate between patients and healthcare providers in instances of complaints regarding prior authorisation, reimbursement of costs and harm. This was an important point for the ALDE party. 'The ALDE's core amendment has been to appoint a European Patients Ombudsman. Thank you for endorsing it' (statement made by MEP Karin Rils-Jordensen prior to the plenary vote in Parliament on 23 April 2009).

68 Article 9(7).

the European Health Technology network (although this is not considered for the level of delegation as it merely concerns quality of care).

Although largely supportive of the directive, the Parliament reduced the directive's scope slightly by narrowing the definition of cross-border healthcare[69] and by excluding specialised care (Art. 8(1)), organ transplantations and long-term care (rec. 12, Art.2), amendments that were unanimously accepted in Parliament.[70] Given that these were minor amendments, it did not significantly affect the directive's level of liberal legalisation. To summarise, the majority of the Parliament's amendments strengthened the level of liberal legalisation by slightly increasing the level of delegation and enhancing the directive's degree of market integration.

Although the debate in Parliament was characterised by high levels of cooperation, agreement on a common position was not self-evident. Two issues had led to strong internal disagreement and had, for a while, hampered the Parliament in agreeing on a compromise: the issue of prior authorisation, as explained above, and the directive's legal basis (i.e. Art. 114 TFEU (ex Art. 95 TEC)). Members of the S&D party, GUE/NGL and IND/DEM parties were concerned about the effects of the decision to treat healthcare as an economic service subject to the rules of the internal market.[71] To this end, the Socialists, Verts/ALE and GUE/NGL proposed a dual legal basis for this directive (i.e.

[69] See recital 13 and Art. 4(c). The Parliament reduces the meaning of cross-border healthcare by excluding (a) permanent presence of a healthcare provider and (b) temporary presence of persons. This leads cross-border healthcare to merely be: patient mobility and delivery of a service from a distance without moving into the other Member State.

[70] See consolidated amendment 2 in the 'Compromise/Consolidated Amendments' by John Bowis (PE415.355v01-00).

[71] See: *European Parliament Patient's Rights in cross-border healthcare – Debates 23 April 2009 in Strasbourg* (CRE 23/04/2009 – 3).

both Art. 114 and Art. 168[72]), an amendment with largely symbolic rather any legal implications.[73] This amendment was rejected, however, by a majority of Parliament.

Whilst not directly relevant to the directive's level of liberal legalisation, a significant amount of amendments made by Parliament aimed at creating new rights for patients suffering from rare diseases and granting special rights for disabled patients. As a result of these amendments, these two groups of patients are never made subject to the requirement of prior authorisation.[74] Some have argued that these amendments illustrate the direct lobbying influence of the pharmaceutical industry, the only issue on which industry seemed to have mobilised throughout these negotiations. By creating special rights for rare disease patients, the industry saw real benefits in marketing pharmaceutical products for patients with rare diseases.

TABLE 6.2: Effect of Parliamentary amendments on the directive's level of liberal legalisation

	Scope	Delegation	Degree of market integration
Parliament's Amendments	Narrowed: exclude long-term care, specialised care, organ transplantation	Increased by adding new agencies: clearing house, European Ombudsman	Slightly increased: further tightening of the grounds for prior authorisation paired with legal rights to reimbursement; increase information provision, quality guarantees and redress option to practically assist patients. (Negative: removal list of treatments which will be reimbursed)

[72] TFEU Treaty, *Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union: Charter of Fundamental Rights of the European Union (2010/C 83/01)*, March 2010.

[73] Interview senior policy analyst on healthcare at European Social Observatory (OSE), Brussels 29 November 2010.

[74] Art. 6(1) specified that patients with rare diseases have the right to access healthcare in another Member State and can receive reimbursement even if this treatment is not among the benefits provided for by the legislation of Member State of affiliation. It further adds that the extra costs which people with disabilities incur should be reimbursed by the Member State of affiliation (Art. 6(3).

The Council amendments

Whilst the Council ideologically supported a Patient Mobility Directive[75], it was reluctant to go beyond codification of the Court's rulings.[76] The reason for this was that there were no significant electoral rents to be gained from the people this directive catered to, i.e. patients in general. Few patients were interested in cross-border health and industry proved similarly uninterested. At the same time, the potential costs of this directive were significant in terms of loss of sovereignty, possible adaptation of national healthcare systems and increased administrative burdens. For a majority of countries, the subsidiarity principle[77] (i.e. the ability to decide nationally what healthcare services to reimburse) was a crucial aspect of the compromise. All these considerations made the majority of the Council supportive of a prudent directive; a preference which had a negative effect on the directive's level of liberal legalisation.

The Council amended the directive's scope in line with the Parliament. Although the Member States were fairly unanimous in their decision to oppose the multitude of Parliamentary amendments (aimed at creating new institutions, new patients' rights[78], further obligations for Member States and increased delegation of power away to the European Commission), it did agree with the Parliament on one important amendment:

[75] The Council acknowledged that there is value in an initiative on health services 'ensuring clarity for European citizens about their rights and entitlements'. Source: 'Council conclusions on Common values and principles in EU Health Systems of June 2006' as quoted in *Draft Patient Mobility Directive*, COM(2008), p.2.

[76] Conclusion made by author after analysis of the Council's amendments and their rejection of Parliament's amendments. See Table 1 in Appendix 5.

[77] The British health counsellor indicated that this was a breaking point for the UK. It proved similarly important Spain and France. Source: interviews conducted with the British health counsellor, Brussels 30 November 2010; interview with the health counsellor at the French Permanent Representation, Brussels 29 November 2010; interview with the health counsellor at the Spanish Permanent representation, Brussels 2 December 2010.

[78] Member states opposed the idea that patients would be entitled to more healthcare abroad than at home. It therefore excluded the amendments made by Parliament on rare diseases and disabled people.

its scope.[79] Adopting the Parliament's changes, it even tightened the directive's scope slightly further by also excluding 'public vaccination programmes against infectious diseases' (Art 2) from the directive.

Besides limiting the scope, the Council reduced the directive's level of liberal legalisation more generally. First, it reduced the directive's degree of market integration by widening the ground for prior authorisation.[80] Where the directive had proposed a closed list of grounds for prior authorisation, there was general consensus among Council members that the directive did not allow sufficient grounds for prior authorisation. The Council argued that the Commission had gone beyond the ECJ's case law by proposing a closed list of grounds for prior authorisation. The Council felt that the proposal should include overriding reasons of general interest (such as quality and safety standards and guidelines), a justifiable ground acknowledged by the Court.[81] Recollecting the financial and administrative stakes of the Member States in maintaining a strong gate-keeping system for their healthcare systems, with prior authorisation clearly crucial to its functioning, one can understand the high importance that the Council attached to amending this principle along its desired lines.

To this effect, the Council added that prior authorisation may be asked, and reimbursement refused, on the basis of 'overriding reasons of general interest'.[82] At the

[79] It limited the exclusion of organ transplantation to 'access and allocation of organs'. See: *Draft statement of the Council's reasons on application of patients' rights in cross-border healthcare*, Interinstitutional File 2008/0142 (COD).

[80] Interview French health counsellor, Brussels 29 November 2010.

[81] The result was that Member States were allowed to manage the outgoing and ingoing flows of patients under certain conditions.

[82] Interview British health counsellor, Brussels 30 November 2010.

same time, it also specified that reimbursement only applies to providers that are affiliated with a system of professional insurance in the Member State of treatment.[83] This was the direct result of the concerns of a minority group of Southern and Eastern European countries, which opposed the obligation to reimburse treatments from non-contracted providers.[84] To understand this amendment fully, it is necessary to explain the concerns of the minority group demanding this amendment.

The controversy on this issue was the result of the directive's principle to treat private/public and contracted/non-contracted healthcare providers equally. This means that patients who are not entitled to private healthcare, and similarly those who are not entitled to non-contracted healthcare provision in the Member State of affiliation, are entitled to be reimbursed for healthcare obtained from private, and non-contracted, healthcare providers in another Member State. It should be clear that the Commission, in doing this, was following the reasoning of the Court. The absence of a distinction between public and private healthcare providers was particularly problematic for those countries with public healthcare systems such as Poland, Romania, Hungary and Slovakia. As these countries do not entitle patients to access to private care under their public healthcare system[85], patients going abroad would be entitled to treatments from providers (e.g. private) which they would not be entitled to at home. This was politically impossible to explain.

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83 See: *Draft statement of the Council's reasons on application of patients' rights in cross-border healthcare*, p.6.

84 Interview Spanish health counsellor, Brussels 2 December 2010.

85 Most of the Eastern European countries in recent years moved to insurance based systems with selective contracting; the cornerstone of their healthcare system. Interview with director DG SANCO, Brussels 1 December 2010.

For Spain, a similar dilemma arose. Spanish patients are only entitled to reimbursement when following treatment from contracted healthcare providers. The Patient Mobility Directive, however, would not necessarily approve this conditionality. As a result, Spain and Portugal (facing similar problems) subsequently opposed this principle of no distinction on contracted and non-contracted healthcare providers, arguing that contracted and non-contracted healthcare providers provide different services.[86] For the latter, the Member State cannot guarantee the quality of care to its patients as these providers are not necessarily subject to domestic regulation of quality of healthcare.[87]

Joining forces, a minority group of countries composed of Spain, Portugal, Romania, Poland and Slovakia demanded that the directive should allow Member States to oppose reimbursement to out-of-state non-contracted providers on the basis of inadequate quality safeguards.[88] The solution was to widen the grounds on which prior authorisation could be demanded. In practice, this meant including quality control, by amending Art. 7(5), and by including specific provisions on quality and health (Art 7(9(9))). This succeeded in overcoming this minority's opposition.[89]

The final amendment to the degree of market integration came from the Council's removal of the community term 'hospital care'. Where the Council agreed with the Parliament that healthcare should remain to be defined by the Member States, it also

[86] Interview Spanish health counsellor, Brussels 2 December 2010.

[87] Spain does not require prior authorisation from its patients for out of state healthcare obtained from healthcare providers that are accredited (i.e. contracted) in other Member State. This strengthens Spain's argument that its demand for increased application of prior authorisation is solely based on concerns of quality.

[88] Interview with the director of DG SANCO, Brussels 1 December 2010.

[89] Interview British health counsellor, Brussels 30 November 2010; Interview director DG SANCO, Brussels 1 December 2010. Poland, however, remained opposed.

removed the Community definition of 'hospital care' and opted for a general term of 'healthcare' that includes hospital and specialised care, treatments, medicinal products and medical devices.[90] This amendment slightly reduced the directive's level of harmonisation as well as its legal clarity by leaving this term undefined whilst continuing to subject this subcategory to specific rules (i.e. on prior authorisation). The effect of the widening of the grounds of prior authorisation, widening the grounds on which reimbursement can be rejected and a removal of a Community-defined concept for hospital care all reduced the directive's degree of market integration.

The Council also reduced the directive's level of delegation. It removed the parliamentary amendments that had enhanced the directive's level of delegation (e.g. reference networks, clearing house). More importantly, it removed the Commission's ability to set guidelines for Member States of treatment (Art. 5(4))[91] and National Contact Points (Art. 12(3)), its ability to design a community format on prior information (Art. 10(3)), its ability to adopt measures to enforce harmonisation of E-Health systems (Art. 16) and its involvement in cooperation management of new health technologies (Art. 17(4)). A majority of the Council members (except Spain) opposed the Commission's large involvement, particularly in the area of E-Health.[92] Especially the UK and Germany feared that Commission involvement might oblige them to change the newly installed E-

[90] Interview British health counsellor, Brussels 30 November 2010.

[91] Parliament 1st Consolidated Reading, Art. 5(4): The Commission shall, in accordance with the regulatory procedure referred to in article 22(2), adopt measures necessary for achieving a common security level of health data at national level, taking into account existing technical standards in this field.

[92] The UK and Germany were ahead of the rest of Europe in this development. Interview director of DG SANCO, Brussels 1 December 2010.

Health systems.[93] To avoid this, they argued that the Commission's harmonising ambitions went against Art. 168 TFEU.[94] The result was that the Council was only willing to accept guidelines from the Commission if cooperation was completely voluntary rather than obligatory. This amendment is rather symptomatic of the general nature of Council amendments, replacing 'shall' by 'may', thereby changing the legally binding nature of the directive into a voluntary nature.[95] The result was a reduction of the directive's level of delegation.

TABLE 6.3: Effect of Council's amendments on the draft directive's level of liberal legalisation

	Scope	Delegation	Degree of market integration
Council's Amendments	Reduced further: also excluded special vaccine programmes	Decreased: objected to EP's amendments; partial removal of Commission powers under comitology[A]	Decreased: grounds for prior authorisation widened (incl. reasons of quality control and health), widen grounds to reject reimbursement (incl. overall reasons of general interest) and removal of harmonised concept 'hospital care'.

A: initial Art. 5(3); Art. 10(3); Art. 12(3); Art. 16 and Art. 17(4) removed. Made MS responsible instead. Only tasks maintained: recognition prescriptions (new Art. 11(2)) and European reference networks (new Art.12(4)).

Issues not affecting level of liberal legalisation but crucial to overall compromise

It seemed there was general consensus in Council on the desired level of liberal legalisation. The issues discussed above did not cause disagreement in Council, but they did affect the directive's level of liberal legalisation. This, however, was not the case for some other issues. Although not affecting the level of liberal legalisation, they generated large internal disagreement. I will discuss these concerns in turn.

93 The UK has made a total investment of around 6 billion in setting up its E-Health system. Source: interview British health counsellor, Brussels, 30 November 2010.

94 This article outlines that there will be no harmonisation of healthcare system.

95 Similar amendments were made to Art 12 on European reference networks and Art. 20 on cooperation on management of health technologies. See: See: *Draft statement of the Council's reasons on application of patients' rights in cross-border healthcare*.

There were significant concerns about the inequitable nature of the proposed system on the part of (mainly) Eastern European countries. It should be noted that patients, although theoretically granted the same rights, do not benefit equally from the right to free patient mobility in practice. There are large differences in costs of treatments (i.e. the costs of treatment are generally lower in Eastern European countries than in Western European countries).[96] As the directive acknowledges that reimbursement depends on the standards set by each Member State, some patients will de facto not enjoy equal rights to healthcare services. Concretely this means that patients from 'cheaper' countries are likely not to be reimbursed fully in instances where they obtain more expensive treatment in another Member State.

Whilst this directive could have functioned as a measure to overcome unfairness induced by Court-led liberalisation[97], the directive maintains these levels of unfairness. Due to the requirement of up-front payment for treatment, it will in practice not be possible for poorer patients to travel abroad for treatment. In addition, it places patients from countries where medical care is cheaper at a disadvantage, as they will not be likely to receive complete reimbursement for the treatment obtained in a 'more expensive' country.[98] To resolve this, someone was going to have to pay. However, the more expensive countries did not want to subsidise healthcare for foreign patients, and the cheaper countries did not want to carry the burden of additional reimbursement costs for

[96] Interview Spanish health counsellor, Brussels 2 December 2010.

[97] Patients usually require a high degree of education, given the complexity of the material, and the economic ability to make upfront payments for treatments to use the rights set out by the Court. Therefore, the Court may have unintentionally disadvantaged some groups (Source: Mossialos et al (2010))

[98] MEP Siiri Oviir (ALDE) confirmed this: 'it is unacceptable that we theoretically confirm fairness, but in practice we disregard it due to domestic financial restraints'. Statement made during plenary debate in Parliament of 23 April 2009 in Strasbourg.

out-of-state healthcare services.[99] This issue was put to rest by the simple realisation that none of the countries were willing to open up the discussion on the core principle of reimbursement of this directive, i.e. reimbursement of the costs up to the level that the treatment would have cost at home. This meant that this level of unfairness of the directive was maintained.

Another issue that caused great internal disagreement, and kept the Council from agreeing on a common position until mid-2010, was the issue of financial reimbursement for pensioners. The question that had to be resolved was what country should financially be liable for the reimbursement of healthcare costs of (mainly West European) pensioners residing in Southern European Member States in instances of pensioners obtaining treatment in a country different from the one in which they are residing. This issue was particularly important for the Southern European countries[100] as the possible financial implications of this directive were high for them.[101] Whilst Regulation 1408/71 (as amended by 883)[102] already outlined that the country in which the pensioners *reside* is responsible for assuming the costs of healthcare obtained, it does not regulate which country is liable for reimbursing the costs in instances where pensioners voluntarily move abroad to obtain healthcare services. The Southern Member States demanded that pensioners who reside in their country but deliberately travel to their former country of

99 Interview Spanish health counsellor, Brussels 2 December 2010.

100 Namely: Spain, Italy, Portugal, Greece and Malta. Source: interview with the Spanish health counsellor, Brussels 2 December 2010.

101 The extra costs of these pensioners obtaining healthcare abroad are expected to amount to an extra 2 billion euro's, according to the Spanish health counsellor, Brussels 2 December 2010.

102 Regulation 1408/71 as amended by 883 specified that in instances of a person moving to another country, their healthcare and pension entitlements are transferred to the new country.

affiliation (e.g. Germany) to obtain healthcare services should be reimbursed by the country of citizenship (i.e. Germany).

Agreement was reached when the UK and Germany, the countries responsible for the largest share of pensioners moving to the Southern European countries, agreed to pay for the costs of their former nationals when these nationals obtain treatment in their country of citizenship, with the country of residence (i.e. mostly Southern European countries such as Spain) being responsible for reimbursement of costs if treatment is consumed there (i.e. in country of residence). This compromise allowed the Council to ensure a very thin majority, with Poland, Slovakia and Portugal voting against the common position and Romania abstaining.[103]

To sum up: overcoming stark internal differences, the Council's common position largely appeased everyone's concerns. By allowing for national differences in healthcare systems, a dual legal basis of the directive[104], the right for each Member State to define healthcare services, for extended grounds of prior authorisation, by largely removing the harmonising articles [105] and by limiting the supranational (especially Commission) influence on the EU healthcare market, harmonisation of the sector was lowered.

[103] Interview British health counsellor, Brussels 30 November 2010. The demands which these countries made generally went against the ECJ rulings on this issue. Therefore, it was legally impossible to meet their demands. However, it seemed that it was politically favourable for them to be outvoted than to agree.

[104] The inclusion of a dual legal basis of the directive was crucial to the compromise. Although the practical implications of this inclusion were limited, subjecting only Art. 13 and 15 to Art. 168 whilst the rest of the directive remains based on Art. 114, for some Member States such as Spain its symbolic significance was of great importance.

[105] Measures to harmonise for example prescriptions, invoices and E-health were removed as this would have required one common system and inevitable changes to domestic systems. No country wanted to bear these costs.

Similarly, by changing the directive's obligatory nature into a voluntary one, using the Court's rulings as a basis for agreement, the general effect of the Council's amendments on the directive's level of liberal legalisation was negative. And although the Commission had pushed for more influence on the development of E-health, using it almost as a bribe in negotiations with the Council to accept its amendments, a large majority opposed these proposals and no additional changes were made.

Final Compromise

After the Council's common position was adopted, the Parliament reintroduced a great number of its initial amendments[106], a set of amendments which had been prepared in close cooperation with the Council through trialogue meetings. Interestingly, these amendments refrained from specifying additional rights for patients, as they had initially done for disabled patients; Parliament acknowledged the additional grounds for prior authorisation and instances of reimbursement refusal, it refrained from reintroducing the new institutions it had presented in first reading (European Ombudsman, clearing house etc.) and specifically acknowledged the validity of maintaining the plurality that exists between national healthcare systems. In sum, the Parliament refrained from reintroducing amendments that were impossible for the Council to agree with.

[106] Art.6(3) enforces measures to settle disputes, Art. 6(1) specific duties National Contact Points, Art. 6(5) reintroduces specific rights for disabled patients, clarification of grounds for justification for overriding reasons of general interest (recital 39).

The Parliament reintroduced many of its amendments on quality of care.[107] It is interesting to note that the Parliament reintroduced the issue of rare disease by inserting a completely new Article (Art. 12(a)). At the same time, it refined two amendments of the Council regarding the directive's degree of market integration. First, through recital 31(a), it prevented the automatic requirement of prior authorisation in instances where Member States have not established a list of treatments for which reimbursement is guaranteed. Second, it specified more clearly what should be considered a 'medically justifiable time-limit' within which medical care is to be provided (amendments to recital 40(a); 42); Art. 8(5)), and specified how a request for cross-border healthcare is to be dealt with (Art. 9(2)). Whilst important, these amendments did not impact on the directive's level of liberalisation much; they merely refined existing principles.

The Parliament's amendments reintroducing delegation of power to the Commission[108] did however enhance the directive's level of liberal legalisation. This compromise was paired with the inclusion of new Articles 16 (exercise of delegation) and 17 (revocation of the delegation). These Articles delegate powers to the Commission to fulfil the tasks outlined in Art. 11(5)[109] and Art. 12(5)[110], but at the same time allow for these powers to be revoked at any point in time by either the Parliament or the Council. This was done

[107] Art.9(2a) (guidelines for decision cross-border healthcare request); Art. 9(3a) (a voluntary system of prior notification) and most importantly Art. 10(2b) (obligation on Member States to provide information on the right to practise of health professionals).

[108] The Commission's power was enhanced with regard to the following issues: European reference networks (rec. 52; Art. 12(4),(5)); Art. 10(2a) cooperation of agreements between Member States (Art. 10(2a)); E-Health (Art.13(3)) ; cooperation on management of health technologies (Art. 14 (3b)).

[109] Article on recognition of prescriptions issued in another Member State

[110] Article on European Reference Networks

given the entry into force of the TFEU (Lisbon Treaty).[111] Although this makes the exact level of delegation difficult to determine, as it is conditional, it can be concluded that the Parliament slightly increased the directive's level of delegation. The Commission adopted all Parliamentary amendments on 24 February 2011 and the Council adopted the compromise on 28 February 2011.

6.6 The directive's level of liberal legalisation

The final compromise of the Patient Mobility Directive to a large extent reflects the concerns and amendments of the Council. Having explored the effect of the Council's amendments on the level of liberal legalisation, this means that the final compromise will have a lower level of liberal legalisation than the draft directive initially proposed.

The scope of the final directive is small. It is limited to the free movement of patients to obtain healthcare services (public and private non-hospital and hospital care) in a Member State other than that where the patient is an insured person. Given that the final directive has been reduced even further in scope, excluding specialised care, long-term care, organ transplantation and public vaccination programmes against infectious diseases, the directive only addresses a fraction of the total number of activities that constitute cross-border healthcare.[112]

[111] See: See: *Draft statement of the Council's reasons on application of patients' rights in cross-border healthcare*, p.9.

[112] It should be noted that the final directive does cover 'rare diseases' even though this amendment had successfully been included by the Parliament in second reading.

Turning to the directive's degree of market integration, this was also reduced. The grounds for prior authorisation application were widened, which enhanced the possibilities for Member States to refuse free movement of patients to obtain healthcare services. In addition, the level of harmonisation was reduced by leaving definitions of hospital and non-hospital care up to Member States to define. Added to this is the fact that legal insecurity remains with regard to hospital care, a term that is left to be defined by Member States individually, and ambiguity remains with regard to reimbursement (specifically on how the costs of treatments are to be calculated).[113]

The directive also scores low on its level of delegation. Although the Parliament had proposed new, additional forms of delegation, these measures were not accepted. In addition, the existing forms of delegation were weakened. Participation in European reference networks and cooperation on management health technologies was made voluntary. The Commission's influence was reduced by granting the Commission power on a conditional basis (through Art. 16-18, see Table 1 Appendix 5). The Member States therefore retained a lot of their influence and severely limited any transfer of power to the supranational level. As there would have been clear benefits from delegation to an independent agency or the Commission, given the perverse incentives of Member States to keep markets closed, the negative effect of this low level of delegation on the expected liberalisation of this service sector becomes even more apparent. Table 6.4 gives an overview of all amendments made resulting in the final outcome.

[113] The general level of ambiguity of this directive is high not the least as its relation with Regulation 883 remains unclear. Interview with health counsellor at Dutch Permanent Representation, Brussels 30 November 2010.

TABLE 6.4: Overview of all amendments made to the draft directive's level of liberal legalisation

Issue	Commission	Parliament	Council	Final outcome
Scope	Narrow: only patient mobility. In this subsection, directive covers all healthcare services.	Narrowed: only movement of patients. Excludes the movement of healthcare providers; exclusion of long-term care, specialised care, organ transplantation	Narrowed further: exclusion of specific vaccine programmes.	Scope is very narrow. All amendments accepted: scope more limited than ECJ rulings (i.e. the status quo).
Degree of market integration	High: demarcated grounds for prior authorisation; reimbursement for all services to which entitled at home; Community definition 'hospital care'.	Increased: further tightening of grounds for prior authorisation; creates additional rights for rare diseases and disabled patients; amendments to guarantee practical cross-border movement and reimbursement.	Decreased: widens grounds for prior authorisation, for refuting reimbursement; removal of harmonised principles	Medium; corresponds completely to the Council's wishes with the ECJ's principles forming the basis.
Delegation	Delegation medium: new networks created (a) European reference network and (b) health technology network; delegation power to Commission under comitology procedure	Enhanced: delegation to European Patients' Ombudsman; clearing house; enhanced power to Commission under comitology procedure; (reintroduced amendments to enhance power of Commission in second reading[A])	Reduced: opposing all EP's amendments; weakening of delegation of power to Commission under comitology procedure	Level of delegation is low. Cooperation in European reference network and cooperation health technology made *voluntary*. Delegation of power to Commission on a *conditional* basis

A: Art. 10(2a); Art. 12(4); Art. 12(5); Art 12(a); Art. 13(3); Art. 14(3b).

6.7 Winners and losers – testing the model

In trying to account for the level of liberal legalisation of the Patient Mobility Directive, I argue that my framework is particularly well suited. Having discussed the context in which the Patient Mobility Directive was tabled, it becomes clear that the relative absence of economic benefits for industry and the relative lack of interest of the main beneficiaries (i.e. patients in general) in the outcome of this directive rendered the group of proponents of full liberalisation of the healthcare sector extremely small. The demand

for this directive was entirely the result of the discrepancy which had been created by the Court between the practical and legal rights of patients regarding cross-border healthcare.

To understand the shape of the Patient Mobility Directive completely, I showed that one should also consider the effect of a possibility of politicisation. The politicisation of the Services Directive some years before had illustrated the general public concern about a directive on healthcare liberalisation. In combination with the presence of sceptical Member State governments unwilling to support a directive that would liberalise the free movement of healthcare providers[114], there was a credible possibility for politicisation which seems to have affected the Commission's decision to draft a directive with a very limited scope.

This decision, to merely focus on patients' rights, proved however very conducive to ensuring the overall success of the directive. First, by limiting its scope, and adopting a *logic of patients' rights*, it averted possible negative mobilisation of the public against healthcare market liberalisation. Second, it assured Parliament as its partner. Being aware of the strong resistance of the Member States towards healthcare liberalisation, this partnership was essential if the Commission was to create a sufficient support base for this directive.

The negotiations reduced the level of liberal legalisation slightly further. Although Parliament and Council agreed on the desirability of a directive with a limited scope, the

[114] Interview British health counsellor, Brussels 30 November 2010. This scepticism is illustrated by the removal of the words 'free movement of services' from the draft circulating before the tabling of the draft Patient Mobility Directive.

negotiations were characterised by significant differences in preferences between legislators. The Member States, although ideologically supporting the right for patients to obtain cross-border healthcare, were concerned about the loss of sovereignty regarding national healthcare. Parliament, on the other hand, saw real benefits for the people of Europe with the passing of a strong Patient Mobility Directive; i.e. a directive that would specify patients' rights on a European level and outline the Member States' duties to ensure these rights.

The final outcome to a great extent reflects the Council's amendments. The Council stayed close to codifying the Court's principles, and was unwilling to go beyond this.[115] The electoral rents of going beyond codification would be extremely low, due to the lack of interest of the public in this directive and the absence of economic benefits of this directive for industry. This strategy of codifying the Court's principles had two advantages. First, this would lead to greater legal clarity about patients' rights, something which the Council was clearly committed to. Second, basing the amendments on the Court's rulings would make it more difficult for the Parliament and Commission to oppose. Its amendments on the inclusion of 'overriding reasons of general interest' and 'health and quality requirements' were fully supported by the Court, as were its amendments on requiring prior authorisation for non-hospital care in instance where this is paired with significant costs.

The Parliament had difficulties maintaining the amendments it wanted. Given that it faced strong Member State opposition, it required a strong support base for its

[115] Interview British health counsellor, Brussels 30 November 2010.

amendments to 'force' the Member States to agree. Unfortunately for the Parliament, as already discussed above, societal interest in this directive was low. Industry had hardly mobilised at all during the negotiations on this directive, the public seemed largely uninterested and, as only a marginal increase in cross-border movement of patients was to be expected from this directive, insurance companies were also rather indifferent to the directive. In addition, as the Commission's proposal was completely written to improve patients' rights, there was no need for the public to get involved. Due to the absence of strong organised lobby groups supporting the Patient Mobility Directive [116], the Parliament found itself armed mainly with ideological rhetoric (i.e. the desirability of strengthening patient's rights) and the principles outlined in the Court's rulings; however, the latter were, as discussed, endorsed by the Council.

In addition to this, where the Commission was very willing to accept the Council's amendments it refrained from strongly supporting the Parliament's amendments. There were two reasons for this. First, the Commission preferred the successful conclusion of a directive to no directive. A directive would grant them a tool to pursue further integration through the application of e.g. infringement procedures, whereas a failure of this directive would be the second failure on this dossier in five years (see Services Directive). As the Commission feared that the Parliament's amendments could possibly upset the Member States[117], the Commission only supported a few of the Parliament's amendments. Second, DG SANCO, the DG responsible for this directive, was particularly keen to see this directive succeed. A directive would enhance the influence of this relatively weak

116 Interview with director at DG SANCO, Brussels 1 December 2010.
117 Ibid.

Commission DG and offer it a legal measure with which to pursue further liberalisation of this area.[118] To that effect, the Commission was willing to compromise quite significantly on its initial proposal.

In the end, the Commission saw a sober version of its initial proposal accepted. Although the Parliament was a strong supporter, the negligible economic benefits and limited societal involvement weakened the Parliament's position, leading the Council to become the dominant legislator to shape the directive during negotiations.

6.8 Conclusion

Throughout this chapter, I have focused on the issue of patient mobility, and in particular on the first legislative measure adopted to liberalise the European healthcare market. The negotiations of the Patient Mobility Directive present an interesting example of the inherent tension between supranational efforts towards liberalisation on the one hand and attempts to retain sovereignty over domestic (e.g. healthcare) sectors by the Member States on the other hand.

Despite the directive's low level of liberal legalisation, this directive is far from shorn of significance. The directive's largest achievement lies in the fact that a successful conclusion was possible at all and that an initial step towards an opening of domestic healthcare markets was made. This directive presents a unique experiment for the rest of

[118] Interview Dutch health counsellor, Brussels, 30 November 2010

the world where regional initiatives struggle with similar ideas of healthcare cooperation.[119]

Nonetheless, it seems that the new directive, due to the fact that it does not strictly codify ECJ law[120], will not bring an end to court cases on the issue. On the contrary, this 'proposal could lead to an increased number of different types of cases unless Member States establish extremely clear rules on the prior authorization and conditions for reimbursement'.[121] This means there is a realistic change that this topic will again rise to the political agenda and will reopen negotiations on this sector in the near future.

The question of how to combine services liberalisation in areas such as health care with social requirements and institutional diversity in the EU has not yet been addressed. Due to the explicit decision of the Commission and the legislators not to focus on any other form of cross-border healthcare provision, the directive avoided the general concerns of deregulation and loss of social character that are likely to be paired with healthcare market opening. This directive allowed healthcare markets to remain nationally regulated. This is not to say that this dilemma will not become an issue of discussion again. Ageing populations and expanding budget requirements will present challenges to the current healthcare systems, increasing pressures on the (financial) viability of domestic healthcare markets. Discussions on healthcare market liberalisation will inevitably come

119 Jarman and Greer (2010).

120 Sauter, W. (2008), 'The Proposed Patient Mobility Directive and the Reform of Cross-Border Healthcare in the EU', *TILEC Discussion Paper no. 2008-034*, p.51.

121 'Patient Mobility', *Euractiv*, 8 June 2008.

up as a possible solution to addressing these national problems, assuring interesting negotiations lie ahead.

7. Conclusion

'Facts are facts, but perception is reality'[1]

This thesis has focused on the liberalisation of the services market in Europe, an economically important but difficult market to liberalise. There are many economic and ideological reasons to pursue the liberalisation of the services market. It is therefore not surprising that the services market was at the heart of the formulated goals when the Member States launched the Lisbon Strategy in 2000 to make Europe 'the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion'.[2] Despite these potential benefits and the commitment of the Member States to complete the internal market reiterated repeatedly in the past, large differences in levels of liberalisation between service sectors remain. The main question throughout this thesis has been: what explains the difference in levels of liberalisation within the services market? How can one account for the level of liberal legalisation that characterises each service sector?

To answer this question, I have presented a model capable of explaining the different levels of liberalisation. It starts with the demand for market opening, where I adopt the insights from the theories of European integration about the drivers of integration. The demand for integration can arise either from changes in economic conditions, which then lead to increased mobilisation of societal groups resulting in demand for change, and/or from enhanced supranational activity on the part of the Commission and Court

[1] Interview with member of the cabinet of Commissioner McCreevy, Interview Brussels, 15 December 2006.

[2] *Presidency Conclusions – Lisbon European Council 23 and 24 March 2000*, Lisbon 24 March 2000.

stimulating further societal demand for change. These drivers proved a useful starting point in explaining the levels of liberalisation within the services market. However, to explain the exact level of liberalisation this model required more detail. To that effect, I held that one should in addition analyse the negotiations, and particularly the intervening influence of politicisation thereupon.

To understand the differences in liberalisation, I adopted a two-tiered approach of analysis. First, I focused on the context in which the legislation was tabled and discussed the stakes and preferences of all actors involved. Rational choice and historical institutionalism provided helpful starting assumptions about actor's preferences, behaviour and why and how this could change over time. Second, I analysed the negotiations using a method of process-tracing. Both steps were crucial. Where one could not have understood the negotiations without placing the draft legislation in a wider context, this thesis also showed that one cannot fully account for the shape of the legislation without a closer look at the negotiations. This second step revealed which actors were particularly dominant in amending the legislation and why.

Particularly interesting was the influence of ad hoc politicisation, or the possibility thereof, on the legislation's level of liberal legalisation. The case studies seemed to confirm my initial suspicion and showed how ad hoc politicisation primarily intervened in the negotiations by altering the relative influence of the actors involved. It thereby negatively affected the outcome and helped explain those instances where the level of

liberal legalisation differed from what could have been expected a priori on the basis of the drivers of integration.

Aside from illustrating how politicisation can significantly affect single policy outcomes, the thesis also showed how its influence may extend beyond instances of actual politicisation. It can have long-term effects by for example casting future negotiations under the shadow of politicisation.

In sum, this thesis confirms that European integration is an inherently political outcome and illustrates how the public at large, through politicisation, can influence this. This research has shown that negotiations, a stage which is often not deemed interesting to study in detail, can provide valuable information required to explain the level of liberalisation within the services market and thus the process of European integration more generally. By understanding and explaining the differences in levels of liberalisation within the services market, a better understanding can be gained of the more general question of why services, as a whole, have been lagging behind the other three freedoms. This helps explain more general differences in speed and degree of internal market integration (i.e. establishing a single market). As the internal market is a pivotal aspect of the general project of European integration, a better understanding of its development helps to gain a better understanding of the process of European integration.

7.1 The results – what have the case studies shown?

In the table below, I have outlined the insights which this thesis has generated into the drivers of integration, the influence of politicisation and the negotiations. With this overview in hand, I will review the main insights from these case studies and discuss to what extent this model has proven successful at explaining the levels of liberalisation within the services market.

TABLE 7.1: Overview of liberalisation process per case study

Issue	***Drivers Economic/ Supranational***	***Societal Reaction***	***Politicisation***	***Negotiations: Who Shaped Outcome?***	***LLL****
Postal Market – 3rd Postal Directive	High economic benefits and high supranational activity of the Commission (ensuring implementation previous directives)	Δ Economic conditions & supranational activity led to Δ preferences postal operators (esp. France's La Poste). Result: ↓ opposition	Absent 3rd Directive; negotiations of 2nd Dir. made under shadow of politicisation which influenced negotiations.	3rd Directive: there was agreement Parliament and Council. 2nd Directive: opposition (postal operators; labour unions) benefited from possible politicisation. Strengthened PES, GUE and Greens in Parliament & the opposing MS** in Council.	High
Electricity Market – 3rd Electricity Directive	Initially low-medium (Δ global world may affect energy security); 3rd Directive. High supranational activity Commission (active application comp. law and ensuring implementation) stimulated path-dependent forces which led to ↑ in share of industry to see economic benefits in liberalised market	Δ in practice as a result of transposition of 1st and 2nd Directive made large energy companies more supportive of full market opening. Absence of societal interest groups; only lobby from industry.	Absent	Council, dominated by minority of FA/DE, decided some crucial issues (e.g. ownership unbundling) for directive's LLL. Parliament, in second reading, did manage to enhance level of reregulation in exchange for compromise.	Med.
Services Directive	High expected economic benefits from liberalised services market (awareness services increasingly make up GDP). High Court	Δ Awareness MS of economic benefits service market. SMEs (unable to pursue strong lobby) were supportive of	High level politicisation Public opinion against directive negatively	Parliament dominant. Council internally divided; Parliament overcame internal division and shaped final directive. Influence Parliament ↑	Med.

	activism functioned as driver. Need for directive created by legal discrepancy.	directive. Workers and labour unions were concerned.	affected the level of liberal legalisation.	due to politicisation (widened its support base)	
Patient Mobility Directive	No economic benefits for industry. High Court activism formed driver behind directive by creating legal uncertainty.	Absence of involvement of societal groups. Prior to draft: unclear what reaction would be; inclusion healthcare under Services Directive had caused politicisation.	Possible politicisation prior to tabling draft. This led to reduction of scope during agenda-setting stage.	Council dominant. Parliament and Council agreed on aim: patients' rights. Parliament favoured higher degree of re-regulation, increased patients' rights beyond mere Court codification. Parliament had no direct societal support.	Low

* LLL: Level of Liberal Legalisation.
** MS: Member States.

Drivers of Integration

The process of European integration, as these case studies have shown once more, is mainly a battle between openness and closedness.[3] European integration tends to proceed when the group supportive of openness outweighs those supporting closed, controlled markets. To a large extent, the drivers of integration can explain these changes in preferences. The higher the (expected) economic benefits of increased cross-border exchange, the stronger the demand from society (in particular industry) to act on this. These economic benefits can alter due to changes in the market brought on by e.g. technological innovation or practical change over time. Either leads to a changed cost-benefit analysis for the actors involved. At the same time, increased supranational activity can foster market liberalisation. The higher the level of supranational activity on the part of the Commission or the Court, the higher the pressure on all actors to pursue further liberalisation.

[3] Bartolini (2005)

To explain the process of integration, it is necessary to distinguish between the drivers that initiate a process of integration and the drivers that underlay the tabling of specific pieces of legislation as these may differ. While they can be complementary or remain unchanged over time, this is not necessarily a given. Drivers can substitute each other or complement each other over time. Particularly when legislation is the product of an ongoing process over time, it is crucial to be clear on the drivers that led to the tabling of the directive. This is important to acknowledge, as it significantly affects one's understanding of why and how European integration proceeds.

The 3rd Electricity Directive and 3rd Postal Directive clearly illustrated how initial supranational activity was paired with the increasingly rising costs of a closed market (due to a change in technological developments and practical change resulting from previously concluded legislation). The processes of postal market and electricity market liberalisation were initiated by the European Commission. Unlike the telecommunications sector, where the process of liberalisation had for a large part been driven by competitors demanding competition, such societal demand was absent in the postal and electricity market. As both were former state monopolies, there simply were no expected economic benefits of a liberalised market. For this, the monopoly had to be removed and competition had to be introduced. Only then would societal demand for market opening start to form.

The lack of societal demand for market opening and the Commission's ideological desire to integrate and complete the European single market seem to have been the primary

reasons why the Commission became the main driver behind the liberalisation of these markets. The Commission's role in liberalisation of both the postal and electricity market has been substantial; both at the beginning in initiating the process of liberalisation, and throughout the process through implementation and application of competition law. These activities led to practical change which subsequently had a positive effect on the group of proponents of further market opening.

However, the role of the Commission in the process of liberalisation differs widely between cases. Comparing the Commission's influence on liberalisation of the postal and electricity sector to the Commission's enormous success in liberalising the telecommunications sector for example, one can observe a striking difference. Many scholars have studied the discrepancy between the relatively easy liberalisation of telecommunications on the one hand and the difficult liberalisation of postal and electricity markets on the other hand[4], with a particular focus on the differing role which supranational institutions played in each process.

The difference in success of the Commission can firstly be explained by differences in the Commission's ability to use its provisions of competition law, granted under Art. 90.[5] Despite the fact that the Commission used this right extensively to liberalise the telecommunications market, it did not apply this principle to either the postal market or the electricity market.

[4] Schmidt (1998)

[5] Remember that article 90 (TEC) awards the Commission the right to issue directives by itself in those cases where Member State governments have endowed undertakings with rights conflicting with the Treaty's rules.

Crucial to the Commission's inability to use Art. 90 in the case of the electricity market was that 'in contrast to telecommunications, there was no central judgment of the Court to which the Commission could refer supporting these obligations'.[6] The costs of the electricity market reform were much higher than for the telecommunications market, while the benefits of liberalisation were less clear. Ironically, those for whom the benefits of monopolies were clear (e.g. for high-volume users), suffered from a collective-action problem in bringing cases before the Commission or the Court. This meant that in the case of the electricity and postal sectors, the Court faced strongly organised resistance as 'the suppliers were interested in the maintenance of their monopolies, [whilst]… their well-established links in the organization of grid operators … [a]llowed them to block most case-specific measures under European law quite effectively'.[7]

The result was that the Court adopted a careful approach. Facing strong opposition from the Member States, the Court was always careful to judge the case in favour of the Member States (to familiarise the Member States with the idea without provoking them too much with the practical implications). This is well illustrated by some important Court cases decided in 1997. Here, the Court found that import and export monopolies constituted discrimination contrary to what is now Article 31 of the EC Treaty, but decided not to rule against Germany in the *PreussenElectra* case.[8] For the Commission,

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6 Schmidt (1998) on page 176 referring to Slot, P. (1994), 'Energy and competition', *Common Market Law Review*.

7 Schmidt (1998), p.179.

8 See: Schmidt (1998).

this meant that it had little support from the Court or third party actors to strengthen its position against national governments.[9]

Although the Commission was clearly hampered in its attempt to challenge state-protected monopolies by this lack of societal and Court support, the incremental practical change over time did lead to changed cost-benefit analyses of the actors involved. The practical changes that resulted from implementation of the previous electricity directives over time opened up economic prospects to competitors of further electricity market liberalisation. The active application of competition law by the European Commission had ensured that the electricity market had slowly opened. This led a majority of electricity companies to become favourable towards further market opening.

A comparable process of liberalisation was observed in the postal sector. Similar to the electricity case, the Commission's initial attempt to rapidly liberalise the market through Article 90 was hampered as a result of massive opposition from Member States and postal operators. As a result of the postal market's labour-intensive nature, the organisational inefficiencies and the reluctance of postal operators to renounce their monopoly, initially there was a large group that mainly stood to lose from a process of liberalisation. Again, in absence of significant Court rulings, the Commission realised that its success would depend on slowly generating a critical mass large enough to support full market opening rather than pushing liberalisation through on the basis of competition law.

[9] Ibid., p.180.

Contrary to the electricity market, postal market liberalisation was also pushed by a significant economic factor, namely the decline in market share of postal services. Due to an increase in competition from other communication industries and given the high inefficiency of former monopolies, the postal market was rapidly declining in volume. Increasingly, governments started to realise the size of the potential costs they might face when maintaining their inefficient postal operators, whilst postal operators realised they would need to restructure and obtain access to larger markets in order to stay competitive. This made the need for reform clearer and more inevitable. Given that the liberalisation of the telecom sector had provided a perfect example of the positive effects of public service liberalisation, it was argued that enhancement of competition could very well rectify the problems of the postal market.

Additionally, the costs of full market opening reduced over time as a result of previously adopted legislation. Domestic practical change took place as a result of the implementation of the 1st and 2nd Postal Directive and the active application of competition law by the Commission, leading to an incremental increase of supporters of further postal market liberalisation. Crucial here was that with the implementation of the 2nd Postal Directive, the most powerful incumbent operators became supportive of full market liberalisation. This reduced the group of opponents to merely postal workers (a group that directly stood to lose from further postal market liberalisation) and labour unions. This paved the way for full market liberalisation during the negotiations of the 3rd Postal Directive.

To summarise, both the electricity and postal case study illustrate the importance of supranational activity. The Commission has shown to be a strategic actor in these case studies, meaning that the 'position of governments'[10] and the level of societal support remain pivotal in determining supranational activity. This explains why it has not always used the tools available and partly explains the differences in its success to liberalise the services market.

Whereas the Court's role was limited in the electricity and postal market, its actions were crucial to the tabling of the Patient Mobility Directive. That the Court of Justice can be an important accelerating force in the process of market opening had already been illustrated in the case of telecommunications liberalisation.[11] It can play a pivotal role in liberalisation of services markets by creating and fostering demand for further integration.

In this thesis, it proved to be the main driver behind the Patient Mobility Directive. The Court created a situation in which patient's legal rights failed to correspond with practice. This was the result of it having applied principles of the internal market to the public sector. This disparity created the need for European legislation. The Court's rulings were pivotal to the tabling of this directive, as there was relatively little societal demand for this legislation and an absence of potential economic benefits to be gained for industry from enhanced patient mobility. The Court's potential to drive integration of this sector suffered from this lack of economic benefits of enhanced patient mobility. In addition, the significant costs it would impose on Member States made the latter reluctant to adopt

[10] Schmidt (1998), p.182.
[11] Talus (2007), p.437-438.

a highly liberalising directive. This left the need to address legal uncertainty as the primary reason for the adoption of the Patient Mobility Directive.

Finally, the Services Directive proved the perfect combination, being driven primarily by the economic incentives of further market opening but also by Court activity. The primary driving force behind this directive was the expected economic benefits that Member States perceived could be obtained from a truly liberalised market. The low level of cross-border service provision meant a significant share of potential economic activity remained untouched. There was clear support for this particularly from SMEs, who, due to their size, were unable to pursue a forceful lobby.

However, the Court activity prior to the Services Directive also contributed significantly to this directive being tabled. The rulings of the Court had clearly specified what legal barriers were and were not allowed and how cross-border service trade should be regulated. For a majority of service providers, practical reality clearly did not match legal reality. Particularly small and medium business providers suffered disproportionally.

In sum, the influence of supranational activity (both Commission and Court) proved important for the process of liberalisation in all case studies. It was complemented by the influence of (expected) economic benefits from increased integration in almost all case studies (with the exception of the Patient Mobility Directive). Where expected economic benefits were the primary driver behind liberalisation for some sectors (e.g. Services Directive and to some extent the postal directives), in other areas this factor only became

important as practical change within the market started to take place (e.g. electricity market), opening up opportunities for competitors and leading to increased returns from pursuing further market opening.

The Court proved particularly crucial as an actor kick-starting integration in those areas where no direct economic benefits were to be obtained from further liberalisation and on which the Commission had no direct influence (e.g. Patient Mobility). Clearly, no process of liberalisation would have been initiated on patient mobility if it had not been for the Court. Although judges at the Court uphold the claim that they are merely interpreting the law without an activist agenda[12], their actions may sometimes appear to contradict this claim, particularly regarding the issue of Patient Mobility. The Court has the advantage of being able to hide its activist nature, if present, behind a veil of legalism[13], claiming to have merely interpreted the law as it stands.

It could perhaps even be expected that the Court's influence on initiating processes of liberalisation will become even larger in future. Already, one can observe a trend of European integration increasingly concerning issues that have spilled over from the internal market rather than being demanded by society or driven by potential economic benefits. This sparking off of a liberalisation process has significant consequences. Although its initial effects may be limited (see the Patient Mobility Directive with a very low level of liberal legalisation), the processes of postal and electricity market liberalisation have successfully shown how prudent initial steps towards liberalisation can

12 Interview judge at the European Court of Justice, Luxembourg 12 February 2010.
13 See: Burley and Mattli (1993).

over time lead to full market liberalisation. Therefore, the significance of starting a process of integration is much larger than may initially be judged from its level of liberal legalisation.

7.2 The role of politicisation

Although the drivers of integration go a long way towards explaining the levels of liberalisation that can be observed in the services market today, this thesis shows that the exact level of liberal legalisation cannot be explained without attention to the mediating influence of ad hoc politicisation.

In recent years, politicisation has increasingly received attention as a factor that has come to affect the process of European integration. This thesis allowed for a broader conception of ad hoc politicisation than merely the materialisation of full public opposition, and acknowledged that there is a wide array of forms through which politicisation can influence EU policy-making. This means that even in absence of full materialisation of politicisation, the possibility of politicisation is capable of influencing the decision-making process.

With the exception of the electricity market, ad hoc politicisation or the possibility thereof affected the level of liberal legalisation in three of the legislative pieces I considered in this thesis. For one, the level of liberal legalisation of the Services Directive could not have been explained without attention to this intervening factor. Given that the expected economic benefits and the level of supranational activity on the part of the

Court were both high, the drivers would initially have us expect a higher level of liberal legalisation. However, the high level of politicisation intervened in the negotiations, changing strategic objectives and enhancing the influence of the Parliament over the Council. This altered the final outcome in an important way.

The effect of politicisation during the negotiations on the Services Directive was that the Council and Parliament became internally divided along national lines. Where the Parliament was capable of overcoming internal division, and profiled itself as the actor representing the general public interest, the Council was incapable of proposing amendments. This, paired with the fact that the Parliament enjoyed the support of the public for its amendments, led to an enhanced relative influence of the Parliament and explains its dominant influence on the final policy outcome. In the case of the Services Directive it led to a weakening of the degree of market integration and a reduction of the scope, thereby weakening the directive's level of liberal legalisation.

Although less obvious in the other cases, the intervening influence of possible politicisation led some legislation to be made under the shadow of politicisation. Both the 2nd Postal Directive and the Patient Mobility Directive were discussed in the shadow of politicisation.

Contrary to earlier negotiations, only a small minority (in both Council and Parliament) were opposed to further liberalisation during the 3rd Postal Directive. Although the drivers of integration could have predicted the level of liberalisation of the 3rd Postal

Directive, they would have difficulties explaining the large discrepancy between the ease with which the third round of negotiations were concluded and the painstaking negotiations that had dominated the second round. Particularly when considering that the issue at hand during the third round of negotiations (i.e. reserved area of letter post below 50 grams) had proven most controversial all throughout the process of postal market liberalisation. Even granted that practical change over time had made a majority of actors favourable towards the abolition of the reserved area below 50 grams, it does not explain the large discrepancy in controversy between the 2nd and the 3rd Directive. Why, contrary to all expectations, did the third round of negotiations prove so easy?

Part of the reason is that the second round of negotiations took place in the shadow of politicisation. A genuine possibility was present for politicisation to materialise. This explains why, despite the fact that the division between opponents and proponents during the negotiations on the 2nd Postal Directive was equal and one may therefore have expected a compromise that reflected the middle ground, the directive resembled the wishes of the opponents much more closely than the wishes of the proponents. The possibility of politicisation had enhanced the relative influence of the opponents over the proposal. The absence of any of such possibility during the negotiations of the 3rd Directive, i.e. due to the absence of a strong entrepreneur, allowed for a relatively easy round of negotiations and almost unanimous approval of full market opening.

Although the possibility of politicisation during the 2nd Postal Directive seems to have primarily led to a delay in the process towards full postal market liberalisation, and not to

have had a significant effect on the general process of liberalisation of the postal sector, this does not detract at all from the importance which this factor has had in intervening in the negotiations. To explain the process of postal market liberalisation completely, attention to this mediating factor cannot remain neglected.

Finally, the possibility of politicisation is a crucial factor for explaining the level of liberal legalisation on the Patient Mobility Directive. Here, the possibility of politicisation seems to have influenced the Commission's decision to table a directive with a scope limited to patients' rights, a decision that was crucial to the directive's level of liberal legalisation. In absence of a possibility of politicisation, extending still from the politicisation during the Services Directive where the inclusion of healthcare had contributed to mass opposition materialising, it would be difficult to explain why the Commission would table a directive with such a limited scope. Given that the Court had already laid down these principles on which the directive was based, one could have expected the Commission to build on this and propose something that would go beyond mere codification. However, the sensitivity of the issue and the strong Member State opposition to a directive that would go beyond the cross-border rights of patients, prevented the Commission from doing this. A decision that was made in the shadow of politicisation. Only time will tell whether this possibility of politicisation will also have significant consequences for the overall development of the sector or not. The fact remains that the current outcome was directly subject to the influence of possible politicisation.

Politicisation – lessons on how it affects legislative outcome

Although full politicisation clearly had the strongest intervening effect on the policy outcome, as the Services Directive illustrated, this thesis has shown how the possibility of politicisation was able to influence legislative outcomes. This effect was not limited to the negotiation stage. As the Patient Mobility Directive showed, the possibility of politicisation affected the Commission's decision about the scope of the draft directive during the agenda-setting stage.

I had expected that politicisation would mainly affect the policy outcome by changing actors' relative influence. This was confirmed by the case studies of this thesis. During the negotiations on the Services Directive, the Parliament's relative influence increased due to a widening of its societal support base, i.e. the general public. It managed to reassert itself even more vis-à-vis the Council by proving capable of overcoming internal differences and agreeing on a common position where the Council could not. A similar observation was made in the postal market. Here, the possibility of politicisation strengthened the relative influence of the opponents of further market opening during the negotiations of the 2nd Postal Directive. This explains why the compromise catered primarily to their wishes. Finally, the possibility of politicisation prior to the tabling of the Patient Mobility Directive may have strengthened the demands of the Member States to reduce the scope of the directive and made the Commission very receptive to these demands. However, one cannot be sure. It may also have been the case that the Commission had intentionally invited the Member States to change the draft prior to tabling. In either case, the possibility of politicisation seems to have been the underlying

reason for their behaviour. The result was that the scope of the directive was extremely limited, which reduced the directive's limited level of liberal legalisation.

These analyses of the negotiations do not only show the influence of politicisation, but also contribute to understanding the conditions under which politicisation materialises and the ways it influences policy-making processes. Although scholars agree that politicisation can be ad hoc and only temporary, to my mind no research has so far focused on policy-making in the shadow of politicisation. The term 'in the shadow of politicisation' perfectly captures the various guises in which ad hoc politicisation can affect policy-making. The 'shadow of politicisation' refers to an effect that extends much further and beyond visible mass opposition. By doing this, one is able to capture how ad hoc politicisation can affect a much wider range of service sectors.

Where policy made under the shadow of politicisation is clearly less significantly influenced by politicisation than policy which was made with the materialisation of full ad hoc politicisation, this thesis has shown that despite its weaker influence it is an important intervening force that should be accounted for. This research has thereby added to the more general understanding of politicisation on EU policy-making, especially by acknowledging the various ways in which politicisation can impact on EU policy-making.

7.3 Trends distilled from the negotiations?

This research has also provided interesting insights into the negotiation process. This research shows that the Council is dominant during the negotiations in a majority of cases. This fits in with some large N-studies which have confirmed this Council-centric model.[14] Starting from the assumption that all actors are strategic influence maximisers, it makes sense that the Council is often the dominant factor. Contrary to the Parliament, it has sovereignty to lose, is viewed as the actor directly responsible for national interests and is directly held accountable domestically for the economic costs of a proposed policy.[15] Therefore, in order for another actor to make the Council accept something against its wishes, it either needs very strong societal support for its claims, meaning that ignoring this request would lead to high electoral costs on the part of the Member States, or simply requires internal disagreement within Council as this prevents it from speaking with one voice.

The case studies clearly illustrated how the absence of strong societal support weakened the Parliament's influence in the Electricity and Patient Mobility Directive. Whilst aiming at ensuring better rights for consumers and patients, the group they were arguing for was largely uninterested in the directive. At the same time, they were facing a Council some of whose members faced very high economic costs (i.e. Germany and France) in the electricity directive, and sovereignty costs in the case of the Patient Mobility Directive, in pursuing the proposed changes.

[14] See: Thomson et al. (2006).

[15] Although MEPs can be held accountable during elections, the likelihood is much lower given general public disinterest and unawareness of MEPs' voting behaviour.

There were instances, though, where the Parliament cooperated on an equal basis with the Council (i.e. during the 3rd Postal Directive when both had similar views) or when it even was the dominant actor during the negotiations, such as during the Services Directive. The reason for this dominance of the Parliament was the strong internal division within Council brought on as a result of the high level of politicisation that dominated the debate. Parliament reaped the benefits of this by being better able to overcome internal division (see Services Directive).

However, the Parliament also showed new ways in which to enhance its influence over the Council. The negotiations on the 3rd Electricity Directive illustrated how Parliament applied new tactics during the negotiations so as to enhance its leverage over the Council. By opposing any concessions on the most controversial aspect of the directive in first instance, the Parliament, by conceding in second reading, obtained leverage to pursue its other amendments in second reading. Issues which may otherwise not have been accepted (see the reaction of the Council after Parliament's first reading) were now included.

Therefore, these case studies clearly point at the conditionality of the Council's influence. Furthermore, it has become clear that if the Parliament wants to enhance its influence, succeed in higher levels of reregulation and force the Council to adopt these changes, it benefits from active support of the general public.

7.4 What conclusions can be drawn for the future?

Aside from the fact that this research has allowed me to explain the policy outcomes in more detail, it has also provided more general insights with regard to the suitability of the theories of European integration in explaining the state of the internal market. The research, for one, has illustrated the limitations of the realist explanations of integration. Although legislative outcomes can be a reflection of the formally strongest actor, the relative nature of legislators' power, subject also to external factors, precludes this assumption as a rule.

At the same time, this research points to the limitations of functionalist explanations of integration. What these case studies have shown is that European integration is more than a 'series of rational choices made by national leaders'.[16] Although I agree that during the negotiations national leaders make a rational choice, I account for the fact that they may be constrained in their options by unintended consequences of previous decisions or by external factors such as ad hoc politicisation. Thus, while the drivers behind change may be functionalist, the outcome does not necessarily have to be so. Rather, the outcome is a function of the drivers *and* of the political process of negotiations.

This influence of ad hoc politicisation is an interesting phenomenon, and a phenomenon which may increasingly have come to influence EU policy-making in more diverse ways than perhaps initially expected. Whether one can actually observe an increasing trend of

[16] Moravcsik (1998), p.18.

ad hoc politicisation or not remains debated, but it is clear that the shadow of politicisation has fallen widely over the European services market.

In search of explanations for this possible trend, if indeed it proves to be one, it seems Höpner and Schäfer's post-Ricardian theory of European integration may offer insights. They note that the European Union is slowly going beyond its initial mandate on determining what constitutes an obstacle to competition through the progressive interpretations of the supranational institutions. This has led them to go so far that *institutional differences as such* are considered an obstacle to competition.[17]

Bearing in mind that the limited number of case studies and research conducted in this thesis undoubtedly render any claim very preliminary, the research conducted in this thesis seems to confirm this observation in some instances. The current developments towards liberalisation taking place in the services market, particularly the Services Directive and the Patient Mobility Directive, do to some extent confirm the observation of active supranational institutions driving integration by creating the initial demand for change. In combination with very neo-liberal approaches such as the Commission's initial approach of pure mutual recognition to liberalise the Services Market, this generates large public involvement and in some cases even a public backlash.

That said, the EU is far from a runaway bureaucracy. These case studies illustrate perfectly the limits of supranational activity. The case studies on postal and electricity market opening have shown that the Court is reluctant and the Commission unable to

[17] Höpner and Schäfer (2007), p.8. Italics added.

push for further market opening in instances where this support is lacking. Supranational institutions require societal support for their proposals, and with strong Member State opposition able to halt a process of further integration if the desired benefits fail to outweigh the costs, European Union policy-making is one where institutions and Member States constantly constrain each other.

At the same time, as the trend of increasingly liberalising contentious service sectors seems to have been paired with an enhanced involvement of public opinion, this influence on policy-making additionally illustrates that integration by stealth is no (longer a) viable strategy.[18] The public can halt processes of liberalisation when the costs for the public at large, in their view, are too high.

An interesting question then is: what has the effect of this enhanced mass involvement been on the democratic nature of the policy outcome? It seems that politicisation of policy-making could have enhanced the democratic nature of policy-making when measuring the level of democracy by its input. The more diverse and inclusive the input from society during the negotiations process, the more democratic the process and, in all likelihood, the outcome. This wider input basis could also be expected to lead to increased common interest legislation and a shift away from capture regulation.

As argued before, politicisation mainly influences the policy outcome by enhancing the relative influence of the actor willing to take on the concerns of the public. In practice,

[18] Majone, G. (2005), *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth.*

this seems to mean that the Parliament would generally stand to gain from politicisation as the Parliament generally represents the concerns of the public at large. In all case studies, the Parliament was generally more supportive of heightened consumer rights, workers' rights and policies to benefit the public at large. During the Services Directive the Parliament even became the leader to ensure workers' rights against the 'evils' of neo-liberal market pressures. Therefore, enhanced influence of the Parliament (i.e. public voice) could in theory reduce the possibility for capture regulation. This would be a welcome effect for the EU project in general, given that the European Union has traditionally been faced with concerns about low transparency of policy-making and, more recently, increasing support for nationalism and protectionism.

However, there are some caveats here. Firstly, diverse input (i.e. demand side) is not in itself a sufficient condition to ensure common interest legislation. Both the demand and supply side, as Mattli and Woods argue, should satisfy the conditions of inclusiveness for common interest legislation to be concluded.[19] Although the increase of power of the Parliament should have contributed to satisfying the conditions on the supply side, i.e. allowing societal interest groups open access to an increasingly influential actor, in practice the irony seems to be that the increased role of the Parliament may have led to a weakening of the democratic process. The increased application of fast track legislation and early agreements has negatively affected the possibility for smaller political parties and lobby groups to influence the policy-making process as agreements were quickly

[19] See: Mattli and Woods (2009).

formed by party leaders.[20] This has had a negative effect on the accountability, transparency and overall democracy of the European Union.

In a similar vein, the enhanced role of Parliament in co-decision has led Council and Commission to be more inclined to use delegation (i.e. to adopt secondary legislation in comitology procedures).[21] Delegation is a rather undemocratic measure, leaving implementation and future rule-making to independent non-democratic agencies[22], again reducing the democratic nature of the Union.

For example, during the process of electricity market liberalisation, and to some extent also in the process of postal market liberalisation, integration has meant a shifting of authority away to independent regulatory agencies – sometimes for reasons of expertise, sometimes merely for politicians to shift blame. Although this may have been done consciously, high levels of complexity, technicality and pre-occupation of alternative issues influenced their decision.

Although politicisation seemed to overcome some of this democratic deficiency by including a wider societal input during the negotiations, I suspect that the long-term effects of this enhanced politicisation are likely to again negatively affect the democratic nature of policy-making. As politicisation leads to enhanced contestation, actors not standing to gain from politicisation will be inclined to only adopt framework legislation

[20] See Héritier, A. (forthcoming), 'Continuous Institutional Change in Europe: co-decision and comitology transformed' paper presented at a workshop on 6 May 2011 at St John's College Oxford.
[21] Héritier and Moury (2011), p.163.
[22] See: Héritier and Moury (2011).

whilst delegating away ex post rule-making and implementation powers.[23] As delegation facilitates agreement at the legislative stage,[24] this tendency will increase when principals are divided over issues as it may prove a successful strategy to avoid a situation of gridlock.[25] The fact remains, however, that in the end a large share of decisions about future regulation of these service markets resides with undemocratic agencies.

Given the rationale behind it, i.e. to overcome contestation on EU level, one may not only expect Member States to prefer delegation but one could also expect the Commission to apply this approach more frequently in future so as to avoid difficult negotiations. In combination with ongoing trends towards fast track procedures and early agreements,[26] this development of the policy-making process may harm the democratic level of European legislation.

That said, it seems that the politicisation of decisions may also have led to a shift in rhetoric from a strong neo-liberal internal market economic rhetoric to an ideologically induced consumer interest rhetoric. One can already observe some change in the rhetoric of the Commission's proposals for legislation after the politicisation of the Services Directive. It seems there has been some general shift from a pure neo-liberal market operating ideology, favouring industry, towards a more balanced consumer-oriented strategy (see Patient Mobility Directive). Perhaps this may hint at a more general change

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[23] Epstein, D. and S. O'Halloran (1994), 'Administrative Procedures, Information and Agency Discretion', *American Journal of Political Science*; Epstein, D. and S. O'Halloran (1999), *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers.*

[24] Ibid.

[25] See: Epstein and O'Halloran (1999); Huber, J.D. and C.R. Shipan (2002), *Deliberate Discretion? The Institutional Foundations of Bureaucratic Control* as referred to in Héritier and Moury (2011).

[26] See Héritier (forthcoming 2011)

in perception of what the main goal of the internal market is, or ought to be. Where the internal market project had initially focused on industry and justified its existence by assisting national businesses in achieving their potential, the rhetoric of the Commission may have started to change. It seems that a general change in focus has taken place, from serving the market to serving the people of Europe. Perhaps this is partly due to this public backlash against the neo-liberal market project, very visible during the public mobilisation against the Services Directive and the referenda on the Constitutional Treaty more generally. If true, this could present optimistic prospects for the confidence and support of the people of Europe. This approach could even restore or regain the confidence of the general public that is so desperately needed during a time of withering support in the aftermath of the financial crisis.

In conclusion, maybe Hooghe and Marks are correct when saying that we have 'come to understand the wellsprings of European integration just as they are changing'.[27] Perhaps so. However, while acknowledging that policy makers will be more careful in the future to avoid upsetting public opinion, I do not think this can be avoided altogether. The plurality of the European Union will continue to provide incentives to those opposing to mobilise public opinion against proposed policies. Some way or another, the Union will have to come to grips with the influence of the public. In this changed situation an approach of technocracy, how efficient it may be, will not prove very efficient for the long term. In order to guarantee a long-term prosperous European Union, the support of the public for this project is needed. My suggestion to all: we'd better start listening.

[27] Hooghe and Marks (2008), p.123.

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