EU Legislation and National Regulation

The Uncertain Steps towards a European Public Policy

Jørgen Grønnegaard Christensen
Department of Political Science
University of Aarhus
Abstract
The EU with its supranational powers is a unique institution. Contrary to other international organizations it can make laws that are binding to its member governments as well as to their citizens and enterprises. However, we find little consensus in the literature as to its true role as a law maker. This and the following three papers remedy this empirical deficiency. The present paper presents a comprehensive analysis of the scope of binding EU regulation. Here the EU is presented as an important law maker. It has with considerable effectiveness been able to overcome recurrent crises that have often called its viability into question. But the same analysis also reveals that the EU, in spite of several treaty reforms expanding its responsibilities into new policy areas, remains a predominantly economic regulator. Finally, EU law making is to an increasing extent delegated to a Commission dedicated to the de facto task of maintaining the internal market.

In the early 1990s the Conseil d’État, the supreme French administrative court, sounded the alarm. Its annual report was dedicated to a comprehensive analysis and scathing critique of the impact of EU regulation on French law and public policy.¹ The general concern was the sense that supranational legislation pervaded national regulation. Of equally serious concern was the opacity of EU legislation. The Conseil d’État pointed to the fact that EU-law “is, due to its nature, hybrid law.” The French public lawyers also observed that “European law is diplomatic law – the result of long and slow negotiations between sovereign states…. In the case where lawyers strive for precision, diplomats practice the unsaid and don’t hesitate to take refuge to ambiguity.” Finally, they claimed that EU law “remains to a large part hidden law. Little is done to facilitate users’ material access allowing them to rapidly trace the entire set of regulation that applies to a given policy issue.” (Conseil d’État 1993, 42-48).

The starting point for the Conseil d’État was a prediction by Jacques Delors, the renowned president of the EU Commission. Speaking in July 1988 to the European Parliament, he predicted that ten years later “80 pour cent de la legislation sera d’origine communautaire” within the economic and social fields (quoted after Conseil d’État 1993, 17). The statement, which he made after the ratification of the Single European Act (SEA) and in the wake of the negotiations that led to the Maastricht treaty, was full of self-confidence. It was made by the man who personified the ideas and the ambitions of a Europe becoming ever more close-knit. His bold words have since come to be perceived as a fact, and politicians and academics alike tend to claim that nowadays the overwhelming part of national regulations can be traced back to regulation issued by the EU lawmaking machinery.

¹ Although this paper covers the present EU since its creation in the 1950s, it has changed its official name several times, but EU and The European Union are used as its names here.
The fact is that nobody really knows. First, until quite recently there have not been many serious attempts to estimate the impact of EU regulation on national regulation. Second, it is an analytically complex task to be approached with a judicious balance of technical finesse and prudence. This is especially so when the ambition is to say something quite definitive on a comparative basis, covering more members of the European Union. Therefore, this and the following three papers subject the factual statements of the past to a systematic reality check. This raises several questions about the state of EU rulemaking and how it relates to national legislation. Together the four papers propose empirically based answers to a series of questions. The present paper asks three questions: 1) What is the scope of the EU’s public policy profile? 2) How has it developed over time? 3) What are the problems in estimating and analysing the impact of EU legislation on national public policies? This sets the framework for the analysis in the following three papers. Together they provide answers to two other questions: 1) What is the impact of EU legislation on national legislation and public policy? And 2) what are the institutional mechanisms through which EU regulation is decided and subsequently integrated into national legislation and public policy in a given national context? These articles analyse the impact of EU legislation on Austrian (Marcelo Jenny and Wolfgang C. Müller), Danish (Jørgen Grønnegaard Christensen), and Dutch (Mark Bovens and Kutsal Yesilkagit) regulation. A joint conclusion briefly draws up comparative problems and perspectives raised by our research.

This analysis starts with a brief review of recent advances in the analysis of the EU and its interaction with national governments. This is followed by a presentation of the data and the data collection procedures used. This section also discusses how to develop appropriate empirical measures of EU rulemaking as well as of its incorporation into national legislation and public policy. This is a delicate task entailing severe risks of either inflating or deflating the impact of the EU. The empirical part of the analysis portrays the EU as a predominantly regulatory regime. Over the years it has gone through remarkable developments despite consecutive crises that put its institutions under severe stress. Yet, it is equally obvious that the EU of today is not the dominant and ever-expanding regime envisaged by Jacques Delors and other EU enthusiasts. Nor is it the European Leviathan depicted by the Conseil d’État.

**Advances in the Study of the EU**

Since its inception in the early 1950s the EU has attracted considerable attention among political scientists. Its unique construction, a set of institutions endowed with supranational authority, continues to fascinate. Their fascination is reinforced when considering how the EU has managed to
broaden its membership through a series of expansions and because the union’s constitutional architecture seems under constant revision. These developments have paved the way for EU fora of rare institutional and organizational complexity.

As the EU has matured the analytical focus of political scientists has changed. Although the EU has retained its unique institutional traits, modern EU analysis starts from the assumption that it can and should be studied based on the theories and methods used for the analysis of national political systems.\(^2\) This has led to considerable advances in our knowledge of how the EU works and why it is organized as it is. However, the ever-increasing volume and extreme complexity of EU institutional mechanisms implies that the analyses focus on one particular feature of its operation, for example its law making procedures, the procedures of comitology that regulate cooperation between national and Commission officials in the implementation of EU policies, as well as national level studies of administrative coordination and parliamentary oversight of EU related decision-making. These studies all provide rich information on institutional operation and change, but they tell little about the EU’s impact on the public policy pursued by the EU and its national members.

Two other strands in the EU literature are relevant to the problem of the interaction between EU and national public policies. The first consists mainly of studies focusing on cases from one or a few policy areas, concentrating on the analysis of policy making dynamics or policy implementation. They are characterised by in-depth analysis of the rich information on the interaction between the European and national actors. Among these studies we find theoretically informed studies that provide crucial insights into the political dynamics that characterize policy-making in the EU (See e.g. Héritier 1999; Héritier, Knill & Mingers 1996; Levi-Faur 1999; Thomson et al. 2006). Other studies with similar analytical strengths focus on the administrative implementation of EU policies at the national or sub-national level (Knill 2001). However, the case study approach taken in these studies reduces their general value. They inform us as to how the EU operates within very specific contexts. Equally importantly, they also point to the complex interaction between the EU and national governments. They have shown that the EU and especially the Commission can act as a policy entrepreneur, but they have also demonstrated that the EU is often just a forum for exchanging ideas between national governments that each compile their own distinct policies within a common, although loose and incoherent, legal framework (Falkner et al.,

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\(^2\) Some recent monographs clearly demonstrate this observation; see e.g. Héritier 1999, Hix 1999 & 2005, and Pollack 2003. A flourishing literature in general and specialized journals support the impression.
2005). Still, they do not give us a precise and comprehensive idea about the character and importance of the EU and the general impact of its policies on public policy in the member states. A particular problem to be taken up below relates to the extensive use of soft regulation within the EU. Even though analysis of soft regulation is beyond the scope of this issue it would be wrong to ignore its possible impact on national public policies.

**European Public Policy**

The second strand is an embryonic research that to some extent meets the demand for comprehensive analysis of European public policy and how it impacts and interacts with national public policies. The few contributions within this field combine a long-term perspective several or all aspects of EU public policy or its general impact on the public policies of the member states. Such research increases the number of diachronic observations and paves the way for a systematic analysis of core areas of European public policy compared to more peripheral ones. It also allows for empirical analysis of the general impact of consecutive institutional reforms and of the step-wise expansion of the membership from six to now 27 countries.

One question is linked to the idea that the EU increasingly determines the framework for national public policy and especially governmental regulation. Mark Pollack has addressed this problem. First, he analysed the long-term development of EU policy within six policy areas (environment, consumer protection, education, regional policy, research and culture). Based on the number of directives in force and budgetary figures he found some support for his claim that the EU has expanded the scope of its policies since the late 1960s (Pollack 1994). In a later article Pollack (2000) asked whether this dynamic still holds empirically, given the concern in member governments for subsidiarity and budgetary restraint. He concludes that the European Union during the 1990s has faced severe budgetary constraints. Simultaneously, it continued its development towards becoming a supra-European regulatory body, constraining the role of the national regulatory state. However, during the same period EU legislators have changed their regulatory strategies by relying increasingly on regulations and decisions rather than directives.

Jonathan Golub has studied the long-term effects of the legislative procedures and national preferences on Community and EU legislation (Golub 1999). He argues, quite rightly, that the analysis should be based on general and legally binding EU legislation. Consequently, he omits decisions; they are the Commission’s specific application of EU legislation and thus do not generally add to EU regulation. The analysis includes all directives issued between 1974 and 1995.
Allowing for short-term fluctuations he finds that the EU over the period demonstrated a legislative effectiveness that contrasts the common impression of crisis and stagnation that went before the institutional reforms that introduced voting by qualified majority in the Council of Ministers. One of his important observations is that the Luxembourg compromise, contrary to the accepted view, neither blocked for, nor slowed down lawmaking in the EU. However, the complex legislative procedure, now involving the European Parliament, has slowed the pace of legislative decision-making. Equally important, Golub finds that member state preferences have an impact on legislative effectiveness, but it is not clear whether that negates the influence of institutional factors. To the extent that this is so it calls into questions Pollack’s (2000) claim that member state reluctance towards EU policies has constrained budgetary expansion, but not put a brake on regulatory expansion.

Golub’s ambition is to analyse the long-term effects of institutional procedure and institutional reform on European law making, but his empirical results also shed interesting light on the EU as a regulatory body. The EU of the 1970s and 1980s was not paralysed and stagnant to the extent that conventional wisdom has it. Nor has the institutional revival, which began with the SEA and continued with the treaty revisions, endowed the EU with new dynamics. Still, in this context there are two important limits to the analysis. First, it concentrates exclusively on directives while ignoring regulations. Regulations have the same general and binding nature as directives, but they are immediately binding for citizens and business within the member states. Second, it is beyond the scope of Golub’s analysis to estimate the impact of EU legislation on national public policies.

Edward Page has in a series of papers addressed these issues, and he alone has brought together an analysis of EU public policy and its impact on national, in this case British, public policy. First, together with Dionyssis Dimitrakopoulos he finds “the EU to be law- rather than employee- or money-intensive” (Page & Dimitrakopoulos 1997, 366). Even if the number of EU laws in force has been constantly increasing, the overwhelming bulk by the mid 1990s remained within classic EU core areas, namely regulation of the customs union and its complementary internal market, as well as the common agricultural policy (cf. Franchino 2005). Newer areas of regulation like environmental protection were clearly expanding, but it is remarkable that the EU very early in its history actually began to regulate this field within the framework of the Treaty of Rome. Like Golub, Page and Dimitrakopoulos also show that the rise of the regulatory EU has been surprisingly little affected by economic and political cycles and especially by Eurosclerosis, which
is often said to have paralyzed the EU between the Luxembourg compromise and Delors’ re-launch of the European project.

Second, Page has also analysed the impact of EU regulation on British public policy. The main impact lies within the core areas of the common and internal market, and he shows that the EU is far from colonising British public policy if the impact measure is defined as the percentage of national legislation that refers to the obligation to transpose European directives or regulations into British law. The basis for his conclusion is an analysis of statutory instruments, that is, delegated law making. In a British context this is the most frequent instrument used for transposing directives. Actually more than 90 per cent of all directives are transposed by statutes. While the percentages are quite high for the Ministry of Agriculture and the Department of Trade and Industry (51 and 29 per cent respectively), the average does not exceed 15 per cent, a figure that pales beside the 80 per cent often quoted (Page, 1998). However, there are two important caveats. In another paper Page points out that transpositions of directives or incorporation of EU regulations into national law is only one of the ways in which the EU influences national public policy (Page, no date). So, the implementation of, for instance, common policies for agriculture and fisheries has necessitated the development and maintenance of a specialised administrative regime. Similarly, in making national law policy-makers must ensure that new policy initiatives are consistent with EU regulatory policies.

The implication is that a narrow focus on the transposition of directives into national law tends to underestimate the impact of Europe. But again the complexities are large. EU regulatory policies in general correspond to the national allocation of policy portfolios, and EU regulatory demands have widely been accommodated within domestic political and administrative procedures. Still, these complexities raise a series of methodological issues to be thoroughly discussed before we can develop a valid measure of Europeanisation to be used in broader comparative studies (Töller 2007; 2008; Moravcsik and Töller 2007).

**Estimating the EU Impact on Public Policy**

The EU is primarily a regulatory body. Therefore, an analysis of European public policy and its impact on national public policy is in any event a study of regulatory legislation and administrative implementation. The present study focuses on EU general regulation that is binding for member states. This is the case with regulations and directives. As regulations are binding for individual citizens and businesses they enter directly into the legal order that national authorities administer
alongside national rules and regulations. Directives are binding for member governments and they are committed to transposing the policy laid out into national law before a deadline stipulated in each directive. Together, regulations and directives in force constitute what might be described as European public policy, with which member states must comply in their legal and administrative practice. Both types of rules enter into the basis of this analysis. It thus differs from other studies that look exclusively at the directives, the argument being that directives are the politically salient part of EU legislation, while regulations are of a more technical nature.

This may indeed at times be so, but generally it is important to emphasise that EU law does not operate with a clearly conceived hierarchy of rules as is normally the case in the well-developed legal systems of the member countries. Directives and regulations are therefore used rather indiscriminately by EU lawmakers, mirroring the political and administrative circumstances of the situation rather than a consistent evaluation of their legal and political scope. Simultaneously, the complex EU legislative procedures make it important that both types of rules are included in the analysis of European public policy. The reason is that in particular regulations may be the result of a more or less demanding law making procedure. Like most directives, they may be the output either of the Council or have been decided according to the co-decision procedure of the Council and the European Parliament. However, the Commission, according to an alternative procedure, often issues regulations on its own provided that rulemaking authority has been delegated to it. We argue that this indicates differences in the political saliency of particular EU rules.  

Including directives and regulations in the analysis presents few problems at the EU level. It is more difficult to determine how to estimate their combined impact on national regulatory policy. Ideally both should be included, but it is not possible to add them together, nor is it easy to estimate the precise impact of regulations. In many cases they are absorbed into an administrative regime set up and maintained in order to ensure the implementation of EU policies; in other cases specific national legislation is necessitated even if formally the regulation forms part of the basis for national authorities (Page, no date). In this analysis a double strategy is followed. The primary source is the old CELEX data base. It contained all EU regulation in force as well as information on its application by the European Court of Justice and member state notifications of transposition of directives. At the EU level both directives and regulations have been counted. The national impact

3 Hofmann (2000) presents a comprehensive analysis of EU’s lack of a well-defined hierarchy of legal norms and of the problems this raises for the transparency of EU-legislation.

4 Both Plehwe (2007) and Töller (2007; 2008) offer good discussions of these problems without coming up with a solution to be accepted without reservations.
is estimated based on the governments’ notifications to the Commission on the transposition of directives. The three articles on the EU impact on national regulation give precise information on data collection in the specific contexts of Austria, Denmark and the Netherlands.

Other sources of EU regulation are either not general or not binding. The former applies to administrative decisions, often made by the Commission, concerning implementation of general EU law. The latter are different types of general or specific policy declarations that have no binding effect, but are important in quantitative terms. The EU register of legislation in force encompasses all these types of regulations, regardless of their binding or non-binding character. As the focus is on general regulation the basic distinction is between binding regulations defined as directives and regulations and soft law defined as the total number of registered regulations minus directives, regulations and decisions. Soft law legislation is listed under a variety of names such as communications, declarations, guidelines, recommendations, resolutions, special reports and statements. This form of soft regulation is easy to count, but it is extremely difficult to measure its impact on national public policy in a quantitative study covering several policy areas and ideally public policy in general. To this comes that soft regulation also takes other forms. So, little attention has here been given to the development of joint standards negotiated between national business associations. Furthermore, networks of national regulatory agencies play a subtle role both when it comes to the coordination of national standards and the provision of policy advice to the Commission. Finally, these softer forms of international standard setting often make it difficult to draw a precise line between EU impulses and impulses from a wider and less formalised international community (Coen and Thatcher 2008; Héritier and Lehmkuhl 2008; Jacobsson and Sundström 2006, 72-96).

There is a special problem with counting the EU laws. As is the case for other polities, policy-making is a continuous process involving the enactment of new laws as well as the revision and updating of laws already in force. As the goal of this analysis is to estimate the scope of EU regulation and its impact on national regulatory policy, a directive or regulation is only registered when it was first enacted, and later revisions are therefore excluded in the Danish and Dutch case studies. This clearly underestimates the level of legislative activity in the EU. However, the important thing in this context is that it gives a precise indication of when the EU first enacted binding legislation within a particular policy field. This counting procedure omits the numerous,

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5 CELEX stopped at the end of 2004. In the future EUR-Lex will integrate the information previously contained in CELEX. However, the facility is not yet fully operational.
minor and technical amendments that are normal features of the legislative process, thus avoiding
the inflation of total EU regulation. This obviously involves the risk that an accumulation of
successive revisions of an existing rule lead to a deepening of the integration.

The EU’s Official Journal and the official databases (CELEX and Eur-Lex) classify all EU legal
acts into 20 categories. For practical purposes these categories mirror the internal allocation of
responsibilities within the Commission and among its directorates general. These main categories
are subdivided into three further levels. At level 4, the lowest level, the classification is so detailed
that it allows for a fairly precise characterisation of the issues regulated by the EU. It also makes it
easier to match EU and national information. The appendix lists the classifications used. It is worth
mentioning that a certain rule sometimes may be listed under more than one heading, but EU
practice is not consistent in this regard.

The Scope of EU Regulation

The principal EU policy instrument is the rule. Its unique importance compared to any other kind
of international cooperation is demonstrated by the more than 5000 general rules in force. Rules are
binding for the member countries, and infringement by national authorities or private parties are
subject to the Commission’s monitoring activities and, in the last resort, to the ECJ’s jurisprudence.
It is also beyond discussion that within the fields subject to supranational regulation, the EU is an
important source of public policy. What is more, since its creation the EU has seen a remarkable
expansion of its policy scope (Stone Sweet et al. 2001). However, Figure 1 shows that even though
successive revisions of the treaties have extended the scope of cooperation and strengthened EU
lawmaking procedures, the EU by and large remains the customs union with a common agricultural
policy designed in the 1950s and early 1960s.

This is in part explained by the fact that some policy areas are less susceptible to the use of
regulatory instruments. The development of a common foreign and security policy and efforts to
strengthen cooperation within research and education are illustrative. Even with these caveats more
than 85 per cent of the rules in force deal with problems of the customs union, relations to third
countries, the common agricultural and fisheries policies, and the internal market. Areas like labour
market and social affairs (2.4 per cent) and environmental and consumers’ regulation (5.5 per cent)
are dwarfed in comparison. In the same comparative perspective it is equally clear that the EU’s
newly won responsibilities for cooperation on legal and domestic affairs have barely begun to materialise.

Since its creation the EU has gone through turbulent developments where political and institutional crises have alternated with bold initiatives for institutional reform. These dramatic changes have at times left the impression of an EU locked in political stalemate, interrupted by periods of strong institutional dynamics. From the Luxembourg compromise in 1966 until the Delors Commission launched its proposal for the creation of an internal market, the EU was often assumed to be severely hampered by political sclerosis. Decisions had to be reached in unanimity, and the EU was narrowly focussed on the common market, including the CAP. A prevalent idea is that the Single European Act revitalized the EU because it was now accepted that decisions be made by qualified majority in the Council, and because the policy scope was extended beyond the narrow management of the common market. Table 1 shows how EU regulation has developed since 1958. The rules in force in 2003 are broken down according to institutional regimes and policy areas. The table includes directives and regulations when first issued, thus omitting later amendments to the same rule (cf. the data discussion above). Hence, Table 1 provides a very precise picture of what EU public policy is about and when EU became engaged in a certain area of public policy.

--- TABLE 1 ABOUT HERE ---

Table 1 allows for three observations. First, throughout the period the common and internal market is totally dominant as some 85 per cent of all binding rules in force fall within these fields. Second, although environmental protection did not arrive on the general EU agenda until the launching of the Delors plan and the SEA, the EU did in fact engage itself in these issues at a very early stage. It is equally important that quantitatively regulatory policy within these fields has not increased despite the reforms instituted in the wake of the Single European Act and subsequent treaty revisions. Third, throughout its history the EU has produced rules that were binding for its member countries and directly and indirectly for their citizens. Over the long period since its creation and until 1987, the year before SEA came into force, the average annual number of new directives and regulations was 789. After the reforms beginning in 1988 there was a dramatic increase to 1645 for the SEA period and 1311 for the period under the Maastricht treaty. Since the ratification of the Amsterdam treaty the number of new binding rules has been reduced to an annual average of 1011. In sum, this confirms the image of an EU with considerable dynamics throughout its history and one that early developed a policy profile, the primary emphasis of which is on
regulating a common market (Golub 1999; Héritier 1999; Page & Dimitrakopulous 1997). The EU is only marginally disturbed by recurrent conflict and crises, but at the same time its law-making output is little affected by reforms of legislative procedures and expansion of policy responsibilities. The partial exception from this pattern was the upsurge in legislative activity following the initiation and implementation of the internal market. However, from a regulatory policy perspective the internal market was not so much a radical expansion of the EU agenda as it was a complement to the original common market project.

The EU thus demonstrates how its unique institutional features in conjunction with a solid political base have developed into a supranational regulatory body the primary mission of which is economic regulation. In this capacity it has been remarkably resilient to political crisis and has retained the capacity to adapt policy to changing circumstances, as witness both the upholding of an efficient legislative capacity and its successful implementation of the internal market programme. At the same time, Figure 2 indicates a dramatic change in its legislative practices, a change that began after the internal market programme was completed and the Maastricht treaty had come into force.

--- FIGURE 2 ABOUT HERE ---

In EU law the basic distinction is between immediately binding regulations and directives that commit member governments to take the steps required to meet their requirements through domestic law. In the early EU history legislative activity was low, but it took off during the 1960s with the creation of the common agricultural policy and the development of the customs union. Paradoxically, this happened from the mid 1960s on and continued with minor fluctuations for the next two decades. The annual issue of regulations peaked in the 1980s. It has since fallen dramatically, and in 2005 it was back at the 1975 level. Comparatively, the number of directives has remained stable at 95-105 per year, after a peak in the early 1990s when the directives needed to create the internal market were enacted. Even more conspicuously, since the same peak period the EU has increasingly begun to rely on soft law, that is to say, an ill-specified group of declarations, recommendations and resolutions where one or another EU institution in a politically and legally non-committing form announces a policy stand (cf. the precise definition above). As Figure 2 shows, such policy declarations have been used to a highly varying extent since the 1970s, but they have virtually exploded since the 1990s. The extensive use of soft law has allowed the EU to deal with policy issues that reach beyond the willingness of member governments to commit themselves
to binding policies (Falkner et al. 2005). As discussed above EU’s increasing reliance on soft law raises a series of interesting problems that reach beyond the scope of this issue.

**Political Maturity and Delegated Rule Making**

Today’s EU began as a common market with a common agricultural policy. Since then it has expanded its policy scope. Still, the EU does not embrace the full range of policy issues. Especially distributive tasks associated with the provision of welfare and other public services remain the exclusive responsibility of the nation states and, in several of the member countries, of sub-national government. During the same period the EU has undergone a series of reforms. They have to a large extent been linked to the policy reforms that expanded the scope of integration. Taken together these reforms have empowered the EU to move into policy areas of greater sensitivity in terms of national sovereignty and at the same time increase the institutional capacity and law making efficiency of its legislative institutions.

However, it has already been seen that the EU policies enacted almost exclusively fall within the original core of a common and internal market for goods, labour and services. This also implies that the EU has to balance creation of new policy within the core and in the new fields of cooperation with its responsibility for maintaining already established policies. The assumption behind Table 2 is that delegation of law making authority to the Commission is an indicator of lower political saliency. It is also that use of regulations rather than directives indicates the saliency of the rules issued. Thus, the combination of greater reliance on regulations and delegation of lawmaking authority to the Commission is tantamount to more routine and less salient EU legislation.

--- TABLE 2 ABOUT HERE ---

Table 2 provides strong support for this proposition. First, regulations are by far the preferred type of rule used within the core of economic regulation. Simultaneously, they play a relatively minor role within the field of social regulation that deals with market externalities in the form of environmental and consumers’ protection and workers’ health and safety. Second, law making authority has been widely delegated to the Commission within the core area. The Commission has issued more than two thirds of all rules dealing with economic regulation. For social regulation the Commission enjoys much less authority and EU legislation relies mainly on directives, leaving it to national governments to decide how they will meet their policy commitments. Compared to these fields the EU’s responsibility for general legal regulation (that is, rules regulating the general rights and duties of individual citizens) has up to 2003 led to only a few binding decisions with little
authority delegated to the Commission. Finally, the EU also administers a series of structural funds, allowing it to support and subsidise activities at the national and sub-national levels. In this policy field the primary instrument is budgetary allocation of funds combined with regulations and decisions that specify the conditions under which support is granted. These procedures are highly politicized and the Council plays an important role whether the instrument used is a directive or, as is normally the case, a regulation (Blom-Hansen and Yesilkagit 2007).

The Commission’s role as a law maker has become more evident over time. Table 3 distinguishes between the institutional stages through which the EU has developed since the Treaty of Rome. Even if the reforms have focused on strengthening the use of majority voting in the Council and increasing the power of the European Parliament, the Commission has in the real world assumed an ever larger role as law maker.

This is particularly evident within the core area of economic regulation, where the Commission has developed into being the prime law-maker. The Commission’s share of EU rules has increased from some 40 to 66-69 per cent since the Maastricht-treaty came into force. A similar trend towards increased delegation of authority to the Commission is found in the fields of social regulation and redistribution. Its relative weakness compared to that of economic regulation mirrors the political sensitivity of social and redistributive issues. Still, the overall trend towards increased delegation also shows that as EU responsibility within a certain field matures, administrative concerns take over. What happens is that in this situation the Council takes the risk of delegating the authority to fill out the political framework with more specific, technical and legally binding regulations. The conclusion is that delegation to the Commission is on the increase, but is not so much the result of the functional demand for credible commitment (cf. Pollack 2003). Rather, it shows an EU succumbing to a high workload of administrative detail (Coombes 1970; Mohr 1982). The Council alleviates some of this pressure through delegation to the Commission. Delegation under these political circumstances represents a neatly calculated risk, given the elaborate procedures of comitology (Pollack 2003; McCubbins, Noll & Weingast 1989).

**Comparative Impact Analysis**

Austria, Denmark and the Netherlands are similar in important political respects, but their EU histories are extremely different. The Netherlands is one of the founding ‘fathers’ of the EU, while Austria and Denmark joined the EU later. Denmark joined in 1973, but only after a conflict-ridden debate and a referendum. Since then the degree of integration has been contested, and in two
referendums the electorate voted no, first to the Maastricht treaty and later on to full membership of the economic and monetary union. For neutral Austria membership only became an option after the end of the cold war and in 1995 it entered the EU along with neutral Finland and Sweden. The implication was that unlike the Netherlands, and to a wide extent Denmark, it had to accept an *acquis communautaire* accumulated over the previous three decades. For the Netherlands the political climate was entirely different for a long time. Its governments consistently and fervently supported European integration in general and EU’s supranational institutions in particular. EU policy was hardly an issue on the Dutch political agenda, a situation that ended abruptly when the electorate voted down the EU constitution in 2005.

With their different EU histories some basic questions to be answered in the following three articles are to what extent the three countries have chosen different procedures for implementing EU policies decided in the form of directives. Is parliamentary oversight less developed in the Netherlands than in Austria and Denmark? Have Dutch legislators been more prone delegating the implementation of directives to the government and its departmental ministers than have Austrian and Danish lawmakers? These questions are not only important because EU membership and European integration has been much more contended in the countries that did not belong to the circle of founders. It is also important because the development of a supranational law-maker raises important issues of democratic control and legitimacy.

Even if the three countries meet the same obligations to implement EU policy at the national level there may be differences in national public policy and hence in EU impact. Such differences may be due to different priorities set in the past by national legislators. They may also follow from differences in legislative tradition and legal principles that result in different regulatory styles. There may in this regard be a difference between an Austrian-German tradition of legal positivism and a Danish-Dutch consensual pragmatism. In the former tradition the normative position is that a hierarchically ordered system of rules forms the basis of public policy. In the latter a similar legal tradition is combined with a strong reliance on consensual bargaining in the implementation of law; this pragmatic approach rests on the normative presumption that democratic legitimacy rests on broad political consent rather than formal legal criteria. Thus, regulation of the Danish labour market largely relies on collective agreements where there is continental tradition for legislative regulation (Jensen 2002). Similarly, the pragmatic and consensual approach prevalent in Dutch politics has paved the way for very flexible procedures for implementing EU directives (Harmsen 1999).
The strengths of the analytical approach taken in this and the following three papers should be obvious. First, contrary to much analysis of European public policy its scope is universal and not limited to one or a few policy areas or cases. Second, it systematically links formally binding EU legislation with national legislation implementing EU directives. Third, this methodology enables a more precise and quantitative overview of the impact of EU legislation on member state legislation.

This, of course, is not the only way in which the EU has affected and constrained national policymaking. Regulations that are directly binding to all legal subjects in the EU should ideally be included, but it is impossible to just add them to either the directives or the national rules transposing directives. Similarly, the EU may influence and constrain national policy makers in more subtle ways, for instance by inducing them to adapt their administrative regimes in order to meet the implicit demands of EU policy or anticipation of future EU policy. Finally, our analytical approach does not allow us to distinguish between more or less salient rules. However, this limitation holds for any kind of quantitative analysis, and its effect most probably goes both ways, sometimes underestimating, sometimes overestimating the formal impact of Europe.

Keeping these reservations in mind our claim is to present one of the first systematic attempts to give a precise quantitative estimate of the EU as a lawmaking institution and to link this estimate to an assessment of its impact on national legislation. In our view these formal estimates are absolutely central to an evaluation of the long-term performance of the supranational EU model. It is the legally binding rules that distinguish the EU from other international forms of cooperation and coordination. It is also these rules that directly or indirectly, when transposed into national law, can lead to a judicial trial where either national governments or their subjects are brought before the European Court of Justice. It is this very core of EU integration that distinguishes the EU from most other formal cooperation at the international level that we analyse.

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References


### Appendix

EU classification of rules, policy areas and regulatory function¹

<table>
<thead>
<tr>
<th>EU classification of rules, level 1</th>
<th>Classification of policy area: European regulatory policy</th>
<th>Regulatory function</th>
</tr>
</thead>
<tbody>
<tr>
<td>01 General, financial and institutional matters</td>
<td>EU institutions and finances</td>
<td>Coordination</td>
</tr>
<tr>
<td>02 Customs Union and free movement of goods</td>
<td>Customs Union and external relations: 02 + 11</td>
<td>Law relating to undertakings: market regulation 03.05 + 03.10 + 03.20.10 + 03.20.30 + 03.40 + 03.60 + 03.70 + 03.80 + 04 Redistribution, subsidies and transfers: 03.20.20 + 03.30 + 04.10.10 Social regulation: 03.50</td>
</tr>
<tr>
<td>03 Agriculture</td>
<td>Agriculture and Fisheries: 03+04</td>
<td></td>
</tr>
<tr>
<td>04 Fisheries</td>
<td></td>
<td></td>
</tr>
<tr>
<td>05 Freedom of movement for workers and social policy</td>
<td>Labour market and social policy</td>
<td>Economic regulation: 05.10+05.20.05+ 05.20.30 (- 05.20.30.20) + 05.20.40+05.20.50 Social regulation: 05.20.20 + 05.20.30 Redistribution, subsidies and transfers: 05.20.10</td>
</tr>
<tr>
<td>06 Right of establishment and freedom to provide services</td>
<td>Internal market etc.: 06 +07 +08 + 09 + 10</td>
<td>Economic regulation</td>
</tr>
<tr>
<td>07 Transport policy</td>
<td></td>
<td></td>
</tr>
<tr>
<td>08 Competition policy</td>
<td></td>
<td></td>
</tr>
<tr>
<td>09 Taxation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>10 Economic and monetary policy and free movement of capital</td>
<td>Taxation, monetary and economic policy 09 + 10</td>
<td>Coordination: 10.10+10.20+10.30 Economic regulation: 10.40</td>
</tr>
<tr>
<td>11 External relations</td>
<td>Internal market etc.: 11 + 12 + 13 + 14 + 17</td>
<td>Coordination: 11.10 + 11.20 Economic regulation: 11.30 +11.40 +11.60 Redistribution, subsidies and transfers: 11.50 +11.70</td>
</tr>
<tr>
<td>12 Energy</td>
<td></td>
<td>Enterprise policies</td>
</tr>
<tr>
<td>13 Industrial policy and internal market</td>
<td></td>
<td></td>
</tr>
<tr>
<td>14 Regional policy and coordination of structural instruments</td>
<td></td>
<td>Redistribution, subsidies and transfers</td>
</tr>
<tr>
<td>15 Environment, consumers and health protection</td>
<td>Environment and consumer protection: 15</td>
<td>Social policy</td>
</tr>
<tr>
<td>16 Science, information, education and culture</td>
<td>Research and education: 16</td>
<td>Public service production</td>
</tr>
<tr>
<td>17 Law relating to undertakings</td>
<td></td>
<td>Economic regulation</td>
</tr>
<tr>
<td>18 Common Foreign and Security Policy</td>
<td>Foreign and security policy: 18</td>
<td>Coordination</td>
</tr>
<tr>
<td>19 Area of freedom, security and justice</td>
<td>Legal and internal affairs: 19 + 20</td>
<td>General regulation</td>
</tr>
<tr>
<td>20 People's Europe</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

¹ The EU classification of legislation in force can be accessed at http://europa.eu.int/eur-lex/lex/en/repert/index.htm
Table 1. EU’s institutional development and regulation in force by policy areas

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>EU’s Institutions and finances</td>
<td>3.5</td>
<td>2.4</td>
<td>2.6</td>
<td>0.8</td>
</tr>
<tr>
<td>Customs union/3rd country relations</td>
<td>19.0</td>
<td>31.5</td>
<td>30.5</td>
<td>28.8</td>
</tr>
<tr>
<td>Agriculture and fisheries</td>
<td>37.7</td>
<td>29.4</td>
<td>37.9</td>
<td>42.4</td>
</tr>
<tr>
<td>Labour market and social affairs</td>
<td>3.0</td>
<td>2.4</td>
<td>2.1</td>
<td>2.2</td>
</tr>
<tr>
<td>Taxes, monetary and economic policy</td>
<td>2.1</td>
<td>2.4</td>
<td>2.3</td>
<td>1.5</td>
</tr>
<tr>
<td>Internal market</td>
<td>29.2</td>
<td>23.7</td>
<td>19.3</td>
<td>15.3</td>
</tr>
<tr>
<td>Environmental and consumers’ protection</td>
<td>4.5</td>
<td>7.3</td>
<td>4.6</td>
<td>5.7</td>
</tr>
<tr>
<td>Research and education</td>
<td>9.0</td>
<td>0.5</td>
<td>0.5</td>
<td>0.4</td>
</tr>
<tr>
<td>Foreign and security policy</td>
<td>–</td>
<td>–</td>
<td>0.4</td>
<td>0.1</td>
</tr>
<tr>
<td>Legal and domestic affairs</td>
<td>–</td>
<td>0.4</td>
<td>0.1</td>
<td>0.1</td>
</tr>
<tr>
<td>Total N (100 per cent)</td>
<td>1084</td>
<td>1103</td>
<td>1548</td>
<td>1327</td>
</tr>
<tr>
<td>New directives and regulations:</td>
<td>Annual average</td>
<td>789</td>
<td>1645</td>
<td>1311</td>
</tr>
</tbody>
</table>

Source: CELEX, summer 2003.

* See note to Figure 1.
Table 2. Delegated rulemaking and rule type

<table>
<thead>
<tr>
<th>Regulatory function</th>
<th>Regulations</th>
<th>Directives</th>
</tr>
</thead>
<tbody>
<tr>
<td>Economic</td>
<td>68 (3106)</td>
<td>26 (1049)</td>
</tr>
<tr>
<td>Social</td>
<td>51 (105)</td>
<td>9 (233)</td>
</tr>
<tr>
<td>General legal</td>
<td>6 (36)</td>
<td>0 (22)</td>
</tr>
<tr>
<td>Redistribution</td>
<td>49 (285)</td>
<td>0 (39)</td>
</tr>
</tbody>
</table>

Source: Celex, summer 2003.
Note: Percentage of rules issued by the Commission. N in parentheses.
Table 3. Institutional regime and delegated rule making in the EU

<table>
<thead>
<tr>
<th>Institutional regime</th>
<th>Economic</th>
<th>Regulatory functions</th>
<th>Social</th>
<th>General legal</th>
<th>Redistribution</th>
</tr>
</thead>
<tbody>
<tr>
<td>Common Market</td>
<td>41 (892)</td>
<td>9 (54)</td>
<td>–</td>
<td>21 (83)</td>
<td></td>
</tr>
<tr>
<td>Single European Act</td>
<td>44 (878)</td>
<td>14 (101)</td>
<td>0 (8)</td>
<td>50 (82)</td>
<td></td>
</tr>
<tr>
<td>Maastricht Treaty</td>
<td>66 (1287)</td>
<td>35 (92)</td>
<td>0 (5)</td>
<td>46 (90)</td>
<td></td>
</tr>
<tr>
<td>Amsterdam Treaty</td>
<td>69 (1098)</td>
<td>25 (91)</td>
<td>4 (45)</td>
<td>58 (69)</td>
<td></td>
</tr>
</tbody>
</table>

Source: Celex summer 2003.
Note: Percentage of rules issued by the Commission. N in parentheses.

Figures

Figure 1. The scope of EU legislation 2004

Source: CELEX summer 2003.
Note: CELEX (and EUR-Lex) in some cases list a particular rule under two or more policy-headings.
Figure 2. New EU directives, regulations and soft law