

# The European Commission and the law-making process: compromise as a category of praxis

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## Abstract

*Understanding law-making requires coming to grips with cognitive schemas, practical wisdom of agents involved in the production of law, as agents may interpret or apply the law according to socially accepted mental schemas developed as a result of socialisation in families, schools, universities and other social settings or in the course of exchange in professional settings. A case study on the conduct of officials of the European Commission seeks to illustrate this point. This looks at tacit understandings regulating the conduct of officials of the European Commission, engaging in the production of a legal proposal or in the implementation of a legal measure. Such interaction may be successful, or less successful, depending on how contentious a legal file is, but is underlined by certain understandings, particular norms of conduct, as to how things are get done. In uncovering shared understandings, the article looks at modes of co-operation in working parties and shared files, promotion procedures, mobility, and how reputation is valued and acquired. The thesis advanced is of important cognitive schema, anthropological category of praxis, regulating the law-making process inside the European Commission is compromise.*

## 1. Introduction

The general question of how the social environment informs the shaping of substantive and procedural aspects of law has long been at the heart of academic debate. From an anthropological perspective, answering this question requires looking at the legal order as being embedded in society and, following Comaroff and Simon (1981), the emphasis may shift from studying the formal rules of adjudication to coming to grips with the processes shaping the resolution of disputes and development of norms. Furthermore, in the light of the social constructivist stance, it is suggested that the study of legal processes should also include the examination of beliefs, perceptions and identifications. This has been termed as the ‘cognitive approach’.

The ‘cognitive turn’ was a major intellectual development of the twentieth century and its theoretical insights initiated debate in various disciplines, such as philosophy, psychology, linguistics, anthropology and social theory.<sup>1</sup> In the field of legal studies, the socio-legal literature challenged the formalist understanding of law as being shaped by doctrine and precedent by means of looking at ideological assumptions underlining the application and interpretation of law, and critical legal theory illuminated the ways in which mental categories of race and ethnicity, for instance, may inform the interpretation of legal doctrine (Matsuda, 1998; Robin, 1988; Williams, 1988; Lawrence, 1987).

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1 For a review, see Brubaker, Loveman and Stamatov (2004, p. 54).

The law and economics movement explicitly included in its research agenda the notion of agency and preferences, although it was criticised for introducing fixed preferences leaving aside the question of their social construction (Posner, 1996, 1997, 1998; Lessig, 1995, 1998; Sunstein, 1996). However, major theoretical attempts to apply the cognitive approach by stressing the significance of informal norms and practical knowledge are presented by Garfinkel's ethno-methodological inquiry of courtroom interaction and Bourdieu's theory of practice, as applied in the field of law and the field of bureaucracy (Bourdieu 1986a, 1994), as the following section will seek to demonstrate.

In a nutshell, the argument here is that to understand law-making in general, it is important to come to grips with *cognitive schemas*, practical wisdom of agents involved in the production of law. Agents may interpret or apply the law according to socially accepted mental schemas developed, for instance, in the course of exchange in professional settings, or as a result of socialisation in families, schools, universities and other social settings.

A case study on the conduct of officials of the European Commission seeks to illustrate this point. This looks at tacit understandings regulating the conduct of officials of the European Commission engaging in the production of a legal proposal or in the implementation of a legal measure. The arguments in a legal file are the result of the complex interaction amongst many persons and many different services of the European Commission. Such interaction may be successful, or less successful, depending on how contentious a legal file is, but is underlined by certain understandings, particular norms of conduct, as to how things are get done. In uncovering shared understandings, the article looks at modes of co-operation in working parties and shared files, promotion procedures and mobility, while reputation, how it is valued and acquired, is a theme that runs across all relevant sections.

In what follows the question addressed is: what are the common-sense understandings reproduced, for example, in the course of exchange leading to the initiation of a legislative proposal? In answering this question the following section will first engage in a theoretical articulation of the notion of cognitive schemas and how this is relevant to studying the making of a legal proposal by the European administration. The article will then proceed to give an interactionist account of exchanges inside the European Commission. Finally, the last main section will engage in a theoretical analysis of my empirical results. The main proposition is that *compromise* is an important pattern of praxis regulating the crystallisation of a legal argument.

## 2. Schemas as social constructs

Schemas<sup>2</sup> can be universal, idiosyncratic (characteristic to individuals) or culturally constructed, and as such distinctive to groups of people (D'Andrade, 1995). It is this third category of schemas that concerns us here, since it is through the lenses of the social constructivist stance that the following paragraphs will proceed, as the relevant analysis is on the cultural characteristics of law-making inside the European Commission. In other words, the focus here is on practical knowledge dependent on specific cultural and historical conditions and on practical reason linking to the study of action. The remainder of this section will explain the rationale underlining the choice of the theoretical framework.

The idea of schemas points to important questions such as: What is the role of context in shaping human action? How rational are human beings and what are the social factors that limit their rationality? These questions link cognitive science with the concerns of the phenomenology of

2 There is no space here to elaborate on the distinction between categories, social categories, stereotypes and cognitive schemas. The focus of this article is on the application of cognitive schemas in the study of legal processes. For an overview of differences see Brubaker, Loveman and Stamatov (2004).

human learning in general and the Dreyfus model of learning in particular (Dreyfus and Dreyfus, 1988). According to the latter, experts – that is proficient performers of particular activities such as chess and football players, paramedics and ordinary drivers – accumulate and organise experience which is, most of the time, intuitively and not consciously used.

In other words, action is not bound by rules, but experts, having first associated what the right way to respond is in respect to a particular class of experiences, then proceed to recognising similarities between new situations and accumulated experience, and act accordingly. This follows Aristotle's contention that *phronesis*, as in 'tacit' knowledge encapsulated in practice, is an important type of knowledge, a position also adopted in the field of the philosophy of science (Bachelard, 1940, 1953; Polanyi, 1958; 1967; Kuhn, 1962; Searle, 1983), philosophy (Gadamer, 1976, 1981, 1994) cultural studies (Bellah et al., 1996) and anthropology (Rice, 1980; Quinn, 1996).

In sociology, this understanding of schemas strongly resembles Bourdieu's notion of habitus, Garfinkel's ethnomethodological approach and Goffman's interactionism. According to the interactionist tradition, social structures are interpreted by agents and undergo interpretation, social order is the product of well-ordered improvisation (Mead, 1934), and individuals create the social world by means of reproducing it in the course of interaction (Blumer, 1969). Bourdieu's theory of practice and ethnomethodology take the interactionist position further. Agents do not merely respond to an objectively given social world, but there is constant communication between minds and structures, the one transforming the other.<sup>3</sup>

Bourdieu's understanding of cognitive schemas as 'habitus' present us with an elaborate effort to study the ways in which symbolic forms of authority are embedded in mental structures, hence the communication between minds and structures. Geertz (1983) argued that 'in the political centre of any complexly organised society there is both a governing elite and set of symbolic forms expressing the fact that it is in truth governing'. In the same spirit, legal semiotics and the philosophy of language have shown how a legal document derives authority from invoking mental categories of social perception (Balkin, 1991; Delgado, 1990). These have a double function of acting both as frames of interpretation and promoting images of authority and power. For instance, the most usual basis of the legitimacy of law is the belief in the legality of rules, which are formally acceptable and have been enacted by means of accepted procedure. To this effect, sustaining the image of law as objective and neutral is crucial in maintaining its legitimacy, further supported by the acts of codification, formalisation, systematisation, and the grammatical persistence of passive and impersonal constructions in legal texts (Bourdieu, 1986[a/b/c]).

The notion of schemas sits comfortably with the ethnomethodological idea that mundane interaction requires participants to 'fill in' information from their stocks of tacit knowledge. This is why for Garfinkel the important question was the study of practical action and practical reasoning

3 It should be noted that the notion of 'structure' is notoriously difficult to define and may be used in contradictory ways in sociology and anthropology. For the latter, it may be equivalent to culture while for the former, structure tends to be determining and culture derived from it, on these issues see Sewell (1992). The present analysis takes on board Bourdieu's thesis that structures and schemas reproduce each other, as structures have to be legitimised and may be resisted and subjected to change. However, Bourdieu's concept of habitus has been criticised as implying rigid determinism, leaving no place to accommodate the notion of social change and collapsing into objectivism, since the rationale behind agents' actions is found in the internalisation of objective structures in the bodies of individuals. The position adopted here is that habitus is the catalyst between minds and social structures, processing information in a way that allows regulated improvisation, interpretation and appreciation of the possibilities embedded in structures, bridging the gap between micro and macro approaches. Such an understanding conforms to DiMaggio's claim that the challenge to cognitive approaches is to conceptualise the interaction between minds and structures and adequately responds to the criticism addressed to the cognitive approach as presenting us with static categories of thought not allowing a creative conceptualisation of how the social world evolves (DiMaggio, 1997, 2002). Unfortunately, there is no space to elaborate here on this, for a lengthier analysis see Vandenberghe (1999) and Sideri (forthcoming).

underlining jury's common sense. The importance of the relevant exploration lies in that such common-sense knowledge is based on particular conceptions of fact and what counts as a reasonable argument, in other words lay knowledge reproducing social practices and cognitive schemas. Jurors have stocks of knowledge, which consist of categorisation of context specific information applicable to particular situations pointing to typified action making the social world (and members of it) reasonable (Garfinkel, 1967).<sup>4</sup>

To summarise, a cognitive approach assumes that human beings sort experience into useful clusters of information to make sense of the world. When studying organisations such as courts, or, as in the present case, the European Commission, a cognitive approach is committed to uncovering schemas of perception and appreciation that bound decisions made by individuals such as officials and judges, while at the same time reproducing beliefs and practices that often go without saying. To this effect, uncovering organisational routines is important as, for instance, Hawkins and Tiedeman (1975) argued that decisions taken by organisations as to what constitutes deviant behaviour are often shaped by organisational needs for efficiency, perpetuation and accountability. Efficiency requires a simple system of fixed categories, which results in organising and standardising a variety of, otherwise, diverse behaviours. Definitions of what counts as 'daily' or 'multiple' use of drugs or 'high' crime rates is important as they give useful information about organisational routines and the reproduced taken for granted taxonomies.

In the light of the above, the suggestion in what follows is that the analysis of the process of crystallisation of a legal argument by the European Commission can be elucidated if studied with a view to uncovering patterns of praxis developed in the course of interaction amongst officials.

### 3. Inside the Commission: rules of interaction

The European Commission is a fascinating field site for anthropological research of this kind. It is a powerful institution of the European Union, where various nationalities, political and administrative cultures mix. At the same time, the European Commission frequently triggers popular stories about being an elite bureaucracy, remote from the desires of the peoples of Europe, often escaping accountability for its actions, even now after the 1999 reform of the European Commission aiming at implementing new policies of transparency and openness. A number of commentators have conducted research on the cultural characteristics of the European Commission (Abélès et al., 1993; Bellier 1995; Cini, 1996; McDonald, 2000; Shore, 2000).

Abélès, Bellier and McDonald looked at the use of language, hierarchies and personnel policy, and north-south differences. Abélès and Bellier in particular concluded that there was a multitude of competing cultures because of the diverse nationalities and languages, but also noted the existence of departmental identities and a culture of compromise emerging exactly as a result of abundant difference. On the other hand, Shore's work on the European Commission's organisational culture (Shore, 2000, p. 173) concluded that it is a system of political bargaining and informal networking encouraging nepotism and bearing the traces of the ideas prominent when it was created.

Following Durkheim, the view taken here is that to study the existence of shared patterns of praxis it is important to look at the extent to which civil servants interact with one another. Work activities that depend on differentiated yet complementary tasks attach agents to their work group. However, if one accepts that an organisation is something more than the sum of its individual parts, then interaction results in civil servants accumulating and sorting experience into useful clusters of

4 Such an approach has been adopted by Cambrosio, Keating and McKenzie (1990) in respect to patent disputes. The authors looked at the transcripts and judicial opinions from a patent trial and their research focused on the construction of socio-technical identities and knowledge as to what counts as an invention.

information to make sense of the world inside the European Commission, as ethnomethodology taught us. Without these, any social group is bound to degenerate.

In the light of the above, the aim here is to uncover cognitive schemas shared by officials inside the European Commission by means of employing an ethnographic and micro-interactionist study of the informal, 'everyday' classification and categorisation of practices employed. As already mentioned in the previous section, such common assumptions have a double function of acting both as frames of interpretation and promoting images of authority and power as to how a legal proposal should look and who should be involved in its making. They may become a '*bodily hexis*' attached in the physical expression of individuals. They may manifest themselves in turn takings and new paragraphs added in texts, in the particular way in which an internal note is written, or in repetitions during interviews.

This approach is inspired by the ethnomethodological research agenda that contends that documentary interpretation of official and unofficial documents can be used to interpret behaviour (Garfinkel, 1967, p. 78). Moreover, fieldwork should consist of closely observing situated activities in their natural settings and discussing them in the course of interviews with officials (Garfinkel, 1967). The present analysis of data collected in the course of interviews with officials at various levels in the hierarchy, concentrated on identifying repetitions, themes occurring and re-occurring in the interviews (D'Andrade, 1981), and on searching 'indigenous categories', contrasted with analytical categories (Bogdan and Taylor, 1975; Patton, 1990).<sup>5</sup> The interviews were conducted in three rounds with civil servants from various Directorates Generals of the European Commission, and various levels at the hierarchy. The first round of interviews were separated from the third by a two-year period of time, as the author initially identified various important themes, but had to further clarify issues, before refining the final conclusions.

The research concentrates on language and hierarchies, studying how officials work in shared files and committees, while reputation, how it is valued and earned will be a focal theme (Heclo and Wildavsky, 1981). Although the following sections look at the legislative context of initiating a legal proposal, the focus is also on the role of the Commission in various committees, formal and ad hoc, and on promotion and mobility rules, in order to uncover patterns of interaction.

### The formal organisational characteristics of the European Commission

Formalism and hierarchy are omnipresent, denoting the Franco/German influence on the institution. The terminology used is similar to the one employed in a French Ministry. The organisational divisions of a Directorate General (hereinafter DG), '*directions générales*,' '*direction*' and '*sous direction*,' follow the French tradition. Moreover, the institutions of the *cabinet*, *body of advisers* and *aides to the Commissioner* and the ranks ('*conseiller*,' '*directeur*,' '*chef de cabinet*'), all reflect French ministerial organisation, which has also been adopted by many Southern European countries (Page, 1997, p. 7).

Passing the '*concours*' (competitive entry examinations) is required in order to be employed by the European Commission. This is similar to the one in France, which was introduced in this country a century ago (Page, 1997, p. 7). According to Stevens and Stevens (2001) the French influence is evident in the emphasis put on hierarchy, codification, centralisation, the principles of permanence and independence and the creation of an *esprit de corps* among the *élite* of officials, while the German traits can be found in employee participation in work councils and the autonomy of individual Commissioners.

5 It is important to say that the author spent three months as a trainee in the European Commission and has knowledge of work routines. This had a considerable bearing on the kind of questions addressed to interviewees (unstructured interviews) and helped gaining their trust.

Hierarchies are rigid when it comes to the approval of the drafts and proposals prepared by a civil servant (*fonctionnaire*). An official needs the approval of about five persons for her drafts, as these will have to go through *the Head of Unit*, or sometimes *the Head of Sector, the Director, the (deputy or) Director General*, before him *the assistant of the Director General*, the person in *the cabinet of the Commissioner* responsible for a *fonctionnaire's* file and *the Commissioner*. Moreover, officials are always dependent on the Legal Service and the Secretariat General. This is because formal approval of procedures is required by the Legal Service, while both the Secretariat General and the Legal Service report directly to the President of the European Commission.<sup>6</sup>

The '*life of a file*' inside the European Commission is also prescribed in formal rules. File allocation is done by the Head of Unit, while this is only decided on the level of the cabinet of the President of the European Commission in the event more than one DG considers that a particular file falls within its competence. Once a file is within the responsibility of a DG (or the joint responsibility of more DGs), it then sends a questionnaire to member states (MS) and on the basis of the information it collects, it sets a working party, whose members are representatives from MS, the industry, and other interested parties.<sup>7</sup> Parallel to this, other DGs are consulted, but such inter-service consultations are formalised, as there is a special informatics instrument (CISNET) for it. The relevant '*dossier*' moves around DGs with an attached note on it, which sets the requirement of comments being given within certain time limits. Meetings with lobbyists are managed on an informal basis (Cini 1996, pp. 152–154).

Initiative in identifying a new legal problem may come from various levels of the hierarchy, but this should be undertaken in the light of general strategic priorities set by the Commissioner, such as: 'Competition should work in recently liberalised markets and in sectors that were never monopolised but are heavily regulated by Member States.' Within this framework, a Director can decide to launch a consultation (sector inquiry) and focus on cases (for instance Belgian architects). The Director should then speak to the Director General and the Commissioner to get their agreement and then move onto organising hearings in order to prepare a policy paper, and then begin discussions with the professionals concerned: 'we want you to organise and clean up your house. We will not take action next year, but if there are still infringements we will be tough.'<sup>8</sup> Then the proposed legislation will have to go through inter-service consultation and be amended if necessary. It will then be checked by the Legal Service and approved by the Commissioners' 'cabinets'. Once the proposal is ready, the Secretariat-General will put it on the agenda for a forthcoming Commission meeting. At this meeting, the responsible Commissioner will have to explain to the College why this legislation is being proposed. If there is agreement, the College will 'adopt' the proposal and the document will be sent to the Council and European Parliament for their consideration. If there is disagreement, the President of the Commission will ask Commissioners to vote. If a majority is in favour, the proposal will be adopted. Once adopted, according to the principle of collegiality, it will have the unconditional support of all the members of the European Commission.<sup>9</sup>

6 Since the Legal Service and the Secretariat General report directly to the President of the European Commission, it is through these services that he can potentially keep an eye on European Commission's activities. Nonetheless, as Cini notes (1996), the old days of the active and at times interventionist Secretariat General are over.

7 Interview with a Head of Unit at DG Information Society, conducted on 22 January 2002.

8 Interview with a Head of Unit at DG Competition, conducted on 10 June 2004.

9 However, in practice the principle of collegiality does not fully apply in respect to contentious proposals. On this issue, see below n. 16 and associated text.

**Figure 1 Decision-making process in the EU****Example 1: Proposal for a Council Framework Decision on Attacks against Information System**

Private Com (2002) 173	2002/0086/CNS
Proposal for a council framework decision on attacks against information systems	
Private Fields Of Activity:	
Justice and Home Affairs	
Legal basis:	
Commission:	Traité/UE/art 29, 30 par 1, 31, 34 par 2
Procedures:	
Commission:	Consultation procedure
Type of file:	
Commission:	Proposal for a Decision
Comments:	
This proposal does not relate only to acts directed at member states. It also applies to conduct on the territory of the European Union, which is directed against information systems on the territory of third countries. This reflects the Commission's commitment to tackle attacks against information systems at a global as well as European Union level.	
Private 19-04-2002	Adoption By Commission
Primarily responsible	DG Justice and Home Affairs
Jointly responsible	DG Information Society
Optional consultation	European Parliament
Addressee for formal act	Council
Responsible	Erkki Liikanen; Antonio Vitorino
Documents:	<a href="#">COM/2002/173/FINAL</a> <a href="#">IP/2002/601/</a>
Procedures:	Consultation procedure
Type of file:	Proposal for a Decision
Legal basis:	Traité/UE/art 29, 30 par 1, 31, 34 par 2
Numero Celex	<a href="#">52002PC0173</a>

Source: COM (2000) 385, 2000/0189/COD

[http://europa.eu.int/prelex/detail\\_dossier\\_real.cfm?CL=fr&DosId=158278](http://europa.eu.int/prelex/detail_dossier_real.cfm?CL=fr&DosId=158278)

### Blurring hierarchical relations: Negotiating and co-operating in a microcosm of unclear hierarchies

If one chooses to move beyond formal structures in order to understand how people are really related, how obligations are repaid, how reputations are built and what the norms regulating the above



are (Heclo and Wildavsky, 1981), a different set of observations would be valuable in revealing indigenous categories of praxis. Therefore, understanding decision-making as being the ordered orchestration of formal procedures giving birth to a proposal or a draft, simply misses the point. There is a more complicated reality underlining the process through which a piece of legislation is initiated. The reason for this is that a civil servant working for the European Commission is called to negotiate and co-operate with various other persons. Good personal relationships with the hierarchy and in particular with the Director of the DG, the Director General or colleagues in the cabinet of the Commissioner can prove to be very useful in the event a proposal is blocked.

This is because, through these people, there may be important exchanges of information. The exchange of information, in the sense of exchange of views, justifies the importance of balancing the formalism of prescribed rules and hierarchies and the need to allow some flexibility in the way the final arguments will be crystallised. Much of the working time of officials is dedicated to drafting information notes to the Commissioner, to whom they report. Such notes have to be written before any decision is crystallised. Most of the Directorate Generals have 'jour fixe' meetings with the Commissioner dedicated to following up to the most important notes, focusing on the ones that imply various legislative choices. But the practice varies strongly from one DG to another, and from one Commissioner to another.

When the cabinet of a Commissioner receives a note, it is common that the cabinet contacts the person who drafted it and asks for clarifications and background information:

'The colleagues of the cabinet call me and ask what I think about various points. And if I have this information it is important that I send it by email to the Director General and the cabinet. And it is important that you do it in a transparent way.'<sup>10</sup>

Information is crucial for the members of the cabinet. The meetings of the chefs de cabinet are every week and consist of hours of exchange of information. For those who want to form an informed opinion it is important to have collected an array of different views from different avenues. A responsible member of the cabinet in fact would send back any 'closed notes', that is notes that do not provide for alternatives. On a more informal level, chats are also significant for the cabinet of a Commissioner, as in this way a fonctionnaire may provide direct background information, not 'censored' by the Director General for example. Such chats are concerned with collecting information about people and their qualities, departments and their work, winners and losers in conflicts. They are important as they form expectations, warn about people or point to good working practices.

The Director General is one of the most important avenues through which the cabinet and Commissioner may receive information. Therefore, if one's proposal is blocked for example by the Head of Unit, then it may be possible to convince the Director General as to the importance of presenting an alternative view to the Commissioner or the cabinet. Therefore:

'good relations with the Director General may also prove useful as, in the event the Director or Head of Unit are aware of this, they may consider the risk of blocking your proposal. Therefore very important meetings are these in which your Director General participates and for whom you have prepared the briefings.'<sup>11</sup>

However, it is unusual for a fonctionnaire to try directly to reach the cabinet or the Commissioner. This may be perceived as disloyal to the Service and against team spirit. Contacting directly the Director General is understood in the sense that the latter person has an interest in hearing the advantages and disadvantages of as many opinions as possible, and may choose to discuss

<sup>10</sup> Interview with a Head of Unit DG COMP on 12 June 2004.

<sup>11</sup> Interview with an administrator at DG Competition, conducted on 24 January 2002.



an array of views with the Commissioner or the cabinet. It does not offend the image of the DG or reduce confidence by means of revealing to outsiders that there are internal problems of co-ordination and communication amongst the different levels of the hierarchy.

In fact, when two colleagues strongly disagree on a point, they are expected to resolve this issue by meeting with the Director General. However, this is not always the case and conflicts may reach a climax.

'We have agreed in November on the Framework Decision and begun working since April, and then somebody destroyed everything for no good reason. Now, I have to talk to one member of the cabinet and try to convince him to speak to the Commissioner.'<sup>12</sup>

In this instance, a fonctionnaire may try to mobilise the cabinet to 'sell' a proposal directly to the Commissioner, who then might want to speak to the Director General, circumventing opposition from lower in the hierarchy.

A fonctionnaire who knows her place will avoid doing this. Things should be kept in line with the views of other colleagues, as it is important to present the image of the particular DG and the European Administration in general as strong and successful, since a fonctionnaire's career and reputation is also dependent on this.<sup>13</sup> Such attitude may be perceived as a way for doing things through the back door and as such an unfair way to present one's view while discarding the views of others. Hence, one's reputation as a team player may be harmed. But reputations are also built on the basis of one being an assertive and aggressive negotiator, and the balance to be kept is delicate. This was a theme constantly occurring during interviews. The following section on trans-departmental dialogue will seek to elucidate this point further.

### Trans-departmental dialogue

After allegations of mismanagement, nepotism and fraud which led to the resignation of the Santer Commission in 1999, a reform was launched by the Prodi Commission and supervised by Commission Vice-President Neil Kinnock whose central aim was to better plan and organise the way the Commission carries out its work by setting clear priorities and guaranteeing the availability of necessary resources. The European Commission has long been associated in the minds of European citizens with an obscure and unaccountable centre of decision-making. The reform was partly concerned with addressing these issues and the 2000 White Paper on Reforming the Commission (COM (2000) final) explicitly states that its main preoccupation is to provide quality service to citizens and taxpayers, promoting a 'culture of service'. See Appendix I.

The situation relevant to inter-service collaboration on files where several DGs would have to be consulted has also been revisited. The DGs of the European Commission are caught in constant communication and collaboration. For instance, although one DG has prime responsibility for a file, it also has to consult other DGs. As already mentioned, case handlers do not themselves have to decide when and whom to consult on their drafts. Inter-service consultations are formalised, as there is a special informatics instrument (CISNET) for it.

Although trans-departmental dialogue is an important component of decision-making, it may prove problematic. This has been recognised by the European Commission in its report with the title 'Designing Tomorrow's Commission' (Inspectorate General Report 1999). The report stated that European Commission departments currently devote 5.7% of intramural human resources to the

<sup>12</sup> Interview with a Head of Unit at DG Information Society, conducted on 22 January 2002.

<sup>13</sup> Interview with an administrator DG Research, conducted on 8 June 2005.

internal consultations. This comes to something like 1,280 men per year, with 880 men per year being in the administrator and manager category (as opposed to assistants and contract agents).<sup>14</sup>

However, the report recognised that co-ordination is not as effective as it could be –

‘due to a lack of clarity as regards the split of responsibilities between departments, the over-assertiveness by departments in some cases, and authoritarianism on the part of certain team leaders in others – which has the effect of distorting interdepartmental consultations and creating certain organisational problems which slow down response times.’<sup>15</sup>

Therefore, it further proposes that there should be a clear separation of responsibilities, and that the ‘lead’ department and the other departments consulted should be given autonomy and responsibility. To this effect, the Secretariat-General is now given a greater part to play and is assigned the task of promoting a culture of co-operation. See Appendix II.

The importance of securing collaboration is aggregated in view of the need to integrating environmental considerations into key European Union policies, as required by Article Six of the Amsterdam Treaty. For example, the environmental dimension is integrated in the mandate of the research-funding programme of the European Commission (FP6), especially in respect to energy, transport and agriculture. It is also incorporated into the priorities of various DGs such as agriculture, enterprise, development, transport and energy, and should be taken into account in EU co-operation with developing countries (COM (1999) 543 final; COM COM (2005) 17 final). Very importantly, the European Commission seeks to ensure that its decision-making is subject to an assessment of environmental impact. Projects such as SEAMLESS and SENSOR, funded by the Commission, aim at designing computer models for the assessment of alternative agricultural and environmental policy options and environment-friendly land use for sustainable development in Europe.

These computerised tools are expected to be used by the European Commission before the stage of implementation, to make an assessment as to the potential impact of policies (such as the common agricultural policy (CAP) or rural development policies) to sustainable development. Sustainability Impact Assessment (SIA) implies that, for instance, to make an assessment of the benefit of developing infrastructure in a particular region, it is required to engage in the simultaneous examination of the impact on the environment, biodiversity and employment. This may be expected to reshape in fundamental ways the interaction between different DGs and involves management decisions on different levels of governance following the principle of subsidiarity. What is crucial for the purpose of the present analysis is that it brings the problem of co-operation amongst DG into the foreground.

14 Before the Prodi reform, the basic staff categories were four: A, B, C and D. A *grade entrants* could join the European Commission either without professional experience (at A8 level) or with a minimum of two years’ experience (A7/A6 level). In order to sit some A7/A6 competitions, candidates may have needed a specialised degree in law, economics, accounting or statistics and relevant professional experience. Note that a *Head of Unit* was an A3, a *Director* was an A2 and a *Director General* was an A1. *Candidates for B grade* posts must have successfully completed a course of advanced secondary education and obtained a final certificate or diploma. They must also have had at least two years’ experience in a field related to the activity being applied for. Staff in category B is mainly responsible for executive tasks and participates in every area of EU activity. *Staff in category C* were mainly responsible for secretarial and clerical work, while *Category D* staff were engaged in manual or service duties (Report by the Inspectorate-General of 7 July 1999). With the Prodi reform, the situation has changed, as the basic categories for officials are reduced from four to two function groups and a single pay scale with sixteen grades (each with five seniority steps). The old B and C categories are now called assistants; the old A category is replaced by the administrator function group, while Heads of Unit, Directors and Director Generals are called managers. Contract agents will gradually replace the D category. The transition period from the previous system to the new one is due on 1 May 2005.

15 Inspectorate General Report 1999. Interestingly, the report further mentions that some DGs have expressed their concern in reference to their relations with member states’ private offices, as they considered that there is excessive interference by them in the internal management of DGs.

It is true that co-ordination may prove to be difficult, but in other instances meetings would run smoothly, resulting in a fruitful exchange. Conflicts can be for two main reasons: personal conflicts, and policy conflicts, as some issues are more contentious than others. This depends on the controversial nature of the file concerned. A very technical, politically neutral file would not normally be problematic. A politically sensitive file may be changed considerably and in some cases be completely blocked. Different DGs may approach and understand an issue from a totally different angle, as it was the case with the debate surrounding the issue of data retention.

The DGs involved in the Data Retention File were DG Justice and Home Affairs, DG Internal Market, and DG Information Society:

'We (DG Information Society) are "the sausage," trying to compromise things in respect to issues that relate to privacy and the Internet . . . What happens is that, on the one hand you have the 'law enforcement' people and on the other hand Internet service providers and telecom operators in a strange position. Although telecom operators used to retain data themselves, since they are often victims of fraud, (but of course nobody knew that, as it is an illegal act), they do not want laws [concerning data retention] to impose on them obligations. Then you have the civil rights people who claim that this is a surveillance situation. I want to find a compromise solution, maybe accept that providers need some data to be retained, what data depends on the business model. If this practice [data retention] is legitimised by law, then the law should not impose heavy obligations on them.'<sup>16</sup>

Negotiations can be very intense. Certainly, it is a matter of pride to have one's opinion taken into account. Various internal notes prove this point. On the level of Heads of Units, conflicts, as depicted in such notes, can be very intense and most of the time the message is 'you did not take me into account', while on the level of Directors General the tone changes and is far softer. After all, having won a battle will increase one's bargaining power in the next conflict. However, even if primary responsibility rests with one DG and other DGs are only consulted, a capable official understands the importance of trying to reach agreement. A report produced by the Secretariat General states that the leading department is responsible for involving and taking into account the legitimate interests of other departments, and that it is a duty to participate in a co-operative spirit following the policy mandate of the Commission and the strict priorities set to DGs. However, this is another instance when the formal mandate of a report conflicts with native patterns of action. This is because, co-operation in practice is achieved as success and securing present and future outcomes may be dependent on it.

When a DG has principal responsibility for a file, while other DGs are consulted, the influence of the latter comes from the fact that the Commission is a collegial body. The principle of collegiality points to collective decision and responsibility. All Commission decisions have to be submitted to the College of Commissioners with an attachment of the opinions of the other DGs consulted. However, it is important to note that, in principle, decisions are taken by consensus and it is rare that vote takes place. If the President accepts or demands that there is a vote, decisions are taken according to simple majority. This may be problematic, as some Commissioners may be absent during this time. In respect to contentious proposals, this in practice means that a potential positive vote is not taken into account and that the proposal is withdrawn. This is why in such instances the date of the meeting of the Commission is subject to careful consideration, in order to verify the presence of

16 Interview with a Head of Unit at DG Information Society, conducted on 22 January 2002. In May 2002, the Parliament passed the Communications Data Protection Directive (EU 2002/58/EC) 351 to 133, despite an aggressive campaign by civil liberties groups. The Directive provides that unsolicited email, (spam) is outlawed, Internet-fed identification programs (cookies) are tolerated if people are informed of them, and EU governments can order the retention of customer data beyond useful billing purposes.

Commissioners. And of course, informal contacts and telephone calls are important so as to secure support or find a compromise solution.<sup>18</sup>

However, the principle of collegiality also implies that a 'case-handler' can 'block' the input produced by consulted DGs, but then the risk is taken that the cabinet of the Commissioner in charge of the consulted DG would raise the issue and try to block the decision on the level of the College of Commissioners.<sup>19</sup> It is therefore important to engage in a dialogue with colleagues or at least to minimise the points of disagreement:

'If you disagree with a colleague from another DG and primary responsibility rests with us [DG Competition], you should be careful to avoid putting anything on paper. Then the antagonism is crystallised. It is important not to do this as this may prejudice the quality of the relationship for a long time, and you do not want this to happen, as you may need these people in the future. I avoid producing any document signed by the Director General at this stage. I want to move them gradually to a point where an acceptable solution is agreed. Bilateral meetings and informal discussions are very important to do this. It is very important that you know when to crystallise intentions, not to do it too early. This is a decision that involves an assessment as to what you think you can decide yourself and what you need to inform the hierarchy.'<sup>20</sup>

In cases when trans-departmental dialogue is required, mundane administrative practices relating to where files are kept may be very important. This is because such 'details' can be quite contentious since they imply who *controls* the file (Cini et al., 1998, p. 154). Although inter-service consultation is a frequent phenomenon, most of the time other DGs are only consulted and one DG has the lead responsibility, hence *shared* files are not the rule, but the exception. Even in this case, the control is not really shared, since one of the two DGs has the 'master copy' and on technical and drafting issues it is not possible to block the colleague holding this. In order to avoid this imbalance, DGs may decide to divide the articles to avoid one of them having the whole master copy.

In reference to the exact location of keeping files inside a DG, the system varies strongly. This is also because security considerations vary from one DG to another. At DG Competition case-handlers kept their files in their office, a practice that reflects the fact that *rapporteurs* have important independence in this particular DG. However, the files regarding infringement procedures were kept by the secretary, possibly because access to files and appeals procedures against the European Commission were relatively frequent, and the European Commission would then have to transmit the file to the court. In the Merger Task Force, secretaries make copies of all documents for the case-handlers. In other DGs again practices vary considerably.

In the course of inter-service consultations, the case-handler sets the agenda of meetings with other DGs and conflicts may be viewed as the healthy result of trying to balance many views, allowing the College of Commissioners to make informed decisions. Individual DGs have different priorities, still the College of Commissioners should take a balanced decision in the light of the overall policies of the Commission. For instance, DG Environment, Competition and Enterprise often disagreed precisely because of the interests they represent. However, consultations may take time also because of bad personal relationships or games of power amongst DGs. DG Competition has a difficult relationship with DG Enterprise on the issue of airline industry regulation.

18 Interview with a Director, DG Internal Market, conducted on 14 June 2004.

19 When vote takes place, the President of the Commission can play a crucial role, as she may choose to intervene in order to maintain or withdraw a contentious proposal. Prodi for instance would not easily support controversial proposals, especially after the resignation of the Santer Commission. Interview with an administrator, Secretariat General, conducted on 12 June 2004.

20 Interview with a Head of Unit, DG Competition conducted on 15 June 2004.

'They think that they have a say, this is because the mission of DG Enterprise became unclear, it is not the time of national champions. They have a thousand people working there. They promote the interests of the industry, which is not the general view here. You know in advance what the other person is going to say and then the dialogue is not fruitful. Of course, they realised that if they wanted to be heard they would have to bring value added. Otherwise, they would never have the legitimacy to voice opinions and they would fight the battles and lose. At some point, they changed the person in charge and things improved. They now bring sector expertise and this is valuable.'<sup>21</sup>

In such instances, good personal relationships with the hierarchy can prove important. Inter-service consultations must be launched via the Head of Unit and signed by the Director. A case-handler's reputation and good relationship with the Head of Unit and/or Director can thus prove crucial. For example, because of strong criticism by other DGs, a Director may decide to stop initiatives of her officials, to avoid starting a 'war' on that subject. On the other hand, if it is the case of a 'turf battle', a Director may try to protect the competences of the DG, and it is also for the case handler to try to expose her arguments in favour of a particular direction.

Overall, co-operation is facilitated by the fact that due to the mobility of civil servants, it is likely that persons involved know or have heard of each other.

### Mobility

Page's analysis is of interest, as he concludes that there is considerable mobility in senior posts. His data indicate that 61% of his sample had previously worked in another Directorate General (Page 1997: 35). In a Communication from Vice-President Kinnock to the European Commission (SEC 2002 146: 3)<sup>22</sup> the above figures seem to hold true for today's situation.

According to the data in this communication, about 1,000 officials of all grades change DG or department each year. The figure for 1999 is 1,058 out of approximately 20,000 officials working for the European Commission. For the period between 1990 and 1999, the number of officials who changed posts in the context of interdepartmental mobility amounted to 8,669. Nevertheless, this number excludes mobility within a DG, as accurate numbers do not exist. In general, mobility is considerable, and the Kinnock communication sought to formalise this trend by means of setting benchmark periods. As a rule, all officials should consider changing jobs once they have spent at least two, but not more than five years in the same post. A reasonable period for a new official to remain in her first post would be three years. Nonetheless, individuals aged 55 and above, who wish to remain in their post, may do so (Commission Communication SEC 2002 146: 6). Finally, as regards officials in top management posts, such as Director Generals and Directors, they *have to* move regularly (Commission Communication SEC 2000 2305/5). The principle of rotating senior posts after five years was introduced after the Santer Commission resigned and the idea behind it was to reduce the control of certain member states on particular departments and allow staff to build their careers upon broad experience.

Mobility is in principle not related to promotion, as officials keep their grades when moving to different DGs or another Unit in the same DG. An exception to this is the designation of Directors and Director Generals. This is considered a promotion because the title corresponds to a specific grade and

21 Interview with a Head of Unit, DG Competition conducted on 15 June 2004. However, it is interesting to note that administrators from other DGs also complain that it is difficult to co-operate with DG Competition, interview with an administrator DG Enterprise conducted on 22 June 2004.

22 It is important to note that mobility is voluntary, with one exception: the case of sensitive posts, where officials have special expertise or handle sensitive information.

salary. In general, vacant positions are advertised on the intranet describing the grade/profile expected. Everyone can apply, but for someone to be transferred to another Unit, the Head of Unit has to consent. The only case of transfer without consent happens in case of restructuring parts of Units (for example when Units merge), so, since files 'move', officials have to move with them.<sup>23</sup>

Heclo and Wildavsky (1981, p. 81) contend that transfers between departments are vital for the administration's bond of unity and cohesion. By means of transfers, individual DGs can benefit from outside expertise and tackle isolation. In the same spirit, the Prodi reform advocates the importance of increased decentralisation. The complexity of files requiring increased inter-service consultation brings collaboration into the foreground. Mobility is crucial to achieve this as individuals have knowledge of how other departments work, what their priorities are and what people are like. Personal relationships and predictability of situations make collaboration easier. This last point is also valid in respect to promotions.

### Promotion

When Jacques Delors was President of the European Commission (1985–95), a reform of rules governing promotion procedures took place: to become a Head of Unit (A3 level), one would no longer have to gradually go up all the levels in the hierarchy (from A7 to A3). Even an A7 could become a Head of Unit on the basis of merit (Edwards and Spence, 1997).

'The reform was undertaken in the name of flexibility, as it would allow the capable to go up in the hierarchy faster than the others. However, in reality the reform aimed at controlling the people who occupy the A3 post (Heads of Unit) so as to ensure their willingness to respect and serve the ideals that underline the political mandate of the Commissioner. Having the right contacts and ideas is important in order to become a Head of Unit. But, before the reform, A level fonctionnaires would inevitably one day become Heads of Unit, as going up the hierarchy was prescribed in administrative rules, with no involvement of political figures, such as the Commissioner. This actually resulted in some Head of Units not always being receptive to some of the Commissioner's ideas.'<sup>24</sup>

With the entering into force of the new Staff Regulations on 1 May 2004, staff policy, including recruitment, promotions and retirement, has been significantly revised.

'The aim is to create an independent, sustainable and top-quality European public service, making the Commission into an organisation that sets world-wide standards.'<sup>25</sup>

According to the 2003 Progress Review Reform (COM (2003) 40 final/2), the changes aim at better linking merit to career development. The new appraisal system takes on board training and mobility, and officials' ability to achieve fixed objectives. The criteria against which any assessment will be made are ability, efficiency and conduct, which are laid down in the Staff Regulations. Every year a Career Development Report (CDR) will have to be produced by staff on the basis of intensive dialogue with immediate superiors, and there are additional priority points, which DGs will be able to use to make special bonus awards of up to ten points for individual officials. Any assessment of 'special merit' requires the involvement of the Director-General and an appeals system is in place within individual DGs.

As for Directors and Director Generals, a system of 360° appraisal is introduced and is to be conducted every two years. Commissioners will also be involved in the final appraisal (Commission

23 Interview with an administrator at DG Research, conducted on 29 May 2002.

24 Interview with a Head of Sector at DG Competition, conducted on 23 January 2002.

25 [http://europa.eu.int/comm/reform/2002/chapter02\\_en.htm#3](http://europa.eu.int/comm/reform/2002/chapter02_en.htm#3) (last accessed 25 Feb. 2005).



of European Communities, 2002). Moreover, linear pay progression is introduced, meaning that the salary at a higher grade would always be equal to or higher than the salary in the previous grade. Finally, the number of grades in the new career system is increased and the number of seniority posts decreased. The rationale behind this is to offer the possibility of an increased number of promotions, creating incentives for improvement of performance (COM (2003) 40 final/2: 27).

With the Staff Reform, all staff members not only have specific responsibilities and appraisal reports are written according to these, but also individual DGs have to produce an 'Annual Management Plan' (AMP) which again sets out objectives to be achieved and monitors progress (COM (2003) 40 final/2). Moreover, the reform requires a new activity-based management (ABM) approach, clearly defining the Commission's priorities and ensuring the availability of human and financial resources. ABM requires 'detailed management information on costs, resources and results, and necessitates continuous processes of monitoring of assessment and prioritisation' (Kinnock 2002, p. 24). It implies that each Director General develops with her DG an Annual Management Plan for all activities and has the autonomy to design management and control systems subject to 'minimum standards' and performance standards which are set for individuals and sub-units (Kinnock 2002, p. 25).

What is particularly important is that the new appraisal system and performance management are linked to promotion. The Union Syndicale Fédérale, which is one of the three principal trade unions of the European public service, produced in 2000 a working paper critical of linking appraisals to promotions. The reasons for this are that appraisals will disrupt work and create excessive paper load, lead to a potential abuse of power by Director Generals and the 'human resources' department of DGs and, finally, the points system for individuals and quotas system for DGs may lead to the transformation 'of evaluations to a collective haggling and make them ineffectual' (USF 2000, p. 10). The UFS accepts the importance of linking merit to promotions, however, criticises the new career system as it may result in the creation of an 'elite emerging from permanent competition among individuals, contrary to team spirit necessary for the missions of the commission' (USF 2000, p. 9).

According to Levy (2003), it will be normal for individuals and DGs to emphasise achievements, conceal failures and shift responsibilities to other DGs, or even the Council and the College of Commissioners. Levy notes that there is already evidence that this is happening as the first annual reports produced claim that 70–75% of DGs managed to achieve minimum standards. In these reports, when DGs had to present reasons for not fully achieving the reforms they blamed the lack of staff, lack of guidance and lack of control over the member states and decentralised agencies. It appears that the USF's warning that the reformed appraisal system may lead to collective bargaining of appraisals and competitive behaviour among individuals, or even among DGs, between the College of Commissioners and DGs, and between cabinets and DGs, is an important possibility.

Just like the Delors reform of the 1980s, the Prodi reform is undertaken in the name of flexibility, aiming at allowing the capable to be promoted quickly on the basis of merit. However, being evaluated by the hierarchy, peers and colleagues, may very well mean that building a good reputation becomes increasingly important. In other words, fulfilling expectations and adhering to shared patterns of conduct as to how one should behave in the course of working on a legal file becomes more significant. And sometimes, it is a mystery how reputations are built or shattered.

### Reputation

A civil servant with a good reputation is a person who is self-confident and assertive, has a good drafting hand and is a team player, has motivation, political judgement, negotiating skills and realism, all at the same time. However, it is not really through a logical process that reputations are formed. It is the result of things one knows, heard or was told. When it comes to recruitment and mobility of civil servants, for example, a candidate's curriculum vitae will be thoroughly examined,



but after all, most candidates speak five languages and have considerable qualifications. What makes the difference and affects final decisions is a number of factors, which are very difficult to define.

In this instance, reputations 'travel' amongst services and units, because what people say about others' qualities is important. Learning about one's personal qualities, such as the ability of the person in question to be a 'team player' and co-operate with others, is important, as, after all, decisions inside an organisation such as the European Commission are about limiting risk. Risk aversion requires that the choice of a person is underlined by the simultaneous consideration of factors such as the ability to do the job and personal qualities. For instance, it is important for the members of staff involved in recruitment to like the person and the ideas that she promotes, since they will find themselves having to co-operate with the person in question for the following years. This implies that, as in every organisation, choices in respect to recruitment and mobility will also be motivated by the need to reinforce, replicate and reproduce the culture of the staff involved in middle (Heads of Unit) and high management level.

This is a culture that requires a fonctionnaire not only to have experience, a good drafting hand and intelligence, but also to know her place and conform to the unwritten rules of the game, summarised in the triptych: effectiveness in problem solving, common sense/political judgement and information collector/team spirit. A fonctionnaire faces complex problems, which have to be solved quickly. Common sense and political judgement are invaluable to this effect, as a perfectly drafted legal argument may very well be politically impossible.

In this instance, common sense is important in order to draw the practical distinction between what can and cannot be done. Effectiveness requires that the detail of the relevant problems is reduced to the minimum, simultaneously accommodating the necessary. The ability to be flexible and receptive is important, as co-operating with others minimises conflicts; hence the importance of being a team player. Very importantly, co-operating, or, to use a better expression, being in constant communication with others, implies that the person in question will be able to furnish valuable information as to developments in other Units, DGs, or the cabinet. The Commission is a small world and officials are in touch with one another, exchanging views and information on the informal level. The complexity of issues dealt with by the DGs requires this, as in this way an informed view is shaped and chances of a draft being blocked are minimised.

Therefore, delivering relevant information enhances one's respect by colleagues. This can be done via informal avenues (chats, exchange of emails and internal notes copied to a large number of colleagues) or more formal channels such as meetings. This is why it is important to participate in meetings such as *ad hoc inter-service meetings* organised on specific files (these refer to interdepartmental meetings), on horizontal issues (where many units from a DG may work together, one example are the meetings organised at DG Competition on *collective dominance* and *access to networks*). Weekly meetings are also significant in this respect. These are organised by the Head of Unit and serve the purposes of co-ordination and keeping everybody informed about the work carried out in the Unit. During these meetings, everybody has to report about the tasks performed in the previous week and the ones that would be performed in the near future. Releasing important information that sheds light onto a different aspect of a particular file is crucial.

Having served in a cabinet definitely is an indicator that one *knows* people and has the ability to collect and process important information. Cabinet members are important, as they deal directly with other cabinet members and heads of cabinet, and are visible in the sense that they have to communicate with senior managers, such as Directors and Director Generals. Every cabinet and every Director General has their own dynamic. The cabinet's job is to show the Commissioner another point of view from the one cast by the DG, to make recommendations and simultaneously explain drawbacks, to give advice and open options. In the course of this process not only does one build a reputation as 'being able to do this job', but also as a person who knows people and has access to important information.

In short, a fonctionnaire who knows her place should promote a culture of delivery and the interests of the organisation by means of securing regulatory output. Securing regulatory output requires that the administration collects as much information as possible in order effectively to put the social world in legal categories and minimise the potential of conflicts and embarrassments when the proposal reaches the College of Commissioners or the Council/Parliament. However, there is a fragile balance to be held between promoting the image of being a flexible team player and at the same time the image of a person who has informed views, brings information to the DG and has influence.

The way to keep this delicate balance is subject to a learning process, through which a fonctionnaire will copy what others in the DG think as the pragmatic approach to perform this is. For instance, a junior fonctionnaire should not say more than she is *expected* to say, as this would show disrespect to the hierarchy, and would be interpreted as a sign of lack of prudence and judgement, having not realised that there is a lot more to learn. Or, as explained earlier, a Head of Unit should not try to reach for the Cabinet and the Commissioner directly to convince them to speak to the Director General when a proposal is blocked, as circumventing the Director General means that things are done through the back door. Creating enemies by means of promoting risky initiatives is not desirable, as the Unit or the DG may be exposed. Finally, if somebody makes an improper public comment, such as disclosing sensitive information, everybody is exposed.

DGs increasingly have to deal with specialised and complex files requiring the collection of as much information as possible about local needs. The above denote that personal achievements and specialisation are important to build a good reputation, but not enough. Bringing in information about local needs is a virtue and this can be further enhanced by means of sitting in or having contacts with committees and specialised groups. National networks can also be important. French nationals, for example, are thought to be very well networked, although the people who have graduated from the elite French Universities, the *Grandes Ecoles*, present an interesting example of a network within a network, not to mention the hierarchies inside this sub-network (Ecole Supérieur, Ecole Normale and Ecole Polytechnique).

### Committees and groups

The degree of officials' active participation may depend on the type of group concerned and, of course, on the subject matter. There are numerous and of many types. There are formal internal committees like the 'Communications Committee' (Cocom), which 'exercises its function through advisory and regulatory procedures in accordance with the Council Comitology Decision. The Cocom furthermore provides a platform for an exchange of information on market developments and regulatory activities' (European Communities, 1995–2004).<sup>26</sup> Similarly, in DG Agriculture only in respect to the management of the common fisheries policy, there are three such Committees: the Committee on Structures for Fisheries and Aquaculture (Council Regulation (EC) No 1260/1999 of 21 June 1999), the Committee for Fisheries and Aquaculture (Council Regulation (EC) No 2371/2002 of 20 December 2002) and the Committee for Fisheries Products (Council Regulation (EC) No 104/2000 of 17 December 2000).

Furthermore, there are groups, which serve as meeting points between national authorities and the European Commission, such as the European Regulators Group for electronic communications networks and services (ERG). This –

'has been set up by Decision 2002/627/EC to provide a suitable mechanism for encouraging co-operation and coordination between national regulatory authorities and the Commission, in

26 The information is available at [http://europa.eu.int/information\\_society/topics/ecomm/all\\_about/work\\_progress/committees\\_working\\_groups/index\\_en.htm](http://europa.eu.int/information_society/topics/ecomm/all_about/work_progress/committees_working_groups/index_en.htm) (last accessed 3 Mar. 2005)

order to promote the development of the internal market for electronic communications networks and services, and to seek to achieve consistent application, in all Member States, of the provisions set out in the Directives of the new regulatory framework . . . The first meeting of the group was held in Amsterdam on January 23, 2003. On average, the ERG meets every other month’  
(European Communities 1995–2004).<sup>27</sup>

Similarly, in DG Environment, following the EU legislation on sources of noise,<sup>28</sup> a ‘noise steering group’ was established, comprising of representatives of member states, local authorities, industry and NGOs.

Moreover, there are many fora of discussion where interested parties are invited to participate and which are run but not controlled by the European Commission (for instance the Cybercrime Forum has been established hosting discussions on cybercrime and data retention). Finally, there are internal task forces where representatives of various DGs sit. A small inter-service task force may have five participants. In general, the European Commission is surrounded by myriads of committees providing advice on both the development of legislation and on its implementation. As regards the former, independent experts drawn from throughout the European Union, but not representing the interests of any member state or scientific institution, sit in ‘expert’ or ‘scientific’ committees.

The European Commission also convenes special ‘*Reflection Groups*’ or ‘*Independent Expert Panels*’ whose members are high-level European personalities to advise on particular issues such as the future macro-organisation of the Framework Programme funding European projects. Moreover, the Research Group of the Committee of Permanent Representatives (COREPER) also provides *upstream* consultation (on the development of legislation), and is a high-level committee set up by the Council of Ministers, representing the interests of member states (Technological Options Assessment (STOA) Programme PE 167 327/Fin.St.).

#### 4. Analysis: compromise as a socially constructed cognitive schema and its relevance to law-making

It is true that the European Commission is a blend of various cultures, nationalities, languages and working styles. This certainly has an effect on how the organisation thinks and pursues its interests. However, the argument here is that one important cognitive schema, anthropological category of praxis, regulating life inside the European Commission is *compromise*.<sup>29</sup> The following section will engage in its theoretical articulation in the light of the previous analysis on the processes of exchange underlining the initiation of a legislative proposal.

As mentioned earlier, the present analysis of data collected in the course of interviews with officials at various levels in the hierarchy, concentrated on identifying repetitions, themes occurring and re-occurring in the interviews and on searching ‘indigenous categories’, contrasted with analytical categories. For instance, although hierarchies inside the European Commission are strict, they may be blurred for the sake of allowing flexibility and information flows; mobility and promotion rules are meant to strengthen accountability, but in reality their consequence may be that an official

27 The information is available at [http://europa.eu.int/information\\_society/topics/ecommm/all\\_about/work\\_progress/committees\\_working\\_groups/index\\_en.htm](http://europa.eu.int/information_society/topics/ecommm/all_about/work_progress/committees_working_groups/index_en.htm) (last accessed 3 Mar. 2005).

28 The legislation is available at <http://europa.eu.int/comm/environment/noise/home.htm#4> (last accessed 24 May 2005).

29 For an excellent theoretical review of the proposition that further research should be undertaken to illuminate the ways in which *compromise* functions as an important category of praxis see the special edition on *Compromise of Social Science Information* 214: 43, 131–330, and in particular Nachi’s contributions.

should conform to expectations and becomes dependent on what others think, which further has an effect on how reputations are built; or, in respect to inter-service consultations, one would expect that since other departments are only consulted, their opinion would not count, as it is non-binding. However, in practice, officials are very careful not to prejudice a relationship for long, since co-operation may also be required in the future. Moreover, the theory is that a civil servant is a well-educated person, independent and with a good drafting hand, but the reality is that belonging to networks of information is very important. On the basis of the above, the thesis advanced here is that an official may be engaging rationally in all these acts, but the unspoken underlying theme, indigenous category of practice, is *compromise*.

Officials have to achieve outcomes and to do this they put the social world in legal categories on the basis of collected information. The collection of information through diverse avenues is important in order to minimise the potential of conflicts and embarrassment. Such information is incorporated in the making of a legal text, and the production of relevant regulatory output bolsters the image of the European Commission as a powerful organisation. The tools of technical competence are employed, (legal language, reliance on precedent for example), a process reflecting the need for securing efficiency. Efficiency further requires following routines and categories of praxis organising the social world, and the details of individual cases are fitted into such organisational categories and routines. However, the argument in what follow is that inside the European Commission *compromise*, as a category of thought, regulates exchange and reproduces understandings and images of authority as to how a legislative proposal should look, and very importantly as to who should be involved in its making and how opposing views should be treated.

According to Simmel (1971) compromise, understood in the sense of trying to avoid confrontation, is at the heart of any effort to live together with others; in other words, it is by means of compromise that social organisation becomes possible. Interestingly, Simmel conceptualised compromise as the way to escape the authority of single definitions as to what counts as 'common good' and what is politically desirable. Compromise loses its derogatory meaning as being moral retreat or defeat, by means of accommodating an understanding of social obligations as always embracing the possibility of acting differently. Following Bergson's analysis (1911, 1928, 1936), Simmel contends that there are indeterminate potentialities in everyone and each individual could have become something different from what she actually became (Simmel, 1978). In this way, action opens up to accommodate contingency and agents are consciously aware of alternative possibilities, hence the obligation to engage in compromise.

It then becomes a cognitive schema, a category of praxis, in such situations where the validity of alternative views of the social world is acknowledged and there is an obligation also to consider them. Individuals have a lived responsibility, a commitment to consider the 'Other', a duty in civil society towards securing social justice (Simmel, 1971). In this instance, compromise enables a pluralist conception of social justice, committed to an understanding of modern society as having to accommodate 'difference' in the notion of order. In other words, social justice is anchored in a pluralistic conceptualisation of society, which promotes differentiation and the simultaneous operation of many different accounts of truth claims, as in Beck's discussion of the 'truth of others' (Beck, 2004).

To follow this intuition in the context of the process through which a legal argument is crystallised in a proposal produced by the European Commission, the thesis promoted here is that, in an increasingly differentiated world, where furnishing information about local needs is crucial in order to form informed decisions, compromise becomes an important category of praxis. In other words, the more institutions and agents are involved, the more the need to compromise becomes important.

According to the analysis in the previous section, there is constant communication amongst individual DGs, cabinets and DGs, and amongst committees of various kinds. Securing outcomes is dependent on the availability of information in view of the increasing complexity of relevant issues.

Moreover, it is exactly because of the different nationalities, languages and working styles that compromise is required to secure outcomes. A typical example of this is the development of a meta-language. Words have been inserted in the French and English vocabulary having no meaning outside the context of the European Commission, such as '*égalité des chances*,' '*agenda*,' and '*speaking brief*' (Abélès and Bellier 1996, p. 440). In other words, the abundance of difference leads to certain osmosis in order to co-operate, also stimulated by the recognition of the existence of other, alternative, worldviews. Finally, due to rules concerning mobility and recruitment, which elevate the importance of appraisals by peers and hierarchies, it appears that reputation and how it is earned, becomes increasingly dependent on how *others* evaluate performance. In this instance, following Goffman's analysis, civil servants express themselves in ways reflecting what is thought to be a *proper* way of expression, conforming to expectations and compromising their individuality.

Compromise then becomes a cognitive lens, as a legal proposal becomes less about saying the right thing and more about reflecting a temporary equilibrium, which is bound to change again. In other words, the more complex a society is, the more the state needs interest groups, networks and experts to furnish information; the more inside an administration tasks become specialised and are the responsibility of various individuals or departments, the more law becomes a compromise ordered by the force of the written text temporarily to universalise, and simultaneously ensure legal certainty and continuity.

It is also useful to situate the present discussion in the context of the new decentralised governance structures promoting the proceduralisation of legal rules. 'Turn takings' in texts and new paragraphs added are important when trying to identify important themes in qualitative research. It is then interesting to note the insistence on 'transparency' and 'accountability' of the various documents of the European Commission advancing administrative reform, and official documents of the Secretariat General stressing the need for co-operation. These are underlined by the preoccupation that there is a need to clarify who is taking decisions, especially now that the issue of decision-making becomes increasingly important in the light of the discussion on new governance structures and deliberation in the EU that would allow the inclusion of interested parties.<sup>30</sup>

According to the *White Paper on Governance*, regulatory law should facilitate the inclusion of interest groups and should be concerned with rules, procedures and practices affecting the participation of European citizens, the improvement of the quality of European legislation, and the creation of a thriving civil society, promoting networks and fora for discussion. In this instance, the European Commission promotes itself as offering the hierarchical assistance required in the monitoring and enforcement stage, by means of engaging interested parties in the making of laws affecting them with a view to collect valuable specialised information about local needs. And when legal processes open to accommodate multiple interests, as when a legislative proposal is drafted, compromise amongst competing views of the world becomes important.

The legal process opens up in view of the complexity and fragmentation characteristic of modern societies resulting in creating interdependencies amongst actors, networks or differentiated systems, all being interconnected within the European polity. Interdependencies exist because no single actor has enough information effectively to pursue its interest. No regulatory law can effectively intrude into other autonomous social systems in a direct way, as it cannot fully comprehend systems' internal mode of functioning. In addition, networks have their own understanding of what a regulatory problem is and what solution is required based upon shared classificatory schemes constructing a culturally informed point of view.

Therefore, regulatory law should be engaged with steering activity rather than imposing goals, as this is crucial in a world characterised by increased scientific uncertainty requiring the co-operation

<sup>30</sup> See e.g. Eriksen, Joerges and Neyer (2003).

of the administration with private forces in order to come up with decisions informing regulatory policy and implementation. In this way, unforeseeable risks are quickly identified and information as to possible ways to come up with solutions is swiftly furnished (Ladeur, 1997). In short, for one thing, in a fragmented world, consisting of communities and networks on a global level, modern governance has to rely more than ever on information about local needs. For another, legal procedures regulate issues such as the choice of topics, who should participate in fora of discussion and how opposing views should be treated.<sup>31</sup>

However, I here wish to depart from the notion of responsible individual who acknowledges the importance of compromise in sustaining social relationships and instead adopt a constructivist approach, to argue, as Durkheim would, that there is something else that pre-exists and makes possible the emergence of the notion of compromise as a category of thought. Social solidarity is not the result of contract or rational choices, but emerges as a result of social norms making it possible. In other words, we do not compromise because we want to, but because we need to, and whether there is a need to compromise is subject to structural factors.

In the case study of this article, what creates the need to compromise is the 'division of labour' inside and outside the European Commission, that is the need to collect information from as many sources as possible and co-operate with many other individuals. In other words, since the production of a legal measure presupposes the 'Other' we need to recognise the 'Other' in the light of the need to produce outcomes. In this instance, compromise is a category of thought and its importance lies in that it would be interesting to articulate the difference between compromise and consensus/negotiation (Nachi, 2004; Arnsperger and Picavet, 2004; Kutty and Nachi, 2004).

However, the analysis here is not meant to promote the view that there is a single category of themes regulating the initiation of a legal proposal waiting to be discovered. The claim is that compromise as a category of praxis is a major theme, which may function alongside other categories shaped by nationality, educational background or professional training. For instance, nationality and how it may affect decision-making has been a contentious issue. The very concept of *Commissioner* is a good starting point, because, although they are appointed by major parties in their member states, their role is both to serve the European interest and to provide a channel of communication between the government in their country and the European Commission.

Then there is the difference between cabinets and DGs. McDonald's anthropological analysis shed light on how cabinets are perceived by fonctionnaires as being the ones with power and prestige, since they have the final say in drafts and proposals produced by the officials. And they are also most certainly the place where national affiliations and national loyalties would be found, as they have regular contacts with national lobbyists, national administrations and the permanent representations of MS in Brussels (McDonald, 2000).<sup>32</sup>

On the individual level, it would be wrong to forget that most European Commission officials come from a national educational, administrative and political system. As Christiansen (1997) notes, officials, with a 'European' educational formation, (as a result of being educated at the College of Europe, the European Institute of Public Administration or the European University Institute), are a

31 Empirical work on deliberative modes of governance is presented by Joerges and Neyer (1997); Lewis (1998); Hayes-Renshaw and Wallace (1997). Unfortunately, due to space limits, the link between compromise and deliberate democracy cannot be elaborated further here. This is undertaken in a separate working paper of mine.

32 According to McGowan (2000), on the level of Commissioners' cabinets, there is a specialist, for example a competition specialist, who may try to protect the national interests of the Commissioner's home country. The specialists meet twice a week, and these meetings are called 'special chefs meetings'. The recommendations from these meetings are referred to the weekly meetings of the chefs de cabinets. If agreement is reached among the chefs de cabinet, then the College of Commissioners usually accepts their recommendation. In this way decision-making is linked to the overall framework of EU policy.



small albeit growing minority. Generally, the link with national administrative systems has been the subject of a number of recent studies (Egeberg, 1996; Trondal, 2001; Bellier, 1994). Moreover, it appears that schemas derived from professional background may also be institutionalised in Units or even whole DGs (Jourdain, 1996; Sideri, forthcoming). However, the argument that officials as individuals or individual Units/DGs hold diverse cultural values does not rule out the proposition that there are patterns of praxis embedded in modes of co-operation that are valid for the European Commission as a whole.

## 5. Conclusions

Acculturation in a group implies the existence of coherent patterns of appropriate conduct, which should be performed, consciously or not, and are embedded in cognitive structures. This approach does not present us with static categories of thought. Schemas are conceived as the catalyst between minds and social structures, processing information in a way that allows regulated improvisation, interpretation and appreciation of the possibilities embedded in structures. To substantiate an argument to this direction, the present inquiry looked at interaction inside the European Commission and in particular in rules governing promotion and mobility, working in shared files and committees, with reputation, how it is earned and valued, underlining all relevant analysis.

The previous section concluded that compromise is an important category of praxis, reproducing understandings as to who should be involved in the making of a legal measure and how opposing views should be treated. Compromise then becomes a cognitive lens, as a legal proposal becomes less about saying the right thing and more about reflecting a temporary equilibrium, bound to change again, especially now in view of the new decentralised governance structures promoting the engagement of interested parties in the decision-making process.

The present analysis also aims at starting a debate on how 'compromise' may be viewed as an alternative way to conceptualise a different type of legitimacy, of how legal processes are shaped and how they should be shaped, and elaborates on how it differs from other notions such as consensus and bargaining. The contribution here lies in the proposition that compromise inside the European Commission is an important schema by virtue of structural reasons. In particular, the argument in the previous sections was that 'the division of labour' inside the Commission nurtured relations of dependence, hence the construction of compromise as an anthropological category of praxis.

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## Appendix I

*It [The Commission] wants to be associated in the minds of Europe's citizens with high quality, honesty, openness and integrity. These have been the Commission's operating values since the birth of the European Union. The reform process makes a new commitment to these values, enshrining them in a new approach to management based on four principles:*

### **Clearer responsibility**

*In many areas of the Commission's work, responsibility has become blurred by procedures that tend to obscure, rather than to reveal whom has actually taken a decision or approved expenditure. The reform process is remedying this by clearly defining the responsibilities of individuals at all levels, including the College of Commissioners. A clear definition of tasks also makes clear ambiguity about who is responsible for what.*

### **Strengthened accountability**

*As a European Institution, the Commission is formally accountable to the citizen in various ways . . . At the same time the Commission's accountability is being strengthened by greater openness to public scrutiny.*

### **Higher efficiency**

*The Commission has to deliver its services in the most cost-effective way. Decentralisation is also increasing efficiency by clearly defining responsibilities and encouraging officials to use their own initiative.*

### **Public and internal transparency**

*This word deserves clearer definition than it is often given. To the Commission it means that its procedures and actions must be open to public scrutiny. Transparency also has an internal application and requires effective communications between all levels of the administration, openness to new ideas and a readiness to accept criticism as a positive encouragement to do better. The whole reform process is dedicated to achieving these four objectives. In the interest of getting results, the Commission adopted in 2000 a comprehensive and far reaching Action Plan, comprising 98 points whose implementation is closely monitored (White Paper Reforming the Commission COM(2000) 200 final/2, pp. 7–8).*

## Appendix II

*Introducing further decentralisation and increasingly empowering Commission departments mean that better co-ordination and planning will be required. This need is all the more pressing given that Commissioners are to be housed in the same buildings as their departments, that many of the jobs handled cover a variety of disciplines, that responsibilities are fragmented and assigned to increasingly specialised departments and that strict priorities have to be applied to the activities and policies of the Commission. Consequently, internal co-ordination needs to be strengthened around the following three objectives:*

- (a) *promoting a real culture of co-operation (internal team spirit) where co-ordination is a matter for everyone and action is taken to guide, channel and foresee events as early on in the process as possible, with the emphasis increasingly on substance rather than form;*
- (b) *ensuring compliance with the guidelines set out by the President and with the policy priorities subsequently adopted by the Commission, strict priorities being set for the Directorates-General and departments and taking into account available and/or necessary resources;*
- (c) *ensuring that the work done is consistent overall and that documents are of a high standard . . .*

*The competent department is primarily responsible for internal co-ordination, first, since it designs and launches the initiatives which fall within its area of responsibility and which must faithfully reflect the priorities set by the Commission and second, since it organises and chairs the relevant interdepartmental working parties and any*

other networks or thematic discussion groups. The competent department is in particular responsible for involving from the outset the other departments directly concerned and for taking account of their legitimate interests. They in turn have a duty to participate in the work of co-ordination in a co-operative spirit.<sup>33</sup>

*Inter alia, the Secretariat-General will:*

- check whether appropriate mechanisms are necessary to ensure co-ordination between departments in particularly difficult or strategically important cases;
- automatically inform the weekly meeting of Directors-General and heads of department of any matters likely to be appearing on the agendas of forthcoming Commission meetings so that their substance can be examined and so as to report on progress so far as regards their preparation;
- regularly inform the weekly meeting of Directors-General on medium-term programming of future initiatives in the context of the implementation of the Commission's work programme;
- if necessary and depending on the nature of the problem, refer cases to the weekly meeting of Directors-General, the GCOM, or any other appropriate co-ordination body;
- consider whether meetings of interdepartmental working parties might under certain circumstances replace written interdepartmental consultations; and – revise the current list and structure of the interdepartmental working parties and look at creating a website on their activities and setting up an electronic letter box for the use of departments so that the list of working parties can be updated on a regular basis.<sup>34</sup>

33 [http://europa.eu.int/comm/reform/operation/coordin\\_en.pdf](http://europa.eu.int/comm/reform/operation/coordin_en.pdf), p. 2 (last accessed 21 Feb. 2005).

34 [http://europa.eu.int/comm/reform/operation/coordin\\_en.pdf](http://europa.eu.int/comm/reform/operation/coordin_en.pdf), p. 4 (last accessed 21 Feb. 2005).

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