Informal Governance in the European Union

Kleine, Mareike

Published by Cornell University Press

Kleine, Mareike.

THE IMPLEMENTATION
OF EU POLICIES

“Comitology” is established Community shorthand for the system…whereby the Member States can exercise some control over implementing powers delegated to the Commission by the Council. The fact that these committees exist is fairly well-established. But who sits on them, when they meet, how they work and what they decide is something of a mystery…

—House of Lords, Select Committee on the European Union, 1999

Given the vast array of legislative proposals, the complexity of many issues, and the scarcity of resources and time, it seems impossible for legislative actors to formulate laws in a way that lets the laws always be applied without ambiguity. Legislative actors usually have no choice but to delegate the making of secondary rules to a bureaucracy.

The Treaty of Rome envisaged this bureaucracy to be the European Commission. Article 155 states that the Commission should “have its own power of decision and participate in the shaping of measures.” In some areas, the Treaty of Rome conferred implementing powers automatically on the Commission. The rules were more ambiguous in other areas where the treaty left it up to the Council and, later on, the European Parliament to decide how and by whom the legal act was supposed to be implemented. Once delegated, however, the treaty provided for no means to revert powers to the member states.

Why on so many issues did the Treaty of Rome delegate substantial powers to the Commission and give it ample discretion to implement EU policies? After all, national authorities can draw on extensive local knowledge to apply legal acts on the ground. The reason is that the centralization of implementing powers in the hands of an independent bureaucracy constitutes a credible commitment to economic integration where governments might otherwise cave in to domestic pressure to renege on the agreement. Pledged to the rule of law, the Commission’s
primary concern is supposed to be the timely and consistent implementation of the EU’s legal acts, whereas implementation by national administrations, which are more susceptible to government’s ad hoc pressure, may result in disparate sets of national policies that defy the purpose of an EU policy.

The political science literature typically explores the factors that determine the choice of the implementing agent and its discretion. Fabio Franchino, among others, investigates under what circumstances the Council and Parliament delegate implementing powers to the Commission, to national administrations, or to both (Franchino 2007). Introducing the American literature on bureaucratic discretion to EU studies, Mark Pollack (1997, 2003b) brilliantly explores why and to what effect governments establish *ex ante* and *ex post* control mechanisms to keep the Commission and other supranational agents in check.

Of particular interest in that regard has been the development and use of comitology, which we will see is an opaque web of informal governmental committees that oversee the Commission’s implementing actions. There has been some debate about the function of comitology. Instead of viewing comitology as a mechanism to control the Commission, as Pollack suggests, Christian Joerges and Jürgen Neyer (1997, 294; cf. Pollack 2003a) argue that these committees are better perceived as an instance of “deliberative supranationalism,” a decision-making mode that is characterized by collective problem-solving rather than strategic bargaining among states. Finally, given that the ambiguous treaty rules incited intense conflicts among the legislative actors, there is also an extensive legal literature on the rights and obligations of each actor in the area of implementation (Bergström 2005).

All these analyses highlight important aspects of the implementation of EU legislation. What has been overlooked, however, is the important function that comitology and other implementation practices play in the provision of flexibility. This chapter argues that the implementation of EU policies is characterized by informal governance practices that function like an emergency brake when central implementing measures trigger strong conflicts at the domestic level. Precisely because the member states remove the Commission from the national level in order to bolster their commitment to economic integration, this central bureaucracy may become oblivious to the political sensitivities on the ground.

To gain situational flexibility in the implementation of policies, Liberal Regime Theory expects governments to adopt practices of informal governance in areas of high political uncertainty. The emergence and use of these practices is expected to generate strong conflicts between the member states and supranational actors, rather than among the member states themselves. Thus, in addition to preventing the Commission from overstepping its discretion, as the
literature on bureaucratic discretion suggests, I argue that some of the informal
governance practices in the implementation of EU policies also serve to prevent
the Commission from doing precisely what it is supposed to do when its action
would otherwise stir up strong domestic conflict.

Before we proceed to our empirical analysis, two caveats are in order. First, in
comparison to the previous stages, the treaty rules regarding the implementation
of EU policies are very ambiguous and have been changed, challenged, and reinter-
preted over and over again. As a result, the definition of formal and informal gover-
nance is sometimes ambiguous and changes over time. Second, it is difficult to attain
reliable and systematic data about the variation in informal governance. As the quote
above suggests, it is doubtful that any of the legislative actors has always had a com-
plete overview, especially of the comitology system of oversight committees.

Implementation on an Elusive Leash

In some issue areas, such as agriculture, competition, the common commercial
policy, and transport, the Treaty of Rome automatically centralized implement-
ing powers in the hands of the Commission. In other issue areas, it was more
ambiguous whether the Council was supposed to centralize these powers or
delegate them to national administrations. Once delegated to either national
administrations or the Commission, the Treaty of Rome provided no means to
revert implementing powers to the Council. Given that Council majorities need
to be concerned about minorities’ willingness to implement an act, a practice
of formal governance that we can expect on the basis of these rules is the cen-
tralization of implementing powers in the Commission’s hands. Conversely, the
delegation of implementing powers to national administrations is considered an
informal governance practice that is less conducive to the timely and consistent
implementation of EU policies.

Applying the Leash (1958–1969)

One of the European Community’s first policies to become operative was the
customs union, which replaced the tariffs between the member states with one
common external tariff for imports from third countries. In this area, the treaty
automatically gave the Commission the authority to negotiate tariffs with third
countries. At the same time, however, Article 113 of the Rome Treaty provided
for a committee (unimaginatively called the “Article 113-committee”) “to assist
the Commission in this task.” By the early 1960s, it was agreed that the Article
113-committee would work under the auspices of the Council, not the Commis-
sion, and be composed of governmental trade officials (Johnson 1998, 16–17).
When, over the course of the 1960s, the Commission assumed more and more responsibility in other issue areas as well (Noël 1963, 16), the Article 113-committee became a model for those policies where the treaty did not provide for a formal mechanism to limit the Commission’s discretion. All governments except the Dutch delegation felt that the Commission’s discretion under the treaty rules was too extensive. To dispel these concerns, the Commission therefore proposed in 1961 to set up a committee, similar to the Article 113-committee, to consult with it on important agricultural matters. The Council, however, went beyond the Commission’s proposal and set up a considerably more restrictive “management committee procedure” (comités de gestion), according to which the Commission was to submit all its implementing decisions to government experts (Bergström and Héritier 2007, 172–79), a majority of whom would be able to refer implementing measures back to the Council for review.1

Crucially, the establishment of this procedure implied that the implementing power was only conditionally delegated to the Commission even if the treaty conferred it automatically. In other words, the Commission’s authority could potentially revert to the governments and its decisions could be altered, whether they concerned technical matters or aspects of political significance (Bertram 1968, 247). Complaints by the Commission and the Parliament that this informal practice violated the formal rules as it deprived the Commission of the “authority vested in it by the treaty” went unheeded (Rat der EWG 1963, 180).

The management committee outlined above was mostly used in the Common Agricultural Policy, but similar formulae were repeated in other issue areas as well. A less restrictive “advisory committee procedure” was invented for the European Community’s competition policy—another area where the treaty envisaged the Commission as the sole implementing authority. Although France demanded to copy the aforementioned Article 113-committee for the competition policy, the German delegation successfully insisted on giving the Commission much wider discretion (Gerber 1994, 105–7; Hambloch 2002, 892). In 1962 “Regulation 17,” which specified the content of the competition policy, merely obliged the Commission to consult with the governmental advisory committees before the adoption of implementing measures (Council of the EC 1962; Wigger 2008, 147–50; Goyder and Albors-Llorens 2009, 50; on advisory committees, see, e.g., van Gerven 1974; Graupner 1973).

A far more restrictive version, the “regulatory committee,” was used mainly for the remaining common market policies where the Treaty of Rome had left it up to the Council to delegate implementing powers to the Commission or to national authorities, or both. According to this procedure, when the Commission was in charge of implementation, it was only permitted to adopt measures that had previously been approved by the regulatory committee or, if the
committee disapproved, by the Council within a given period of time (Bergström and Héritier 2007, 179–85).

Absent a legal classification, a broad informal distinction emerged over the course of the 1960s among three main types of committees, going from least to most restrictive: advisory committees, mainly used in the competition policy, consulted with the Commission; management committees, mainly used in the Common Agricultural Policy, could block implementing measures; and regulatory committees, used in most other areas, had to approve the Commission’s measures before they would become effective (Ayral 1975).

This system of informal governmental oversight committees, whose number increased fivefold in this first decade, to forty-nine management and regulatory committees by 1969 (Institut für Europäische Politik 1989, 43), would soon become known as comitology (an EU neologism meaning “the study of committees”) (Schindler 1971, 184).

The Commission heavily criticized the proliferation of comitology on the grounds that it undermined the institutional balance of powers as it was envisaged in the Treaty of Rome. The European Parliament, for its part, complained that the Council had usurped the Parliament’s official responsibility to control the Commission in the performance of its tasks (Lassalle 1968, 406). Since the treaty did not make an official distinction between legislation and implementation, the European Parliament also worried that the Council might deprive it of its consultative legislative function by delegating politically significant decisions to the Commission and the comitology committees surrounding it (Bradley 1997, 231–33). These fundamental points of criticism would give rise to major disputes between the institutions over the next forty years.

**Legal Uncertainty and Conflict (1970–1986)**

The Council’s legislative activity expanded dramatically toward the end of the 1960s and in the early 1970s. The resulting legislative backlog gave rise to calls for a more frequent and extensive delegation of implementing powers to the Commission (Répresentation Permanente de la Belgique 1973). At the 1974 European Council, the chiefs of government demanded that their ministers make use “of the provisions of the Treaty of Rome whereby the powers of implementation and management arising out of Community rules may be conferred on the Commission” (European Council 1974, 8). On the European Council’s request, the Three Wise Men drafted a report on the functioning of the institutions, in which they agree with the chiefs of government that the Council “is simply trying to do too much…. The Council attempts to take far too many decisions which are of a minor, technical or recurrent nature” (Council of the EC 1980).
However, the Council of Ministers showed reluctance to delegate implementing powers and typically limited the implementing actors’ discretion by detailing the exact execution of policies in the original legislative act. However, when the Council did delegate implementing power to the Commission, it was generally to be controlled by one of the comitology committees. The number of these committees consequently quadrupled from around fifty in 1970 to 218 in 1986, two-fifths of which were of the most restrictive regulatory type and used for common market matters (Institut für Europäische Politik 1989, 43–45), while less restrictive management committees dominated the implementation of the Common Agricultural Policy. At the same time, the variety of these committees also proliferated. At one point, the European Parliament identified no fewer than thirty-one different comitology procedures (Spence and Edwards 2006, 241).

The Commission continued to view the Council’s reluctance to delegate, as well as the system of governmental committees, with great suspicion. In 1970, a case brought before the European Court of Justice questioned the legality of an implementing measure adopted under a management committee procedure. The plaintiff alleged that these committees violated official procedures and constituted a direct interference in the Commission’s treaty-based right of implementation, thus distorting the original institutional balance of power. In its Köster ruling, however, the Court found the Court’s practice of delegating and scrutinizing implementation actions through comitology was consistent with the treaty. Because the treaty authorized but did not oblige the Council to confer powers on the Commission, the Court argued that it was permissible for the member states to subject the Commission to additional control as long as these committees did not engage in “essential” legislation (European Court of Justice 1970; see also Schindler 1971).

Thus, the Court sided with the Council, but acknowledged that a distinction had to be drawn between legislation (on essential matters) and implementation (of nonessential matters), and that the Commission and comitology only possessed rule-making authority in the latter case. Yet the Court refused in this and related decisions (Bradley 1992, 700–702, 709–11) to draw this distinction itself. In fact, it gave the term implementation a very broad meaning, describing it as measures, “however important they may be,” that implement those essential elements laid down in the basic act of the treaty (European Court of Justice 1969). The Court thus left it up to the Council to determine what it considered essential because, in the words of an expert, this distinction between the essential and nonessential parts of legislation was a political judgment that the Court was reluctant to make. Instead of clarifying the situation, the Court thus created new ambiguity that provided the Council ample flexibility to decide who and to what
extent politically sensitive matters were going to be implemented (Türk 2009, 55; Lenaerts and Verhoeven 2000, 661–62, 652).

The lack of legal clarity regarding the scope of delegation and the use of comitology worried the European Parliament, which thought that the comitology had become “to some extent autonomous and no longer fully under the Commission’s supervision” (European Parliament 1983). The Parliament was especially critical that there were no ground rules to determine the scope of delegation (i.e., the political importance of implementing measures) and the choice of the comitology procedure (i.e., the Commission’s discretion). This situation not only provided the Council ample flexibility to delimit the Commission’s discretion at will. By delegating the implementation of politically sensitive matters to the Commission and comitology, the Council could also at any time limit Parliament’s participation in legislation on essential matters. A rapporteur on this matter complained:

How can the Council explain the contradiction in its argument that [it requires comitology because] its final decision on matters of vital interests to the Member States is essential, while maintaining that participation by Parliament [in comitology] is superfluous since only “technical implementing provisions” are involved? … Either the interests involved are really vital, in which case the issue is so important that this Parliament must be consulted on them, or they are in reality technical questions; then it is not necessary for the Council to reserve the decision for itself as it has frequently done in the past. (European Parliament 1975, 103–4)

To press for greater legal clarity, the European Parliament therefore threatened to freeze a part of the Commission’s funds unless the member states came up with ground rules for the use of the various types of comitology committees (Bergström and Héritier 2007, 191–92). It became more adamant in its demands when it became apparent in the mid-1980s that the Commission was slated to play an essential role in the implementation of the Single Market. In 1986, it noted again that the ambiguity of the comitology system allowed the member states to retain power especially on politically sensitive matters (European Parliament 1986, 19).

The revision of the Treaty of Rome through the 1986 Single European Act therefore seemed a welcome opportunity to resolve the legal ambiguity surrounding the scope of delegation and the choice of comitology procedures. In fact, its supplement to Article 145, which specified the Council’s rights and obligations, now seemed to oblige the Council to confer power of implementation to the Commission rather than to national administrations. It stated that the Council shall “confer on the Commission, in the acts the Council adopts, pow-
ers for the implementation of the rules which the Council lay down,” and that only in “specific cases” did it reserve the right “to exercise directly implementing powers itself.”

At the same time, however, the treaty put comitology on a legal footing by providing the Council the possibility of “imposing certain requirements in respect of the exercise of these powers.” The member states also refrained from making a clear distinction between legislation and implementation in the new treaty. As a result, the Single European Act largely codified existing practice by which the Council flexibly defined the scope of legislation and implementation as well as the Commission’s discretion on a case-by-case basis.

For the Commission, this meant that it was still not able to control which type of comitology committee would oversee its actions. For Parliament, it implied that the Council still deprived it of its task to control the executive and—where the delegated power was, in fact, politically sensitive—of its newly gained right to participate in essential legislation.


Although the Single European Act had legalized the comitology system, it did little to settle the conflict between the institutions as it remained ambiguous about the scope of delegations and the conditions of comitology’s use. The Commission and Parliament therefore continued to push for further formal specification of the ground rules. The Commission submitted a proposal for a Council regulation that suggested a simplified comitology structure and, more important, defined the principles and rules for the Council’s use of this system (Commission of the European Communities 1986). However, the Council in its 1987 Comitology Decision departed substantially from the Commission’s proposal (Meng 1988, 214–20; Ehlermann 1988) and refused to specify criteria for the scope of implementation and the use of the various comitology procedures (Council of the EC 1987; Dehousse 1989, 125–28; Bluman 1989, 68–70). According to a legal expert, a unanimous Council was keen to preserve the flexible nature of implementing powers, to establish any boundaries only on a case-by-case basis, and to avoid, therefore, any type of general definition or “principles” similar to those found in national constitutions (restricting the scope of implementing powers a national parliament may delegate to a Government). (Bergström 2005, 198)

In fact, the decision did little to change existing practices and continued to keep the Commission “at the national leash” (Meng 1988, 219). In its aftermath, Parliament and the Commission complained that the Council still reserved implementing powers for its national administrations and that when
it delegated powers to the Commission, it still made excessive use of the most restrictive regulatory committees, especially in relation to the implementation of the Single Market (Commission des Communautés Européennes 1991a, 11).

Although the member states retained flexible control over the implementation of the Single Market, they lost flexible control over one of its aspects: the competition policy. Recall that in the early 1960s the Council had decided to give the Commission ample discretion in this policy and merely obliged it to consult with advisory committees. Until the early 1980s, the Commission had used its authority primarily in the area of trade-distorting restrictions in vertical relationships between firms (“vertical restrictions”), while it had paid far less attention to other aspects of competition policy such as merger control, antitrust, and state aid. However, the renewed commitment to the Single Market that the Single European Act represented resulted in a leap in Europe-wide mergers and acquisitions (increasing sixfold between 1982 and 1990) and suddenly pushed the EU’s competition policy in all its aspects to center stage (McGowan and Wilks 1995, 152; McGowan and Cini 1999, 179–80). In this context, the Commission began to use its wide discretion to shift the focus from traditional concerns with private conduct toward the sensitive issue of government interference with the competitive process (Gerber 1994, 137–41)—a development that in the years to come would fuel more general criticism of excessive centralization and bureaucracy at the EU level (Neven, Nuttal, and Seabright 1993, 218; similarly, Goyder 1993, 508).

Order and Scatter (1994–1999)

The Treaty of Maastricht did nothing to resolve the ambiguity surrounding the comitology system. This situation remained unacceptable for the European Parliament. In a modus vivendi concluded in December 1994, the Council and the Commission agreed to a more extensive exchange of information with the Parliament (European Parliament 1996, 2). But for Parliament, which the Maastricht treaty had just been promoted to a genuine co-legislator, the modus vivendi was merely one step in the right direction. It felt that the Council continued to take advantage of the system’s ambiguity by delegating rule-making power on essential matters in order to exclude the Parliament from legislation on politically sensitive questions. It therefore pressed for a clear distinction between legislative and implementing matters and, in the case of implementing matters, for criteria regarding the choice of the committee procedure (Bergström and Héritier 2007, 210, 217).

Most member states, in contrast, preferred to retain the flexibility on politically sensitive matters that the ambiguity of the situation provided. The House
of Lords’ Select Committee on the European Communities shared the Council’s skepticism about formulating legal delegation criteria:

Any criteria must be generally acceptable, readily understandable and workable…They must not be too prescriptive, and they should permit differences of policy…As mentioned, one of the key interests to be protected is that of the Member States. There will remain matters on which there are sensitivities, at least until the Commission has shown itself capable of exercising the powers in question completely. (House of Lords 1999, part 4, no. 164)

According to the Select Committee, it was unlikely that the criteria required could be accurately and concisely translated into formal rules. Therefore, some sort of guidelines should be agreed on in a political rather than a legal text (House of Lords 1999, part 4, no. 165).

Given the member states’ reluctance to give up their flexibility, they did not use the opportunity at the 1996 Intergovernmental Conference on the Treaty of Amsterdam to rid the treaty of its legal ambiguity. The conference merely charged the Commission with formulating a proposal for amending the 1987 Comitology Decision. The new 1999 Comitology Decision revised the existing system in several ways, most notably by introducing criteria for the use of each comitology procedure and providing for a limited involvement of the European Parliament in scrutinizing the implementation of acts adopted under the co-decision procedure.

Overall, however, the 1999 Comitology Decision did little to limit the Council’s extensive freedom of choice (Lenaerts and Verhoeven 2000, 671). Allaying fears that the new criteria might become a new cause for litigation, the decision explicitly states that these were “of a nonbinding nature.” The Commission also committed itself in an official declaration to search for balanced implementing measures in “particularly sensitive sectors” (European Commission 1999a).

As Parliament built up pressure for a formal systematization of comitology, the member states increasingly resorted to an alternative way of implementing policies. In 1993, they established eight “European agencies,”6 and, by the end of 1999, eleven agencies were in operation, most of which dealt with narrow cross-sectional topics within the broader fields of regulation and social policy. There were, for example, an agency for the evaluation of medicinal products and a center for the development of vocational training. Created on a case-by-case basis through an ordinary Council regulation, the agencies were governed by a management board mainly composed of member states’ representatives and operated largely independently of other supranational institutions (Kreher 1997, 227).
The Commission usually had organizational or budgetary responsibility for these agencies. Their principal function was the collection, management, and dissemination of information about the procedures and progress of the implementation of EU policies by national administrations (Majone 1997, 271–72; see also Chiti 2000, 342).

The European Parliament viewed this development with suspicion and demanded formal and transparent procedures to improve the monitoring and control of these agencies (Kelemen 2002, 104–5). The Commission initially welcomed their establishment insofar as the agencies relieved its workload. However, just as the European Parliament had come to demand clear criteria for the use of comitology, the Commission also became increasingly concerned about the lack of criteria for the creation of these agencies.

The Commission became more wary about the establishment of independent agencies when this idea became popular in the competition policy where the Commission had come under increasing fire for its overly aggressive implementation (Gerber 2007–08). Germany floated the idea of delegating the Commission’s responsibility for this policy to a European cartel office similar to the German Federal Cartel Office (Bundeskartellamt) (Ehlermann 1995, 474–75). Other member states and employers’ associations partly echoed Germany’s criticism of the Commission (Financial Times 1994; see also Wilks and McGowan 1995, 265; House of Lords 1993, 35–50), but were more lukewarm about the idea of centralizing authority in the hands of an agency on the German model (McGowan and Wilks 1995, 162–64). Alternative proposals for reform suggested the decentralization of implementation with a view to enhancing the competition policy’s “accountability, flexibility and sensitivity” (Wilks 1996, 167). Overburdened by the competition policy’s complex procedures, the Commission agreed on the need for reform (Forrester 2000, 1036). It reacted to the growing criticism by publishing a white paper on this topic. Hailed by its former directorate general, Claus-Dieter Ehlermann (2000, 1239), as the “most important policy paper the Commission has ever published in the more than forty years of EC competition policy,” the paper proposed a substantial decentralization of the competition policy to national authorities and courts (European Commission 1999b, 5).

**Formalization and Fragmentation (2000–2009)**

After the Treaty of Amsterdam further strengthened the Parliament’s role as a co-legislator, it pressed even more adamantly for a greater formalization and involvement in comitology. It did so first in the context of financial services. In
the early 2000s, the member states decided to give new impetus to legislation in this area and tasked a committee chaired by Alexandre Lamfalussy to make policy suggestions. This committee proposed to tackle the challenge in a two-step process starting with the formulation of regulatory principles through the normal legislative procedure and, in a second step, technical measures to be decided through a comitology procedure.

Though the Commission and the member states welcomed Lamfalussy’s proposal, the European Parliament was more skeptical and successfully pressed for three changes to the proposed procedure: the inclusion of sunset clauses to all delegating acts, that more comprehensive information be provided to the Parliament, and the opportunity for Parliament to react to the Commission’s draft implementing measures (Blom-Hansen 2011, 350–51). Parliament subsequently succeeded in extending the use of this new procedure and establishing criteria for its use. Initially, it had hoped to accomplish this with the ongoing treaty revision through the 2002–04 Constitutional Convention (Bergström and Héritier 2007, 220–23). When the product of this Convention, the Constitutional Treaty, failed, however, it decided to resort to more confrontational means by threatening the Council with withholding funding for comitology committees as well as its agreement to extend sunset clauses for the financial services measures (Blom-Hansen 2011, 358). In response to this threat, the Council agreed to extend this new comitology procedure to provide for greater parliamentary involvement in areas that were subject to co-decision (“regulatory procedure with scrutiny”) (Council of the EU 2006). The Council also specified that “measures of general scope” ought to be subject to this new procedure (Blom-Hansen 2011, 359).

At the same time that the Council agreed on greater parliamentary involvement in comitology, the member states also delimited the gray zone between legislation and implementation that provided the Council so much flexibility. Following the ill-fated Constitutional Treaty, the Lisbon Treaty introduced a hierarchy between so-called legislative, delegated, and implementing acts. Legislative acts are supposed to contain essential, nondelegatable elements such as the objectives, content, scope, and duration of delegated powers. By implication, delegated and implementing acts are not supposed to alter these essential elements. At the time of writing, however, it is still unclear whether these new treaty rules succeeded in clarifying the distinction between legislation and implementation.7

Whilst the comitology system was being formalized, the member states increasingly had recourse to agencies. Another fourteen agencies were established in diverse fields such as defense (e.g., the European Defence Agency), transport (e.g., European Railway Agency), and on very specific regulatory issues
(e.g., the European Food Safety Agency). Both Parliament and the Commission eyed the agencies’ popularity with increasing suspicion. In its White Paper on European Governance, the Commission stressed that the agencies should not be established in policy areas where the treaty gave it exclusive authority (European Commission 2001, 24; Commission of the European Communities 2002, 5–6; European Commission 2005). Repeating arguments about comitology, on numerous occasions it demanded the establishment of clear criteria for the agencies’ creation, arguing for example in 2008 that

the diverse role of agencies fuels concerns that they might stray into areas more properly the domain of the policy-making branches of the EU. The responsibilities of the other institutions toward agencies, and of the Commission in particular, suffer from the lack of a clear framework and defined lines of responsibility. (European Commission 2008, 6)

This complaint was echoed by the European Parliament, which furthermore demanded that the creation of agencies be subject to the co-decision procedure. The Council, however, rejected the Commission’s proposal for an interinstitutional agreement on clear criteria for the creation of agencies (Andoura and Timmerman 2008, 25). The debate was still ongoing at the time of writing.

In the meantime, national authorities became available as a new potential implementing actor alongside the Commission due to the “revolutionary” (McGowan 2005, 987) reforms that followed the Commission’s white paper on the competition policy. Some argue they entail a dispersion of power and authority to the member states and national competition authorities (Forrester 2000, 1040), while others assert that they served to augment the Commission’s power (Riley 2003, 671–72). For our purposes, the important fact is that the involvement of national authorities supposedly made the implementation of the competition policy far more flexible than the previous, highly formalized system (Cengiz 2010, 662–67). The reform envisaged that member states would be primarily responsible for the application of EU competition law, and the Commission would take enforcement action only under limited circumstances (Gerber 2007–08, 1242). To guarantee a consistent Europe-wide application despite this decentralization, the national authorities were supposed to exchange information within the so-called European Competition Network. This informal network decides which national jurisdiction has responsibility for each case. Customarily, the national authority that opens a case typically continues to handle it, and only when more than three countries are affected does the case go to the Commission (Wilks 2007, 441).

The original Treaty of Rome centralized implementing powers for many policies in the hands of the Commission. On the remaining issues, the Council could confer powers to the Commission on a case-by-case basis. Once the Commission was delegated implementing powers, there were no legal means for the member states to alter the Commission’s measures.

If we take a look beyond these initial formal rules, however, we see that much of the implementation of EU policies takes place within an ambiguous legal space or outside the treaty rules. These practices commonly afford the member states collectively a great deal of flexibility to determine the Commission’s discretion on a case-by-case basis. For the European Parliament, on the other hand, these practices usually implied a curtailment of its legislative power and its capacity to control the Commission in its executive function.

This great legal ambiguity—and the real loss in power it implied, especially for the European Parliament—meant that the treaty rules have constantly been subject to legal challenges, revision, and reinterpretation. Although this makes it difficult to clearly discriminate between practices of formal and informal governance, a few trends become apparent. First, the Council managed for most of the time to attain flexible control of the scope of delegation (through the ambiguous distinction between legislation and implementation) and the Commission’s discretion (by specifying implementing actions in the parent legal act and subjecting the Commission to the comitology scrutiny). This flexibility afforded the Council the opportunity to retain much leeway in the implementation of politically sensitive matters. Second, as soon as the European Parliament from the 1990s on successfully pushed for a clear delineation of the scope of delegation and a greater systematization of comitology in order to reduce the member states’ flexibility, the Council increasingly had recourse to alternative forms of implementation. Thus, it created more and more agencies and, in the case of the competition policy, involved national authorities to a greater extent in the process.

As the table below visualizes, however, the empirical record supports Liberal Regime Theory only in part, and only ambiguously so. In line with the theory’s expectation, the Common Agricultural Policy is once again an outlier in these broader trends because the Council subjected the Commission in this area to the less intrusive management comitology committees, whereas most other economic policies with a higher degree of political uncertainty featured the restrictive regulatory comitology procedure.
A second piece of evidence that corroborates Liberal Regime Theory is the fact that—most of the time—conflicts over the rules took place between the member states on one side and the supranational actors on the opposite side. The European Parliament skillfully fought the member states for legal rules that provided greater voice in the delegation of implementation and the scrutiny of the Commission. The Commission, for its part, almost always demanded rules that provided it with the widest possible discretion. The member states, in turn, typically resisted rule changes that would reduce their flexibility to determine the scope of delegation and the Commission’s discretion, and only gave in when the Parliament strong-armed it into giving it more power.

This evidence notwithstanding, table 7 makes apparent that there are limits to Liberal Regime Theory’s explanatory power and no straightforward patterns in the emergence of informal governance. The member states codified the comitology system, and they ultimately agreed to a legal distinction between legislation and implementation, which strongly curtailed their ability to flexibly alter measures that threaten to generate strong conflict at the domestic level. These developments are probably best explained by the European Parliament’s capacity to twist the Council’s arm. And although it seems likely that the increasing formalization of comitology led the Council to search for alternative implementation methods, it is nevertheless an open question whether agencies and national administrations are good substitutes for the flexibility the Council used to have in the early days of comitology.

Thus, contrary to our theory’s predictions, the final three observations in areas of high political uncertainty feature formal rather than informal governance. In addition, the Common Agricultural Policy is an outlier only during the first three decades of the Community’s existence, that is, until the Commission starts to make full use of its discretion in the competition policy. As a result, the empirical evidence is only straightforward for the first two decades of the European Community and ambiguous afterwards.

<table>
<thead>
<tr>
<th></th>
<th>LOW POLITICAL UNCERTAINTY</th>
<th>HIGH POLITICAL UNCERTAINTY</th>
</tr>
</thead>
<tbody>
<tr>
<td>1958–1969</td>
<td>Formal</td>
<td>Informal</td>
</tr>
<tr>
<td>1970–1986</td>
<td>Formal</td>
<td>Informal</td>
</tr>
<tr>
<td>1987–1993</td>
<td>Formal</td>
<td>Formal</td>
</tr>
<tr>
<td>1994–2000</td>
<td>Informal</td>
<td>Formal</td>
</tr>
<tr>
<td>2001–2009</td>
<td>Informal</td>
<td>Formal</td>
</tr>
</tbody>
</table>