# Chapter 9
# The Commission



Frequently portrayed as the civil service of the EU, in reality the Commission is rather more and rather less than that. Rather more in the sense that the treaties and political practice have assigned to it much greater policy-initiating and decision-making powers than those enjoyed, in theory at least, by national civil services. Rather less in that its role in policy implementation is greatly limited by the fact that the member states are charged with most of the EU's day-to-day administrative responsibilities.

The Commission is centrally involved in EU decision-making at all levels and on all fronts. With an array of power resources and policy instruments at its disposal, and strengthened by the frequent unwillingness or inability of other EU institutions to provide clear leadership, the Commission is at the very heart of the EU system.

The Commission is something of a hybrid in that it has both political and administrative branches and undertakes both political and administrative functions. This hybrid character of the Commission is a central theme of the chapter.

## The College of Commissioners

The College of Commissioners sits at the summit of the Commission and it and its members constitute the Commission's political branch.

### Size

Originally there were nine Commissioners, but with enlargements their number has grown: to 13, to 14, to 17, to 20, to 25, to 27, and to 28 following Croatia's accession in 2013. The reason for the lack of symmetry between the number of Commissioners and the number of member states prior to 2004 is that each of the larger states (France, Germany, Italy, Spain, and the UK) used to have two Commissioners. However, so as to avoid the size of the College becoming too big after enlargement it was agreed at the 2000 Nice summit that from January 2005 all member states would have just one Commissioner and that when the EU numbered 27 member states the number of members of the Commission would be less than the number of member states. The IGC that produced the Lisbon Treaty, following in the steps

of the IGC that produced the Constitutional Treaty, duly decided that from 2014 the size of the College would be reduced to the equivalent of two-thirds of the number of member states. However, this reduction was later removed from the Lisbon Treaty by the European Council as part of its attempt to persuade the Irish to vote *Yes* in their second referendum on the Treaty in 2009. In consequence, the 'one Commissioner for each member state' Treaty provision remains.

## Appointment

Prior to the College that took office in January 1993, Colleges were appointed every four years by common accord of the governments of the member states. The Maastricht Treaty changed this procedure, primarily in order to strengthen the links between the Commission and the EP. This strengthening was achieved in two ways. The first was by formalising and somewhat stiffening practices that developed in the 1980s regarding the appointment of the Commission and its President: the member state governments now became obliged to consult the EP on who should be President, and the College-designate became obliged to present itself before the EP for a vote of confidence. The second was by bringing the terms of office of the EP and the College into close alignment: Colleges would now serve a five-year term and would take up office six months after EP elections, which are held on a fixed basis in the late spring (normally June) of years ending in four and nine. (So as to bring about the alignment, a transitional two-year College served from January 1993 to January 1995.)

On the occasion of the first application of the new appointments procedure – in respect of the College that assumed office in January 1995 – the EP pressed its new powers to the full. When Jacques Santer, the Luxembourg Prime Minister, was nominated as President-designate in mid-1994 (the Commission President is formally nominated before other Commissioners) – at short notice and as a compromise candidate following the UK government's refusal to support the Belgian Prime Minister, Jean-Luc Dehaene – the EP was in fact barely consulted. However, the EP made it quite clear to the European Council (the forum in which the nominee of the national governments is agreed) that whoever was nominated would be required to appear before the Parliament and a vote on confirmation would be held. The assumption would be that if the nominee was not confirmed his candidature would be withdrawn. Chancellor Kohl, acting in his capacity as Council President, confirmed that the EP would indeed have a *de facto* veto over the nomination. In the event, Santer was confirmed, but only by a narrow majority. As for the vote of approval on the whole College, the EP held 'hearings', with each of the Commissioners-designate being required to appear before the appropriate EP committee before the plenary vote was held. There was strong criticism of five of the Commissioners-designate, but given that there was no provision for singling them out in a vote, the EP, after being given certain reassurances by Santer, gave a vote of confidence to the new College.

The Amsterdam Treaty confirmed the *de facto* confirmatory power the EP had assigned to itself on the appointment of the Commission President. The Treaty also gave the President-designate a potential veto over the national nominees for appointment to the College. (Under the Maastricht Treaty he was supposed to be consulted on the national nominees to the College, but in practice this amounted to little in 1994.) The Nice Treaty further altered the procedure by specifying that the decisions in the European Council on the nomination of the President and on the other Commissioners plus the decision on the appointment of the whole College could henceforth be made by qualified majority vote rather than by consensus. The Lisbon Treaty then introduced the requirement that in making its nomination for College President the European Council should take into account the recently held EP elections and also stated, in what was intended to have symbolic resonance, that the proposed candidate should be elected by – not, as previously, merely be *approved* by – the EP. The Lisbon Treaty also stipulated that one of the Commissioners should be the person holding the new post of High Representative of the Union for Foreign Affairs and Security Policy (see Chapter 7).

Accordingly, the relevant post-Lisbon Treaty provisions on the appointment of the President and the College are as set out in Document 9.1.

Treaty rules do, of course, often tell only part of the story of what happens in practice, since the circumstances in which the rules are applied and interpreted vary from case to case. This has been

## Document 9.1

### The post-Lisbon Treaty provisions on the appointment of the President of the College and of the other Commissioners

Taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority, shall propose to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members. If he does not obtain the required majority, the European Council, acting by a qualified majority, shall within one month propose a new candidate who shall be elected by the European Parliament following the same procedure.

The Council, by common accord with the President-elect, shall adopt the list of the other persons whom it proposes for appointment as members of the Commission. They shall be selected, on the basis of the suggestions made by Member States, in accordance with the criteria set out in paragraph 3, second subparagraph [which states that Commissioners shall be chosen 'on the ground of their general competence and European commitment from persons whose independence is beyond doubt'].

The President, the High Representative of the Union for Foreign Affairs and Security Policy and the other members of the Commission shall be subject as a body to a vote of consent by the European Parliament. On the basis of this consent the Commission shall be appointed by the European Council, acting by a qualified majority (Article 17, TEU).

... The European Council, acting by a qualified majority, with agreement of the President of the Commission, shall appoint the High Representative of the Union for Foreign Affairs and Security Policy ... (Article 18, TEU).

clearly illustrated in recent rounds of appointing the Commission President and College, all which have been highly politicised both in terms of the political composition of the incoming College and in terms of inter-institutional (especially European Council–EP) relations. Accounts of the appointment of the two Presidents and three Colleges that preceded the current Jean-Claude Juncker-headed College – that is, the Colleges headed by Romano Prodi (1999–2004) and by José Manuel Barroso (2004–09 and 2009–14) – are given on pages 106–111 in the seventh edition of this book. Accounts of the appointment of Juncker and of his College now follow.

### *The appointment of Jean-Claude Juncker as Commission President*

As noted above, the Lisbon Treaty did not change the appointment processes of the Commission President and the College *per se*, but it did give the EP a potentially greater role.

The delayed ratification of the Lisbon Treaty meant that the first use of its provisions for the nomination of the Commission President was not until 2014. With Barroso announcing that he would not be standing for a third term, from mid-2013 the names of several leading EU politicians were mooted in political circles and in the media as being potential contenders. However, the EP, resolved to take advantage of its new Lisbon Treaty powers, moved quickly to assert that it, and not the European Council, now had the right of initiative on who should be the nominee. The Parliament duly operated on the basis of this assumption and worked with the transnational European party political federations (under whose umbrellas the political groups in the EP operate) to create a process that led to most of the federations nominating, before the May 2014 EP elections, a candidate for Commission President. The candidates then attempted to generate 'conventional politics' during the EP elections, including through holding televised debates (which, in the event, were mostly

**Photo 9.1 José Manuel Barroso, President of the European Commission, answering questions in the European Parliament, November 2009**


aired only on specialised channels). In what came to be widely called the *Spitzenkandidat* (top candidate) system, the EP insisted throughout the candidate selection and then the EP election campaign processes that the European Council would be obliged to nominate as Commission President the nominee of the political group that gained the most seats or headed the coalition with the largest majority in the new Parliament.

Some member state governments were concerned about the EP's interpretation of the Lisbon Treaty's provisions on the nomination of the Commission President, with the governments of the UK and Hungary being especially vocal in arguing that the EP did not have the power to nominate. However, in late June, the European Council, anxious to avoid what could have become a major inter-institutional clash with the EP, made the first use of QMV to determine its nominee for Commission President and duly nominated, by 26 votes to 2 (the UK and Hungary voting against), the candidate of the largest political group in the EP after the elections – which was the centre-right European People's Party. This candidate was Jean-Claude Juncker, a former long-term Prime Minister of Luxembourg and a politician with extensive experience in EU circles – including as chair of the influential Eurogroup of eurozone Finance Ministers. On being nominated, Juncker embarked on a campaign of trying to persuade as many EP political groups as possible to support him in the plenary vote on whether or not he was to be confirmed as Commission President-designate. After he had presented an accommodating paper outlining the political priorities of his Presidency and had delivered the customary pre-vote plenary address, his nomination was confirmed – by 422 votes to 250, with 47 abstentions and 10 invalid votes.

The process involved in the selection of Juncker was more high profile, more separated from the appointment of the other Commissioners, and overall, much more politicised than had been the case with previous Commission Presidents. There will be no turning back from this. The details of the process may come to be adjusted, but it is inconceivable that the EP will permit a return to the past practice of the European Council independently making the nomination of Commission President-designate. It is now established that the Commission

**Photo 9.2 Jean-Claude Juncker, European Commission President, November 2014–**

President should reflect the political party orientation of the Parliament. In all probability, an enhanced and intensified *Spitzenkandidat* system will apply in the future.

### The appointment of the Juncker College

There are three stages in the process of appointing Commissioners.

*The nomination stage.* After, or possibly at the same time as, the President is nominated, the name of the Commissioner who is also to be High Representative of the Union for Foreign Affairs and Security Policy is decided by the European Council, by QMV if necessary, with the agreement of the President-designate. Then all remaining member states – that is, those which have not been 'assigned' the President or High Representative posts – nominate 'their' candidates. Or, rather, nominations *should* only be made by member states at this point but, in practice, the names of at least some nominees are commonly made public before the European Council has agreed on who it is to support to be President and High Representative.

Efforts by Presidents-designate to influence the nominations made by member states have, in practice, met with only very limited success. Juncker fared only marginally better than his immediate predecessors, as seen in the fact that even before he had been formally nominated as President-designate by the European Council in late June 2014 the governments of several member states had already released the name of their likely nominee and by the time the EP confirmed his nomination (in mid-July) the number of released names amounted to almost half of the Commissioners-designate. Juncker's room for manoeuvre in exercising influence was further restricted by some member states holding back on names he preferred in the hope of persuading him to give their nominee an important and/or specified portfolio, and by the EP indicating it would be unlikely to confirm the College-designate if it did not contain at least as many females (nine) as were member of the Barroso II College.

*The European Parliament approval stage.* This stage consists of the College-designate being 'subject as a body to a vote of consent by the European Parliament' (Article 17(7) TEU). This requirement of approval only applies to the whole College: the EP has no formal power to withhold approval from individual nominees. However, in practice the EP clearly can threaten to withhold approval of the whole College if particular Commissioners-designate fail to pass muster with MEPs – and so the Parliament does have a *de facto* veto over every Commissioner-designate.

Since the appointment of the Santer College, the EP has used its power of consent over incoming Colleges to 'require' all Commissioners-designate to appear individually before 'examining' EP committees in US Senate-type public 'hearings'. Each hearing lasts for three hours and is held before members of the EP committee or committees covering a Commissioner-designate's portfolio, which means that between 60 and 100 MEPs normally attend each hearing (see Photo 12.1).

Following each hearing, MEPs who are members of the relevant examining committee or committees hold discussions on the performance of the Commissioner-designate they have seen and take a vote. The outcomes of their deliberations and vote are then communicated to the Parliament's Conference of Committee Chairs and Conference of Presidents (the latter of which is composed of the political group leaders), which decide whether a Commissioner-designate is acceptable. In the ensuing two to three weeks, before the vote of consent is formally taken by the EP in plenary session, various manoeuvrings – which include inputs from the Commission President-designate and which are focused particularly on the suitability of individuals to be Commissioners at all or to hold the

**BOX 9.1**

## The Commissioners

- One Commissioner per member state, including the President and the High Representative.
- Five-year term, which may be renewed.
- Each Commissioner is nominated by his/her member state, but must be acceptable to the President-designate.
- The College as a whole must be approved by the EP after individual 'hearings'.
- Commissioners must be independent and not act as national 'representatives'.
- Each Commissioner has a portfolio.

portfolio they have been assigned – occur, with the aim of ensuring that approval is given.

The hearings on the Juncker College were complicated by the raised political tensions that had been generated by the *Spitzenkandidat* process. This was seen both in the partisan rumbustiousness of a few hearings and also in the hints from MEPs during the hearings that if attempts were made to veto a nominee from their political family then they would not hesitate to retaliate in kind. For the most part, however, the hearings focused, as in the past, on the personal competences of Commissioners-designate and their suitability for the portfolios they had been assigned. Most hearings proceeded to the relative satisfaction of MEPs, but in five cases reservations were expressed and in one case – that of the Slovenian nominee, Alenka Bratusek – MEPs decided that she had performed so weakly that she was unacceptable to the Parliament.

The EP's reservations regarding the five cases were quickly resolved – partly by the individuals concerned directly satisfying MEPs and partly by Juncker tweaking the content of a few portfolios. Bratusek, however, had little option but to withdraw her candidacy and she was replaced with another Slovene nominee. When all remaining matters were resolved, the EP gave its consent to the composition of the College in late October – by 423 votes to 209, with 67 abstentions and 52 not voting. Most EPP (centre-right), S&D (centre-left), and ALDE (liberal) MEPs voted in favour of confirmation whilst most of the MEPs of other groups and non-affiliated MEPs either voted against, abstained, or did not vote.

*The formal appointment stage.* The final stage in the appointment of a new College is by approval of the governments of the member states, meeting in the forum of the European Council. The European Council formally appointed the Juncker College on 23 October 2014, with its term of office being set from 1 November 2014 to 31 October 2019.

Photograph 9.3 shows the College that took office in November 2014.

## Impartiality and independence

Juncker has sought to take advantage of his more politicised appointment to present his Commission as being more political in nature than those of his predecessors. He has come near to suggesting that his Commission has a political mandate and he has made little secret of his, and of his College's close working relations with the leading centre political groups in the EP. (See Dinan, 2016, on this claim by Juncker to be leading 'a more political Commission'.) However, he has only been able to press this claimed political underpinning of his College so far, not least because the Commission exists and operates within a context in which it is required by treaty and is forced by practical circumstances to be, and to be seen to be, politically impartial and independent.

This emphasis on impartiality and independence is no more clearly seen than in respect of the national affiliations of Commissioners. Although individual Commissioners frequently are referred to as 'the Finnish Commissioner', 'the Hungarian Commissioner', and so on, Commissioners are in fact not supposed to be national representatives. Rather, the Commission 'shall promote the general interest of the Union' and Commissioners 'shall be chosen on the ground of their general competence and European commitment from persons whose independence is beyond doubt' (Article 17, TEU). Much the same sentiments pertain to the requirement that Commissioners should 'neither seek nor take instructions from any Government or other institution, body, office or entity' (*ibid.*). These requirements are designed to ensure that in undertaking its tasks the Commission looks to the EU-wide interests and that any internal divisions that may exist do not match the nationally based divisions of the Council.

In practice, full impartiality is neither achievable nor attempted. Although Commissioners are formally appointed by the European Council with the agreement of the President-designate and the EP, in reality all but the President and the High Representative are national nominees. It would therefore be quite unrealistic to expect Commissioners, upon assuming office, suddenly to detach themselves from previous loyalties and concern themselves solely with the wider European interest' – not least since a factor in their nomination by national governments is likely to have been an expectation that they would keep an eye on the national interest. The Treaty's insistence on the complete independence of Commissioners is therefore interpreted flexibly. Indeed,

**Photo 9.3 College of Commissioners 2014–19**

neutrality is not even desirable since the work of the Commission is facilitated by Commissioners maintaining their links with sources of influence throughout the EU, and they can most easily do this in their own member states. But the requirements of the system and the necessities of the EU's institutional make-up are such that real problems arise if Commissioners try to push their own states' interests too hard. It is both legitimate and helpful to bring favoured national interests that may have wider implications onto the agenda, to help clear national obstacles to the advancement of Commission proposals, and to explain to other Commissioners what is likely to be acceptable in 'my' national capital. But to go further and act virtually as a national spokesman, or even to be seen as being over-chauvinistic, as a few Commissioners occasionally have been, is to risk incurring the displeasure of the Commission President and losing credibility with other Commissioners. So, for example, in December 2015, the Hungarian Commissioner, Tibor Navracsics, who had written to the other Commissioners objecting to the Commission's registration of a European Citizens' Initiative that criticised the Hungarian Prime Minister, Viktor Orbán, was sent a letter of rebuke by President Juncker reminding him that Commissioners 'must not defend the view of the government that proposed their appointment, but must be solely committed [to] the general interest of the Union' (Zalan, 2015: 2).

## Characteristics of Commissioners

There are no rules concerning what sort of people, with what sort of experience and background, member state governments should nominate to be Commissioners. It used to be the case that most Commissioners tended to be former national politicians just short of the top rank. However, as the EU, and the Commission with it, has become increasingly important, so has the political weight of the College's membership increased, and now most Commissioners are former ministers, and some of them very senior ministers.

Given the diverse political compositions of the EU's national governments, there is naturally a range of political opinion represented in the Commission, with its political balance reflecting the political composition of the governments of the member states at the time the College is appointed. Crucially, all governments have made it their custom to nominate

people who are broadly pro-European and who have not been associated with any extremist party or any extreme wing of a mainstream party. So, whilst Colleges certainly contain party political differences, these are usually within a range that permits at least reasonable working relationships.

Amongst important characteristics of the 28 Commissioners at the beginning of the Juncker College in November 2014 were: nine were women (the same number as in the Barroso II College); nine were returning Commissioners (a much lower percentage than normal); four were former prime ministers and four were former deputy prime ministers; and in terms of their political background, 15 were centre-right, eight were centre-left, and five were liberals.

## The President of the College

The most prestigious and potentially influential College post is that of the President. Indeed, such has been the increased role and profile of the President in recent years that it is common to speak of a 'presidentialisation' of the Commission as having taken place.

Although most important Commission decisions must be taken collectively by the College, the President:

- Is the most prominent, and usually the best known, of the Commissioners.
- Is the principal representative of the Commission in its dealings with other EU institutions and with outside bodies.
- Is expected to give a sense of direction to his fellow Commissioners and, more broadly, to the Commission as a whole. Indeed, Article 17 (6) TEU states the President 'lays down guidelines within which the Commission is to work'.
- Allocates Commissioners' portfolios (see next section).
- May require fellow Commissioners to resign.
- Is directly responsible for overseeing some of the Commission's most important administrative services – notably the Secretariat General which, amongst other functions, is responsible for the coordination of Commission activities and for relations with the Council and the EP.
- May take on specific policy responsibilities of his own, usually in harness with other Commissioners.

Inevitably, given the importance of the offi until 2014 when (as shown above) it lost its so power to independently nominate who should be th Commission President, the European Council was ver careful about who it nominated. This was witnesse by the last four Presidents it chose: Jacques Delors wa a former French Finance Minister; Jacques Santer an Romano Prodi were former Prime Ministers – Santer of Luxembourg and Prodi of Italy; whilst José Manu Barroso was the serving Prime Minister of Portug As noted above, in 2014 the EP's recommendati to the European Council followed in this tradition o nominating 'big names', with Juncker being a form Prime Minister of Luxembourg. (If the EPP had no been the largest political group in the Parliament afte the 2014 EP elections, the nominee probably wou have been Martin Schultz – the S&D 'candidate' an the then President of the EP.)

## Commissioners' portfolios

All Commissioners have portfolios: that is, partic lar areas of responsibility. Some portfolios – such Competition, Trade, and Environment – are more less fixed, whilst others, especially those of a broa and less specific nature, can be varied, or even create depending on how a new President sees the role and tasks of the Commission and depending sometim too, on the pressures to which he is subject fro Commissioners-designate and national governments

Commissioner portfolios carry with them respo sibilities for leading and driving the work of the parts of the Commission services that are related the content of their portfolios. Commissioners are not formally the heads of services, but they are the political reference points and overseers. As can be in Box 9.2, the relationships between Commissio and the services are usually not on a simple one one basis.

Prior to the implementation of the Amsterd Treaty, the distribution of portfolios amongst t Commissioners was largely a matter of negotiat and political balance. The President's will was t most important factor, but he could not allocate p simply in accordance with his own preferences. T intensively lobbied – by the incoming Commissio themselves, and sometimes by governments t to get 'their' Commissioners into positions that

important from the national point of view. all these difficulties, it is not surprisunless a resignation, death, or enlargement reshuffles did not usually occur during the Commission.

This situation meant that Commissioners were not necessarily assigned to the most appropriand also that not much could be done if a Commissioner was not performing satisfactorily. The was, however, partly addressed in a declaraattached to the Amsterdam Treaty and has since strengthened, with the situation now being that, in respect of the special portfolio of High Representative, 'the responsibilities incumbent on the Commission shall be structured and allocated among its members by its President … . The President may reshuffle the allocation of those responsibilities during the Commission's term of office' (Article 248, TFEU). In practice, up to the time of writing (late 2018), no significant re-shuffling of portfolios has occurred once a College has assumed office, though adjustments have necessarily had to be made when a Commissioner has resigned, as the UK Commissioner did after the June 2016 Brexit referendum. (In practice resignations are rare, though a handful did occur in 2014 as the end of the College's term of office neared and some Commissioners sought 'bolt holes' – including in the EP.)

There is no doubt that, notwithstanding Article 248, recent Presidents have been lobbied by Commissioners-designate and national governments on portfolio allocations – especially concerning such key portfolios as Internal Market, Trade and Competition. However, there is also no doubt that recent Presidents have acted much more autonomously than their predecessors when assigning portfolios. That this is so was no more clearly seen than at the beginning of the Juncker College, when the incoming President initiated a major re-organisation of the structure of the College that involved the creation of a new type of portfolio. This creation was partly to deal with the increasing problem for Presidents of finding a sufficient number of substantial portfolios to satisfy the work expectations of incoming Commissioners and partly also to improve the internal efficiency of the College. Juncker's creation involved a new type of Commissioner, with seven Vice-Presidents being given leading and coordinating responsibilities in broad areas of policy activity. More specific policy work was assigned to other Commissioners, in the usual way. Though not described as being 'junior' Commissioners, these other Commissioners were required to work via 'their' Vice-President(s) in newly established Commissioners' groups or, as they are also known, project teams. One of the new Vice-Presidents, Frans Timmermans, was designated as the First Vice-President. The Juncker College is thus more hierarchically structured than its predecessors. (See Box 9.2 for the assignment of portfolios in the Juncker College.)

## Commissioners' *cabinets*

To assist them in the performance of their duties, Commissioners have personal *cabinets*. These consist of small teams of officials numbering, under rules introduced by Juncker, as follows: the President – 12 *cabinet* members and 19 support staff; the High Representative – 11 and 15; the First Vice-President – 8 and 11; Vice-Presidents – 7 and 10; other Commissioners – 6 and 10.

Members of *cabinets* used to be mostly fellow nationals of their Commissioners, which enabled *cabinets* to act as important links with Commissioners' home bases. But President Prodi wanted *cabinets* to have a more multinational character. To give effect to this, new rules were introduced which still apply, requiring that each *cabinet* should include at least three nationalities and indicating that the *chef de cabinet* or the *deputy chef de cabinet* should preferably be of a different nationality to the Commissioner.

Typically, a *cabinet* member is a dynamic, extremely hard-working, 35–50-year-old, who has been seconded or recruited from some part of the EU administration or from the civil service of the Commissioner's member state.

*Cabinets* undertake a number of tasks: they gather information and seek to keep their Commissioner informed of developments within and outside of his/her allocated policy area; they liaise with other parts of the Commission, including other *cabinets*, for purposes such as clearing up routine matters, building support for their Commissioner's policy priorities, and generally trying to shape policy proposals as they come up the Commission system; and they act as a sort of unofficial advocate/protector in the Commission of the interests of their Commissioner's country. Over and above these tasks, the President's *cabinet* is centrally involved in brokering agreements

**BOX 9.2** *Continued*

| *Name and Age* | *Member State* | *Portfolio* | *Main Direct Services Responsibilities* |
|---|---|---|---|
| **Karmenu Vella** 64 | Malta | Environment, Maritime Affairs and Fisheries | DG Environment; DG Maritime Affairs and Fisheries; the relevant parts of the Executive Agency for Small and Medium-Sized Enterprises |
| **Christos Stylianides** 56 | Cyprus | Humanitarian Aid and Crisis Management | DG Humanitarian Aid and Civil Protection; the relevant parts of the Education, Audiovisual and Culture Executive Agency |
| **Johannes Hahn** 56 | Austria | European Neighbourhood Policy and Enlargement Negotiations | DG Enlargement |
| **Neven Mimica** 60 | Croatia | International Cooperation and Development | DG Development and Cooperation – EuropeAid |

* At time of assuming office in November 2014.

from the many different views and interests that exist amongst Commissioners and in the Commission system as a whole so as to ensure that, as an institution, the Commission is clear, coherent, cohesive, and efficient.

## The Services

### Size

Below the Commissioners is the Commission's administration, which is commonly known as the Commission's services. This is by far the biggest element of the whole EU administrative system, though it is tiny as compared with the size of administrations in the member states: EU member states average around 300 civil servants per 10,000 inhabitants, as against 0.8 per 10,000 for all EU institutions.

In 2016 the Commission's staffing establishment numbered just over 25,000, to which must be added some 8,000 in non-established posts of various kinds. Of the established staff, about half are employed [in the] AD grade, which is the grade that deals with [policy] making. (See Nugent and Rhinard, 2015, for a [detailed] breakdown of the Commission's staffing figures.)

The main reason that the size of the Commission [services] is so small is that they do not, for the [most] part, deal with the labour-intensive task of [dealing] with 'front-line' policy implementation. That [responsi]bility lies with administrative bodies based in [the] member states.

### Appointment

Permanent staff are recruited on the basis of [open] competitive procedures, which for the AD [grade] in particular is highly competitive. An internal [career] structure exists and most of the top jobs are [filled] by internal promotion. However, pure meritocratic [prin]ciples are disturbed by a policy that tries to [provide] a reasonable national balance amongst staff. [All] governments have watched this closely and have [acted] to ensure that their own nationals are well [represented]

throughout the EU administrative framework, especially in the upper reaches. For the most senior posts something akin to an informal national quota system has operated, though this is now not as prevalent as it was before a reform programme that has been under way since the early 2000s to modernise Commission personnel, management and administrative policies. The multinational staffing policy of the Commission, as indeed of the other EU institutions, has both advantages and disadvantages, as is shown in Box 9.3. Internal mobility between posts is encouraged, and experience in senior and sensitive posts is obligatory.

## Organisation

The Commission's services are divided into organisational units in much the same way as national governments are divided into ministries and departments. Most of the organisational units carry the title of Directorate General (DG) whilst those that do not are known as general or special services. A list of the DGs and other services is given in Box 9.4.

The size and internal organisation of DGs and specialised services varies. Most commonly, they have a staff of between 200 and 500, divided into six to ten directorates, which in turn are each divided into three to six units. However, policy importance, workloads, and specialisations within DGs produce many departures from this norm. Thus in terms of size, DG Translation is the largest DG, with a staff of almost 2, 300 to handle the EU's 24 official languages and 552 possible language combinations. (In practice, most day-to-day work is conducted in English and French.) Other large DGs include the Joint Research Centre (with just under 2,000 staff), Development (with over 1,000), and Agriculture (with almost 1,000).

**BOX 9.3**

### Advantages and disadvantages of the Commission's multinational staffing policy

Advantages

1. The staff have a wide range of experience and knowledge drawn from across all the member states.
2. The confidence of national governments and administrations in EU decision-making is helped by the knowledge that compatriots are involved in policy preparation and administration.
3. Those who have to deal with the Commission can often more easily do so by using their fellow nationals as access points. A two-way flow of information between the Commission and the member states is thus facilitated.

Disadvantages

1. Insofar as some senior personnel decisions are not made on the basis of pure meritocratic principles but result in part from a wish for there to be a reasonable distribution of nationals from all member states in the upper reaches of the Commission, two damaging consequences can follow. First, the best available people do not necessarily fill all posts. Second, the morale and commitment of some staff can be damaged.
2. Senior officials can occasionally be less than wholly and completely EU-minded. For however impartial and even-handed they are supposed to be, they cannot, and usually do not wish to, completely divest themselves of their national identifications and loyalties.
3. There are differing policy styles in the Commission, reflecting different national styles. These differences are gradually being flattened out as the Commission matures as a bureaucracy and develops its own norms and procedures, but the differences can still create difficulties, especially when there is an influx of staff into middle-ranking and senior grades following EU enlargements.

**BOX 9.4**

## Directorates General and the main general and special services of the Commission*

*Directorates General*

Agriculture and Rural Development
Budget
Climate Action
Communication
Communications Networks, Content and Technology
Competition
Economic and Financial Affairs
Education and Culture
Employment, Social Affairs and Inclusion
Energy
Environment
European Civil Protection and Humanitarian Aid Operations
Eurostat
Financial Stability, Financial Services and Capital Markets Union
Health and Food Safety
Human Resources and Security
Informatics
Internal Market, Industry, Entrepreneurship and SMEs
International Cooperation and Development
Interpretation
Joint Research Centre
Justice and Consumers
Maritime Affairs and Fisheries
Migration and Home Affairs
Mobility and Transport
Neighbourhood and Enlargement Negotiations
Regional and Urban Policy
Research and Innovation
Secretariat-General
Service for Foreign Policy Instruments
Taxation and Customs Union
Trade
Translation

*Main General and Special Services*

European Anti-Fraud Office
European Political Strategy Centre
Internal Audi Service
Legal Service
Publications Office

*Situation in October 2016.

There is no hard and fast reason why some services have DG status and others do not. It is true that non-DG services tend to be more concerned with providing support for policies than directly handling polic
this is not always the case. So, the Secretariat-G
which carries the main responsibility for ensur

Commission as a whole functions coherently, effectively, and efficiently, is a DG whilst the Legal Service, which also deals with all policy areas, is not. Non-DG services should not, therefore, be thought of as being similar to DGs.

## The Commission's Hierarchical Structure

The hierarchical structure of the Commission is as set out in Box 9.5. It is a reasonably clear structure, although in practice complications can occur – especially at the topmost levels. One reason for this is that an imperfect match exists between some Commissioners' portfolios and the responsibilities of services. With more services than there are Commissioners, some Commissioners have to carry responsibilities that touch on at least part of the work of several services, as Box 9.2 shows. Another reason is that the lines of division between the responsibilities of Vice-Presidents and other Commissioners are sometimes blurred.

Another structural problem concerning Commissioners is the curious halfway position in which they are placed. To use the British parallel, they are more than permanent secretaries but less than ministers. For whilst they are the principal Commission spokesmen in their assigned policy areas, they are not members of the Council of Ministers – the body that, often in association with the EP, takes most final decisions on important policy matters. (The High Representative, who chairs the Foreign Ministers Council but is not a voting member of it, is the exception to this.)

These structural arrangements mean that any notion of individual responsibility, such as exists in most member states in relation to ministers – albeit usually only weakly and subject to prevailing political currents – is difficult to apply to Commissioners. It might even be questioned whether it is reasonable that the Commission should be subject to collective responsibility – as it is by virtue of Article 234 of the TFEU which obliges it to resign if a motion of censure on its activities is passed in the EP by a two-thirds majority of the votes cast, representing a majority of all members. Collective responsibility may be thought to be reasonable in so far as all Commission proposals and decisions are made collectively and not in the name of individual Commissioners, but at the same time it may be thought to be unreasonable in so far as the ability of the Commission to undertake its various tasks successfully is highly dependent on other EU actors. In practice no censure motion has been passed although, as is described in Chapter 12, one came close to being so in January 1999 and it was the near certainty of one being passed that prompted the Santer College's resignation in March 1999.

**BOX 9.5**

### The hierarchical structure of the Commission

- All important matters are channelled through the weekly meetings of the College of Commissioners. At these meetings decisions are almost invariably taken by consensus, but majority voting is possible.
- Before College meetings, agenda items are discussed by relevant Commissioner groups and must be 'cleared' by the relevant Vice-President and the First Vice-President.
- In particular policy areas the Commissioner holding the portfolio in question, working closely with the relevant Vice-President, carries the main leadership responsibility.
- DGs are formally headed by Directors General, who are responsible to the appropriate Commissioner.
- Directorates are headed by Directors, who report to the Director General or, in the case of large DGs, to a Deputy Director General.
- Units are headed by Heads of Unit, who report to the Director responsible.

## Decision-Making Mechanisms in the Commission

The hierarchical structure that has just been described produces a 'model' route via which proposals for decisions make their way through the Commission machinery. This route is set out in Box 9.6. From the 'model' route all sorts of variations are possible, and in practice are commonplace. For example, if draft proposals are relatively uncontroversial or there is some urgency involved, procedures and devices can be employed to prevent logjams at the top and expedite the business in hand. One such procedure enables the College of Commissioners to authorise the most appropriate amongst their number to take decisions on their behalf. Another procedure is the so-called 'written procedure', by which proposals that seem to be straightforward are circulated amongst all Commissioners and are officially adopted if no objection is lodged within a specified time, usually a week. Urgent proposals can be adopted even more quickly by 'accelerated written procedure'.

Another set of circumstances producing departures from the 'model' route is when policy issues cut across the Commission's administrative divisions – a very common occurrence given the sectoral specialisations of the DGs. For example, a draft directive aimed at providing a framework in which alternative sources of energy are to be researched and developed prob would originate in DG Energy, but would have d implications for DG Research and Innovation, Budget, and perhaps DG Internal Market, Indus Entrepreneurship and SMEs. Sometimes policy legislative proposals do not just touch on the w of other DGs but give rise to sharp conflicts, sources of which may be traced back to the conflict 'missions' of DGs: for example, there are somet disputes between DG Competition and DG Reg and Urban Policy, with the latter tending to be m less concerned than the former about rigidly appl EU competition rules if European industry is ther assisted and advantaged. Provision for liaison coordination is thus essential if the Commissi to be effective and efficient. There are various p cedures and mechanisms aimed at providing t necessary coordination. Five of these are particul worth noting.

First, at the level of the DGs, various manage practices and devices have been developed to t rectify the increasingly recognised problem of h zontal coordination. In many policy areas this re in important coordinating functions being perfor by a host of standing and *ad hoc* arrangements: inte service groups and meetings are the most import of these arrangements, but there are also task for project groups, and numerous informal and one exchanges from Director General level downwards

**BOX 9.6**

### 'Model route' for the development of a proposal within the Commission

- An initial draft is drawn up at middle-ranking policy grade level in the 'lead' DG. Liaison with other DGs that have an 'interest' is conducted by various means, including the convening of inter-service groups. Outside assistance – from consultants, national officials and experts, and sectional interests – is sought and if necessary contracted, as appropriate. The parameters of the draft are likely to be determined by a combination of existing EU policy commitments, the Commission's annual work programme, and guidelines that have been laid down at senior Commission and/or Council levels.
- Progress is 'monitored' by the Secretariat-General, which needs to be assured that appropriate 'tests' (including of subsidiarity and proportionality) are met and that correct procedures are used.
- The draft is passed upwards – principally through superiors within the DG, through the *cabinet* of the Commissioner responsible, and through the weekly meeting of the *chefs de cabinet* – until the College of Commissioners is reached. During its passage the draft may be extensively revised.
- The College of Commissioners can do virtually what it likes with the proposal. It may accept it, reject it, refer it back to the DG for redrafting, or defer taking a decision.

Second, the main institutional agency for promoting coordination is the Secretariat-General of the Commission, which is specifically charged with ensuring that proper coordination and communication takes place across the Commission. In exercising this duty, the Secretariat-General satisfies itself that all Commission interests have been consulted before a proposal is submitted to the College of Commissioners.

Third, the President of the Commission has an ill-defined, but generally expected, coordinating responsibility. A forceful personality may be able to achieve a great deal in forging a measure of collective identity out of the varied collection of people from quite different national and political backgrounds who sit around the Commission table. But it can only be done tactfully and with adroit use of social skills. Jacques Delors, who presided over three Commissions between 1985 and 1995, unquestionably had a forceful personality, but he also displayed traits and acted in ways that had the effect of undermining team spirit amongst his colleagues. For example, he indicated clear policy preferences and interests of his own; he occasionally made important policy announcements before fully consulting the other Commissioners; he criticised Commissioners during Commission meetings and sometimes, usually by implication rather than directly, did so in public too; and he frequently appeared to give more weight to the counsel of personal advisers and to people who reported directly to him – drawn principally from his *cabinet* and from the Commission's in-house think tank (then known as the Forward Studies Unit, but since reconstituted and now called the European Political Strategy Centre) – than to the views of his fellow Commissioners.

**Photo 9.4 Jacques Delors: President of the European Commission, 1985–95**

Fourth, there are the College-level coordinating mechanisms created by Juncker, which were outlined above. These mechanisms are the seven coordinating Vice-Presidents and the related Commissioner project teams, which bring together Commissioners with overlapping and closely linked policy responsibilities. Amongst the groups are: Energy Union; Digital Single Market; and Jobs, Growth, Investment and Competitiveness.

Fifth, the College of Commissioners, in theory at least, is in a strong position to coordinate activity and take a broad view of Commission affairs. Everything of importance is referred to the Commissioners' weekly meeting and at that meeting the whole sweep of Commission interests is represented by the portfolios of those gathered around the table.

* * *

Commissioners' meetings are always preceded by other meetings designed to ease the way to decision-making:

- Informal and *ad hoc* consultations may occur between Commissioners who are particularly affected by a proposal.
- The above-described groups of Commissioners exist for the purpose of facilitating liaison and cooperation and enabling discussions at College meetings to be well prepared and efficient.
- The First Vice-President takes a leading role in determining when matters are ready/need to be placed on the agenda of a College meeting, and liaises closely with other Commissioners, especially Vice-Presidents, on this.
- The Commissioners' agenda is always considered at a weekly meeting of the heads of the Commissioners' *cabinets* (known as *Hebdo*). These *chefs de cabinet* meetings are chaired by the Commission's Secretary-General and are usually held two days before the meetings of the Commission itself. Their main purpose is to reduce the length of College meetings by reaching agreements on as many items as possible and referring only controversial/difficult/major/politically sensitive matters to the Commissioners.

- Feeding into *chefs de cabinet* meetings are the outcomes of meetings between the *cabinet* members responsible for particular policy areas.
- Officials from the different *cabinets*, who are generally well known to one another, often exchange views on an informal basis if a proposal looks as though it may create difficulties. (Officially *cabinets* do not become involved until a proposal has been formally launched by a DG, but earlier consultation is common. If this consultation is seen by DGs to amount to interference, tensions and hostilities can arise – not least because *cabinet* officials are usually junior in career terms to officials in the upper reaches of DGs.)

There is, therefore, no shortage of coordinating arrangements within the Commission, not least at Commissioners level. Of course, not all coordinating problems have been resolved with, for example, departmental and policy loyalties sometimes still seemingly tending to discourage new and integrated approaches to problems and the pooling of ideas. As in most administrations, demarcation lines between spheres of responsibility are sometimes too tightly drawn and policy competences are sometimes too jealously guarded – especially by larger and traditionally relatively independent DGs (such as Agriculture and Competition). But, notwithstanding such difficulties, the various efforts that have been made over the years to improve internal coordination, and hence Commission coherence and effectiveness, seem to have been broadly successful.

## Power Resources

Like all political actors, the Commission needs power resources to be able to exercise influence. As Box 9.7 shows, the Commission is well endowed with such resources.

The power resources available to the Commission illustrate the special nature of the Commission as an institution, and especially the ways in which it combines features of being both a political institution and an administrative institution. As regards it having resources that are normally associated with political institutions, it does not have the resources that are most associated with, and are most important for, national politicians – the legitimacy that stems from having been directly elected by citizens and the power to not only propose policy measures but also to actually make final decisions on them. But, the Commission does have a key resource of politicians: the power to initiate policies. Where legislation is concerned, this power is mostly exclusive to it. Where other measures are concerned, the initiating power is shared with other actors – most particularly the European Council and the Council. Even, however, where the Commission's initiating powers are not exclusive, its position can be greatly strengthened by other actors often finding it logistically difficult to develop initiatives without receiving considerable assistance from the Commission.

As regards the Commission having resources that are normally associated with public administration, the most important of these are its access to, and understanding of, information about the operation of EU policies: what is working well?; what needs reforming?; what would be the consequences, both for the EU as a whole and for parts of it, of introducing a particular policy or policy amendment? Often the Commission, drawing on its many sources of information, is in a position to make accurate judgements on such questions.

**BOX 9.7**

### Power resources of the Commission

- Its powers of initiative (which are exclusive and non-exclusive).
- Its neutrality (which results in it being seen as less partisan and more trustworthy than most other EU actors).
- It is present in virtually all decision-making forums and at all decision-making stages (and so is very well-informed about the positions of other actors and is often looked to by them for advice).
- Its access to information about EU policies and needs (an access that is assisted by it being surrounded by hundreds of expert and advisory committees).
- Smaller states often look to the Commission for leadership and protection – and most EU states *are* small.

Moreover, such judgements by the Commission are more likely to be generally trusted than are judgements by, say, a national government or a political group in the EP. This brings in another type of power resource of the Commission: those that stem from the unique nature of the EU and the Commission's special position in it. The Commission's duty to be neutral and non-partisan mean that policy proposals stemming from it generally are given a more favourable reception than are proposals coming from a more sectional or perceived special interest source. This is not, of course, to say that there are not circumstances in which Commission proposals do not run into stiff resistance, but even then the Commission's special position in the EU system gives it considerable advantages. Amongst these advantages are that, unlike national administrations, the Commission is physically present in virtually all policy-making forums and at all policy-making stages (including all Council meetings and EP committees) and so is well-placed to be able to anticipate the reactions of other institutions to proposals it makes and to be able to explain and defend its stances.

The Commission's power resources will be further explored and illustrated in the next section on the Commission's responsibilities.

## Responsibilities

Some of the Commission's responsibilities and powers are prescribed in the treaties and in EU legislation. Others are not formally laid down but have developed from practical necessity and the requirements of the EU system.

Whilst recognising that there is some overlap between the categories, the responsibilities of the Commission may be grouped under six broad headings: proposer and developer of policies and legislation; executive functions; guardian of the legal framework; external representative and negotiator; mediator and conciliator; and promoter of the general interest.

### Proposer and developer of policies and legislation

Article 17 TEU states that 'The Commission shall promote the general interest of the Union and take appropriate initiatives to that end.' This means, amongst other things, that the Commission is charged with the responsibility of proposing measures that are likely to advance the development of the EU. Where legislation is envisaged, this power to propose is exclusive to the Commission 'except where the Treaties provide otherwise' (Article 17, TEU). The most important areas where the treaties do so provide otherwise are in respect of certain AFSJ matters. Where proposals do not involve legislation, as in the CFSP area, the Commission's proposing and initiating powers are shared with the member states.

In addition to its formal treaty powers, political realities arising from the institutional structure of the EU also dictate that the Commission is centrally involved in formulating and developing policy. The most important of these realities is that there is nothing like an EU Head of Government or Council of Ministers capable of providing the EU with clear and consistent policy direction, let alone a coherent legislative programme. Senior Commission officials who have transferred from national civil services are often greatly surprised by the lack of political direction from above and the amount of room for policy and legislative initiation that is available to them. Their duties are often only broadly defined and there can be considerable potential, especially for more senior officials, to stimulate development in specific and, if they wish, new and innovative policy areas.

An indication of the scale of the Commission's proposing activities is seen in the fact that in an average year it issues up to 2,000 proposals for directives, regulations and decisions, most of which are, admittedly, administrative in nature. It also normally issues around 250–300 communications and reports, 5–10 Green Papers, and a couple of White Papers.

Although in practice they greatly overlap, it will be useful here, for analytical purposes, to look separately at policy initiation and development on the one hand, and legislative initiation and development on the other.

* * *

*Policy initiation and development* takes place at several levels in that it ranges from sweeping 'macro' policies to detailed policies for particular sectors. Whatever the level, however, the Commission – important though it is – does not have a totally free hand in what it does. As is shown at various points elsewhere in this book, all sorts of other actors – including the European

Council, the Council, the EP, national governments, sectional groups, regional and local authorities, and private firms – also attempt to play a part in the policy process. They do so by engaging in such activities as producing policy papers, issuing exhortations and recommendations, and lobbying. Such activities are frequently designed to exert direct policy pressure on the Commission. From its earliest deliberations on a possible policy initiation, the Commission has to take note of many of these outside voices if its proposals are to find broad support and be effective in the sectors to which they are directed. The Commission must concern itself not only with what it believes to be desirable but also with what is possible. The policy preferences of others must be recognised and, where necessary and appropriate, be accommodated.

Of the many pressures and influences to which the Commission is subject in the exercise of its policy initiation functions, the most important are those that emanate from the European Council and the Council. When these institutions indicate that they wish to see certain sorts of proposal laid before them, the Commission is obliged to respond. However, important though the European Council and the Council are as policy-initiating bodies, the extent to which they undermine the initiating responsibilities and powers of the Commission ought not to be exaggerated. For the institutional structures and compositions of the European Council and the Council make it difficult for them to be bold and imaginative. They tend often to be better at responding than at originating and proposing, which results in the Commission not only taking instructions from them but also using them to legitimise its own policy preferences.

The Commission's policy-initiating activities cover both major and cross-sectoral policies and policy programmes and also specific policy areas. Examples of the former include: the 2014 *Communication… on Long-Term Financing of the European Economy*, which established the need for and possible ways of raising new investment in the European economy and the follow-up 2014 *Communication From the Commission… An Investment Plan for Europe*, which set out plans for a new investment fund capable of generating some €300 billion of 'new money'. Another example of the former type of policy-initiating activity is the 2015 *Communication… A Digital Single Market Strategy for Europe*, which set out a 16-point strategy for opening-up digital opportunities for people and businesses by removing regulatory barriers and creating a fully functional digital single market. Examples of the latter include: attempting to generate a more integrated approach to a policy area – as with the 2015 *Green Paper: Building a Capital Markets Union* and the 2015 follow-up *Action Plan on Building a Capital Markets Union*; attempting to strengthen existing policy frameworks – as with three communications that were issued between 2010-2014 setting out ideas for tightening and further integrating the many dimensions of industrial policy; and attempting to promote ideas, discussion and interest as a possible preliminary to getting a new policy area or initiative off the ground – as with the 2005 discussion document A *European Institute of Technology?* that was issued as part of the mid-term review of the Lisbon Process.

But whatever their particular focus, most – though not all – policy initiatives need to be followed up with legislation if they are to have bite and be effective.

* * *

If the Commission is well placed with regard to policy initiation and development, it is even better placed with regard to *legislative initiation and development*, for it alone normally has the power to initiate and draft legislative proposals. The other two main institutions involved in the legislative process, the Council and the EP, can request the Commission to produce proposals, but they cannot do the initiating or drafting themselves. Moreover, after a legislative proposal has been formally tabled the Commission still retains a considerable measure of control, for it is difficult for the Council or the EP to amend it without the Commission's agreement: the Council can only do so by acting unanimously and the EP can only do so in specified circumstances and then only with the support of an absolute majority of its component members. That said, where EP-Council deliberations result in them reaching an agreement the Commission tends to fall in line and to amend its proposals accordingly.

As with the preparation of policy proposals, the Commission makes considerable use of outside sources, and is often subject to considerable outside pressures, when preparing legislative proposals. The preparation of legislative proposals is thus often accompanied by an extensive sounding and listening process, especially at the pre-proposal stage – that is, before the Commission has formally presented a proposal to the Council and the EP. In this process a

barriers and creating a
market. Examples of the
generate a more integ
– as with the 2015
*Markets Union* and the
*Building a Capital Mar*
trengthen existing
communications that
setting out ideas for
ting the many dimens
tempting to promote
a possible preliminar
initiative off the groun
on document A *Europ*
t was issued as part of
oon Process.
cular focus, most – thou
eed to be followed up
e bite and be effective.

*

aced with regard to poli
, it is even better pla
*itiation and develop*
he power to initiate
he other two main ins
ative process, the Coun
Commission to produ
lo the initiating or dra
fter a legislative propos
Commission still retai
ontrol, for it is difficu
o amend it without
Council can only do
he EP can only do so
hen only with the su
of its component me
ncil deliberations resu
t the Commission ten
proposals accordingl
f policy proposals, th
rable use of outsid
o considerable outsid
islative proposals. Th
oposals is thus ofte
sounding and listeni
proposal stage – tha
s formally presented
e EP. In this process a

important role is played by a vast network of advisory committees that have been established over the years.

### The Commission's advisory committee network

The committees are of two main types.

*Expert committees.* These consist of national officials, experts and specialists of various sorts. Although nominated by national governments, the committee members are not normally viewed as official governmental spokesmen in the way that members of Council working parties are (see Chapter 10), so it is usually possible for them to conduct their affairs on a reasonably informal basis. Many of these committees are well-established, meet on a fairly regular basis, and have a more or less fixed membership; others are *ad hoc* – set up, very frequently, to discuss an early draft of a Commission legislative proposal – and can hardly be even described as committees in that they may only ever meet once or twice. In terms of their interests and concerns, some of the committees are wide-ranging, such as the Advisory Committee on Restrictive Practices and Dominant Positions and the Advisory Committee on Community Actions for the Elderly, whilst others are more specialised and technical, such as the Advisory Committee on Unfair Pricing Practices in Maritime Transport and the Committee of Experts on International Road Tariffs.

*Consultative committees.* These are composed of representatives of sectional interests and are organised and funded by the Commission without reference to the national governments. Members are normally appointed by the Commission from nominations made by representative EU-level organisations: either umbrella groups such as BusinessEurope (*sic*) and the European Trade Union Confederation (ETUC) or more specialised sectoral organisations and liaison groups such as the European Tour Operators' Association (ETOA) and the Partnership for Energy and the Environment (EPEE, which represents the heating, cooling and refrigeration industry in Europe). The effect of this appointments policy is that the consultative committees are overwhelmingly composed of full-time employees of associations and groups. As would be expected, agriculture is a policy sector where there are many consultative committees, with over 20 committees for products covered by a market regime plus half a dozen or so more general committees. Most of the agricultural advisory committees have a membership of around 50, but there are a few exceptions: amongst the largest are those dealing with cereals, milk and dairy products, and sugar, whilst amongst the smallest are the veterinary committee and the committee on hops.

In addition to these two types of committees there are many hybrids with mixed forms of membership.

Most of the advisory committees are chaired and serviced by the Commission. A few are serviced by the Council and technically are Council committees, but the Commission has observer status on these so the distinction between the two types of committee is of little significance in terms of their ability to advise the Commission.

The extent to which policy sectors are covered by advisory committees varies. One factor making for variation is the degree of importance of the policy within the EU's policy framework – it is hardly surprising, for example, that there should be many more agricultural advisory committees than there are educational advisory committees. Another factor is the dependence of the Commission in particular policy areas on outside expertise and technical knowledge. A third factor is the preferences of DGs – some incline towards the establishment of committees to provide them with advice, whilst others prefer to do their listening in less structured ways.

The influence exercised by advisory committees varies enormously. In general, the committees of national experts are better placed than the consultative committees. There are a number of reasons for this. First, Commission consultation with the expert committees is usually compulsory in the procedure for drafting legislation, whereas it is usually optional with the consultative committees. Second, the expert committees can often go beyond offering the Commission technical advice and alert it to probable governmental reactions to a proposal, and therefore to possible problems that may arise at a future decision-making stage if certain views are not incorporated. Third, expert committees also have the advantage over consultative committees of tending to meet more regularly – often convening as necessary when something important is in the offing whereas consultative committees tend

to gather on average no more than two or three times a year. Usually, consultative committees are at their most influential when they have high-ranking figures amongst their membership, when they are given the opportunity to discuss policy at an early stage of development, when the timetable for the enactment of a proposal is flexible, and when the matter under consideration is not too constrained by existing legislation.

## Executive functions

The Commission is closely involved in the management, supervision and implementation of EU policies. Just how involved varies considerably across the policy spectrum, but as a general rule the Commission's executive functions tend to be more concerned with monitoring and coordinating developments, laying down the ground rules, carrying out investigations and giving rulings on significant matters (especially in the competition policy area and in respect of applications for derogations from EU law) than they are with detailed 'ground level' policy implementation.

Three aspects of the Commission's executive functions are worth special emphasis.

### *Rule-making*

It is not possible for the treaties or for primary legislation to cover every possible area and eventuality in which a rule may be required. In circumstances and under conditions that are defined by the treaties and/or EU legislation, the Commission is therefore given rule-making powers. This puts the Commission in a similar position to national executives where, because of the frequent need for quick decisions in that grey area where policy overlaps with administration, and because too of the need to relieve the normal legislative process of over-involvement with highly detailed and specialised matters, it is desirable to have truncated and special rule-making arrangements for administrative and technical law. The Lisbon Treaty formalised this distinction between 'political' and 'non-political' legislation, calling the former 'legislative acts' and dividing the latter into 'delegated acts' and 'implementing acts' (see below on delegated and implementing acts).

The Commission used to issue at least 4,000 administrative legal acts per year – in the form mainly of regulations and decisions (see Chapter 13 for an examination of the different types of EU legal instruments). In recent years, however, with the Commission conscious of the growing expectation that it should issue laws only when they are absolutely necessary, the number has fallen to around 1,500 per year, of which about two thirds are 'basic acts' and one-third are 'amending acts'.

Because they are 'non-political' acts, most Commission legislation is confined to the filling-in of detail or to the updating of specifications of various kinds that follow automatically from primary legislation that is made by the EP and Council, or sometimes (but not much, post-Lisbon) just the Council. Much of it concerns Common Agricultural Policy (CAP). Box 9.8, which lists just a few of the many Commission laws that were issued in late June 2016, illustrates the sorts of matters covered in Commission legislation.

But not quite all of the Commission's rule-making powers are confined to the routine and the straightforward. In some areas opportunities exist to make what verges on 'policy' law. For example, in managing EU trade policy the Commission has considerable discretion in deciding whether to apply preventive measures in order to protect the EU market from dumping by third countries. And in applying the EU's competition policy, the Commission has taken advantage of rather generally phrased treaty articles to issue regulations and decisions clarifying and developing the position on, for example, restrictive practices.

Because legislation issued in the name of the Commission can have considerable consequences for member states, a complex set of 'controlling' arrangements were developed over the years that were designed to ensure that, when exercising its rule-making powers, the Commission was not able to be too independent of the Council. The arrangements were based on committees of member state representatives – commonly called 'comitology' committees – that exercised different levels of control over the Commission (see the sixth edition of this book for details).

The comitology system was completely overhauled following the Lisbon Treaty, with the above-noted division of 'non-political' legislation into delegated and implementing acts resulting in the following arrangements:

*Delegated acts* are deemed to be of 'general application to supplement or amend non-essential elements of the original law (Article 290 TFEU). This potential for delegated acts to amend original laws (and the

legal instruments). In
Commission conscious
should issue laws only
y, the number has fall
which about two third
'amending acts'.
litical' acts, most Com
to the filling-in of de
fications of various
rom primary legislat
Council, or sometim
just the Council. M
ricultural Policy (CA
of the many Commissi
une 2016, illustrates
mmission legislation.
mmission's rule-mak
tine and the straightj
ities exist to make
mple, in managing
as considerable disc
ly preventive measu
ket from dumping
the EU's competitio
en advantage of rath
s to issue regulatio
veloping the positio
ices.
n the name of the
ble consequences fo
controlling' arrang
rs that were designe
s rule-making pow
to be too independ
ents were based o
esentatives – com
ees – that exercise
Commission (see
tails).
pletely overhauled
the above-noted
on into delegated
in the following

'general applica
ssential elements'
). This potential
laws (and thus

**BOX 9.8**

## Examples of typical Commission legislation

- Commission Regulation (EU) 2016/1017 of 23 June 2016 amending Annex XVII to Regulation (EC) No 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) as regards inorganic ammonium salts.
- Commission Delegated Regulation (EU) 2016/957 of 9 March 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the appropriate arrangements, systems and procedures as well as notification templates to be used for preventing, detecting and reporting abusive practices or suspicious orders or transactions.
- Commission Implementing Regulation (EU) 2016/1056 of 29 June 2016 amending Implementing Regulation (EU) No 540/2011 as regards the extension of the approval period of the active substance glyphosate.
- Commission Implementing Regulation (EU) 2016/1057 of 29 June 2016 establishing the standard import values for determining the entry price of certain fruit and vegetables.
- Commission Implementing Regulation (EU) 2016/1058 of 29 June 2016 closing the tendering procedure for the buying-in of skimmed milk powder under public intervention opened by Implementation Regulation (EU) 2016/826.
- Commission Implementing Decision (EU) 2016/1059 of 20 June 2016 excluding from European Union financing certain expenditure incurred by the Member States under the European Agricultural Guarantee Fund (EAGF) and under the European Agricultural Fund for Rural Development (EAFRD).

*Source*: *Official Journal of the European Union*, late June 2016.

potentially generate new legal constraints) has resulted in comitology committees being replaced with a *post hoc* control procedure by which, after the adoption by the Commission of a delegated act, the Council and Parliament have the right to directly intervene and reject the act. Whilst this may seem like a powerful control mechanism, in practice the Commission gains considerable latitude, for not only does it no longer need to consult a comitology committee in advance of adopting a delegated act, but the political mobilisation and attention to detail required by the Council and Parliament to overturn a delegated act makes it unlikely that they will do so. Indeed, from the entry into force of the Lisbon Treaty until the end of 2014 the Council and the Parliament each rejected only one delegated act out of approximately 200 adopted over that period.

*Implementing acts* are used when specifications are required for the uniform application of the original law (Article 291 TFEU). Thus, in principle, implementing acts specify what member states need to do in order to implement the original law and do not create new legal obligations. In these cases, aspects of the old comitology system remain in place, but the number of procedures used has been reduced to two: the advisory procedure (in which the Commission is only obliged to take a committee's opinion into account) and the examination procedure (which allows a simple majority of member state representatives on a committee to reject a proposed implementing act and also allows the Council or Parliament to pass non-binding resolutions if either feels the Commission is consistently exceeding its rule-making powers). Clearly this procedure is potentially restricting on the Commission, but in practice it is not unduly so as committees tend to operate on a mainly consensual basis. Indeed, with implementing legislation not usually being put to the vote if the Commission judges it will not be approved, there are very few Commission defeats.

* * *

The arrangements for dealing with 'non-political' legislation can be seen as a means by which the governments of the member states and the EP seek to

ensure the Commission does not become too independent of them. In conceptual terms, the controls on the Commission's ability to make administrative legislation are one of a number of mechanisms and devices found throughout the EU system used by the EU's principals – mainly the national governments, but increasingly also the EP – to maintain control over their agents, especially the Commission. But the importance of the formal controls should not be exaggerated. For the fact is that the Council and the EP are protective of their powers and would move quickly against the Commission if it was thought it was abusing its powers. Moreover, the Council and EP know that that it is just not in the Commission's long-term interests to try and force unwelcome or unpopular measures on them. The Commission wants and needs the cooperation of the Council and EP.

### *Management of EU finances*

On the revenue side of the budget, EU income is subject to tight constraints (see Chapter 23 for an explanation of budgetary revenue). In overseeing the collection of this income the Commission has two main duties: to see that the correct rates are applied within certain categories of revenue, and to ensure that the proper payments are made to the EU by those national authorities that act as the EU's collecting agents.

On the expenditure side, the administrative arrangements vary according to the type of expenditure concerned. The Commission must, however, always operate within the approved annual budget (the EU is not legally permitted to run a budget deficit) and on the basis of the guidelines for expenditure headings that are laid down in multi-annual planning instruments, known as multi-annual financial frameworks (MFFs), on which all EU annual budgets are based. Of the various ways in which the EU spends its money two are especially important in that together they account for over 75 per cent of total budgetary expenditure.

First, there is spending on agriculture and rural affairs, which accounts for over 40 per cent of the annual budget and is used for agricultural support and rural development purposes. This spending draws on two funds: the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD). General management decisions on the use of funds for agriculture – most of which is directed to direct income support for farmers – are taken by the Commission, usually via an appropriate committee made up of representatives of national governments. The day-to-day application of agricultural policy and management decisions occurs at national levels through appropriate agencies.

Second, there is cohesion policy spending, which accounts for over 35 per cent of total EU expenditure. The EU's cohesion policy is aimed at reducing economic and social disparities in the Union, at both national and regional levels. There are three main funds: the European Regional Development Fund (ERDF), the European Social Fund (ESF), and the Cohesion Fund (see Chapter 20 for details). Programming, partnership, co-financing, and evaluation are key principles of cohesion policy. The practical effect of this in management terms is that cohesion policy is based on a tiered system in which the roles and responsibilities of actors, including the Commission, vary at different levels. The key features of the system are: overall strategic decisions are taken by the Council, on the basis of Commission proposals; broad programming decisions for member states and regions are developed jointly between the Commission and member states (with it being left to member states as to who participates on their side, but with regional and local authority involvement expected); implementation decisions are monitored by the Commission but are undertaken through appropriate member state institutional arrangements involving national, regional and local authorities, and also social partners and representatives of civil society.

* * *

Moving beyond the specific aspects of the Commission's financial management functions to look at the overall picture, it is clear that the Commission's ability to manage EU finances effectively is greatly weakened by the fact that the Council and the EP (especially the former) control the upper limits of the revenue base and take framework spending decisions. In the past, this sometimes caused considerable difficulties because it meant that if it became obvious during the course of a financial year that expenditure was exceeding income the Commission could not step in at an early stage and take appropriate action by, for example, increasing the value added tax (VAT) ceiling on revenue or reducing agricultural price guarantees. All the Commission could do, and regularly did, was to make out a case

come support for [illegible]
mission, usually [illegible]
up of representatives [illegible]
y-to-day application [illegible]
ement decisions occur
ropriate agencies.
policy spending, which
t of total EU expendi-
y is aimed at reducing
ties in the Union, at
evels. There are three
Regional Development
n Social Fund (ESF).
Chapter 20 for details
-financing, and evalu-
cohesion policy. The
agement terms is that
tiered system in which
f actors, including the
t levels. The key fea-
strategic decisions are
basis of Commission
decisions for member
d jointly between the
s (with it being left to
icipates on their side.
uthority involvement
isions are monitored
undertaken through
utional arrangements
local authorities, and
tatives of civil society.

ts of the Commission's
to look at the overall
mmission's ability to
s greatly weakened by
EP (especially the for-
the revenue base and
ons. In the past, this
difficulties because it
luring the course of a
as exceeding income
at an early stage and
ample, increasing the
n revenue or reduc-
All the Commission
to make out a case

what should be done. This dependence on the Council and EP remains, but the general situation is not as fraught as it was, because the use of MFFs since [illegible] has meant there have been clearer controls on the growth of both income and expenditure. Another, quite different, factor in weakening the Commission's financial management capability is that it does not itself directly undertake much of the front-line implementation of EU spending programmes and schemes. Rather, it mostly works through external – mainly national and subnational – agencies which, acting on its behalf, execute over 80 per cent of the EU budget.

In response to criticisms (not least by the Court of Auditors) of the misuse of funds, since the early 2000s an ongoing programme of financial management reforms has been underway. Amongst the many changes to procedures and practices that have been introduced are: the adoption of activity-based management and budgeting, to provide for improved financial planning and the better alignment of political priorities and the allocation of resources; the enhancement of accountability procedures within the Commission; a sharper separation between the approval and the auditing of expenditure functions; and less contracting out of implementing functions to private sector agencies (such contracting out had become increasingly common in the 1990s, largely as part of an attempt to deal with Commission under-staffing).

* * *

Before leaving the Commission's responsibilities for financial management, it should also be noted that the Commission has responsibilities for coordinating and managing finances that are not drawn exclusively from EU budgetary sources. For example, it assists in the management of the European Fund for Strategic Investments (EFSI), a fund that was launched by Jean-Claude Juncker when he was appointed Commission President and which became operational in autumn 2015. The EFSI, which draws only modestly on EU funds, seeks to mobilise €315 billion between 2015–18 to generate additional investment in such key areas as infrastructure, research and investment, and small and medium-sized businesses. Other non-budgetary financial management responsibilities include environmental programmes, scientific and technological research programmes, and educational programmes in which the member states are joined by non-member states.

### *Supervision of 'front-line' policy implementation*

The Commission's role with regard to the implementation of EU policies is primarily that of supervisor and overseer. It does undertake some direct policy implementation, most notably in connection with competition policy – which is considered below in the section on the guardian of the legal framework and in Chapter 20. However, the bulk of the practical/routine/day-by-day/frontline implementation of EU policies is not undertaken by the Commission itself but is delegated to appropriate agencies within the member states. Examples of such national agencies are: customs and excise authorities, which deal with most matters pertaining to movements of goods and services across the EU's external and internal borders; ministries of employment, which check working conditions – including health and safety standards in the workplace; and ministries of agriculture and agricultural intervention boards, which are responsible for controlling the volume of agricultural produce on domestic markets and which deal directly with farmers and traders about payments and charges.

To ensure that policies are applied in a reasonably uniform manner throughout the member states the Commission attempts to supervise, or at least hold a watching brief on, the national agencies and the way they perform their EU duties. It is a task that carries with it many difficulties, four of which are especially important.

First, in most policy areas the Commission is not sufficiently resourced for the job. There just are not enough officials in the DGs, and not enough money to contract the required help from outside agencies, to see that the likes of the agriculture, fishing and regional policies are properly implemented. The Commission is therefore heavily dependent on the good faith and willing cooperation of the member states. However, even in those policy spheres where it is in almost constant communication with national officials, the Commission cannot be aware of everything that is going on, and with respect to those areas where contacts and flows of communication between Brussels and national agencies are irregular and not well ordered it is almost impossible for Commission officials to have an accurate idea as to what is happening 'at the front'. Even if the Commission comes to suspect that something is amiss with an aspect of

policy implementation, lack of resources can mean that it is not possible for the matter to be fully investigated. In respect of fraud, for example, there are only around 400 officials, of whom about half are investigators, in the European Anti-Fraud Office (OLAF), which is part of the Commission but which has operational independence to conduct investigations.

The second difficulty is that even when they are willing to cooperate fully, national agencies are not always as capable of implementing policies as the Commission would wish. One reason for this is that some EU policies are, by their very nature, very difficult to administer. The Common Fisheries Policy is one such policy, with its numerous rules on fishing zones, days at sea, total allowable catches, and conservation requiring surveillance measures such as obligatory and properly kept logbooks, port inspections and aerial patrols. Another reason why national agencies are not always capable of effective policy implementation is that national officials are often poorly trained and/or are overburdened by the complexities of EU rules. The jumble of rules that officials have to apply is illustrated by the import levy on biscuits, which varies according to cereal, milk, fat and sugar content, whilst the export refund varies also according to egg content. Another example of rule complexity is seen in respect of the export of beef, which is subject to numerous separate regulations, which themselves are subject to an array of permanent and temporary amendments.

The third difficulty is that agencies in the member states do not always wish to see EU law applied. Competition policy, for example, is rich in such examples, but sometimes there is little action the Commission can take against a deliberately recalcitrant state given the range of policy instruments available to governments that wish to assist domestic industries and the secretiveness with which these can often be arranged.

The fourth and final difficulty is that EU law can be genuinely open to different interpretations. Sometimes indeed it is deliberately flexible so as to allow for adjustments to national circumstances.

## The guardian of the legal framework

In association with the EU's courts, the Commission is charged with ensuring that the treaties and EU legislation are respected. This role links closely with the Commission's executive functions, especially its supervisory and implementing responsibilities. Indeed, the lack of a full EU-wide policy-implementing framework means that its legal watchdog role serves, to some extent, as a substitute for the detailed day-to-day application of policies that at national level involves such routine activities as inspecting premises, checking employee lists, and auditing returns. It is a role that is extremely difficult to exercise: transgressors of EU law do not normally wish to advertise their illegal actions, and they are often protected by, or may even be, national authorities.

The Commission may become aware of possible illegalities in one of a number of ways. In the case of non-transposition or incorrect transposition of a directive into national law this is obvious enough, since directives normally specify a time by which the Commission must be supplied with full details of national transposition measures. A second way is through self-notification. For example, states are obliged to notify the Commission about all national draft regulations and standards concerning technical specifications so that the Commission may satisfy itself that they will not cause barriers to trade. Similarly, state aid must be referred to the Commission for its inspection. Self-notifications also come forward in respect of restrictive business practices because although parties are not obliged to notify the Commission of such practices, they frequently do so, either because they wish for clarification on whether or not a practice is in legal violation or because they wish to seek an exemption (if a notification is not made within a specified time limit exemption is not permissible). A third way in which illegalities may come to the Commission's attention is from the many representations that are made by individuals, organisations, firms and member states who believe that their interests are being damaged by the alleged illegal actions of another party. For example, Germany has frequently complained about the amount of subsidies that many national governments give to their steel industries. And a fourth way is through the Commission's own efforts. Such efforts may take one of several forms: investigations by one of its small monitoring/investigatory/fraud teams; careful analysis of the information that is supplied by outside agencies; or simply a Commission official reading a newspaper report that suggests a government or

or is not doing, something that looks under EU law.

proceedings are initiated against for not notifying the Commission of taken to transpose directives into national non-transposition or incorrect transposition and for non-application or incorrect of EU law – most commonly in con- with the internal market, industrial affairs, agriculture, and environmental and protection. Before any formal action is against a state it is informed by the Commission possible breach of its legal obligations. If, the Commission has carried out an investigation, breach is confirmed and continues, a procedure force under Article 258 TFEU whereby the

deliver a reasoned opinion on the matter giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

Since most infringements have implications for the functioning of the market, the Commission usually seeks to ensure that these procedures operate according to a tight timetable: normally a state is given about two months to present its observations and a similar period to comply with the reasoned opinion.

Most cases, it must be emphasised, are settled at an early stage. So in an average year the Commission issues up to around 1,000 letters of formal notice, 500 reasoned opinions, and makes 150 references to the CJEU. One reason for so many early settlements is that most infringements occur not as a result of wilful avoidance of EU law but rather from genuine differences over interpretation, or from national administrative and legislative procedures that have occasioned delay.

Although there are differences between member states in their enthusiasm for aspects of EU law, most wish to avoid open confrontation with EU institutions. If states do not wish to submit to an EU law it is therefore more customary for them to drag their feet rather than be openly obstructive. Delay can, however, be a form of obstruction, in that states know it could be years before the Commission, and even more the CJEU, brings them to heel. Environmental legislation illustrates this, with most states not having fully incorporated and/or implemented only parts of long-standing EU legislation – on matters such as air pollution, bathing water, and drinking water.

With regard to what action the Commission can take if it discovers breaches or prospective breaches of EU law, that depends very much on the circumstances. Four different sorts of circumstances are set out in Box 9.9.

* * *

As with most of its other activities, the Commission's ability to exercise its legal guardianship function is blunted by a number of constraints and restrictions. Three are especially important:

- The problem of limited resources means that choices have to be made about which cases are worth pursuing, and with how much vigour. For example, only around 100 officials undertake the detailed and highly complex work that is necessary to give effect to the Merger Regulation.
- Relevant and sufficiently detailed information can be difficult to obtain – either because it is deliberately hidden from prying Commission officials or because, as is the case with many aspects of market conditions, reliable figures are just not available. An example of an EU law that is difficult to apply because of lack of information is the 1979 Council Directive on the Conservation of Wild Birds (79/409/EEC), which was amended in 2009 to become an EP and Council Directive (2009/147 EC). Amongst other things, the Directive provides protection for most species of migrant birds and forbids killing for trade and by indiscriminate methods. Because the shooting of birds is popular in some countries, several governments were slow to transpose the Directive into national law and have been reluctant to do much about applying the law since it has been transposed. On the first of the implementing problems – transposition – the Commission can acquire the information it needs since states are obliged to inform it of the measures they have taken. On the second of the implementation problems, however – application of the law by national authorities against transgressors – the

**BOX 9.9**

## What can the Commission do about breaches of EU legislation?

- *Non-compliance by a member state.* Until the entry into force of the Maastricht Treaty in 1993, the Commission was not empowered to impose sanctions against member states that were in breach of their legal obligations. Respect for Commission decisions was dependent on the goodwill and political judgement of the states themselves, backed up by the ability of the Commission to make a referral to the Court of Justice – though the Court too could not impose sanctions. However, the Maastricht Treaty gave the Commission power, when a member state refuses to comply with a judgement of the Court, to bring the state back before the Court and in so doing to specify a financial penalty that should be imposed. The size of the penalty must reflect the seriousness of the legal infringement, the duration of the infringement, and the state's ability to pay (using GDP as an indicator). The Court takes the final decision. The first state to be fined by the Court was Greece, which in 2000 was held to have failed to fulfil its obligations on waste directives and was ordered to pay €20,000 per day until it complied with the Court's judgement. On a much bigger scale, in May 2002 the Commission asked the Court to fine France €242,650 per day for being in breach of EU insurance laws.
- *Firms breaching EU law on restrictive practices and abuse of dominant market positions.* Treaty provisions, legislation, and Court judgements have established a considerable volume of EU law in the sphere of restrictive practices and abuse of dominant market positions. If at all possible, the Commission avoids resorting to law and taking formal action against firms. This is partly because of the ill-feeling that can be generated by open confrontation and partly because the use of law and formal action involves cumbersome and protracted procedures to establish a case. Offending parties are therefore encouraged to fall into line or to reach an agreement with the Commission during the extensive informal processes – which can last several years – that always precede formal proceedings. If, however, informal processes fail, fines and required actions can result. Such was the case in May 2009 when the Commission imposed a fine of €1.03 billion on the US computer chipmaker Intel for 'illegal anti-competitive practices'. Intel had, the Commission concluded after a long investigation, given rebates to major computer manufacturers provided they bought the computers' central processing units (the computers' 'brains') from Intel. This arrangement, in the view of the Commission, left the computer manufacturers with no choice but to buy from Intel and, in consequence, reduced consumers' choice and also discouraged innovation. In the words of the Competition Commissioner, Neelie Kroes 'Intel has harmed millions of European consumers by deliberately acting to keep competitors out of the market for computer chips for many years. Such a serious and sustained violation of the EU's antitrust rules cannot be tolerated' (*EUobserver*, 13 May 2009). In July 2009 Intel launched an appeal against the decision at the EU's General Court, claiming that the fine violated its human rights and also arguing that such fines should only be issued as a result of criminal investigations and not from administrative proceedings. In June 2014, the fine was upheld in its entirety.

Commission has been much less able to make judgements about whether states are fulfilling their responsibilities: it is very difficult to know what efforts are really being made by national authorities to catch shooters and hunters.

- Political considerations can inhibit the Commission from acting as vigorously as it might in certain problem areas and in particular cases. An important reason for this is that the Commission does not normally wish to upset or politically embarrass the governments of member states if this is at all avoidable. The Commission does, after all, have to work closely and continuously with the national governments both on an individual basis and in the Council – on a collective basis, so it needs its interests to operate in a flexible and politically sensitive manner. An example of political pressure inhibiting the Commission in this way is provided by the above-cited Cor[rupt]ive: in addition to [requir]ing information on [Com]mission's sensitive [to] hold it in check in the [in]terests of regularity and politica[l] [cre]ated for some go[ods] [Irish] and Maltese, if a[ll] [the] thousands who break

**continued**

In July 2016, a record fine of €3 billion was imposed on truck makers – Volvo/Renault, Daimler, Iveco, and DAF – after a five-year investigation revealed a 14-year-old cartel to fix prices and pass on the costs of compliance with stricter emission rules. Significantly, one of the truck makers – MAN – was not fined as it was the company that revealed the existence of the cartel.

- *Breaching EU rules on state aid.* The TFEU provides the Commission with the power to take action against what is deemed to be unacceptable state subsidisation of business and industry. This power can take the form of requiring that the state aid in question be repaid, as was the case in October 2015 when Fiat and Starbucks were each required to pay back between €20 million and €30 million to the Luxembourg and Netherlands tax authorities for receiving tax breaks that amounted to state aid which gave them an unfair advantage over competitors.

In what was arguably the most dramatic decision in the whole history of EU competition policy, in August 2016 the Commission decided that Apple, the US technology firm, should repay €13 billion to the Irish government because tax rulings by the Irish authorities had constituted 'an undue advantage that is illegal under EU state aid rules'.

More generally, however, indeed in about 95 per cent of cases investigated by the Commission, state aid applications and allegations result in the aid being authorised.

- *Potential breaches of EU rules on company mergers.* Under the EU Merger Regulation (Council Regulation 4064/89, as amended by Council Regulation 139/2004), the Commission is assigned considerable powers to oversee and vet proposed concentrations between companies that are deemed to have an EU-wide dimension. Information regarding proposed mergers and takeovers above certain limits has to be notified to the Commission. On receipt of the information the Commission must decide within one month whether it proposes either to let the deal go ahead because competition would not be harmed, or to open proceedings. If it decides on the latter it has four months to carry out an investigation, in the course of which it is entitled to enter the premises of firms and seize documents. Any firm that supplies false information during the course of a Commission inquiry, or conducts a merger or takeover without gaining clearance from the Commission, is liable to be fined up to 10 per cent of its annual sales. In practice the Commission normally authorises the proposed mergers that are referred to it, though conditions are often laid down requiring, for example, some of the assets of the merging firms to be sold off. The best known prohibition is the Commission's decision in 2001 not to authorise the proposed €42 billion merger between the US companies General Electric and Honeywell, even though the US authorities had cleared the merger subject only to minor divestment. Explaining the decision, the Competition Commissioner said the companies made too few concessions, too late, and that 'The merger … would have severely reduced competition in the aerospace industry and resulted ultimately in higher prices for customers, particularly airlines' (*The Guardian*, 4 July 2001).

by the above-cited Conservation of Wild Birds Directive: in addition to the practical problem of acquiring information on the killing of birds, the Commission's sensitive political antennae serve to hold it in check in that it is well aware of the unpopularity and political difficulties that would be created for some governments, such as the Spanish and Maltese, if action were taken against the thousands who break this law. Another example of the inhibiting role of political pressures is the cautious line that the Commission has often adopted towards multinational corporations that appear to be in breach of EU competition law: to take action against multinationals is to risk generating political opposition from the member states in which the companies are based, and also risks being self-defeating in that it may cause companies to transfer their activities outside the EU.

## External representative and negotiator

The Commission's roles in respect of the EU's external relations are considered in some detail in Chapter 22, so attention here will be limited simply to identifying the roles. There are, essentially, six.

First, the Commission is centrally involved in determining and conducting the EU's external trade relations. On the basis of Article 207 TFEU, and with its actions always subject to Council approval, the Commission represents and acts on behalf of the EU both in formal negotiations, such as those that are conducted under the auspices of the World Trade Organization (WTO), and in the more informal and exploratory exchanges that are common between, for example, the EU and Japan over access to each other's markets.

Second, the Commission has important negotiating and management responsibilities in respect of the various special external agreements that the EU has with many countries and groups of countries. These agreements take many forms but the more advanced include not only privileged trading conditions but also financial aid and political dialogue.

Third, under Article 220 TFEU, the High Representative of the Union for Foreign Affairs and Security Policy and the Commission (which is rather confusing as the High Representative is a member of the Commission) represent the EU at, and participate in the work of, a number of important international organisations. Four of these are specifically mentioned in Article 220: the United Nations (UN) and its specialised agencies, the Council of Europe, the Organisation for Security and Cooperation in Europe (OSCE), and the Organisation for Economic Co-operation and Development (OECD).

Fourth, the Commission, working closely with the European External Action Service (EEAS – see Chapter 22), has responsibilities for acting as a key point of contact between the EU and non-member states. Over 150 countries have diplomatic missions accredited to the EU, whilst the EU has over 140 delegations and offices abroad. The Commission is expected to help in keeping the diplomatic missions informed about EU affairs, either through the circulation of documents or by making its officials available for information briefings and lobbying. As for the EU's own delegations and missions, they are heavily staffed by officials originally drawn from the Commission and the Council Secretariat (often on a fixed-term basis), plus seconded officials from national diplomatic services.

Fifth, as was shown in Chapter 5, the Commission is entrusted with important responsibilities with regard to applications for EU membership. Upon receipt of an application the Council normally asks the Commission to carry out a detailed investigation of the implications and to submit an opinion. If and when negotiations begin, the Commission, operating within Council-approved guidelines, acts as the EU's main negotiator, except on showpiece ministerial occasions or when particularly sensitive or difficult matters call for an inter-ministerial resolution of differences. When negotiations are completed the Commission makes a recommendation to the Council – in practice to the European Council – as to whether an applicant should be accepted for membership. The whole process – from the lodging of an application for accession – can take years.

Finally, whilst the essentially intergovernmental nature of the CFSP and CSDP mean that the Commission's role in respect of foreign and defence policies is essentially supportive and secondary to that of the Council and is not in any way comparable to the role it undertakes with regard to external trade, it still has a significant part to play. It does so in two particular respects. First, under the post-Lisbon TEU the High Representative is based in the Commission as well as in the Council. Second, the effectiveness of many CFSP policies are highly dependent on the use of policy instruments – concerned often with trade and development aid – that are managed by the Commission.

## Mediator and conciliator

Much of EU decision-making, not least in the Council, is based on searches for agreements between competing interests. The Commission is very much involved in trying to bring about these agreements, and a great deal of its time is taken up looking for common ground that amounts to more than the lowest common denominator. This mediating and conciliating role obliges the Commission to be sometimes guarded and cautious with its proposals. Radical initiatives, perhaps involving what it really believes needs to be done, are almost certain to meet with fierce opposition. More modest proposals on the other hand, perhaps taking the form of adjustments and extensions to existing policies and preferably presented in a technocratic rather than

manner, are more likely to be acceptable. Commission must often subject itself to a grudging incrementalism.

Commission is not the only EU body that seeks to oil the wheels of decision-making. shown in Chapter 10, the Council itself has mechanisms, notably via its Presidency. Commission is particularly well placed to mediator and conciliator. One reason for this it is normally seen as being non-partisan: its may therefore be viewed less suspiciously that come from, say, the chairperson of a working party. Another reason is that in instances the Commission is simply in the best to judge which proposals are likely to command support, both inside and outside the Council. because of the continuous and extensive that the Commission has with interested from the earliest considerations of a policy through to its enactment. Unlike the other institutions, the Commission is represented at virtually every stage and in virtually every forum of the decision-making system.

although there are naturally limitations on what can be achieved, the effectiveness with which the Commission exercises this mediating role can be considerably influenced by the competence of its officials. Whilst, for example, one Commission official may play a crucial role in driving a proposal through a Council working party, another may so misjudge a situation as not only to prejudice the Commission's own position but also to threaten the progress of the whole proposal. Many questions must be handled with care and political sensitivity. When should a proposal be brought forward, and in what form? At what point will an adjustment in the Commission's position open the way to progress in the Council and/or the EP? Is there anything to be gained from informal discussions with the Council Presidency or the EP's rapporteur? These, and questions such as these, call for highly developed political skills.

### Promoter of the general interest

In performing each of the above tasks the Commission is supposed to stand apart from sectional and national interests. Whilst others might look to the particular, it should look to the general; whilst others might look to the benefits to be gained from the next deal, it should keep at least one eye on the horizon. As many have described it, the Commission should be the 'conscience' of the Union.

In looking to the general interest, the expectation is that the Commission should avoid partisanship and should seek to promote the good functioning and cohesion of the Union as a whole. This is seen to require acting in ways that strike a balance, and if necessary reconciles differences, between different actors and interests: for example, between the net contributors to and the net beneficiaries of the EU budget.

Worthy, however, though it may be in theory, this neutral role is difficult to operationalise. One reason why it is so is that it is highly questionable whether such a thing as the 'general interest' exists: there are few initiatives that do not threaten the interests of at least one member state – were this not to be the case there would not be so many disagreements within the European Council and the Council.

In practice, therefore, the Commission tends not to be so detached, so far-seeing or so enthusiastic in pressing the *Union esprit* as some would like. This is not to say that it does not attempt to map out the future or attempt to press for developments that it believes will be generally beneficial. On the contrary, it is precisely because the Commission does seek to act and mobilise in the general interest that the smaller EU states tend to see it as something of a protector and hence are normally supportive of the Commission being given greater powers. Nor is it to deny that the Commission is sometimes ambitious in its approach and long-term in its perspective. But the fact is that the Commission operates in the real EU world, and often that necessitates looking to the short rather than to the long term, and to what is possible rather than what is ideally desirable.

## The Varying (and Declining?) Influence of the Commission in the EU System

Previous sections of this chapter have shown that the Commission has access to a wide range of power resources and draws on these to exercise a very considerable influence in the EU system. Box 9.10 outlines

key factors favourable to the exercise of Commission influence, with particular reference to its ability to provide leadership for the EU.

But whether the influence is quite as strong today as it was in the mid-to-late 1980s and early 1990s – when Jacques Delors was Commission President and new policy programmes were rapidly coming on-stream – is a matter of some academic debate. Certainly there are many commentators who suggest there has been a marked decline in the influence of the Commission since the days when it was leading the march to complete the internal market and was championing such initiatives as EMU and the social dimension. According to this view, there has been a particular diminution in the Commission's initiating role and a corresponding weakening of its ability to offer real vision and leadership. The Commission has become, it is claimed, too reactive in exercising its responsibilities: reactive to the pressures of the many interests to which it is subject; reactive to the immediacy of events; and above all reactive to the increasing number of 'instructions' it receives from the European Council and the Council (see, for example: Bickerton *et al.*, 2015a and b)

**BOX 9.10**

## Circumstances favourable to the exercise of Commission leadership

- When it has strong and clear powers (for example, its competition policy powers are very strong but its defence policy powers are weak).
- When QMV applies in the Council (because the Commission is then less subject to member state control).
- When control mechanisms are weak.
- When there is uncertainty of information amongst the member states (because they are more likely to be susceptible to Commission leadership).
- When there is an absence of strong conflicts in the Council and the EP (because there is less likelihood of a body of opinion being resistant to Commission proposals).
- When there is the possibility of exploiting differences between member states.

Unquestionably, there is something in this view. The explanation for why it has happened lies in a number of factors, which are set out in Box 9.11. Most of these factors have been inescapable, such as the growing power of the European Council and EP and the fact that there is less room for major new policy initiatives as the EU policy portfolio has become ever more crowded. But a few factors have been at least partly avoidable, most notably the damage done to the Commission's status and prestige by the 1999 forced resignation of the College and the poor performances in office of a few Commissioners.

**BOX 9.11**

## Factors explaining a relative decline in the influence of the Commission

- The policy 'pioneering' days are largely over.
- The increasing influence of the European Council.
- The increasing influence of the European Parliament.
- Loss of status: the 1999 crisis, internal College divisions, poor performances in office of a few Commissioners.
- The Commission has suffered some 'defeats' and failures in recent years. For example: it has exercised little influence in recent IGCs; it was unsuccessful in 2005 in preventing a loosening of the Stability and Growth Pact; the economic liberalisation programme has not advanced as far or as rapidly as the Commission has wanted.
- The growing importance of the use of 'new modes of governance' (NMG) – which are based on flexible and non-legislative policy instruments, notably via the open method of coordination (OMC) – has weakened the Commission's influence. This is because the Commission does not have exclusive initiating rights or strong implementing powers in the increasing number of policy areas where NMG is used.
- Like national administrations, the Commission has been affected and infected by prevailing notions of rolling back the responsibilities of public sector organisations and of concentrating on making them more efficient in what they do, not more powerful in what they could do.

the extent to which there has been a decline in ...tion of the Commission should not be exaggerated. Certainly it has had to trim more than it would like, and it has suffered its share of political defeats – ...ant in its wish for stronger treaty-based powers. But it still commands extensive power resources, it ...has key duties to undertake, and in some respects ...powers have actually increased as it has adapted ...to the ever-changing nature of, and demands ...on, the EU. As has been shown, the Commission ...exercises, either by itself or in association with other ...bodies, a number of crucially important functions. ...Moreover, it has been at the heart of pressing the case ...for, and putting forward specific proposals in relation to, many of the major issues that have been at the heart of the EU agenda in recent years, including: ...consolidating and further extending the internal market; defending the eurozone system; promoting the *Europe 2020* strategy for increased economic growth and employment; and creating a comprehensive and effective EU-wide migration policy.

## Concluding Remarks

The Commission is in many ways the most distinctive of the EU's institutions, combing as it does both political and administrative features and responsibilities. Partly because of its distinctiveness, it has been the focus of extensive debate amongst both academics and practitioners.

To the fore in the academic debate have been different views on the extent to which the powers exercised by the Commission are exercised at the behest and on the direction of other EU actors – notably the European Council and the Council – or are exercised in an at least quasi-independent manner. Box 9.12 summarises the 'polar' views taken by contributors to this debate.

Amongst practitioners, debate has tended to be focused mainly on the extent to which an institution that is unelected should be exercising significant powers. For those who are of the view that the independence of member states must be safeguarded as far as possible, the powers of the Commission need to be restricted and the exercise of what powers it has need to be firmly controlled. But, for those who are more integrationist in spirit, a strong and not over-shackled Commission is vital if the EU is to have policies that are sufficiently creative and ambitious to tackle the many policy problems the EU faces.

But whatever position is taken in these and related debates, it is indisputable that the Commission is a core institutional presence in the EU. There are few EU activities in which it is not involved in some significant way. However, the increasingly frequent appearance on the EU agenda of politically sensitive matters, coupled with the desire of national politicians not to cede too much power to others if they can avoid it, has resulted in member states being reluctant to grant too much further autonomy to the Commission. But, nonetheless, the Commission remains central and vital to the whole EU system.

**BOX 9.12**

### The academic debate on the influence of the Commission

There is an extensive academic debate regarding the extent to which the Commission exercises leadership and undertakes its various roles in an independent manner. Broadly speaking, there are two 'polar' views, with variations stretched out in between.

- The 'intergovernmentalist' view sees the Commission as essentially being an 'agent', operating on the basis of guidelines and instructions given to it by its 'principals' – with the governments of the member states operating collectively in the European Council and the Council being the most important principals.
- The 'supranationalist' view sees the Commission as not being so controlled by its 'principals'. Rather, the 'agent' is able to escape control in important respects, as a focus on decision-*making* processes rather than just on decision-*taking* demonstrates.