Informal Governance in the European Union

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Uncertainty about domestic demands for cooperation—political uncertainty—leads to the emergence of an informal norm of discretion that adds situational flexibility to the formal institutional design, to enable governments to resolve potentially disruptive conflicts at the domestic level. The purpose of this and the following three chapters is to show that, therefore, this informal norm varies systematically with the extent of political uncertainty.

Informal institutional elements are, as the chapter-opening quote suggests, difficult to identify with confidence. How, then, do we trace the informal norm of discretion in the context of the European Union? The previous chapters argued that any institutional element, formal or informal, is visible at the level of behavior. The informal norm of discretion consequently manifests itself in practices informal governance—namely, departures from the kind of behavior we would expect to observe under formal rules. In the context of the EU, this implies departures from the behavior we would expect to observe if the legislative game were exclusively governed by the treaty rules. The first section of this chapter therefore briefly describes the EU’s origins and objectives, and identifies three stages of decision making—agenda setting, voting, and implementation—as the key elements of its legislative procedure, the so-called Community Method.

Drawing on prominent formal analyses of these rules, and using plausible assumptions about the legislative actors’ preferences and information, the second section constructs a stylized model of the Community Method.
in equilibrium. On the basis of this model, it is possible to deduce a set of ideal-typical practices of formal governance—namely, practices that actors would adopt in agenda setting, voting, and implementation if the legislative game were solely dictated by formal rules. According to our theory, however, governments collectively depart from the formal rules in order to exercise tacit discretion. Our legislative actors should therefore feature practices of informal governance, or collective practices that differ from the standard of formal governance.

Given these definitions of what formal and informal governance mean in the context of the EU’s Community Method, the third section specifies the predictions of Liberal Regime Theory and its rivals regarding the variation of informal governance over time, the variation of informal governance across issue areas, and the emergence of conflicts among the legislative actors. This set of competing predictions sets the stage for the empirical analysis in the following three chapters, which contrast the previously defined practices of formal governance in agenda setting (chapter 3), voting (chapter 4), and implementation (chapter 5) to the practices we observe in reality.

The Origins and Objectives of the Community Method

The roots of today’s twenty-eight member-state European Union lie in the European Economic Community, which France, Germany, Italy, and the Benelux countries established with the 1957 Treaty of Rome. At its core was the objective of establishing a common market that consisted of policies governing agriculture, transport, and competition, and the free circulation of goods, capital, services, and labor (the “four freedoms”).

The commitment was taken a step further with the 1987 Single European Act, which amended the Treaty of Rome with a pledge by the now twelve member states to establish a single market, an area in which the free circulation of the four factors of production would be as easy among the member states as within them.

The EU’s expansion to other policy areas notwithstanding, the pursuit of deep market integration has always been the EU’s core objective. Its implementation promised to subject governments to ad hoc societal pressures for and against the project, because it required the removal (by means of elimination or harmonization) of deeply entrenched nontariff trade impediments, such as incompatible domestic regulations, subsidies, and taxes.
Since the Treaty of Rome and all subsequent treaties amending this treaty remained imprecise about how to achieve the objective of deep economic integration, its realization necessitated a series of future individual decisions. In light of the fact that the removal of the various nontariff barriers was certain to generate conflicts within and among the member states, the formal rules entailed several ways to bolster the credibility of the member states’ commitments in the event of changing (“time-inconsistent”) domestic preferences and interest group pressure. The EU governments delegated extraordinary rule-making and implementation power to supranational institutions that were insulated from ad hoc pressure, and they pooled their sovereignty by surrendering their national vetoes on individual decisions.

The result is an original legislative procedure, the so-called Community Method, which brings together government ministers (the Council), an independent bureaucracy (the Commission), and the European Parliament. The European Court of Justice is supposed to enforce these rules and the secondary legislation made within them. Today, the Community Method governs almost invariably all policies that relate to economic integration. It produces various types of EU laws, the most important of which are directives (to be implemented through national law) and regulations (which do not require any implementing measures).

The Community Method is depicted in the following figure:

![Diagram of the Community Method](image)

FIGURE 2  The Community Method (1957)
A number of formal changes have shaped the scope and workings of the legislative process over the years. One of the first important formal changes was the extension of the use of majority voting in the Council through the Single European Act (1987) to cover important aspects of the internal market. The Maastricht Treaty on European Union (1993), negotiated right after German unification and during the first Yugoslav Wars, launched the Economic and Monetary Union and added two intergovernmental policies—Common Foreign and Security Policy and Justice and Home Affairs—outside the existing European Community procedures.

Arguably, one of the most significant changes came with the treaties of Amsterdam (1999) and Nice (2003), which promoted the European Parliament to a co-legislator and prepared the institutional framework for the accession of a dozen and more new member states. The most recent treaty, the Lisbon Treaty (2009), sought to simplify the EU’s institutional structure and inter alia provided for a uniform application of the Community Method (today known as the Ordinary Legislative Procedure) to almost all policy areas. None of these changes undermined the fact that the legislative process commits the member states to continual economic integration, since each stage has always entailed the possibility of imposing an outcome on one or more recalcitrant states.

Formal Agenda-Setting Rules

The Commission initiates the legislative procedure with a proposal for a legal act. Its exclusive right of initiative on matters covered by the treaty (Article 149, Treaty of Rome) and those intended to realize its objectives (Article 235) gave the Commission an essentially political and extraordinarily strong role. The Commission is able to choose one among many feasible proposals for a legal act and, except where the treaty specifies a deadline, it is entirely free to determine the timing of its submission. It can therefore bar proposals from the agenda that are less suited to achieve the objective of deep economic integration.

Furthermore, it can publish proposals when the constellation of government preferences favors their immediate adoption, and it can change or withdraw them when this constellation becomes less favorable. The Commission was, from the outset, aware of its power. Walter Hallstein, the first president of the Commission, remarks:

[A Commission proposal] is an eminently political act. For one, it is political because the Commission may choose among different feasible solutions. Considering what a majority under the terms of the treaty can just accept, it chooses in complete independence a solution that best
approximates the Community interest. It is also a political act because the Commission determines the point of time of a decision: What was unthinkable yesterday might suddenly be possible today. (Hallstein 1965)

In performing its “eminently political” role, the Commission is supposed to be completely independent and “neither seek nor take instructions from any government” (Article 157). For that purpose, it is endowed with an administrative apparatus of permanent civil servants, headed by a Commission president and a college of at least one commissioner per member state. Commission officials hoped this independent supranational bureaucracy would acquire unrivaled expertise on Community matters that would also boost the Commission’s “informal” agenda-setting power as, according to Hallstein, the “persuasiveness of a proposal [stems from the] quality of its rationale” (cited in Oppermann 1979, 441–46).

Formal Voting Rules

After official submission, the Council decides whether to adopt the Commission proposal or change it through amendments. Formal voting rules strongly privilege the first option and thus greatly augment the Commission’s agenda-setting power.

Whereas a qualified majority vote (entailing additional criteria beyond a mere majority of member states) is sufficient for immediate adoption of a legal act, the Council needs to attain unanimity in order to alter the legislative proposal against the will of the Commission (Article 148). This is an extraordinarily restrictive rule for the amendment of proposals, one that represents an even greater protection for the agenda setter’s proposal than that provided for most U.S. congressional legislation (Pollack 2003b, 85).

A European Parliamentary Assembly (renamed the European Parliament), which initially consisted of delegates of national parliaments, was to be consulted before adoption (Article 137). Since 1979, EU citizens directly elect its members, who organize themselves in loose Europe-wide party groups. Gradually, the European Parliament has been promoted to co-legislator status, with formal veto power over Council decisions, and its legislative power has been extended to more and more policy areas.

These formal rules enhance the credibility of mutual commitments in various ways. First, governments can overrule one or more states that are reluctant to deepen economic integration. Second, the rules bolster the Commission’s agenda-setting power, since it is able to disregard the opinions of a recalcitrant minority of states in drawing up its legislative proposals.

The involvement and gradual empowerment of the European Parliament arguably defies this functional explanation of the Community’s institutional
design. Its promotion is probably best explained as an attempt to remedy the “democratic deficit” of the European Union (Rittberger 2005, 4–7). Yet this need not concern us at this point, since the European Parliament’s formal powers in combination with its preference for deeper integration never undermined the legislative procedure’s function as a commitment to the Community’s objectives.

Formal Implementation Rules

In addition to the Commission’s political role in the preparation and negotiation of legislation, it was also slated for the management of EU policies (Article 155). For a few policies, such as competition, the common commercial policy, transport, and agriculture, the Treaty of Rome directly conferred executive powers on the Commission. In other areas, the Council retained the option to delegate the implementation to the Commission or other actors with various degrees of discretion.

This ambiguity regarding the identity of the implementing actor turned out to be a constant source of tension between the institutions and was aggravated through the Single European Act, which stipulated (Article 145) that the Council shall “confer on the Commission . . . powers for the implementation of the rules which the Council lays down” and, in the same breath, stated that the “Council may also reserve the right . . . to exercise directly implementing powers itself.” However, the Treaty of Rome provided no means for the Council to withdraw or change effective measures. Only the Single European Act codified without specifying established law that the Council may “impose certain requirements in respect of the exercise of these powers.”

It is hardly possible to formulate laws in such a way that they can be applied without ambiguity, and this ambiguity provides ample opportunities for governments to manipulate the implementation of policies in order to cater to powerful domestic interests. The delegation of implementation to an agent that is shielded from ad hoc influence therefore bolsters the credibility of governments’ pledges, by preventing a false or uneven application of policies on the ground.

Enforcement

A Court of Justice was supposed to ensure that, in the interpretation and application of the treaty, “the law is observed” (Article 164).7 Regarding the enforcement of secondary law, this initially implied that the European Court of Justice, similar to other international tribunals, resolved disputes about the interpretation of EU law and adjudicated on the legality of infringement proceedings (Commission actions against a member state it considers to be failing to fulfill its obligations
under EU rules). In that respect, Articles 169 and 170 stated that if the Commission or a member state believes another member state has failed to implement EU law, the matter is brought before the Court of Justice after the Commission has issued a reasoned opinion on it. It was not until 1993 that the member states sought to give this procedure more teeth. The new Article 143 of the Treaty of Maastricht allowed the Commission to take noncompliant states back to the Court to have them fined (Chalmers, Davies, and Monti 2010, chap. 8).

In addition to these provisions on centralized monitoring and enforcement, a second, more decentralized way developed on the basis of two landmark judgments (Weiler 1991). The doctrine of direct effect, introduced in 1963, stated that clear and precise Community norms must be regarded as the law of the land in their sphere of application (European Court of Justice 1963). This implied that Community law immediately bestows rights and obligations on individual citizens, and thus when a country fails to bestow these rights, individuals can seek to invoke them before national courts. The Court complemented direct effect in 1964 with the doctrine of supremacy, which stated that Community law trumps conflicting national law whether enacted before or after this norm was established (European Court of Justice 1964). In other words, national legislatures cannot enact laws that contradict a Community norm and must repeal those already passed.

Together, these rulings enabled individuals to bring their government before national courts if it failed to transpose EU law or enacted conflicting law. The European Court of Justice itself is able to shape these decisions, since Article 177 of the Rome Treaty permits national courts to request a preliminary Court ruling when confronted with questions about Community law (Chalmers, Davies, and Monti 2010, chap. 7). The effectiveness of this original procedure consequently depends on a variety of factors, primarily the willingness of individuals to litigate the rights under EU law, of national courts to refer cases to the European Court of Justice, and of the governments to comply with a judgment.8

Nonetheless, the decentralized enforcement of EU law enhanced the credibility of states’ commitment to economic integration compared to other international organizations. This has been cited as the reason why the member states were ultimately willing to accept the doctrines on which this system builds (Garrett 1995, 176).

Formal and Informal Governance in Lawmaking

Now that we have described the formal rules on the making and enforcement of EU law, and the ways they serve to bolster the credibility of states’ commitment to economic integration, we are a step closer to defining the practices of formal and informal governance in lawmaking in this institutional context.
Recall that a set of rules can be said to be in equilibrium when no actor has an incentive to deviate from his or her rule-following behavior. In equilibrium, the rules of the Community Method will therefore induce a number of observable, regular practices of formal governance in the stages of agenda setting, voting, and implementation. Informal governance refers to collective practices that differ from this standard. Formal and informal governance, then, constitute the two endpoints of a continuous dependent variable that measures the regularity with which the legislative actors depart from formal rules.

What practices actors adopt also depends on what actors want and what actors know when they interact with one another. We can make two empirically plausible assumptions about actors’ preferences and information. First, and in line with the bulk of the literature in EU studies, it is assumed that the predominant policy dimension represents the depth of integration where the status quo is shallow economic integration (e.g., conflicting domestic regulations). The treaty itself aims to change the status quo through the deepening of economic integration. The European Parliament and the Commission, which are pledged to help attain this objective, consequently favor deeper integration than the Council.

Second, we assume that the three institutional actors (Council, Commission, European Parliament) are well informed about one another’s preferences. In game-theoretical parlance, the legislative actors have nearly complete information about one another’s location on the policy scale. Although less common in international bargaining, the assumption of nearly complete information is plausible and often used in the context of the EU, where the main institutional actors are, in fact, composed of many interconnected individual actors. An example is the members of the European Parliament, all of whom have to agree (often in public) on a common position before entering the next stage of the legislative process (Garrett and Tsebelis 1996, 280).

Formal and Informal Governance in Agenda Setting

The first set of formal rules on agenda setting endows the Commission with an exclusive right of initiative. These rules allow for the selection of one out of many feasible legislative proposals while keeping rival proposals from the agenda. These rules permit an optimal implementation of the treaty’s objectives if (a) the Commission’s monopoly of initiative in fact remains unrivaled, (b) the Commission’s independence is not compromised, and (c) the constellation of state preferences at the time of decision is conducive to the adoption of progressive acts.
What practices do these three aspects imply for the EU’s legislative actors? The first aspect of agenda setting, the monopoly of initiative, is particularly important when there is the possibility that rival coalitions might repeal an effective policy through new legislation. It is a well-known result in legislative studies that when a policy with multiple dimensions is to be adopted by majority voting, it generates more than one winning coalition and thereby many potential outcomes. Policies are consequently inherently unstable, since an alternative majority can always overturn them through new legislation (McKelvey 1976). Equally important in our case is the possibility that governments, which are under varying pressures from domestic groups, will change their preferences over time and form alternative majority coalitions to replace existing legislation. The Commission’s monopoly of initiative therefore stabilizes EU policies, because it enables the Commission to bar rival policy initiatives from the legislative agenda.\footnote{11}

The rules imply that we should observe the Commission selectively withholding governmental initiatives from the agenda. Why? Even though the Commission has the monopoly of initiative, governments under domestic pressure will still suggest alternatives in order to signal their effort to the pressuring groups. Of these various initiatives, we can expect the Commission to endorse only those that promise an optimal implementation of the treaty objectives.

Thus, \textit{formal governance} in agenda setting can be defined as a practice by which the Commission selectively bars some governmental initiatives from the legislative agenda. Conversely, \textit{informal governance} is a practice where the Commission customarily endorses governmental proposals. Whether the Commission endorses governmental initiatives selectively or as a matter of course should be indicated by the sequence of moves before the official submission of a proposal.

The monopoly of initiative results in an optimal implementation of the treaty only if the agenda setter, in contrast to governments, does not behave opportunistically. For that purpose, it needs to be immune to private or governmental ad hoc pressure from within or outside. The Commission was well aware of this responsibility. As Jean Monnet, the spiritual father of the Community Method and first president of the High Authority (the Commission’s predecessor), explained:

\begin{quote}
The independence of the Authority vis-à-vis governments and the sectional interests concerned is a precondition for the emergence of a common point of view which could be taken neither by governments nor by private interests. It is clear that to entrust the Authority to a Committee of governmental delegates or to a Council made up of representatives of governments, employers and workers, would amount to returning to our present methods, those very methods which do not enable us to settle our problems. (Monnet 1950)
\end{quote}
The second aspect of agenda setting, the independence from ad hoc pressure, implies that the Commission should not have to rely on the information and ideas of rival actors to be able to come up with quality legislative proposals. This need not imply that the Commission’s expertise is superior to everyone else’s. However, the Commission needs to be free to decide whom to ask for policy-relevant expertise, and it should be able to draw on a capable administration in order to process this information.

In short, formal governance is a practice by which the Commission draws on independent expertise and a capable administration. Informal governance is a practice that compromises this precondition for the Commission’s independence. Whether the Commission is sufficiently equipped to remain independent should be reflected in its internal organization.

The final aspect of agenda setting concerns timing. Since government preferences may change over time, there are times that are more or less conducive to the advancement of economic integration. John Kingdon (1995, 203) refers to favorable times as “policy windows,” that is, “opportunities for advocates to push their pet solutions.” The delegation of the power over timing to the Commission therefore enhances states’ commitment to pursuing economic integration, since its capacity to change, withdraw, and resubmit legislative proposals also allows it to await circumstances that are most favorable to attaining this objective.

Why is this important for our case? The control of the timing of a decision not only allows waiting for a favorable constellation of preferences among governments. It may also affect the constellation of domestic interests when, for example, the delay of a decision mitigates the concentration of adjustment costs by giving domestic groups more time to adjust. It may also make a difference regarding a government’s susceptibility to domestic pressure (e.g., before an election). In short, to exercise informal discretion, governments need to be able to control the timing of a decision.

Formal governance can hence be considered a practice where the Commission’s publication of a proposal results in its swift adoption, while informal governance is a practice whereby governments control the time span between the publication and the adoption of a proposal. The duration of moves in-between the submission of a proposal and the conclusion of negotiations indicates this control of time.

**Formal and Informal Governance in Voting**

The second set of formal rules concerns the adoption or amendment of legislative proposals by the Council and, more recently, the European Parliament. The rules
stipulate that governments adopt the Commission proposal with a qualified majority. They can change it only when they are able to attain unanimous support for the amendment. In other words, it is much easier for governments to adopt the Commission’s legislative proposal than to change it. This rule on majority decision making commits governments to advancing economic integration, because it allows a majority to impose outcomes on more conservative governments. What practices do these rules imply for the legislative actors?

One might argue that majority voting provides the opportunity for political exchange over time or across jurisdictions. In other words, a majority can spare minorities that feel intensely about an issue in exchange for political support on an issue they strongly care about. The result of this hypothetical “vote trade” would be a unanimous agreement on both issues.

However, vote trading of this sort is difficult to enforce in practice, particularly in the context of the EU. Precisely because governments are opportunistic, which is why majority voting at the EU level is necessary in the first place, they will find it difficult to trust others to stick to their part of the deal at a later point in time. The exchange of support across policy areas seems improbable too (Weingast and Marshall 1988, 135). Recall that changes to a Commission proposal require unanimity in the Council. Political exchanges across jurisdiction are therefore only possible when there happen to be opportunities to reciprocate political support on another issue to all governments that are necessary to build a unanimous vote. Unsurprisingly, empirical examples of vote trading across jurisdictions in the EU are rare (Mattila and Lane 2001, 46–48).

Given that vote trading across policy areas and over time is unlikely to take place in the EU, the voting rules can be expected to induce majorities to call votes in order to capture their gains. These votes should also take place openly, since this allows the minority to blame the outcome on “Brussels” in order to escape a domestic backlash. Formal governance is therefore a practice where governments cast votes frequently and openly, while informal governance is a practice where governments collectively refrain from voting in order to accommodate a government in the minority. This should be reflected in qualitative and quantitative Council voting data.

The second feature of this stage is the involvement of the European Parliament in decision making on a wide variety of issues. Members of the European Parliament have a strong incentive to bring deliberations out into the open to gain the electoral support of their constituencies and, more generally, to justify their existence. Formal governance can therefore be considered a practice by which the European Parliament avails itself of opportunities to have public debates. Public debates, however, may jeopardize the provision of flexibility, since they may raise concerns among various domestic groups that the accommodation of a government ultimately takes place at their expense. Informal governance can therefore
be regarded as a practice by which legislative actors avoid publicity in decision making. These practices should be reflected in the actual use of plenum debates.

**Formal and Informal Governance in Implementation**

The formal rules regarding the implementation of legal acts are more ambiguous than those of the previous two stages. Initially, the treaty in a few areas directly conferred implementation power on the Commission. The treaty was more ambiguous in the remaining areas, where the Council was free to delegate this task also to national administrations. Various treaty changes and case law did little to clarify the ambivalence about the identity and discretion of implementing actors. What practices do these ambiguous rules imply for the legislative and implementing actors?

Modern societies cannot function without bureaucracies. The complexity of issues and the time and resources needed to address them leave legislative actors no choice but to delegate some responsibility to an agent. Once they delegate, however, they face a potential loss of control over the issue they have delegated (Huber and Shipan 2008). The act of delegation, therefore, usually entails two decisions, first a decision about the identity of the agent, and second about the agent’s discretion, that is, her room for maneuver, which is a function of various control mechanisms (McCubbins, Noll, and Weingast 1989). Although national administrations have extensive expertise about implementation obstacles in their own country, they tend to be less insulated from political influence from within the member state. There is, therefore, the risk that decentralized implementation results in disparate sets of policies that defy the purpose of an EU-wide law. Conversely, pledged to the rule of law, the Commission is primarily concerned about the timely and consistent implementation of legal acts across countries.

According to Fabio Franchino (2007, chaps. 4 and 7), both the Commission and the European Parliament favor centralized implementation and, in addition, ample discretion for the Commission. The same research shows that the Council prefers centralized implementation when it adopts a legal act by majority voting instead of a consensus, since a majority vote makes it more likely that those that have been overruled will defect (Franchino 2007, 174).

Since formal governance implies the frequent recourse to majority voting in the previous, legislative, stage, *formal governance* in the implementation stage must be considered a practice by which governments frequently centralize implementation powers in the hands of the Commission and provide it with broad discretion.

However, the Commission is less familiar than its member-state governments with local implementation obstacles. Centralized implementation therefore
TABLE 2  Indicators and data for informal and formal governance

<table>
<thead>
<tr>
<th>STAGE</th>
<th>FORMAL GOVERNANCE</th>
<th>INFORMAL GOVERNANCE</th>
<th>TYPE OF DATA</th>
</tr>
</thead>
<tbody>
<tr>
<td>AGENDA SETTING</td>
<td>The Commission selectively bars governmental initiatives from the agenda.</td>
<td>The Commission generally endorses governmental proposals.</td>
<td>Sequence of moves before the official submission of a proposal.</td>
</tr>
<tr>
<td></td>
<td>The Commission draws on independent policy expertise.</td>
<td>The independence of the expertise the Commission draws on is compromised.</td>
<td>The Commission’s internal organization.</td>
</tr>
<tr>
<td></td>
<td>The Commission controls the timing of decision making.</td>
<td>Governments have collective control of the timing.</td>
<td>Duration of moves between official submission and adoption of a legislative proposal.</td>
</tr>
<tr>
<td>VOTING</td>
<td>Voting takes place frequently and openly.</td>
<td>Governments refrain from voting.</td>
<td>Voting data.</td>
</tr>
<tr>
<td></td>
<td>Parliament brings decision making out in the open.</td>
<td>The legislative actors eschew publicity in decision making.</td>
<td>Data on public parliamentary contestation of the Council.</td>
</tr>
<tr>
<td>IMPLEMENTATION</td>
<td>The Council delegates implementation powers and wide discretion to the Commission.</td>
<td>Governments delegate to national administrations and narrow the Commission’s discretion.</td>
<td>Identity and discretion of implementing agent.</td>
</tr>
</tbody>
</table>

harbors the risk of generating distributive shocks at the local level, in which case governments will seek to flexibly restrict the discretion of the Commission. Furthermore, if consensus decision making instead of voting prevailed in the previous stage, there is less risk that governments will purposefully fail to implement the legal act. As a result, the member states will be more relaxed about leaving implementation up to national administrations instead of delegating it to the Commission. Thus, informal governance in implementation denotes decentralized implementation and, where the treaty provides for centralized implementation, the flexible restriction of the Commission’s discretion (Franchino 2007, 167, 175). This should be indicated in data on the implementing agent chosen by the Council and its discretion before and after delegation.

We have seen that the Community Method in equilibrium generates six practices of formal governance. Informal governance is defined as the mirror image of formal governance: collective practices that differ from this standard. Formal and
informal governance constitute the two endpoints of a continuous dependent variable. These practices and the indicators used to identify them are summarized in the following table.

By specifying what formal and informal governance means in the context of the EU’s Community Method, this section multiplied the number of observations for our empirical analysis. Instead of merely predicting collective departures from the formal legislative procedure, Liberal Regime Theory and its rivals now have to make specific predictions about informal governance practices in agenda setting, voting, and implementation.

The number of observations is further multiplied by splitting the domain up into five different time periods separated by treaty revisions.15 For our purposes, these periods can be considered semi-independent observations, because each treaty revision provided the opportunity to codify the practices of informal governance that emerged in the meantime (King, Keohane, and Verba 1994, 221–23). In fact, almost every single treaty revision since the Treaty of Rome specifically envisaged the simplification of decision making through the formalization and consolidation of rules (De Witte 2002).

With a focus on six different practices of formal and informal governance in two types of issue areas in five time periods, the result of the multiplication exercise is a large-N data set of more than fifty observations, all of which constitute qualitative mini case studies of decision-making practices in a certain time period.

**Testable Implications and Alternative Explanations**

Having defined the meaning of formal and informal governance in the context of the EU’s Community Method, we are now able to proceed to specifying the testable implications of Liberal Regime Theory and its rivals. To repeat, the theory argues that governments depart from formal rules in order to resolve conflicts at the domestic level. For power-based institutionalism, informal governance is a means for dominant states to escape formal commitments when their vital interests are at stake. For classical regime theorists, informal governance results from states’ attempts to reduce increased transaction costs.

**Liberal Regime Theory**

According to Liberal Regime Theory, informal governance serves to resolve potentially disruptive conflicts that states’ cooperation may generate at the
domestic level. We referred to the propensity for such unexpected domestic pressure for defection as political uncertainty. The theory expects practices of formal and informal governance to vary systematically with the extent of political uncertainty. But how does political uncertainty vary in the context of the European Union?

As argued in the previous chapter, it is impossible to measure political uncertainty directly, let alone to quantify it. If governments cannot specify future domestic pressure at the point of institutional creation, it seems implausible that scholars would be able to do so.

However, drawing on insights from collective action theory, we argued that welfare provisions that provide social security serve as an arguably crude proxy for this variable. Since political uncertainty refers to situations in which governments are facing unexpectedly strong pressure from a domestic group to defy a legal act, it follows that one important determinant of this pressure is a group’s propensity to mobilize in response to imminent adjustment costs. This propensity is itself a function of the presence or absence of welfare provisions: by dispersing unexpected costs over a larger group, these measures lower the group members’ marginal utility of mobilization. If we keep other factors constant, such as the size of the distributional shock a group is facing and governments’ susceptibility to domestic pressure, welfare provisions independently reduce the propensity for unexpected domestic pressure for defection. Political uncertainty is therefore high in the absence, and low in the presence, of welfare provisions.

The fact that welfare provisions affect political uncertainty implies that informal governance can be expected to vary systematically across issue areas in the EU. Although most policies at the EU level increasingly subject national markets to Europe-wide competition, the Common Agricultural Policy, by comparison, stands out as an issue area that by means of high external tariffs, fixed and guaranteed prices, and direct subsidies deliberately protects European farmers from the structural pressures of the global economy.

According to the Treaty of Rome, one of the principal objectives of the Common Agricultural Policy was “to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture” (Article 39 (1b) Treaty of Rome). Continuing existing national policies at the EU level, the member states subsequently agreed on a Europe-wide market organization that, by means of fixed and guaranteed prices, provided a higher and secure income for a specific segment of society, the European farmers.

The establishment of the Common Agricultural Policy, as Elmar Rieger (2005, 161) remarks, consequently reflected “defensive, basically anti-market, national strategies of economic modernization, attaching small farmers’ loyalty to rebuilding democracies, with welfare-functions transferred to the European
level.” Although the Common Agricultural Policy occasionally affects groups other than farmers (for instance the apple wine producers mentioned in the introductory example), it does, more than other policies, absorb potential shocks to the farmers’ livelihood that would suddenly stir up this sector’s domestic politics of collective action.

To be clear, this is not to argue that farmers never mobilize against this policy. On the contrary, they protest vociferously when changes to the agricultural policy affect their subsistence. The principal point is that this mobilization is rarely unexpected. It is, on average, more predictable than the domestic pressure in other sectors and, therefore, manageable in the framework of the formal rules.

Because agriculture is a quite technical field that has attracted little political science research, it is worth elaborating on this point in a bit more detail. A critic might argue that the Common Agricultural Policy has undergone substantive reforms in the last two decades, in response to spiraling costs and the dumping of excessive production (“milk lakes”) in the 1980s, the Bovine Spongiform Encephalopathy (BSE) crisis (“mad cow disease”) in the 1990s, pressure to comply with the rules of the General Agreement on Tariffs and Trade (GATT), and the accession of more than ten rural Eastern European countries in the 2000s.16

Though it is true that various reforms removed or replaced some of the shock absorbers that European farmers historically enjoyed, it should be noted that the reform of the Common Agricultural Policy nevertheless kept intact the safety-net function of this policy. After an interim period where direct income support served as a compensation for reduced fixed prices, the system now aims at stabilizing income independent of production. The Common Agricultural Policy therefore still entails aspects of social security that to some extent protect the rural sector from the competitive forces of the market, which distinguishes it qualitatively from all other economic policies in the EU that do not envisage this kind of protection (Garzon 2006, 180–81).17

Applied to the empirical context of the EU, Liberal Regime Theory therefore generates three specific implications that can be tested. First, informal governance in agenda setting, voting, and implementation is most pronounced in most EU policies where political uncertainty is high, while formal governance dominates in the Common Agricultural Policy, a policy of comparatively low political uncertainty. Second, since the market-creating policies of the EU have always been qualitatively distinct from the Common Agricultural Policy, the difference between agricultural and nonagricultural policies across the spectrum of economic policies can also be expected to remain stable over time. Finally, since the theory expects all governments to prefer the mix of formal and informal governance to a purely formal setup, the use of informal governance should
create conflicts between institutional actors and the national governments, but not among the governments themselves.

**Power-Based Institutionalism**

Power-based institutionalism argues that it is difficult for large states to commit to cooperation, since they are more likely than small states to face opportunities to pursue their interests outside of a formal institutional framework. Anticipating this challenge to the institution, small states offer to acquiesce to large states’ informally assuming control of the international organization on important matters in exchange for more favorable formal voting rights on less sensitive issues (Stone 2011, 14).

Thus, two criteria must be met for informal governance to arise. First, the patterns of interdependence among the member states are highly asymmetric—that is, some small states are far more dependent on the cooperation of a larger state than the other way around. Second, a policy area that fulfills the first criterion must be of predictable sensitivity for the large state.

What policy areas in the European Union can we expect small and large states to strike a deal about informal governance? There are various policy areas in which asymmetries among the member states are more pronounced than elsewhere. For example, the United Kingdom with London as one of the world’s largest financial centers can be considered powerful in the trade of financial products. On matters of monetary policy, Germany is beyond doubt the most powerful state in the Eurozone. France with its powerful agricultural sector has dominated intra-European trade in a wide variety of agricultural products. Among these issue areas, there is one where individual decisions have been predictably sensitive from the outset of European integration. The Common Agricultural Policy was, from the outset, of particular significance to France, which is home to a powerful farm lobby.

Asserting that the Common Agricultural Policy, relative to other policy areas that are dominated by a large state, is certain to be of special importance to France is admittedly a crude measure of a policy’s sensitivity. Yet it is entirely in line with the historiography of the EU. Some students of European integration contend that agriculture stands out as the single most important determinant of French EU policy (Moravcsik 2000a, 2000b). But one does not have to go as far as that in order to acknowledge the fact that agriculture has always been of predictable sensitivity to France and spawned most major intergovernmental disputes from the beginning of European integration until today. As we shall see in chapters 3 and 4, it was, after all, a proposal for the extension of majority voting to agricultural issues that in 1965 prompted French president Charles De
Gaulle to threaten to renege on France’s commitment and withdraw from the Communities (Teasdale 1993, 567–68).

Also, applying power-based institutionalism to the EU, Stone argues that the “veto culture” that supposedly resulted from this crisis in the Common Agricultural Policy “suited powerful countries, because it channeled decision making into informal intergovernmental bargaining, where they could most easily exercise their leverage” (Stone 2011, 105; Golub 2006, 280–82).

In sum, applied to the EU’s empirical context, power-based institutionalism generates several implications that can be tested. First, informal governance arises in issue areas that are of predictable sensitivity to a large state. There is only one issue area that appears to meet these criteria, and this issue area is agriculture. It is here that power-based institutionalism would expect France to strike a deal with smaller member states on the use of informal governance. Formal governance should be more pronounced in the remaining issue areas. Thus, power-based institutionalism, compared to Liberal Regime Theory, predicts the opposite issue-specific variation in informal governance.

Second, the issue-specific variation in informal governance varies, if at all, only slightly over time. Although historians argue that the veto culture in the Council subsided with the conclusion of the Single European Act and as other agrarian-oriented countries acceded to the EU, the Common Agricultural Policy has remained a highly sensitive policy area for France. Informal governance should therefore remain more pronounced on agricultural matters than anywhere else.

Finally, the use of informal governance should provoke disputes between small and large states about its legitimacy. Formed under the condition of uncertainty, the precise boundary between formal rules and informal governance necessarily remains vague and difficult to ascertain. Consequently, there will be ambiguous situations in which the use of informal governance is fraught with tension between large and small states.

**Classical Regime Theory**

For classical regime theory, institutions enable cooperation by reducing the relative costs of transactions. Institutions become inefficient when exogenous factors alter the transaction costs after formal rules have entered into force. In this case, states are expected to restore efficiency by adapting the formal rules through additional informal institutional elements. All states use these elements because they serve to reduce frictions in state interaction that are caused by the use of formal rules. Accordingly, classical regime theory predicts that informal governance varies systematically with the rise of transaction costs in legislative interaction.
But what are transaction costs in the context of the Community Method, and where did they rise after the formal rules had entered into effect?

Two factors, in particular, may strain legislative institutions and generate a demand for informal rules to restore the efficiency of decision making. First, the addition of new policies eats up decision-making time and results in legislative bottlenecks (Cox 2008, 143). Second, the addition of new actors increases the complexity of decision making (Cox and McCubbins 2001, 27; Winham 1977). In line with this theory, it has been argued that transaction costs in EU legislation rose markedly with a leap in legislative activity and the accession of new countries in consecutive rounds of enlargement.

Applying classical regime theory to the EU, Jonas Tallberg (2006, 59) argues that the complexity of the decision-making environment increased heavily in response to an expansion of Council business and an increased number of bargaining partners. In fact, as we shall see in more detail in chapter 4, the Council’s legislative activity leaped dramatically in nearly all issue areas in the ten-year period from the mid-1960s until the mid-1970s. The number of actors increased for the first time in 1973 when the United Kingdom, Ireland, and Denmark acceded to the then European Community. A southern enlargement took place between 1981 and 1986 with the accession of Greece, Portugal and Spain. These countries were followed by Sweden, Finland, and Austria in 1995. The “big bang” enlargement with the accession of twelve Eastern and South European countries took place between 2004 and 2007.

### TABLE 3  Summary of specific hypotheses about informal governance

<table>
<thead>
<tr>
<th>IMPLICATION</th>
<th>LIBERAL REGIME</th>
<th>POWER-BASED INSTITUTIONALISM</th>
<th>CLASSICAL REGIME</th>
</tr>
</thead>
<tbody>
<tr>
<td>ISSUE-SPECIFIC VARIATION</td>
<td>Formal governance in issue areas of low political uncertainty. Informal governance where political uncertainty is relatively higher.</td>
<td>Informal governance in issue areas of predictable sensitivity to large states. Formal governance in less sensitive areas.</td>
<td>Informal governance across the board.</td>
</tr>
<tr>
<td>VARIATION OVER TIME</td>
<td>None</td>
<td>None</td>
<td>Informal governance in response to increasing legislative activity and enlargement.</td>
</tr>
<tr>
<td>CONFLICTS</td>
<td>Between supranational actors and the member states.</td>
<td>Between large and small member states.</td>
<td>None</td>
</tr>
</tbody>
</table>
In the context of the European Union, classical regime theory therefore expects practices of informal governance to vary over time rather than across issue areas. Specifically, the theory predicts the emergence of informal governance from the mid-1960s until the first enlargement in 1973. Further informal practices can be expected to arise with further accession rounds. Since they enhance the general efficiency of decision making, the adoption of these practices should not lead to any major conflicts among states or between states and institutional actors.

A Look Ahead to Subsequent Chapters

The following three chapters test these different predictions regarding the variation of informal governance over time, the variation of informal governance across issue areas, and the emergence of conflicts by contrasting the aforementioned six practices of formal governance in agenda setting (chapter 3), voting (chapter 4), and implementation (chapter 5) to the practices we observe in reality. The focus is on decision making in issue areas that deal with economic integration from 1958 until the entering into force of the Lisbon Treaty in 2009.

To foreshadow the findings: the look beyond the treaty rules demonstrates that the formal legislative procedure is surrounded by practices of informal governance, most of which, in fact, constitute elusive “emergency brakes” through which the governments collectively mitigate the formal rules’ effects at the domestic level.

Formal governance in agenda setting is defined as practices by which the Commission selectively bars rival legislative proposals from the agenda, draws on independent policy expertise, and controls the timing of decision making. However, a look at the development of practices in agenda setting in chapter 3 reveals that the member states quickly diverged from these practices to obtain collective control of the legislative agenda. The Commission was less and less able to bar alternatives to its legislative proposals from the agenda, especially because the European Council, an institution consisting of the heads of state and government (chiefs of government) that existed outside the formal treaty framework, preset this agenda in ways that were impossible for the Commission to ignore. Also, the Commission was not entirely immune to ad hoc governmental influence. In fact, it became increasingly dependent on governmental expertise, and it also struggled to fight off national influence on internal politics. Finally, the Commission gradually lost the capacity to await situations that were conducive to the adoption of its preferred proposals. Because governments refused to discuss proposals officially before their experts had had a look at them, the legislative
<table>
<thead>
<tr>
<th>TIME PERIOD</th>
<th>LOW POLITICAL UNCERTAINTY</th>
<th>HIGH POLITICAL UNCERTAINTY</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001–2009</td>
<td>Informal</td>
<td>Formal</td>
</tr>
</tbody>
</table>
process became, in fact, determined by the work rhythm of government experts in a massive informal Council substructure.

Formal governance in voting is defined as practices by which the Council votes frequently, and the European Parliament brings negotiations out into the open. Chapter 4 shows that actual practices again diverge from this standard. Despite an increase in the use of majority voting over time, it turns out that it has always been the norm among the governments to refrain from voting and to collectively accommodate a government that would otherwise face strong conflict at home and succumb to domestic pressure to defy the law in question. This consensus norm led to the development of a large Council substructure of preparatory groups, which consisted of government experts with specific knowledge about sensitivities on the ground. Furthermore, as soon as the European Parliament was promoted to a more serious legislative actor that was able to contest the Council in public, it was implicated in informal governance even despite its members’ incentives to publicly contest the Council.

Finally, formal governance in implementation was defined as practices by which the Council delegates implementing powers and wide discretion to the Commission. In actuality, however, the Council established an informal and highly elusive system of committees composed of government officials, the *comitology*, which afforded the member states the flexibility to determine the scope of delegation and the Commission’s discretion.

Importantly, these practices are not random. The table below visualizes the six practices of formal and informal governance in agenda setting, voting, and implementation, as they emerged over the course of the past fifty-plus years in the European Union’s economic issue areas. It distinguishes between issue areas of low political uncertainty, which we said holds true for the Common Agricultural Policy, and issue areas of high political uncertainty, a category that comprises all policies that grew out of the former European Economic Community and deal directly with economic integration. Each cell constitutes an individual observation of the prevalence of either formal or informal governance. Because the European Parliament was excluded from decision making on the Common Agricultural Policy, and only gradually gained power in other economic issue areas, some of these observations are dropped from the analysis.

The table suggests that informal governance varies systematically both over time and across issue areas. In contrast to the expectations of classical regime theory, which predicts informal governance would emerge across the board and vary over time in response to enhanced legislative activity and the accession of new member states, we can see that most of the practices are, in fact, remarkably stable over time. Formal governance is most notable in the predictably sensitive Common Agricultural Policy—an observation that runs counter
to power-based institutionalism, which regards informal governance as a means for large states to eschew formal commitments in areas that are of particular importance to them.

In line with Liberal Regime Theory, informal governance appears to be most pronounced in issue areas where it is, in fact, difficult to predict where excessive adjustment costs might suddenly stir up pressure against EU legislation. Once these informal practices have emerged, they rarely disappear again. In the Common Agricultural Policy, however, where the timing and extent of domestic pressure against EU measures are far more predictable than anywhere else, formal rules are much more readily applied.

As we shall see, another piece of evidence in support of Liberal Regime Theory is the fact that most of the time the emergence and use of informal governance spurs conflicts between the governments, on one side, and supranational actors, on the other side. Power-based institutionalism, in contrast, would have expected far more conflict between large and small member states, whereas classical regime theory did not expect informal governance to be particularly contentious.