icy-making in the ropean Union

rachenberg and Alex Brianson

Chapter Contents

- Introduction 198
- The evolving Community method 199
- The ordinary legislative procedure 203
- The open method of coordination 205
- Exploring the open method of coordination in education and training 207
- The implementation of EU policy 209
- Conclusion 211

Reader's Guide

This chapter discusses how policy decisions are taken in the European Union. The chapter begins with an outline of the ways in which such power was originally exercised in the EU and discusses the evolution of the formal balance between the EU institutions over time, drawing particular attention to the increasing legislative power of the European Parliament (EP). Although the Community method remains the core of the EU policy process, the chapter also outlines the ways in which the EU has begun to complement these formal decision-making channels with a range of 'new governance tools' that act to produce coordinated member state action through iterated processes of standard-setting, best practice identification, and knowledge transfer. Particular attention is paid here to the best known of these processes, the open method of coordination (OMC). The final section of the chapter addresses the implementation of EU policy decisions by and in the member states. The chapter closes by assessing current trends in EU decision-making after the EU enlargements of the 2000s and the ratification of the Treaty of Lisbon.

Introduction

Policy-making at the European Union level is complex. All of the member state governments and the EU's **supranational** political institutions, the European Commission and the European Parliament, play very important roles. In certain policy fields, such as monetary policy, particular specialized institutions have the principal parts; in the case of monetary policy, for example, that institution is the **European Central Bank (ECB)**. A wide range of **non-state actors**, such as trade unions, **interest groups**, and non-governmental organizations (NGOs), try to shape policy decisions. Since the 1990s and responding to the expansion of EU policies, numerous agencies with diverse functions (some are quasi-regulatory; others perform specific technical or managerial tasks) have proliferated at the EU level. The **delegation** of functions to agencies such as the European Food Safety Authority (EFSA), for example, aims to facilitate the independent involvement of experts in highly specialized policy areas, to lighten the workload of key institutions such as the Commission and to help the coordination with the member states. Always in the background, however, is the balancing act between the various levels of the system that we know as the EU—that is, the 'European' level, the national level, and the sub-national level (local and/or regional governments). Thus it is possible to identify a *horizontal* and a *vertical* **separation of powers** in the EU.

The elaboration of the classic functions of government in the EU is rather fuzzy (see also Chapter 7). There is clearly a separate judiciary: the Court of Justice of the European Union (CJEU), which includes the European Court of Justice (ECJ) and the (European) General Court (EGC), in conjunction with the national legal systems (see Chapter 12). But the **executive** and legislative functions of the EU are mixed responsibilities. The EU Council and the European Parliament share the legislative function. The task of being the EU's executive—that is, holding responsibility for ensuring that EU policy is carried out properly—is chiefly performed by the Commission (at times in collaboration with regulatory agencies), with the Court also given powers to rule in cases of alleged non-compliance with EU policy by member states, a role that has been enhanced by the **Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG)**. However, the new modes of governance, such as **benchmarking** and **best practice exchange**, allow the member states to coordinate their policies without creating a new common European policy; under these forms of decision-making the member states are also given an executive role, since they are responsible for their own compliance with the measures agreed at EU level.

On the other hand, the *vertical* separation of powers is shaped by the tensions between member state **sovereignty** and the incremental involvement of the EU in areas of policy that were not envisaged by the original **Treaty of Rome**. The principle of **subsidiarity**, which aims to regulate the exercise of **competence** (see Box 14.1), and the detailed description of the allocation of competences between the Union and member states in the Treaty aims to clarify and address the tensions inherent in the fluidity of the EU's multilevel system (see Table 14.1). Thus, in some areas of policy, such as tax, the EU has either no or very few powers. In others, such as agriculture or competition, it has essentially replaced the individual member states as the locus of meaningful power. This balance of power between the EU and its member states changes over time; a case in point is environmental policy, in which the EU initially had no formal powers whatever, but in which it is now often seen as the leading actor in the world (see Chapter 23). The original 'Community method' (see 'The evolving Community method') has thus been considerably revised over time.

The structure of this chapter is as follows. First, and briefly, the chapter explores the evolution of the Community method. Next, it investigates the mechanisms of EU policy-making through an emphasis on the **ordinary legislative procedure (OLP)**. The following section focuses on the recent trend towards 'soft policy', and in particular the most well-known instance, the open method of coordination (OMC). Subsequently we investigate the implementation of EU decisions in the multi-

BOX 14.1 THE PRINCIPLE OF SUBSIDIARITY

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member states, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. National Parliaments ensure compliance with the principle of subsidiarity.

Source: Article 5 TEU.

Allocation of competences between the EU and the member states

Competence?	Policy areas
...clusive competence ...EU may legislate and adopt ...ding acts, the member ...ble to do so only if so ...by the EU or for the ...mentation of EU acts.	**Customs union** Establishment of competition rules Monetary policy for the **euro area** Conservation of marine biological resources under the Common Fisheries Policy (CFP) **Common Commercial Policy (CCP)**
...mpetence between the Union ...member states ...member states shall exercise their ...ence to the extent that the EU ...has not exercised its competence. The ...member states shall again exercise their ...ence to the extent that the ...EU has decided to cease exercising its ...competence.	Internal market Aspects of social policy **Cohesion** policy Agriculture and fisheries Environment Consumer protection Transport Energy Area of freedom, security, and justice Research and technology (R&T) development Development policy
...Competence *to support, coordinate, or* ...supplement the action of the member states The EU shall have competence to carry out actions to support, coordinate, or supplement the actions of the member states, without thereby superseding their competence in these areas.	Human health Industry Culture Tourism Education Civil protection Administrative **cooperation**

Source: Articles 2–6 TFEU.

states. In the conclusion the chapter assesses how well the system is functioning in the EU of 28 member states.

The evolving Community method

John Peterson (1995) divides EU decision-making into two basic types: those of 'history-making' proportions, and those of daily law-making. When it comes to the initial category of really major issues—such as setting out a strategy for the European Union as a whole over a period of years, or agreeing changes to the treaties—member state governments are all-powerful. Meeting at head of state or government level in the **European Council**, they make complex bargains and ensure that the package of proposals that results from such summits is acceptable to all of them, by means of the **unanimity** rule. Thus any member state can veto a proposal that it finds unacceptable, even as part of a bigger compromise package. Recent rounds of proposed treaty change have been prepared by Conventions—that is, gatherings of representatives from the EU institutions, member states, and **civil society**, which have drafted the text of proposed new treaties. These Conventions have been influential in shaping the content of recent treaties, but the power to decide upon what to do with their recommendations remains firmly with the member state governments.

In daily decision-making, Helen Wallace and Christine Reh (2015) identify five policy-making patterns as

a heuristic device to describe the diversity that characterizes the EU. Because policy-making in the EU does not take place in a vacuum, these five patterns reflect experimentation and evolution in the EU over time, different degrees of institutional involvement, different **treaty bases**, changes in national policy-making processes, and the type of decision-making outcome. As shown in Table 14.2, these are: the Community method; the EU regulatory mode; the EU distributional model; intense transgovernmentalism; and policy coordination. The chapter will focus on two of these: the Community method (via the ordinary legislative procedure, or OLP); and policy coordination (via the open method of coordination, or OMC).

Thus, in day-to-day decision-making, the standard operating pattern is now a sharing of formal legislative power between the member states (via the EU Council) and the EP, played out against a backdrop of furious network-building. This process, known as the ordinary legislative procedure (OLP—formerly '**co-decision**'), has had a fundamental impact on the life and relevance of the EP in particular by increasing its legislative role from marginal to co-legislator with the EU Council (see Chapter 11 and Figure 14.1 under 'The ordinary legislative procedure'). However, this emerging standardization of the legislative process is not the whole story, for it is complemented by the increasing use of the so-called 'new' or 'soft' governance tools such as benchmarking or the OMC. These governance tools give essentially no role to either the CJEU or the EP, although they can involve a range of civil society actors, and produce EU decisions of a rather different kind: not legislation, but recommendations, advice on best practice, and guidelines.

The original Community method was famously analysed by David Coombes (1970). He described a mode of **integration** that depended upon a two-way separation of political powers, with the Commission and EU Council enjoying a near monopoly on decision-making and agenda-setting (in other words, getting issues onto the legislative agenda). The EP had extremely few powers. Interest groups were encouraged to lobby, but had no formal powers beyond the rather weak **European Economic and Social Committee (EESC)**. The emphasis was clearly upon 'hard' legislation and although progress was often very difficult to obtain, as witnessed by the **'empty chair' crisis** of the 1960s and the so-called **Eurosclerosis** of the 1970s (see Chapter 1), the system was relatively simple. Unanimity in Council was the decision rule in all legislative decisions.

The process of adapting the Community method began in earnest in the mid-1980s, as part of the drive to complete the single market by adopting the **Single European Act (SEA)**. In order to secure this important objective, the member states agreed to give up their veto powers in a specified range of issues, in recognition that the goal of **market integration** was worth some sacrifice of **national sovereignty** (Sandholtz and Zysman, 1989). This introduced **qualified majority voting (QMV)** to the EU, meaning that only a certain proportion of the member states need to accept a measure for it to obtain the support of the EU Council as a whole. The system allocates a certain number of 'weighted votes' to each member state, roughly in proportion to their population size. From 2014 onwards, a qualified majority requires 55 per cent of the votes in Council, so long as the states in the majority group represent at least 65 per cent of the EU population (Article 238 TFEU). Qualified majority voting does not apply to every area of legislation. Nonetheless, it applies to most of it and constitutes a historic departure from the normal practice of international organizations, in which unanimity is required for all decisions. It has contributed enormously to the success of EU decision-making by making it possible to overcome resistance from a small number of member states when consensus cannot be obtained.

The SEA also paid attention to the EP in order to address certain aspects of the **democratic deficit** (Weatherleigh, 2003), but also to recognize that, through its canny use of its internal rules and few formal powers, the EP was already becoming a more central player in decision-making. The **assent** procedure (now re-labelled the **consent** procedure) was introduced in certain policy areas and this gave the EP the ability to reject, but not to amend, certain proposals. Over time, for the same underlying reasons and also, perhaps, to drive a wedge between the Commission and the EP (Moravcsik, 1999), the powers of the EP have grown (see Chapter 11).

Thus we can see that the legislative system of the EU is a triangle between EU Council, Parliament, and Commission. Formally speaking, no legislative proposal can be made unless it comes from the Commission, which gives the latter significant power over the EU agenda, although both the EU Council and the EP have been known to make successful 'requests' for a proposal to the Commission. The Lisbon Treaty also makes it possible for citizens to ask the Commission to make a legislative proposal via the so-called **citizens' initiative** (Article 11 TEU) (see Chapter 24). Even under the

Patterns of policy-making in the EU

[illegible] pattern	Key features	Typical policy
[illegible]Community	Delegated role to the Commission in policy design, policy brokering, policy execution, and external representation	Aspects of the Common Agricultural Policy (CAP)
	Empowered EU Council through bargaining and package deals	Trade policy (pre-Lisbon Treaty)
	European Parliament (EP) usually has joint decision-making powers with Council under the ordinary legislative procedure (OLP); if not, EP must be consulted before any final decision can be taken	EMU (monetary policy)
	Court of Justice of the European Union (CJEU) has final jurisdiction over all legislation	**European Stability Mechanism (ESM)**
[illegible]ory mode	EU institutions have strong relatively independent decision-making powers	Competition
	Commission acts as agenda-setter, and engages with locked-in **stakeholders**, experts, and agencies to develop **regulation**	**Single market**
	EP and EU Council co-legislate	*Environmental policy*
	CJEU has a significant role in ensuring implementation	Most Justice and Home Affairs (JHA)
		Trade policy (post-Lisbon Treaty)
[illegible]	Commission sets agenda and oversees implementation	Budget
	EU Council is main legislator and decides mainly under unanimity rules	Cohesion policy
	EP has key role in deciding the Budget	
	CJEU has marginal role	
[illegible]mentalism	Right of policy initiation not exclusive to Commission, but also held by member states	Common Security and Defence Policy (CSDP)
	EP in weak consultative position (with regard to consent to international agreements)	
	Focus on cooperation rather than law-making	
	Intensive interaction between governments	
	Decisions made by European Council or Council of Ministers (unanimity)	
	CJEU excluded	
[illegible]coordination	Open method of communication (OMC) is main policy-making instrument	Employment
	Focus on benchmarking best practices in decentralized approach	aspects of **fiscal policy**
	Commission plays increasingly important monitoring and **agenda-setting** role	Economic governance
	Policy goals and guidelines set by EU Council (unanimity)	
	Member states submit to Commission and Council annual reports on their progress	
	EP excluded	
	CJEU plays marginal role	

Source: adapted from Wallace and Reh (2015: 97–111).

Table 14.3 Types of legal act of the EU (Article 288 TFEU)

Type of legal act	Legally binding?	On whom?
Decision	Yes	The specific group or person concerned, for example, a particular member state or firm
Regulation	Yes	All member states, regarding both the substance of the decision and the manner of its implementation
Directive	Yes	All member states regarding substance, but with the manner of implementation at the discretion of the member state
Recommendations and opinions	No	All member states and specific groups concerned

the Commission plays a key role in the early stages of the decision-making process, and is able to shape the positions adopted by the EP and the EU Council. At the other end of the process, formal decisions about the content of policy are left to the EU Council and EP.

Four types of EU legal act result from this legislative process: regulations; **directives**; decisions; and recommendations and opinions. These differ in the degree to which they are binding on the member states or the specific legal persons to whom they are applied but there is no formal hierarchy between them. In other words, directives are not superior to recommendations or opinions (see Table 14.3). Most EU policy is regulated in the form of directives, which gives the member states the maximum leeway on issues of implementation. This is important to note because it allows the different national systems to find their own methods of achieving an agreed common goal. It also means, however, that the EU institutions have fewer powers to oversee implementation of policy than might otherwise be the case.

Additionally, the Lisbon Treaty established two new categories of acts: delegated and implementing acts. Delegated acts allow the Commission to adopt non-legislative secondary measures to supplement or amend non-essential elements of a legislative act (Article 290 TFEU). Implementing acts confer implementing powers to the Commission—in other words, the Commission is able to adopt the implementing measures for a legal act, 'where uniform conditions for implementing legally binding Union acts are needed' (Article 291 TFEU). But such implementing powers are defined by the EP and the EU Council acting under the OLP. These categories were introduced to distinguish between secondary measures that are quasi-legislative (delegated acts) and secondary measures that are executive in nature (implementing acts). The political impact of such innovation is twofold. Firstly, it strengthens the executive functions of the European Commission. Secondly, this distinction is problematic because while it works on paper it is difficult to realize in practice. In other words, it is difficult to establish early in the drafting of a legislative measure whether it will require secondary measures which are either delegated or implementing. This may lead the Commission, Council and EP to favour one or the other depending on which one 'maximizes their input/control and hence is optimal from their perspective' (Craig and de Búrca, 2011: 120; see also Chapter 24).

KEY POINTS

- Decision-making in the European Union is complex. This complexity derives primarily from the vertical and horizontal separation of powers.
- There are five categories of policy-making that describe how decisions are made in the EU: the Community method; the EU regulatory mode; the EU distributional mode; intense transgovernmentalism; and policy coordination.
- The Community method began as a two-way separation of powers at EU level, between the Commission and the Council, and with unanimous voting required in the Council. Over time, the Community method was adapted to introduce two very significant new components: qualified majority voting (QMV) and a co-legislative role for the European Parliament.
- Regulations, directives, decisions, recommendations and opinions are the legal acts enacted by the EU.

The ordinary legislative procedure

After the Lisbon Treaty, what was formerly known as the co-decision procedure became the ordinary legislative procedure (OLP). To understand the OLP, it helps to remember that it is a *process* and that what happens at one stage of the process has an impact on what happens at the next stage, either by opening up new possibilities or by restricting the scope for action. Equally, not all stages of the procedure will be engaged in for a given legislative act; in other words, since 2009, 81 per cent of legislation has been agreed at the first reading stage (UK Parliament, 2014) This process is reflected in the idea of the 'policy chain', which is a metaphor for the interlocking stages of the decision-making process as the particular issue moves from conception to implementation amidst complex feedback loops and inter-linkages (Hudson and Lowe, 2004; Versluis et al., 2011). A typical process for a new EU directive would take place roughly as described in Figure 14.1.

Given the fuzzy separation of powers in EU decision-making both horizontally (at EU level) and vertically (between the EU and national/sub-national levels), it is unsurprising that the decision-making process is characterized by a scramble for influence. This process of *hustling* (Warleigh, 2000) begins before the proposal is published, as actors with an interest in the subject of the proposed legislation attempt to shape its content right from the outset if they are aware it is in gestation. As explained when discussing the Community method, the Commission has the right of legislative initiative, but it is open to input from member states and the European Parliament, and is expected to consult widely with interest groups and civil society. The Commission must also achieve an internal agreement between all of its Directorates-General (DGs) about what should be included in the proposal, reconciling what can often be divergent intra-institutional preferences.

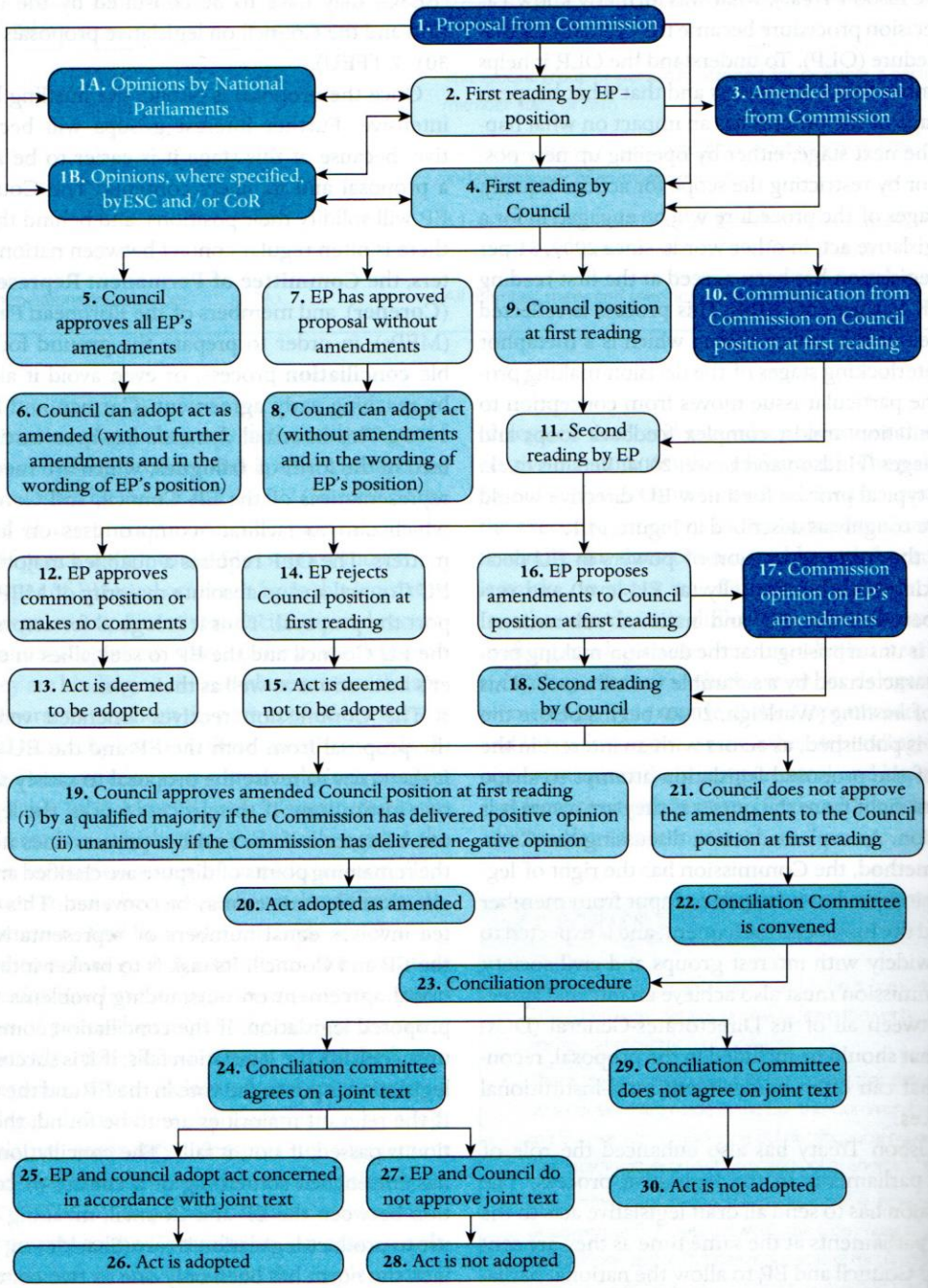
The Lisbon Treaty has also enhanced the role of national parliaments in the legislative process. The Commission has to send all draft legislative acts to the national parliaments at the same time as they are sent to the EU Council and EP, to allow the national parliaments to establish whether the draft legislative texts comply with the **subsidiarity** principle. In their role as 'watchdogs' of the principle of subsidiarity at an early stage of the decision-making procedure, national parliaments are able to contest the legality of the draft legislation (Protocols 1 and 2 TEU). Depending on the policy area, the **Committee of the Regions (CoR)** and the European Economic and Social Committee (EESC) may have to be consulted by the Commission and the Council on legislative proposals (Articles 301–7 TFEU).

Once the proposal is public, the hustling becomes intensive. Further interest groups will become active, because at this stage it is easier to be aware of a proposal and its likely contents. The Council and EP will solidify their positions, and behind the scenes there is often regular contact between national ministers, the **Committee of Permanent Representatives (Coreper)**, and members of the European Parliament (MEPs), in order to prepare the ground for a possible **conciliation** process, or even avoid it altogether by reaching early agreement (Garman and Hilditch, 1998). This informal dynamic has been institutionalized in the form of **trilogues**, which are meetings of representatives of the EP, Council, and Commission which aim to facilitate compromises on legislative matters. The OLP requires a qualified majority in the EU Council and an absolute majority of MEPs to support the proposal. Thus it is logical for actors in both the EU Council and the EP to seek allies in each other's institutions as well as their own.

The Commission receives amended versions of the proposal from both the EP and the EU Council. It then tries to revise the proposal to satisfy the other two institutions. If this process works, the legislation can be agreed; if the revision process does not work, the remaining points of dispute are clarified and a **conciliation committee** may be convened. This committee involves equal numbers of representatives from the EP and Council. Its task is to broker inter-institutional agreement on outstanding problems with the proposed legislation. If the conciliation committee is unsuccessful, the legislation falls; if it is successful, the legislation is put to the vote in the EP and the Council. If the relevant majorities are to be found, the legislation is passed; if not, it falls. The conciliation process has entrenched something of a culture of collaboration between the EP and Council, meaning that failure to produce legislation is rare (Shackleton, 2012). In fact, the norm has been only one or two conciliations per year. In the first half of the seventh legislature (July 2009–December 2011), for example, seven files (four per cent of the total) went through conciliation (European Parliament, 2015).

Once the legislation is agreed, the member states implement it according to their own national systems

Figure 14.1 The ordinary legislative procedure (OLP)



Source: European Commission 2012, http://ec.europa.eu/codecision/stepbystep/diagram_en.htm.

...but with a care to ensure that the agreed ... met by each of them. Where implementa... complete, member states can be prosecuted ... Court of Justice under **infringement proceed...** (Chapter 12). That said, the Commission has ... to inspect policy implementation, except in ... and agriculture policies, so it is, in reality, ... of citizens or interest groups to report prob... the Commission, which then decides whether ... is sufficient, and the political climate con... to such a challenge (Alter, 2001). Such cases ... and since the **Maastricht Treaty** the Court ... the right to impose fines on member states for ... compliance.

...um, the OLP policy chain is complex, but suit... for producing workable policy. Despite its intri... it is able to involve a great array of actors, and it ... proven to be capable of both evolving over time ... extending its application to growing numbers of ... areas.

KEY POINTS

- In the ordinary legislative procedure, the Commission has the right of initiative and is the main agenda-setter.
- The main co-legislators are the EU Council and the EP.
- Other advisory committees, such as the EESC or the CoR, may be consulted.
- In day-to-day policy-making, the key for success is the formulation of a **policy network** that can broker an alliance between the necessary range of institutions and non-state actors to secure the required majority in the EU Council and EP.

The open method of coordination

We now turn to another way in which daily decision-making occurs in the European Union—namely, through 'new modes of governance' (NMGs) and, in particular, the open method of coordination (OMC). The label 'new' might be considered misleading, because while a specific form of governance might be new to the European level, it may have existed for years at national or at international level, such as in the **Organisation for Economic Co-operation and Development (OECD)**. It might be new in a given EU policy area, but not unprecedented in the EU system as a whole; a new mode of governance may be used in combination with other NMGs, or even with the Community method, in a particular issue area. How we study EU governance conceptually has implications for what we see and for what we consider to be 'new' here (Smismans, 2006a).

Moreover, while NMGs can be understood to include any form of policy instrument that deviates from the classical Community method (Scott and Trubek, 2002), others are rather similar to it, so it is right to argue that the distinction between new and old, or hard and soft, modes of governance is one of degree rather than of category (Laffan and Shaw, 2006). Furthermore, these NMGs are not a homogeneous group, because they include a variety of policy-making instruments, such as **framework directives**, **soft law**, **co-regulation**, partnership models, **voluntary agreements**, and the **European Social Dialogue** (see Chapter 13 and Chapter 19). While these policy instruments differ from each other, they all have certain common characteristics. New modes of governance are essentially voluntary and informal means of cooperation that establish frameworks in which policy issues can be discussed and negotiated. Because they are a form of 'soft law', they do not impose legally binding action or detailed obligations on the member states or national social partners, and they can be easily adapted to national circumstances. They promote **flexibility** and participation, which can lead to knowledge creation and perhaps to more effective policy, through deliberation. They are often applied in policy areas in which the national situation differs substantially or in which limited competences at EU level exist.

By the 1990s, the EU had reached the point at which the integration process was approaching core areas of national sovereignty for the welfare state, such as employment and social policy. Many actors considered that further EU activity in these areas was necessary to balance the economic integration process, but member states nonetheless remained wary about yielding more sovereignty in these areas (see Chapter 19). Thus an alternative to the Community method was required so that the EU could play a role without threatening what is often highly prized diversity in these issue areas at national level (Borrás and Jacobsson, 2004; see also Box 14.2). In this context, the development and use of the OMC can be seen as a compromise, because it retains member state responsibility for a policy area, while giving the EU a coordinating and possibly policy-shaping role that member states could accept.

BOX 14.2 CORE FEATURES OF THE OPEN METHOD OF COORDINATION

Participation	More and different actors participate in the policy-making process.
Multilevel	Policy coordination involves actors from various levels of the political system.
Subsidiarity	Policy design is decided at the lowest, most appropriate level.
Deliberation	Policy learning and policy transferability are part of the policy-making process.
Flexibility	The use of soft law ensures the flexibility to adapt policy strategies quickly if needed.
Knowledge creation	Some NMGs use tools such as benchmarking or peer review, which can lead to the creation of new knowledge.

The OMC was created as a package by the 2000 European Council meeting in Lisbon on the basis of various existing instruments from previous processes such as the **European Employment Strategy (EES)** (European Council, 2000). The OMC is a voluntary and informal mode of **intergovernmental** cooperation, which does not impose policy solutions or proposals on the member states and which can easily be adapted to national circumstances. It is designed to be a method of benchmarking best practices in a decentralized approach in line with the principle of subsidiarity (European Council, 2000). The OMC has now been introduced as a form of policy-making in various policy areas. However, there is no uniform OMC process, because different policy areas apply the method according to their particular circumstances (see Box 14.3). There are several factors explaining the variation in OMC processes, including: whether or not there is a (strong) treaty provision in the area of policy concerned; the role of the different institutions; the extent to which other actors can participate in the process; the existence of benchmarks, indicators, and targets; and the possibility of sanctions.

It is difficult to assess the success or otherwise of the OMC, both because it has been operational for a relatively short time and because it exists in several variants. However, analysis of the literature suggests that there are a number of areas in which improvements can be made. These include stakeholder participation, learning potential, the role of policy institutions, and **transparency**. Achieving better stakeholder participation is particularly important, since this is supposed to be a core benefit of the OMC; the recent **Europe 2020** project has recognized this deficit and attempts to correct it, as does the operational practice of several OMC groups.

In order to outline the specificities of an OMC process, the development and functioning of the OMC in the education and training (E&T) policy area will be examined in more detail. Very often, the OMC in employment is used as a case study, because it is the oldest OMC process, with a strong **legal basis** that existed even before the Lisbon Strategy was launched. However, this chapter proposes examining the potential of the OMC as a mode of governance in E&T policy because this is more illustrative of OMC in practice.

BOX 14.3 THE IDEAL-TYPE OMC, AS DEFINED BY THE LISBON STRATEGY

The open method of coordination takes place in areas that fall within the competence of the member states, such as employment, social protection, social inclusion, education, youth, and training. This method has several steps, as follows:

1. Fixing guidelines for the Union, combined with specific timetables for achieving the goals that they set in the short, medium, and long term.
2. Establishing, where appropriate, quantitative and qualitative indicators and benchmarks against the best in the world, tailored to the needs of different member states and sectors as a means of comparing best practice.
3. Translating these European guidelines into national and regional policies by setting specific targets and adopting measures, taking into account national and regional differences.
4. Periodic monitoring, evaluation, and peer review, organized as mutual learning processes.

Source: European Council (2000).

very lightly **Europeanized** policy area, limited legal base for EU action, and an al- EU role prior to the Lisbon European

NTS

important to problematize what is really 'new' about odes of governance'.

odes of governance are usually voluntary informal ways of taking decisions, which provide rks for negotiation and deliberation.

pen method of coordination was an EU compromise, ich allowed EU involvement in policy areas over which ber states did not want to lose control.

difficult to assess the impact of the OMC, because it still a relatively new policy instrument.

Exploring the open method of coordination in education and training

Education and training (E&T) is an intriguing policy area in which a combination of circumstances limits the choice of possible tools and forms of cooperation. First, there is a treaty base (Articles 165 and 166 TFEU) that grants the European Union only supporting competences, excluding legally binding Community initiatives. Second, the enormous diversity of national E&T systems makes **harmonization** particularly difficult even if there is sufficient political will. Consequently, the work of the EU in the field of education and training was limited until the late 1990s to carrying out European education programmes such as **Erasmus**, and no real policy-making took place. At the end of the 1990s, the first attempts were made to improve cooperation in E&T by adopting the 'rolling agenda', which ensures that the EU Council pays ongoing attention to E&T issues, especially regarding employment, the development of quality standards, and professional mobility, and by establishing networks outside the EU framework, such as the **Bologna Process** in higher education. However, it was not until the European Council in Lisbon in 2000 that policy-making really started. This European Council meeting formulated two imperatives relevant to E&T: first, it set the goal for the EU 'to become the most competitive and dynamic knowledge-based economy in the world', thereby creating an important link between education and employment policies and making improvements in E&T a necessity for the EU's competitiveness; and second, the European Council required the EU to 'undertake a general reflection on the concrete future objectives of education systems'. This arguably amounts to the member states giving themselves permission to overstep the explicit treaty base in order to realize their new objectives, while avoiding binding legislation (Hingel, 2001).

In general terms, the open method of coordination (OMC) in E&T functions in a very similar way to the template created at Lisbon. The member states define common objectives and benchmarks, and work on them according to an agreed programme and timetable. Working groups and peer learning activities allow participants to identify common priorities, best practices, and to learn from each other to address common challenges. This is supported by continued checking and monitoring on the implementation, which happens through a reporting exercise. The current work programme Education and Training 2020 (ET2020) holds all of these elements together by serving as the framework for the OMC in E&T. We will use it as an illustrative example of the OMC at work.

The ET2020 is inspired by **Europe 2020**, the EU's growth strategy for the decade leading up to 2020, and which includes education and employment among its objectives. Thus in the context of E&T, member states have agreed four common objectives to be met by 2020:

- making lifelong learning and mobility a reality;
- improving the quality and efficiency of education and training;
- promoting equity, social cohesion, and active citizenship;
- enhancing creativity and innovation, including entrepreneurship, at all levels of education and training.

To achieve these goals, the ET 2020 Working Groups are concerned with primary and secondary education, higher education, adult learning, vocational education and training, and transversal key competencies, namely entrepreneurship, digital skills, and languages. Each ET2020 Working Group has a specific mandate detailing the challenges the group needs to address, the outputs to achieve, and the overall roadmap. It

is within these expert working groups' composed of Commission, member states, representatives, and, sometimes social partners, that the learning occurs. To monitor member states' progress to achieve these objectives, a number of benchmarks have been agreed for E&T:

- at least 95% of children (from four to compulsory school age) should participate in early childhood education;
- fewer than 15% of 15-year-olds should be underskilled in reading, mathematics, and science;
- the rate of early leavers from education and training aged 18–24 should be below 10%;
- at least 40% of people aged 30–34 should have completed some form of higher education;
- at least 15% of adults should participate in lifelong learning;
- at least 20% of higher education graduates and 6% of 18–34-year-olds with an initial vocational qualification should have spent some time studying or training abroad;
- the share of employed graduates (aged 20–34 with at least upper secondary education attainment and having left education 1–3 years ago) should be at least 82%.

Source: European Commission (2015) Strategic framework—Education & Training 2020, available online at http://ec.europa.eu/education/policy/strategic-framework/index_en.htm (accessed 9 June 2015).

The Commission's annual Education and Training Monitor sets out the progress on the ET 2020 benchmarks and it is accompanied by 28 individual country reports. The Commission's document is potentially more critical and perhaps negative, because it is purely Commission-driven. This is the main 'naming and shaming' instrument used to encourage laggards to catch up (European Commission, 2015). National reports are submitted by the member states, and their representatives are involved in the whole reporting process, both before and after collecting the data.

The Commission and the EU Council are the main actors in the OMC in E&T. At first sight, the Council has by far the most significant role, since it has both the first word, deciding on the objectives, indicators, and benchmarks, *and* the last word, adopting the reports and Council conclusions. However, the role of the Commission should not be overlooked, because the Commission is often the initiator, driver, and main agenda-setter in the OMC process. The role of the European Parliament in the OMC in E&T, on the other hand, is very limited, because it is only informed of decisions. While the involvement of non-state actors besides government representatives is officially promoted, the practical participation of social partners, regional governments, and civil society at large depends very much on the national traditions and political structures in the member states. For example, federal states usually involve their regions in the OMC processes more fully than more centrally organized member states.

Although it is difficult to quantify the impact of OMC measures in E&T policy, it is fair to say that the OMC in E&T has substantial consequences for policy-making at both European and national levels, albeit with a significant degree of variation between the member states, and with clear limits to the convergence of national policies and systems (Warleigh-Lack and Drachenberg, 2011). Some member states already had policy in keeping with the emerging European consensus and thus needed to change less; in some cases, member states have adopted the new EU standards as their own national equivalents; in other cases, member states have been somewhat cavalier in their approach to the OMC. However, the OMC has shifted the context in which member states make policy on E&T issues and has locked in a new link to competitiveness rather than social policy. Furthermore, national E&T policy-making is increasingly regarded as having joint objectives in a European context: as an illustration, the European qualification framework led, in many member states, to the voluntary creation of national qualification frameworks.

While using the OMC in the E&T policy area has not led to the transfer of any formal competences to the EU, it is also indisputable that the Commission has gained significant influence in this field (Warleigh-Lack and Drachenberg, 2011). There is now a substantial increase of policy output at European level in E&T as a direct consequence of this form of governance (European Commission, 2008b). Moreover, there has been a clear uploading of national issues and approaches via the OMC in this area, such as that by Belgium and France on 'equity' and teacher education.

In sum, while the OMC in E&T is a relatively 'soft' and 'weak' way of making policy decisions, it is a successful one. EU cooperation and policy-making in E&T have significantly increased over the last

Commission has gained an important
The OMC has led to more political com-
member states towards cooperation
European level—a major change to the
2000 Lisbon European Council.
and EU Council have confirmed
the continuation of the OMC in this
lowing the substantial political momen-
gained over the last ten years. Certain
proposed, in order to address some of the
and shortcomings. The strategic objectives
and working methods are supposed
including strengthening of the peer
activities.

POINTS

- The open method of coordination instrument is used differently according to the specific conditions of the policy areas, and thus the OMC template provided by the Lisbon Strategy is not always followed entirely. Consequently, there is not one OMC, but many.
- The Commission has established for itself a significant role as initiator, driver, and agenda-setter in the OMC, at least in the area of education and training.
- European integration in the E&T policy area has increased significantly since using the OMC as a governance form, indicating that the OMC can be a successful means of deepening the integration process.
- The policy tools under the original Lisbon Strategy have been updated as part of the recent Europe 2020 strategy.

The implementation of EU policy

The implementation of EU policy is a key part of the policy-making process, since it is what member states do—or fail to do—in this stage of policy-making that determines the real-world impact of the EU as a legislator. For Versluis et al. (2011: 181), implementation in the EU context can be understood as 'the member states putting into effect EU laws and regulations'. This definition is only straightforward on the surface, since, as the same authors point out, the EU political system contains at present 28 member states, and thus 28 implementation systems. Similarly, although once the decision-making process is complete at EU level the baton passes to the member states to implement EU policy, there are aspects of implementation that are still carried out at the European level. The chapter has already discussed the role of the European Commission in implementing acts, but as guardian of the treaties, it is also entrusted with overseeing the proper and uniform implementation of EU legislation in the member states. Thus through the infringement procedure, the Commission engages in legal action through the Court of Justice of the EU if the administrative part of the procedure has not succeeded in addressing a member state's incorrect transposition or lack of it (see Chapter 12). To ensure the uniform implementation of legislation in the member states, the Commission is supported and some would argue controlled by the **comitology** committees. These are composed of member states' representatives and chaired by the Commission, and their role is to develop implementation measures that are subsequently adopted by the member states. Their role has developed from taking technical decisions quickly and efficiently to a system that takes increasingly more important and sensitive decisions (see Chapter 7 and Chapter 24). Finally, some implementation tasks are carried out by independent agencies.

It is not easy to generalize about how well EU policy is implemented, or to assess the EU's strength in policy enforcement capacity, for three core reasons. First, the different forms that EU legislation takes leaves the member states different amounts of leeway when it comes to policy implementation (see Table 14.3). Regulations impose not only the objectives of the legislation, but the manner in which they must be implemented. Directives, not to mention the OMC, give member states far more room for manoeuvre. Consequently a certain degree of variation is to be expected. Second, the EU institutions have powers to inspect national implementation of EU legislation in only two issue areas: competition policy, and the Common Agricultural Policy (CAP). These powers are unusual in an international organization, and contribute to the case made by analysts who class the EU as a polity in its own right; they are also important because they apply to both a key aspect of the EU's work—competition policy is at the heart of the single market—and a key area of its spending: CAP takes up roughly 40 per cent of the EU's budget. However, they are also limited; they do not apply, for example, to EU environment policy, let alone EU security cooperation.

Third, the legal system and opportunity structures are as Janus-faced as their political equivalents. Legal scholars have studied the creation of the EU's novel legal order for decades, and have shown how the CJEU

has been active in creating this system. However, given the EU's limited powers to inspect policy implementation, it is often in reality the task of citizens or interest groups to report problems to the Commission, which then decides whether the evidence is sufficient, or the political climate conducive, to such a challenge (Alter, 2001).

The political science literature, then, both sounds notes of caution and suggests a range of explanations of the EU's record in policy implementation. Indeed, one of the core projects of the extensive Europeanization literature has been understanding the varied impact of EU policy and policy-making on the policy, administrative structures and processes, and actors of the member states (for example, Bulmer and Lequesne, 2005; Graziano and Vink, 2007; see also Chapter 8). In order to explore these issues, several scholars have undertaken case studies of specific policy areas such as environmental policy (Haas, 1998; Knill and Lenschow, 2008) or employment policy (Falkner et al., 2004; Falkner and Treib, 2008). Matters such as the role of European agencies in policy implementation (Versluis and Tarr, 2013) and (non-) compliance in EU cohesion policy (Blom-Hansen, 2005) have also been addressed. Still other scholars take a more macro/quantitative perspective, looking across policy areas at the total number of infringement cases to discern patterns (Börzel et al., 2010). The existing research thus combines in-depth case studies with more generalizable analyses. So far, the two approaches reveal a limited symmetry of findings. For instance, the Working Time and Equal Treatment directives case study examined by Falkner and Treib (2008) put Luxembourg together with France, Greece, and Portugal in the category of 'world of transposition neglect', while the findings of Börzel et al. (2010), based on analysis of EU infringement procedures between 1978 and 1999 across all policy areas, place Luxembourg among the top group of policy implementers, while considering France, Greece, and Portugal as laggards.

Many scholars today agree that several of the early assumptions of investigators of EU policy implementation have not been as useful as had been hoped. For instance, the promising concept of 'goodness of fit', which posits that the level of Europeanization of a given national policy depends on how radical a change it requires of that existing policy, has proved of limited explanatory capacity (Mastenbroek, 2006). Neither does it appear that 'new' member states regularly implement EU legislation less well than their 'older' counterparts (Falkner and Treib, 2008), that Eurosceptic countries implement less well than those whose elites are more pro-European (Börzel et al., 2010), or that federal states, whose domestic political structures are more complex and offer more opportunity for actors who so wish to create barriers to implementation, are less good at implementation than unitary states (Börzel et al., 2010).

What, then, can be said about the extent to which member states fail to implement EU legislation fully, or the reasons why they do so? Scholars tend to emphasize that there is in all likelihood no single reason or explanation—member state A and member state B might both fail to implement the same policy fully, but for different reasons (Falkner et al., 2004). Reviewing the literature, these are the most likely explanations for implementation gaps or non-compliance. The first two are forms of voluntary non-compliance, that is, the result of deliberate choice. The remainder are forms of non-voluntary failure to implement policy, in which state actors lack not the will, but the capacity.

1. *Opposition to European policy*: Sometimes called opposition through the backdoor (Falkner et al., 2004), this refers to the situation where a member state tries to change or delay policy in the implementation phase, in order to circumvent the failure of its attempt to block the legislation earlier in the policy-making process. This explanation is intuitively attractive, but must be able to explain how member states which are often the most awkward or critical players during the decision-making process, such as the UK, are then among those with the best implementation track record.
2. *Number of veto players*: If too many strong national veto players exist, the member state government may not have the strength or the will to implement an unpopular European policy (Haas, 1998). Therefore, EU countries with higher numbers of veto players may have more implementation problems than member states with fewer veto players.
3. *National administration shortcomings*: Lack of state administrative capacity and resources can cause poor policy implementation. However, it is also the case that some of the richer member states with greater capacity in this regard are

ss well than their
eib, 2008), that Eu
s well than those
n (Börzel et al., 20
nestic political str
more opportunity
rriers to implemen
ation than unitary

bout the extent to
nent EU legislation
so? Scholars tend t
elihood no single
ate A and member
ent the same policy
kner et al., 2004). Re
the most likely expl
aps or non-compli
luntary non-compli
ate choice. The re
ary failure to imple
lack not the will, but

icy: Sometimes called
ackdoor (Falkner et
e situation where a
nge or delay policy in
e, in order to circumv
to block the legislation
ng process. This
attractive, but must be
ber states which are
or critical players during
ess, such as the UK, are
he best implementation

oo many strong
, the member state
e the strength or the
opular European policy
EU countries with
layers may have more
s than member states

ortcomings: Lack of
city and resources can
nentation. However, it
of the richer member
ty in this regard are

worse at implementation than their smaller counterparts (Börzel et al., 2010). argue that differences in the 'regulatory for example, the interaction between istrative and societal actors) and 'regulatory structures' (such as centralization versus centralization as well as concentration versus fragmentation) explain the variations between member states in policy compliance (Knill and Lenschow, 2008).

linkages: Here the implementation can either be aided or burdened by transposing the specific European legislation together with other pieces of legislation for political purposes, whether they are thematically related or not. This would also be the case for 'gold-plating'; that is, making specific European requirements even more stringent or bureaucratically complicated when transposing the directive into national law (European Parliament, 2014).

Interpretation differences: Due to the fact that some European legislative texts are rather vague, this leads to the possibility of diverse interpretations at national level of the exact meaning of the legislation, which in turn opens a doorway to implementation failure or variation in the quality of implementation.

6. *(Political) Cultural differences* between member states regarding policy enforcement: This possible explanation examines the general view in a member state society regarding policy implementation (Börzel et al., 2010); the focus is on whether general social norms about the importance of compliance with national law simply carry over to that of the EU, and whether the existence of an active civil society improves implementation levels, since in such states citizens are well-placed to know that the EU legislation in question exists and mobilize in its favour.

Thus, research regarding policy implementation remains a very challenging area, not least because of the need for sufficient empirical data for all the member states in order to confirm or reject theoretical explanations for the implementation gaps and variation.

Conclusion

Recent years have seen several important changes to the EU system, in terms of both its geographical extent (the latest rounds of enlargement) and its institutions (with the Lisbon Treaty). In this final section of the chapter, we assess how these changes appear to have shaped the EU decision-making process and context so far.

The first point to make is that the European Union continues to make policy decisions in a range of complex ways, and that the difference between 'history-making' and quotidian decision-making remains. New treaties are still agreed by the member states only; the same goes for setting EU strategic directions, which are still established by the European Council. Indeed, in the context of the economic crisis, it has become obvious that the European Council is where the action is regarding the EU's strategic decisions (Dinan, 2011; see also Chapter 26).

Some policy areas, such as tax, remain almost entirely national competences. That said, the rise in power of the European Parliament is obvious and EU policy decisions are increasingly the source of so-called national policies. Intriguingly, new modes of governance are often deployed as a *complement* to the Community method, as well as a *substitute* for it, and are often most effective when combined with it. This kind of variation is the result of bargains between the member states when they agree a change to the EU treaties or a new treaty entirely. If the EU is complicated, this is because the member states prefer it that way!

Ideologically, the EU appears to have shifted to the right, with less emphasis in the European Council and EU Council on both the regulation of the economy and the integration of new policy areas at European level than in the past. This is, at least to some degree, the result of a north–south/east divide that is discernible on matters of subsidies (Thomson, 2009) or protecting social standards (Crespy and Gajewska, 2010). This trend appears to hold good across a variety of policy areas and institutions, shaping not only the Council, but also the EP (Burns et al., 2012) and the Commission (Peterson, 2008). The aftermath of the crisis has seen member states in the eurozone integrate their economies further but protect their independence through intergovernmental mechanisms,

while the Commission and the Court have been granted roles in some areas of implementation (see Chapter 26).

Enlargement and the subsequent further diversification of the EU also increased the need for flexible policy tools such as the OMC. In particular in policy areas in which a great variety and diversity exists between the member states and in which competences remain in the medium to long term at national level, the use of these forms of governance remains popular. It remains necessary, however, to hustle frantically in order to shape the content of EU legislation. Indeed, this need to hustle was made more acute by the Lisbon Treaty, which introduced a new role for national parliaments in EU decision-making: an alliance between half of the national parliaments and either the EU Council or the EP can now block a new piece of EU legislation on the grounds of subsidiarity. Such a step may be welcome to boost the EU's **legitimacy** and to involve national parliamentarians' engagement with EU legislation, but it may make the decision-making process more complex and more obviously multilevel. As ever in the EU, time will tell.

QUESTIONS

1. What was the original Community method and why was it adapted?
2. To what extent has the ordinary legislative procedure altered the balance of power between the EP, the Commission and the EU Council?
3. Why was it considered necessary to use 'new' forms of policy-making such as the open method of cooperation?
4. To what extent does the OMC constitute a paradigm shift in the way in which the EU makes policy decisions?
5. Why does the implementation gap vary between member states?
6. What do you consider the main innovations in EU decision-making that were introduced by the Lisbon Treaty and why?
7. Do 'soft' and 'hard' forms of legislation suffer the same implementation gap?
8. Can member state 'losses' in the decision-making process be compensated for during the implementation process?

GUIDE TO FURTHER READING

Borrás, S. and Radaelli, C. M. (2010) *Recalibrating the Open Method of Coordination: Towards Diverse and More Effective Usages* (Stockholm: Swedish Institute for European Policy Studies) A very informative piece of research that provides an insight into the successes and shortcoming of the OMC.

Falkner, G. and Treib, O. (2008) 'Three worlds of compliance or four? The EU-15 compared to new member states', *Journal of Common Market Studies* 46/2: 293–313 An excellent comparative analysis of compliance across EU member states.

Mastenbroek, E. (2005) 'EU compliance: Still a "black hole"?', *Journal of European Public Policy* 12/6 1103–20 A useful article that reviews the scholarship on compliance in the EU.

Peterson, J. and Bomberg, E. (2009) *Decision-making in the European Union* (Basingstoke: Palgrave Macmillan) A very useful book on EU decision-making.

Versluis, E., van Keulen, M., and Stephenson, P. (2011) *Analysing the European Union Policy Process* (Basingstoke: Palgrave Macmillan) A guide to understanding the development and usages of the EU political system.