European Governance, Deliberation and the Quest for Democratisation.

Erik O. Eriksen, Christian Joerges and Jürgen Neyer (eds.)

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Chapter 3
Communicative Rationality in European Governance? Interests and Communicative Action in Functionally Differentiated Single Market Regulation.

Thomas Gehring[1]

I.   Introduction

European governance is, like international relations and domestic politics, not least because it is organised by communication. Neither states and their bureaucracies, nor the supranational organs and interest groups are mere dumb players on the chess board of European politics. They constantly talk to each other, explain their preferences and proposals, and negotiate about collective decisions. Recent contributions suggest that the arrangements of decision-making in the European Union systematically induce actors to deliberate and produce more reasonable (i.e., 'better' and, therefore, more legitimate) outcomes than are expected from traditional intergovernmental bargaining schemes. Special attention is

drawn to a particularity of the European polity, namely, to governance through committees (Joerges/Vos 1999, Christiansen/ Kirchner 2000). It is believed, for example, that decision-making within a particular type of the so-called Comitology committees transforms governance from intergovernmental bargaining into supranational deliberation (Joerges/ Neyer 1997a, 1997b) and leads to a particular form of 'good governance' (Joerges 1999).

While the ubiquity of communication in European and international governance may be empirically observed, its relevance for collective decision processes is still subject to dispute. The question is whether communication constitutes a factor which influences outcomes separately from other important explanatory factors such as established interests (preferences) and power. On this issue, a new line of conflict has developed in recent years (*e.g.*, Eriksen/Weigard 1997, Risse 2000) along the firmly established divide between rationalists and constructivists (Keohane 1988, Lapid 1989).

For rationalists, communication plays an inferior role compared to other explanatory factors. Empirically observed communication among actors is frequently treated as unimportant 'noise'. After all, co-ordination, and even co-operation in Prisoners' Dilemma situations, may 'evolve' without communication (Axelrod 1984). If rational choice theory recognises that communication may matter even for rational utility maximizers, it does so in the forms of cheap talk (Farrell/Rabin 1996) and signalling (Morrow 1994). The constructivist side of the meta-theoretical divide, having, in the past, been basically concerned with the role of norms and institutions for the formation and development of actors' preferences, and having complemented the rationalist 'logic of consequentialism' with a norm-oriented 'logic of appropriateness'

(March/Olsen 1998), witnesses a 'cognitive turn' (Checkel 1996). Communication has been introduced into the analysis of European and international politics in the forms of epistemic communities (Haas 1989, 1992), speech act theory (see Kratochwil 1989: 30-39, 1993), and communicative action (Müller 1994, Risse-Kappen 1996, Risse 2000). Drawing on the Theory of Communicative Action developed by Jürgen Habermas (1981), it is argued that neither European nor international governance is limited to the balancing of fixed preferences. Through communication, actors may convince each other, and thereby affect each others' preferences. Reasons, in addition to power, are identified as a second source of influence on the outcomes of co-ordination processes.

While the field is still new and somewhat incoherent, it is rooted in two rather different research interests. Its normative branch is linked to the deliberative democracy tradition (Habermas 1992, Eriksen/Fossum 2000, Cohen/Sabel 1997, Dryzek 2000), which focuses on the 'input' side of the policy-making process, and on perspectives to overcome the legitimacy problem of governance institutions beyond the nation-state (Zürn 2000). It argues that legitimacy may be achieved through an exchange of public arguments and reasoning among free and equal citizens because the reasonableness of policy options may be scrutinised in public discourses. Publicly binding-decisions ought to be made in a deliberative way, rather than by mere aggregation of preferences (Cohen 1989, Jacobsson 1997). While the normative branch implicitly assumes that deliberative governance does exist, or is at least possible, in the real world, it does not address the empirical issue of how far existing polities such as international institutions and the European Union already fit this ideal, nor the theoretical issue of where the limits of deliberative governance are located (see contributions in Elster 1998).

A much less well developed analytical branch of inquiry examines the conditions under which communicative action may be relevant to real-world political processes. Jon Elster (1994, see, also, Saretzki 1996) argued, for example, that the participants of constitutional assemblies will be inclined to promote generally justifiable propositions if negotiations are transparent to an attentive public. Accordingly, he constructed an ideal-type of 'arguing' based on transparency, which is diametrically opposed to rational-choice bargaining. However, we cannot expect transparency of negotiations always to lead to the rule of reasons, instead of to the traditional aggregation of parochial interests. Moreover, we cannot exclude that interaction behind closed doors, for example, among scientists, takes place discursively. Remarkably, Habermas designed his concept of communicative action originally in the first place for intra-family co-ordination (Habermas 1981). Hence, the publicity of a communication process is neither a necessary, nor a sufficient, condition for deliberation. The interaction mode of 'arguing' must be established independently of public observance (Gehring 1996, 2002: 107-121).

For this purpose, the concept of a 'logic of arguing' (Risse 2000: 4) complementing the traditional 'logic of consequences' and the 'logic of appropriateness' is analytically of limited assistance as long as it is based on a particular model of 'communicative man' which matches the traditional models of 'economic man' and 'sociological man'. Thus, it will merely describe a particular form of interaction without helping us to understand under which conditions real-world actors may be systematically expected to interact according to this particular logic. To explore this question theoretically, we will have to follow the path indicated by Elster and find an answer to the following analytical question: Under which conditions will an actor voluntarily follow a logic of arguing as the best form of

strategic action, even if he, first and foremost, endeavours to maximise his own utility and declines to subordinate the pursuit of interests to communicative understanding?

If the European Union drives actors systematically towards deliberation, *i.e.*, interaction based on reasons, rather than power, this effect will be the result of its unique institutional arrangements. It is observed that committee decision-making is characterised by a comparatively low level of conflict, and that decisions are usually adopted by consensus (Falke 1996). This is, in a somewhat *ad hoc* fashion, basically explained by the fact that the participating civil servants are 'socialised' by their intense and regular collaboration, and become used to deliberative problem-solving (Neyer 1997: 30, Wessels 1998: 228) as well as the presence of European law. In other contributions, attention is drawn to the relevance of scientific committees (Gehring 1999, Krapohl 2003). In a whole series of articles, Majone (*e.g.*, 1997, 2001) argues that independent regulatory agencies, if made accountable, will, in many cases, provide more problem-adequate (*i.e.*, 'better') decisions than majoritarian governance, because regulation, in contrast to re-distribution, is largely influenced by the collective search for good solutions (1994). These contributions suggest that the institutionalised organisation of governance affects the quality of decisions in systematic ways. However, this discussion has only just started. Still, contributions are not usually conceptually founded sufficiently to support the far-reaching claims that are made seriously. What is needed is the careful analysis of the opportunities, as well as the limits, of systematically improving the output of governance institutions by different forms of organisation of decision-making.

Moreover, contributions still focus on rather specific institutional arrangements and ignore the fact that a committee or an agency is embedded in a wider institutional structure. Since many of them explore decision-making in the single market, it will be useful to examine how the decision-making arrangements of supranational governance in this field differ from their corollaries in traditional international institutions. The purpose of European single market policy-making is strikingly similar to that of the World Trade Organisation (WTO). In both cases, Member States endeavour to intensify the exchange of goods and services, by eliminating discrimination against imports, and to remove trade barriers. What differs is the way in which collectively binding-decisions are made. Within the WTO, decisions are basically made by intergovernmental negotiations, while the European Union has developed an impressive decision-making apparatus that also involves, beside States, supranational, transnational and sub-national actors. The numerous decisions from which the single market emerges are located at different levels of decision-making. At the treaty level dominated by the Member States, the institutional framework within which European policy-making takes place is hammered out, while substantive decisions are delegated to a lower level of decision-making. At the legislative level, directives and regulations are basically agreed upon by the collaboration of the three legislative organs, namely, the Commission, the Council and the Parliament. Frequently, in particular, in the context of the so-called 'New Approach' introduced as part of the single market programme, directives and regulations once again delegate substantive parts of regulation to committees, standardisation organisations and newly established regulatory agencies, thus creating a third level of decision-making. Beside this 'vertical' differentiation, decision-making is

differentiated 'horizontally'. At the lower levels, decision-making is rarely delegated to a single agent. Instead of establishing 'independent agencies', procedures usually envisage a number of stages involving different actors. In short, single market regulation is the result of activities located at different levels and stages with complementary functions.

Against the backdrop of the discussion on deliberation and communicative action, the present paper explores the question of whether the peculiar organisation of decision-making in the European single market has the effect of systematically sorting out parochial interests of the actors involved, and thus promises to produce systematically 'better' results than traditional intergovernmental bargaining systems. The question is whether, and under what conditions, the distribution of distinct functions to the different levels and, at each level, to the different stages of decision-making, may systematically induce actors to deliberate and argue, rather than pursue their parochial interests by bargaining.

In spite of the long and multi-faceted tradition of integration research, we know surprisingly little about the effects of the peculiar form of supranational governance. From an intergovernmentalist perspective, the Union is still comparable to other international institutions because the Member States control the most important decision-making level at which the treaties are made and amended, and they are assumed to act as they do in regular intergovernmental negotiations. Accordingly, integration would amount to a series of 'grand bargains' and subsequent consolidation periods (Moravcsik 1993, 1998). The establishment of the impressive decision-making apparatus and the delegation of policy-making are basically explained by the Member States' desire for 'credible commitments' (Moravcsik 1998: 73-77). Close to the 'institutional

bargaining' (Tsebelis 1990) and the 'rational design of international institutions' literatures (see the contributions in the special issue of International Organization 2001/4), intergovernmentalism examines the Member States' motivation for the delegation and the adoption of institutional arrangements fairly well, but fails to examine their consequences.

Intergovernmentalism is widely criticised for its inability to grasp major aspects of the integration process. Historical institutionalists (Pierson 1996, Thelen/Steinmo 1992) point to the fact that a theoretical perspective which exclusively focuses on the analysis of major isolated events does not account for the development of the Union over time. If a decision generates consequences (it is believed largely unintended ones) which, in turn, influence subsequent decisions, a path-dependent process (North 1990) which was not envisaged at the beginning will be created. Modern Neo-functionalism (Sbragia 1992, Sweet Stone/Sandholtz 1997) emphasises the role of supranational and non-state actors for European decision-making. It is claimed that states lose control, and other actors (*e.g.*, interest groups, regions, *etc.*) take over – at least at the lower levels of decision-making which are so important within European policy-making (Marks *et al.* 1996). The focus on actors and the distribution of power implies a zero-sum game. However, the participation of numerous actors other than the Member States in European decision processes will not imply that states have largely lost control if the former act in the (long-term or 'enlightened') interest of the latter.

Rational institutionalism (Garrett/Tsebelis 2001), originating from comparative politics and having entered integration theory only in the 1990, occupies a possibly fruitful intermediate position. Basically

focusing on the relationship between the Commission, the Council and the Parliament in regular legislative processes (Tsebelis 1994, Garrett/Tsebelis 1995, Hubschmidt/Moser 1997), it emphasises the role of formal procedures for the distribution of power between these actors. Thus, it transforms the analysis of the behaviour and presence of certain actors into an analysis of the incentives and opportunities for action created by institutional rules. It is the rules organising decision–processes that become the primary source of power for the actors involved. In addition, rational institutionalism reaches beyond the mere description and intuitive analysis of procedures; it provides analytical tools for the careful examination of their consequences. Other authors operating in a similar strain employ the 'Principal–Agent'–Approach, originating from economy and widely used in US–political science (Kiewiet/McCubbins 1991, Epstein/O'Halloran 1999), to examine the vertical differentiation of levels of decision–making. From this perspective, the core issue is how the principal ensures that an agent's operations are in conformity with his interests. The establishment of several hundred so–called 'Comitology–Committees' (Pedler *et al.* 1996, Wessels 1998) may thus be interpreted as a powerful instrument of the Member States to control the activities of the Commission (Pollack 1996, 1997, but see Ballmann *et al.* 2002). However, once again, 'power' or 'influence' are conceptualised throughout as a homogeneous resource distributed among the actors involved in a zero–sum arrangement. Other consequences of different forms of organisation of decision–making and procedures, such as changes to the mode of interaction among the actors involved, or the impact on the quality of decisions, (so far) escape the attention of rational institutionalism.

The argument of the present paper reaches across the entrenched lines of academic warfare. It borrows the concepts of discursive interaction and of 'reasonable', i.e., 'good', decisions from Habermasian communicative action which is usually attributed to the constructive side of the debate. However, in order not to rely on all too idealistic assumptions, it starts from a concept of actors who strategically pursue their interests and try to maximise their own utility. From intergovernmentalism, it borrows the insight that the Member States establish and maintain the entire institution, and design its rules and procedures according to their interests. Yet, it recognises that its neofunctional and institutional critiques point to important aspects of the Union which are ignored by intergovernmentalists. More precisely, it assumes that the empirical clue to grasping the consequences of the peculiar institutional organisation of European single market policy-making is to be found at the bottom level, rather than the top level, of the European decision-making apparatus.

The paper's claims are three:

First, Habermasian communicative action provides a reliable conceptual foundation as well as useful tools for the empirical analysis of largely ignored, but important, aspects of the role of communication in international relations and European politics. It draws attention to the fact that, alongside power, reasons constitute a separate resource which (also) affect actors preferences and collective outcomes. Employing the perspective of rational utility maximizers, it turns out that communication based on reasons is relevant for real world actors even if they are not inclined to disregard their parochial interests. The conditions under which this is the case are systematically explored.

Second, the European Union (and, to a lesser degree, international institutions) bear the potential for 'rationalising' decisions in a

Habermasian sense. Their decision processes may be organised in ways which ensure that outcomes approach the standards of Habermasian discourse theory. As governance institutions move along from 'pure' negotiation systems towards more complex political decision systems, modes of governance change so profoundly that reasonable decisions may be produced even if the participating states and non-state actors behave as rational utility maximizers and endeavour to pursue their parochial interests.

Third, the transformation of governance is based on a single important social mechanism, namely, the division of a given decision-load onto a number of specialised decision-making processes which are functionally complementary. The functional differentiation of decision-making forms the basis for three related mechanisms. It provides room which favours actors who wish to achieve decision-making through the arguing mode rather than the bargaining mode, thus depriving actors of some of their original opportunities to pursue their parochial interests. It allows the task of goal-formation to be separated from that of the implementation of the established goals. And it constitutes the foundation for systems of 'checks and balances' in which the room of manoeuvre of any given decision-making stage is limited by both the previous and subsequent stages. This does not mean that every functionally differentiated decision-making apparatus will necessarily ensure communicative rationality. Instead, it is claimed that we can identify institutional arrangements which systematically push outcomes towards the normative standards of decision-making by deliberation. We find them in the European single market regulation, in particular, at the lowest level of decision-making.

The paper is organised as follows: Section 2 explores the Habermasian Theory of Communicative Action and argues that it provides both an

interesting mode of interaction, namely, arguing, and a useful (normative) standard for the appraisal of the quality of collective decisions even in cases which do not meet the theoretical ideal. Section 3 examines the conditions under which we may expect rational utility maximizers to communicate by means of reasons, rather than bargain by means of power. The conditions prevailing in international negotiations differ significantly from those that exist in more complex decision-making systems such as the European Union. It turns out that there is some, albeit limited, room for reason-based interaction in negotiations, while the institutional arrangements of more complex decision systems may force even rational utility maximizers to communicate in ways that promise rational outcomes in the Habermasian sense. In Section 4, single market regulation is examined with regard to the existence of arrangements that systematically induce actors to use reasons, rather than power, as the dominant resource to exert influence on outcomes.

2. The Concept of Communicative Action

The present section is devoted to developing a concept of communicative action that is relevant to the theoretical analysis of international relations and European governance. From the core ideas of communicative action based on both reasons and discourse as a procedure for the collective evaluation of reasons, it derives a mode of interaction, called 'arguing', which is diametrically opposed to power-based bargaining. This concept is based on demanding pre-requisites that make it appropriate for normative theorising, but seem to be difficult to apply to positive analysis of real-world interaction processes (1). It then argues that the concept may be useful for the empirical analysis of both international relations and European governance problems precisely because of its normativity.

Discourse ethics addresses the question of 'how the world should be', and may easily be employed as a standard for the appraisal of social norms and collective decisions, which provides an alternative to the frequently used Pareto-criterion (2).

2.1. Discourse Theory: The Power of Reasons in Habermasian Communicative Action

Unfortunately, Habermas starts to develop his concept of communicative action by creating a model of 'communicative man' that has entered the theoretical debate in International Relations and Integration Research (Risse 2000). In communicative action, he argues, actors do not first and foremost pursue their own goals, choose the appropriate means, and calculate the direct and indirect consequences of different options, as they do in strategic action. They attempt to reach understanding and agreement (Verständigung), and they pursue their own goals only on condition that they can mutually adjust their action on the basis of a common definition of the situation. Thus, it seems that the interaction of the participating actors is co-ordinated by acts of understanding, rather than by a calculus of individual preferences (Habermas 1981: 384–385). As will be seen later (Section 3), this may be true from a descriptive point of view. However, complementing the traditional model of 'economic man' with an additional model of 'communicative man' creates too stark a contrast between utility maximization and attempts to reach communicative agreement. It undermines a careful analysis of the conditions under which real-world actors may communicate and precludes theoretical attempts to reconcile strategic and communicative action (see Dryzek 1991, Johnson 1993). Moreover, if actors were assumed to be able to choose freely between communicative and strategic action, it would be difficult to analyse under which conditions they could

be expected to act according to the one or the other logic. In short, the creation of the model of 'communicative man' is unnecessary, and fails to constitute an indispensable part of the Theory of Communicative Action. Its use in the theorising of European integration and international relations seems to be a – definitional – answer to the question of whether communicative action matters in real-world interaction.

Most fundamental for understanding the essence of the Theory of Communicative Action is the distinction between two diametrically opposed modes of interaction, namely, bargaining and arguing (Elster 1992). These modes of interaction are not necessarily linked to different models of actors, and permit the examination of the conditions under which rational utility maximizers will be inclined to argue, rather than bargain. Both modes of interaction are channelled through verbalised communication. Bargaining is well-known from the rational choice analysis of negotiation processes (Schelling 1960, Elster 1989). "To bargain is to engage in communication for the purpose of forcing or inducing the opponent to accept one's claim. To this end, bargains rely on threats and promises that will have to be executed outside the assembly itself." (Elster 1992: 15). Bargaining allows actors to draw on power resources that are external to the negotiation process. In the terms of speech act theory, developed by Austin and Searle and employed by Habermas (1981), action of this type is intended to influence his addressee directly by saying something ('Hands up') (Habermas 1981: 389-90). This type of speech act will generate effects only if it is accompanied by the appropriate (positive or negative) sanctions, *i.e.*, threats or promises ('Hand up, or I shoot'). The predominant power resource in negotiations is the threat to reject a co-operative solution (for exit, see Hirschman 1970). To be successful in a bargaining-process, an actor must have at his

disposal, or endeavour to develop, acceptable alternatives to the negotiated outcome (Fisher/Ury 1989). Accordingly, weaker participants will affect the outcome less than stronger ones (Elster 1989). In a pure bargaining process, power is the only asset that matters, and bargaining is a device to exchange signals about the power resources available to the participants and to evaluate the (usually unknown) constellation of power existing outside the negotiation forum collectively. Agreement will come about as a compromise dependent on the external conditions of the bargaining situation. In short, bargaining is "linguistically mediated strategic action." (Habermas 1985: 294).

Habermasian Theory of Communicative Action relies on the (empirical) observation that verbalised communication is not necessarily limited to the exchange of power-related signals. It also enables speakers to act by saying something ('I believe, that the global climate changes due to human action'). A communication will create an effect only if its content convinces the addressee of its truth or validity. Hence, it is intended to create a 'rationally motivated' assent to the content of a statement based on common convictions voluntarily agreed upon by the actors involved (Habermas 1981: 387). In speech acts of this type, the addressee is affected exclusively by the content of the communication. Communicative action is exclusively concerned with speech acts of this kind that operate separately from the external power resources of the speaker and the addressee. It provides the basis for arguing, and is an ideal-typed mode of interaction diametrically opposed to power-based bargaining.

In contrast to bargaining which is comparatively well established in the rational choice literature, the concept of arguing is still normatively

overburdened and requires some careful elaboration. First, there is the question of the conditions under which a speech act may be expected to generate effects without resort to positive or negative external sanctions. Generally, it will create effects if it convinces the addressee of its content. To motivate his addressee rationally to accept the speech act, a speaker will have to claim that its content is valid, and provide reasons which support this claim (Habermas 1981: 406). The addressee will be inclined to accept the communicated content of the speech act if he has reason to believe that it is acceptable. While an actor's own preferences might suffice to advance a proposal, he needs reasons to make it acceptable to others (Jacobsson 1997: 71), or the speaker must at least be assumed to be in a position to provide these reasons. Accordingly, a speech act is not acceptable as such. Convincing reasons replace the sanctions that accompany a strategic communication, and provide the foundation for the rational motivation of an addressee to accept a stated validity claim ('I believe that the global climate change is due to human action, because…'). They become a resource in interaction processes because they provide the foundation for a 'rationally motivated' consent. It is important to note that this notion of rationality is completely different from the rational choice notion of the term. Rational means the provision of convincing reasons for one's validity claims, and not the best possible pursuit of one's preferences.

Even if accompanied by reasons, a validity claim is not necessarily accepted by a given addressee. Once again, it will not suffice to reject the original claim. In doing so, an actor automatically states his own validity claim which will also be convincing if it is accompanied by appropriate reasons ('I do not believe that climate change is man-made, because…'). In order to reach agreement that is convincing to all parties, the actors

involved will have to scrutinise and appraise the reasons accompanying the conflicting validity claims together. They need a co-ordinating mechanism that enables them to resolve their conflict. The procedure must be directed at creating common conviction based on reasons, and allow collective judgement of the conflicting claims. This procedure is a discourse (Habermas 1981: 44–71). In a discourse, the participants identify commonly accepted criteria against which the conflicting claims may be appraised. These criteria are necessarily located at a higher level of abstraction (for example, 'convincing reasons supporting validity claims about the changes of the global climate must be based on the rules of modern science'). If the reasons related to the competing validity claims refer to the same criterion, they may be judged against this criterion ('Do the reasons submitted by the participants hold against this standard ?'). If the reasons given to support competing claims refer to different criteria, the participants will have to look for a commonly accepted criterion at an even more abstract level ('How does precaution fit into the rules of modern science?'). Once the participants have identified a common criterion, at whatever high level of abstraction, they have a common point of reference for the appraisal of competing claims at a more concrete level (Habermas 1973: 252-255). This is arguing in its pure form (Gehring 1996, 2002: 107–114). It allows actors to remove disagreement gradually by collectively identifying the validity claims that are accompanied by the most convincing reasons. They engage in a collective learning process which leads them to an unknown destiny (Cohen 1989: 25–26) in which at least one party will change its original position if consensus is achieved (Eriksen 1999). Collectively reached agreement is acceptable for the actors, because it implies that they are convinced of its reasonableness.

It turns out that a discourse does not exclude actors from having preferences, nor from having their moves influenced by them (Habermas 1981: 385-388, 1986: 364-366). It does not matter whether a convincing argument originates from the intuition of a negotiator, or from the fact that it fits the interests of a state, or non-state, actor, or from the a major investment, *e.g.*, an expensive research programme. Reasons are either convincing or not, but they are indifferent as to the ways of their coming into being. However, a discourse is not a compromise. Its power to convince the participants relies immediately on the 'free compulsion of the better argument.' (Habermas 1981: 52). The most convincing validity claim is definitely not the one best supported by the threats and promises of a particularly powerful actor. Therefore, actors must not resort to bargaining power. They may only pursue their interests by convincing arguments. For this reason, the participants must disregard the positions that they occupy outside the deliberation and offer each other an equal chance to influence the deliberation by submitting convincing arguments. To solve a conflict about mutually incompatible validity claims, they must enter into what Habermas calls an 'ideal speech situation' (Habermas 1973: 255-256), or they must, at least, assume to interact in a situation of this type (Habermas 1995: 553). It is obvious that these conditions are demanding and difficult to realise in the real world. They provide the foundation for the ongoing discussion of whether the Habermasian concept is outright utopianism or whether it is directly applicable to the real world (see, for example, the contributions in Elster 1998). Here, it is sufficient to realise that bargaining and arguing are diametrically opposed ideal types of interaction. While the former is exclusively based on the availability of external power resources, the latter is completely severed

from existing power resources and exclusively based on the provision of convincing reasons.

Although a discourse is a suitable device for the appraisal of validity claims, another *caveat* has to be made. The procedure does not ensure that discursively reached outcomes are always valid. It cannot be excluded that two groups of actors having to decide upon whether the Earth is a globe or a disc might reach completely different conclusions. Even conclusions reached in a sincerely conducted discourse are, therefore, always subject to challenge by new arguments. Determining the ultimate validity of a claim would require what Habermas calls a 'reasoned consensus' (*begründeter Konsens*), which would be reproducible everywhere at any time, because it takes every possible argument that might ever be submitted into account (Habermas 1973: 239). Despite this shortcoming, it has been long established, and is institutionalised in modern science, that claiming validity for propositions about the world and the discursive appraisal of the accompanying reasons is a particularly well-suited procedure for ascertaining the truth. This is because discursive interaction is based on the generation of convincing reasons and, thus, promotes collective, and, if sufficiently inclusive, even societal, rationality in the Habermasian sense.

To conclude, Habermasian discourse theory identifies a particular form of communication that is exclusively based on reasons which are actually apt to convince, or to have at least the potential of convincing, an addressee. It distinguishes communicative action ('arguing') from other forms of communication which may also be present in social interaction. In the form of the discourse, the theory provides a procedure for the collective appraisal of conflicting validity claims, which is entirely based

on the provision of reasons and their collective judgment according to mutually agreed criteria. A Habermasian discourse strictly excludes power and parochial interests as selection criteria. Consequently, it must be carefully distinguished from other notions of discourse that are more closely related to power (*e.g.*, Foucault 1991). Finally, the Habermasian concept of communicative action draws attention to the rationalising potential of discourses and provides a concept of societal rationality of which little use, if any, has been made in international relations and European integration theorising. The outcome of a discourse is more convincing than any individual validity claim fed into it because it is collectively examined and approved. Remarkably, and in contrast to much of the normatively oriented literature on the subject (Cohen/Sabel 1997, Neyer/Joerges 1997a), as well as some of the analytical literature (Elster 1998), interaction in the mode of arguing is not immediately related to the transparency of a discourse to an attentive public. It may well be employed behind closed doors, for example, by a group of scientific or technological experts.

2.2. Discourse Ethics: A Standard for the Appraisal of Norms and Collective Decisions

Discursive interaction is particularly well-suited to identifying the truth, for example, about the facts and laws of nature. In this case, it helps decide conflicts about empirical facts in the categories of 'true' and 'false'. To determine whether the Earth is a globe or a disk, it is obviously inappropriate to refer to bargaining power or to conclude compromises. The arguments made, and reasons given, within the discourse about the truth of a fact may refer to empirical knowledge and experience made outside the deliberation.

However, the Theory of Communicative Action, as well as almost all of its application in the social sciences, has a decidedly normative intention. Habermas claims that the procedure for the discovery of empirical truth may also be employed for the identification of normatively right social norms and collective decisions (Habermas 1973, 1992). The many authors who, in one way or another, favour 'deliberative democracy' (Cohen 1989, Elster 1998, Dryzek 2000) join him in this claim. The successful transfer of the discourse procedure from identifying the truth to selecting social norms promises to mobilise the rationalising power of this device for the organisation of society. The core idea is that deliberation allows a society to engage in a process of discursive, *i.e.*, reason-based, will-formation (Jacobsson 1997) beyond the mere aggregation of preferences as it takes place, for example, in the form of parliamentary voting. Thus, deliberatively reached collective decisions and social norms are believed to have a higher degree of legitimacy. However, this strand of normative theorising is prone to almost insurmountable analytical and practical difficulties. Practically, the encompassing participation of the population of only one nation-state would render the discourse about norms virtually impossible, because it is difficult to imagine that an actual deliberation with millions of participants will ever achieve consensus. Even in deliberative societies collectively-binding decisions have to be made, eventually, in the traditional forms of negotiations or majority-voting (Cohen/Sabel 1997: 320-321). Analytically, how traditionally institutionalised decision-making may actually be influenced by societal deliberation will have to be carefully examined. In polities beyond the nation-state, whether they be in the European Union or in an international regime, this would be even more complicated (Zürn 2000). In short, this line of reasoning is not,

perhaps, the most promising for enriching analytically oriented international relations theory.

Instead, we might draw on normatively oriented discourse ethics to develop a standard for the– 'critical' – assessment of the quality of outcomes emerging from existing institutional arrangements (Knight/Johnson 1994: 287). A 'Habermas-standard' derived from the Theory of Communicative Action would simply turn normative claims ('how should the world be organised?') into a benchmark for the appraisal of existing arrangements ('how closely do given real-world decisions approach the standard?'). Standards for the appraisal of the outcomes of institutionalised decision processes are not unfamiliar in international relations and integration theory. Pareto-efficiency is probably the most widely used criterion in rational choice-based co-operation theory (Krasner 1991). A Pareto-optimum exists in a given situation, if the outcome of no single actor may be improved without incurring losses for any other participating actor. Another standard is Kaldor-efficiency (Kaldor 1939), according to which the welfare losses to be incurred by some actors are subtracted from the gains realised by others. Thus, it is apt to *identify the solution producing maximum social welfare irrespective of its distribution.* Like any other standard, a Habermas-standard is not exposed to criticism based upon its possible inapplicability to real world institutional arrangements, *including international institutions and the European Union,* because it is not intended to describe facts existing in the real world. Unlike the Pareto and Kaldor standards, it would rely on discourse, *i.e.,* on assessing and appraising reasons, rather than calculating preferences. Hence, it must become clear that discourse theory can be used to derive a reasonable standard for the appraisal of social norms.

A social norm outlines socially demanded or recommended behaviour in contingent situations in which other forms of behaviour are also possible. For example, a norm demanding to drive on the right-hand side will only be relevant if one could also drive on the left-hand side, and it could, therefore, well prescribe driving on the left-hand side. Accordingly, a social norm cannot be true or false; it may only be justifiable or not ('valid' or 'invalid'). Accordingly, a discourse about the normative rightness of a norm is necessarily less clearly bound to experience, let alone experiments, beyond the deliberation forum than a discourse about the truth of a fact. It will be more difficult to identify commonly accepted criteria and decide on their basis with regard to incompatible claims (Apel 1988: 35-36).

Let us first tackle the question of how the rightness (the validity) of a norm may be appraised in a discourse. A discourse about normative rightness will, like any other discourse, be based on competing validity claims. At the minimum, there must be a proposal for a social norm which claims normative rightness and the rejection of this validity claim. An actor could not expect to convince his counterpart the validity of his claim if he resorted to the power resources beyond the deliberation available to him. Therefore, the conditions of the 'ideal speech situation' prevail. Likewise, an actor cannot expect to convince his counterpart with arguments that are largely rooted in his own parochial interests (Cohen 1989: 24, Eriksen/Weigard 1997: 229). Convincingly, a participant will be able to claim only what is generally acceptable to all those affected if they disregard their parochial interests and stakes. In his 'general principle of discourse', Habermas argues that: "It is precisely those norms of behaviour which could be agreed upon by all those possibly affected, if they were participants in rational discourses, which

are valid." (Habermas 1992: 138, my translation). This will be the case if nobody can submit convincing reasons which challenge the validity of a discursively reached social norm any more. It does not matter whether the outcome is in conformity with anybody's parochial interests.

In order to be reliable, a discourse about norms must take account of the perspectives, *i.e.,* validity claims stated and the reasons given for their support, of everyone possibly affected by the deliberated norm. This may be a small group in a discourse about the choice of the appropriate means to reach a technical goal, but it may also be the universe of human beings. For the practical application of the standard, it is important to note that although all the people possibly affected must be taken account of, they do not have to be present in the actual deliberations. Habermasian discourse-ethics does not propose to organise large-scale deliberations among the actual participants. It relies on a hypothetical discourse that takes all the relevant perspectives into account and decides on the basis of a careful appraisal of the accompanying reasons – rather than balancing the preferences of individuals or accounting for an existing distribution of power. Like a judge who reaches, or at least should reach, his decision on the basis of the facts, the reasons and the arguments submitted during the hearing, a scientific observer may now appraise the quality of outcomes of political decision processes by weighing the pros and cons (validity claims) and their accompanying reasons. It should be noted that Rawls reaches almost the same conclusion here. In the 'state of nature', in which nobody knew his position in society, which is virtually identical with a Habermasian 'ideal speech situation', an agreement could be identified by any single participant: "If *anyone after due reflection prefers one concept of justice to another, then*

they all do, and a unanimous agreement can be reached" (Rawls 1980: 139).

Employing the Habermas standard for the appraisal of real-world social norms involves a demanding thought-experiment. The most challenging task may be the compilation of all reasonable arguments that might be advanced by the actors who might be affected by a decision. However, it does not seem to be more ambitious than the compilation of the preferences of a possible large number of actors upon which the economic appraisal, according to the Pareto and Kaldor criteria, would rely. It could be achieved either by empirical inquiry (Zürn 1989), or by inference from the situation structure (Snidal 1985). Secondly, the reasonableness of claims must be appraised by examining their generalisability and the opportunities to accommodate them in a reasonable whole (Eriksen/Weigard 1997: 229). This task will be comparatively easy, and probably not more difficult than economic calculations of *optima* if the common interest is well-determined. In this case, it will not be difficult to identify the reasons which, if generalised, would add up to a reasonable whole, and reject those that do not. In contrast, conclusions will be less reliable if the common interest is ill-determined. The standard will be inapplicable in situations in which the actors concerned cannot agree on abstract principles of a common interest.

By applying the communicative rationality, we obtain a standard that is based upon a common interest, rather than mere individual preferences. In this regard, it is much closer to the Kaldor than the Pareto standard. The latter focuses on distribution and depends on an existing power constellation as well as the actors' opportunities for action in a

given situation, and may thus lead to different outcomes in comparable situations. Hence, the Pareto-optimum identifies only a local maximum of public interest. In contrast to Pareto, Habermas resembles Kaldor in disregarding distributive effects. Thus, both of them are 'idealistic' and more difficult to achieve in practice. However, in contrast to Pareto and Kaldor, Habermas does not take the positions (validity claims) submitted by the relevant actors as externally given. It provides an instrument for the appraisal of their rationality (acceptability) in light of common criteria. Presumably, some preferences will be more readily justifiable for convincing reasons and will therefore exert more influence on a (hypothetical) discourse than others. Hence, preferences are weighed according to the possibilities of their accommodation of the common interest. Habermas and Kaldor will reach identical conclusions if the common interest is limited to economic efficiency. Otherwise, the Habermas standard is more readily appropriate to account for non-economic considerations. The standard is not only applicable to discursively reached agreement, it can be employed for the appraisal of the quality of collectively binding-decisions and social norms, as well as proposals, in whatever way they are produced.

3. Opportunities for, and Limits of, Communicative Action in Real-world International and European Co-ordination Processes

It is clear that interests and power matter in international and European negotiation processes. Claiming that real-world negotiations as such come close to Habermasian discourses, or that the outcomes of negotiations usually meet the standards of Habermasian rationality would grossly

overstate the argument. However, on closer inspection, the provision of reasons and the attempt to convince the addressees of the truth or rightness of a validity claim may not always be totally absent from, or irrelevant for, horizontal co-ordination (Müller 1994, Risse 2000). Thus, the question to be answered is: Can we expect real-world actors to engage voluntarily in discursive negotiation, or to produce outcomes which approach Habermasian rationality? And if the answer is yes, under which conditions?

Methodologically, I do not treat this question as a matter of theoretical choice, on the part of the observer, which would inevitably lead to a battle between the believers of interest-based action and those of communicative action. In order to be as realistic as possible and to avoid 'smuggling in' (Keohane 1984: 67) idealistic assumptions, I will assume that actors behave like rational utility maximizers in the traditional economic sense. These actors will not be inclined to argue, or to implement discursively reached results if their parochial interests are undermined. They constitute a 'hard case' for an analytical theory which explores the relevance of communication in international relations and European governance. If communicative action matters for these actors, it will also matter for real-world actors. In addition, 'economic man' draws attention to the limits of communicative action.

In this section, I explore first the relevance of arguing for co-ordination in simple negotiation systems in which actors, for example, states, sit around a table and exchange their positions on a particular subject with a view to reaching agreement. This is the bottom-line of the institutional arrangements available to actors beyond the nation-state. It turns out that arguing matters and may be expected to drive outcomes systematically towards communicative rationality, but only under

comparatively restricted conditions (1.). Then, I demonstrate that more complex decision-making systems, such as that of the European Union, are not necessarily subject to the same restrictive conditions. Thus, they offer enlarged opportunities for meaningful communicative action (2.). Finally, I identify institutional arrangements which promise to motivate systematically even rational utility maximizers to argue not only for the purpose of seeking the truth, but also in discourses about the normative rightness of social norms.

3.1. Habermasian Rationality in Simple Negotiations

It is conventional wisdom that rational utility maximizers, when negotiating, resort to bargaining. This mode of interaction is easily accommodated with rational choice co-operation theory. Bargaining allows an actor to pursue his own interests by introducing the power resources available to him into the negotiation forum. The better an alternative to negotiated co-operation an actor has, the more credible will his threat to leave the negotiation be, and the more influence on the outcome will he exert (Elster 1989), and vice versa. From this perspective, reasons appear to be a resource for the weak, and it is difficult to see why the powerful should engage in arguing if they can gain by bargaining.

Opportunities for communicative action will emerge, if, and only if, the resort to power inherent in bargaining is not the most promising form of interaction in order to pursue one's own interests, even for the powerful actors. In his 'Theory of Justice', Jon Rawls (1980: 136-142) has identified a constellation in which even these actors cannot usefully bargain any more. He points to the fact that actors will operate under a 'veil of ignorance' if they are, in a 'state of nature', unaware of their place

in society, class, status, intelligence, *etc.*. If they do not know their parochial interests, it will not be useful for them to resort to power resources or to the formation of coalitions to influence the decision process, because they cannot identify the option which is best suited to them personally. Evidently, the Rawlsian state of nature is an idealised analytical construction. The participants in international and European negotiation processes, state and non-state actors alike, are well aware of their status, *etc.*. However, the core idea remains valid: it is uncertainty about preferences which will hinder rational utility maximizers from effectively pursuing their parochial interests and which, therefore, paves the way for communicative action. Herbert Simon (1972) demonstrated long ago that actors with limited information processing capacity will behave significantly differently from the expectations of rational choice, even though they struggle to maximize their utility (Scharpf: 1997). For these actors, negotiations may perform a second function which can be strictly distinguished from the accommodation of fixed preferences in a bargaining process (Fearon 1998b).

Uncertainty prevails even in pure bargaining processes. Usually, there are several possible solutions with different distributive effects along the 'Pareto-frontier' (Krasner 1991). If the participating actors were fully aware of the relevant distribution of power existing outside the forum, there would be no point in serious negotiation. For strategic reasons, actors are well-advised to hide relevant information. When negotiating about the price of a used car, you simply do not tell how urgent you need the car and how high a price you are prepared to pay if necessary. Accordingly, meaningful negotiations always take place under strategic uncertainty (Keisuke 1993). Bargaining communication may thus be conceived of as a device for collectively reducing this type of uncertainty.

To remove strategic uncertainty, it may well pay for an actor to explain why he gave, or refused to give, a particular concession. In their famous 'Harvard negotiation project', Fisher and Ury (1989) recommended principled negotiating. Instead of letting offers and demands clash unexplained, they advised actors negotiating about the price of a used car to resort to commonly accepted sources of information about current market prices. If the participants can agree upon a more abstract criterion to solve the dispute (in this case the market price), strategic uncertainty may as well be better removed by discursive arguing than by regular bargaining - especially if the high transaction costs are reduced. However, a discourse of this type takes place in the shadow of an existing power distribution. It is intended to modify the negotiation positions of the participants, but not their preferences. It relieves the actors of the cumbersome and time-consuming interaction in the mode of bargaining, but it cannot be expected to lead to a significantly different outcome compared to the original bargaining process. It may introduce Habermasian rationality into the process of finding a commonly agreed solution, but it will hardly affect the validity (rightness) of the outcome.

If this were the whole story, room for communicative rationality would hardly exist. However, the development and outcome of real world negotiations, say, for example, on the European Treaties of Maastricht and Amsterdam, are tremendously difficult to predict prior to their conclusion. Negotiation situations are frequently much more complex than their conception as bargaining processes suggests. Thus, neither the immediate negotiators, nor the corporate actors represented by them (*e.g.,* the states) or the bureaucracies acting on their behalf, nor observers are capable of calculating all the available options and their implications - be it because they lack the necessary information or

because they lack the capacity to process them systematically. These actors suffer from 'analytical uncertainty' (Keisuke 1993). They are not entirely sure of their preferences, and may be prepared to change them if provided better information than was available before.

In practice, analytical uncertainty which might motivate a rational utility maximizer to reconsider, and possibly modify, his preferences comes about in two different forms. On the one hand, actors' preferences rely on information about relevant framework conditions. If an actor is not sure what the problem at stake is, or as to how far he is actually affected by it, it will be difficult for him to determine reliable preferences. For example, the consequences of the single market programme or of monetary union may not have been entirely clear to all the participants at the beginning of the respective inter-governmental conferences. In so far as negotiation processes produce convincing knowledge on these issues, they will motivate rational governments to reconsider their negotiating positions (see Vanberg/Buchanan 1989). This type of uncertainty addresses disputed validity claims about empirical facts. It is particularly well-suited for discursive interaction, because empirical truth cannot be discovered in power-based bargaining processes.

On the other hand, the exact location of the Pareto-frontier (Krasner 1991) is usually uncertain in complex situations. Thus, it is in the common interest of the actors involved not to focus exclusively on distribution, but to expand the scope of their envisaged co-operation project as far as possible (Young 1989, 1994). By deliberately adding (or subtracting) issues (and possibly also parties), they will influence the constellation of power and interests of a negotiation immediately, even if

no preference of any single actor on any single subject has changed (Sebenius 1983, 1991). For example, at some point during the negotiations of the Amsterdam Treaty, it became clear that, beside the main task of adjusting decision procedures to enlargement, progress could be made in the area of justice and home affairs by integrating the Schengen regime into the Union (Moravcsik/Nicolaides 1999). This type of uncertainty addresses the appropriate overall design of a negotiating situation before the arm-twisting type of bargaining over detailed conditions and distributive effects begins. It will be open to a common search for a promising design if actors do not have clear preferences, as is frequently the case. Only if actors are aware of their preferences over the design of the negotiations may it become a matter of bargaining in its own right in protracted pre-negotiations (Gross Stein 1989).

In areas of analytical uncertainty, discursive interaction is not a mere substitute for power-based bargaining which basically leads to the same outcome. It is complementary to bargaining and influences the design of the bargaining situation. A rational utility maximizer will be inclined to reconsider his preferences upon new convincing and relevant information. Accordingly, actors may influence the negotiations by convincing their co-actors, *i.e.,* by claiming validity for propositions and normative solutions and by reinforcing their claims with reasons. Or they may provide convincing reasons to challenge established claims. In short, rational utility maximizers may well engage in truth-seeking discourses that are meaningful for the formation of their preferences.

The evaluation of the opportunities for communicative action also elucidates the limits to this form of co-ordination. By deliberating about the framework conditions and opportunities for co-operation, the

participants of a negotiation process gradually remove the veil of ignorance which originally hindered them from fixing their preferences appropriately. Eventually, they reach a state in which they can define fairly well-founded preferences – and are then equipped for bargaining about the distributive aspects of the envisaged outcome. Accordingly, agreement in international and European negotiations will be very difficult to reach exclusively by arguing. It will usually be a mixture of both modes of interaction (Holzinger 2001).

More precisely, deliberation among rational utility maximizers will be limited by two factors related to distribution. On the one hand, actors will make sure that the outcome of a negotiation does not ignore the Pareto-condition, which indicates that no co-operator incurs a negative benefit. Usually, an actor will simply reject a co-operation project which is of disadvantage to himself. Occasionally, he might accept the agreement – but will then refuse to implement it voluntarily. On the other hand, a bargaining situation will usually have multiple *equilibria* which differ as to their distributive effects. If they are aware of their preferences, rational utility maximizers are not hindered from introducing their bargaining power into the negotiation process in order to struggle for a beneficial distribution of gains. They cannot be expected to voluntarily provide room for deliberation about norms. Accordingly, rational utility maximizers will not be inclined to modify their preferences by convincing arguments about the normative rightness of a proposal because changing preferences would inevitably require them to ignore their own parochial interests. Therefore, in negotiation systems, rational utility maximizers cannot be expected to select meaningful social norms in the form of discursive interaction about normative rightness.

We may conclude that the demanding co-ordination mechanism of discursive arguing is relevant even in horizontal negotiations among rational utility maximizers (Johnson 1993, Risse 2000). Although these actors only operate in the mode of arguing if it fits their parochial interests, they will be open to reliable information and convincing arguments in areas of analytical uncertainty. Uncertainty makes it difficult to pursue one's interests with no regard for new information, and less rational to fix preferences in advance. Thus, the two types of strategic (power-based) and communicative (reason-based) interaction are not mutually exclusive. They fulfill different functions in negotiations. Moreover, collective decisions about social norms will be influenced by truth-seeking discourses if the latter affect the preferences of relevant actors. However, there are strict limitations to the intervention of meaningful deliberation into negotiations about norms. Discourses about normative rightness will be irrelevant for the selection of collective decisions and social norms in negotiation systems because rational utility maximizers cannot be expected to change their preferences accordingly.

3.2. Complex Decision-making Systems

Next is the question of whether the opportunities for communicative action, especially for the selection of meaningful social norms by deliberation about their normative rightness, may be systematically enlarged by the particular form in which decision processes are organised. It is beyond doubt that the decision-making system of the European Union is much more complex than a simple inter-governmental negotiation. Moreover, there is a widespread impression among integration analysts that its operations are systematically distinct from those of simple negotiation systems. I argue that this is the consequence

of two general properties of complex decision-making systems, namely their ability to overstep the Pareto-condition (1) and their systematic reliance on, and integration of, very different decision-making rationales (2).

3.2.1. Diminishing Relevance of the Pareto-condition for Decision-making

Decision-making within the EU is virtually not subject to the necessity to observe the Pareto-condition. Instead of a single comprehensive decision package to be accepted or rejected by the participants, the EU produces a steady stream of decisions with a comparatively narrow scope that are separately agreed upon and enacted. Its 'acquis communautaire' is made up of thousands of decisions and develops steadily. The whole package of European regulation is decided upon only by those countries entering the Union, and hypothetically by those considering leaving it. The separate decisions are so tightly locked together, that rejecting a single one amounts to challenging the whole co-operation project. The selective exit from an undesired decision is virtually closed (Weiler 1991: 2412). It is simply not possible to accommodate an outright rejection of unwanted parts, for example, the Banana Market Regulation or the Bathing Water Directive, with membership. Accordingly, Member States are forced to choose among the three options which Hirschman (1970) identified for members of organisations. They may endeavour to revise undesired decisions according to established procedures (voice), or accept these decisions in spite of their unfavourable effects (loyalty), or leave the Union altogether (exit). A rational utility maximizer will choose this third option only if the whole package of rights and obligations of which the acquis communautaire is composed produces negative benefits, i.e., if

membership is less beneficial than non-membership. Distributive effects of single decisions are not relevant for this decision.

The nesting of any given decision within a broader package increases the freedom to adopt decisions with asymmetrical distributive effects. Whereas the outcome of an isolated negotiation among rational utility maximizers may not overstep the Pareto-frontier, if implementation cannot be enforced, any single decision adopted within the EU, according to valid procedures and in accordance with European law, may become effective, legally and practically, without the consent of the Member States (Vanberg 1982: 164-165) – contrary to what is sometimes believed (Garrett 1995). While acceptance of an unwanted decision may seem to be irrational when examined as an isolated 'sub-game' (Ordeshook 1986: 139-142), it is understood if its nesting within a larger game is recognised (Tsebelis 1990: 5-11). Ideally, the European Union could be a stable political system even if every single decision, of which its *acquis communautaire* is composed, produced an asymmetrical distribution, and was not consented to by the Member States in isolation. The pre-requisite is that the aggregate distributive effects of the whole package generate sufficient benefits for every single Member State.

Hence, the European Union provides more room for Habermasian rationality than an isolated negotiation system. Its complex political system will /enable it to implement decisions that meet the standards of Habermasian rationality, as outlined in Section 2.2, even if their distributive effects are unbalanced. We do not have to assume that rational utility maximizers agree on a system like this in order to overstep the Pareto-frontier and improve outcomes. There may be good reasons to abandon a simple negotiation system and agree on more efficient arrangements for the adoption of collective decisions (Koremenos *et al.*

2001). Bargaining-processes are time-consuming and cumbersome, and they are not well-suited to dealing with complex issues. Actors may also desire to adapt agreements which are flexible to changing circumstances and thus conclude 'incomplete contracts' (Williamson 1987). Hence, approaching communicative rationality will not, in many cases, be the original purpose of an arrangement, but, instead, will be its unintended – although welcome – side-effect.

3.2.2. Functional Division of Labour as a Core Characteristic of Complex Decision-making Systems

Complex decision-making systems are characterised by functional division of labour. Regulatory decisions are not merely the result of the small negotiation systems that nest within bigger ones. They emerge from the collaboration of the different decision-making bodies. The European Union, and even its single market policy-making branch, consist of numerous sub-systems each of which performs some particular function within the larger decision process. Since Adam Smith, it is well-known that division of labour may dramatically increase the productivity of a production process. Surprisingly, the relevance of the division of labour in decision processes has gained little attention so far.

To understand this peculiarity of complex decision-making systems, it is useful to have a look at simple negotiation systems first. Traditionally, a negotiation is considered as a forum for the activities of the participating actors. This is definitely not wrong and shall be kept in mind in the present paper. However, drawing on insights from sociology (Luhmann 1984, 2000) and organisation theory, it may also be treated as a comparatively simple social system (Gehring 2002: 133-154). When a negotiation begins, some issues are inevitably identified as the subject

matter on which agreement is to be reached, while others are simultaneously excluded. Moreover, some actors are identified as members whose communication matters for the negotiation process, while others are not. A communication system has its own boundaries and divides the world into internal operations, which are part of itself, and everything else, including the actors, as part of its environment. It helps focus the attention of relevant actors on some aspects of the world and ignore others.

The emergence of a social system is, first of all, an answer to complexity. It would be meaningless if the issues to be discussed and the group of participating actors were already well defined. Its relevance increases with its selectivity. A highly selective social system will necessarily ignore many aspects of its outside world, which may be important for its co-ordination function, like a negotiation system focusing entirely on power and interests. In contrast, a wide focus minimises the risk of ignoring important aspects, but it undermines the ability to process the information sincerely, like a negotiation system burdened with bargaining over distribution and simultaneous arguing about various other aspects (Holzinger 2001). The creation of sub-systems constitutes a solution to this dilemma. These systems specialise in fulfilling particular functions that are complementary to each other. They operate in a form of divided labour. Due to its sub-systems, a complex organisation such as the European Union may simultaneously respond to numerous different aspects, and process them more carefully than could be done in a unitary process. A multi-lateral negotiation process or an international organisation which does not include at least a number of specialised working groups and committees is indeed a rarity.

Let us have a closer look into what it means to create specialised sub-systems. Consider an originally undifferentiated inter-governmental conference on, say, monetary union, which assigns the task of working out the different options and their effects to some subsidiary body, namely, in this case, the famous 'Delors-Committee' on monetary union (Sandholtz 1993). This step institutionally divides the workload into two portions, to be discharged by the regular conference and an outside body. The latter will be staffed with experts, thus raising the level of expertise and enhancing the probability that interaction will take place in the mode of arguing. It will discharge its function best if it concentrates on its task and ignores all other issues relevant in the negotiations (*e.g.*, costs, political preferences *etc.*). The greater the number of other issues (for example, related to the preferences of Member States) that influence its decision-making process, the more it will merely duplicate the main negotiations and the less relevant will its outcome be in itself. If the intended division of labour succeeds, the conference will be faced with an agreed appraisal of alternatives from which it may eventually choose one (for other examples, see Gehring 1999, Krapohl 2003).

The creation of a specialised sub-system does not just add something to an existing decision process, as is sometimes believed. It also has implications for the main conference. As some relevant issues are now taken out of its originally encompassing agenda and referred to the new sub-system, the main body will also be more 'specialised' and focus on a sub-set of all issues to be tackled in the decision process. For example, the EEC-Treaty of 1957 assigned some tasks to the Commission, namely, the assessment of the opportunities for co-operation and 'getting the facts right', and, at the same time, deprived the Council of these tasks. This has the immediate effect of reducing the Council interaction to adjusting

proposals to the constellation of power and interests in the mode of bargaining. Based on its monopoly of fact-finding and policy entrepreneurship, the Commission has developed an impressive network of informal contacts to interest groups and outside actors (McLaughlin/Greenwood 1995). Moreover, the Council is faced with a steady stream of proposals of limited scope and will lose control of the whole package of decisions to which Member States are subject, even though every single legislative act passes the Council (Gehring 2000). Hence, the separation of functions in a decision-process matters because it modifies the interaction among the participating actors.

A sub-system will only be relevant if it has a margin of discretion at its disposal. Moreover, it must be allowed to operate according to its own decision criteria, which are not applied elsewhere. Otherwise, there is either nothing to decide, or the decisions are of little relevance because they could as well be taken elsewhere. This has an important consequence for the ability to control the operation of a complex decision-making system even if sub-systems are formally arranged in a hierarchical order. Actors must choose. They may closely control an advisory body or a technical working group, but sacrifice the potential of divided labour. Alternatively, they exploit the efficiency gains of functionally differentiated decision-making, but sacrifice their control of the outcomes. If functional differentiation is effectively established, all the sub-systems involved contribute their part to a meaningful outcome. None of them is theoretically more important than another.

The application of the theory of social systems to decision-making in the European Union generates important insights for the argument of this paper. First, the functional differentiation of decision-

making creates sub-systems with their own specialised functions and their own decision criteria, which are relevant for successful regulation. It introduces decision criteria into the decision-process that are different from power-based bargaining and affect outcomes. Moreover, the creation of a new sub-system changes the decision-process from which it emerged. Thus, a state-centred negotiation process taking place, for example, at an EU intergovernmental conference or within the Council, may be substantively modified by its integration into a complex system of functionally differentiated decision-making. Hence, functionally differentiated decision-making may have the potential to supersede power-based bargaining and to open a door for discursive interaction about the normative rightness of social norms even among rational utility maximizers. Second, if division of labour between the relevant sub-systems matters, their internal operations and their contribution to the overall outcome, will have to be carefully identified. All attempts to grasp the peculiarities of complex decision-systems by limiting the analytical focus to a single sub-system, be it a regulatory agency (Majone 2001), or a comitology committee (Joerges/Neyer 1997b), or the European Court of Justice (Alter 1998), will inevitably miss some of the core features. To explore the effects of functionally differentiated decision-making on outcomes, we must carefully assess the influence which the sub-systems exert on each other's performance.

3.3. Functional Division of Labour as a Source of Communicative Rationality

It is quite clear that the functional division of labour does not per se ensure that decisions meet the standards of communicative rationality. Otherwise, all modern domestic political systems as well as the European

Polity would come close to achieving the Habermasian ideal. Thus, the question to be tackled in this sub-section is whether we can devise an institutional arrangement that is simultaneously acceptable to rational utility maximizers and capable of motivating them to behave in ways that promise to produce well-reasoned decisions. To put it more bluntly: under which conditions will the functional differentiation of a decision process induce real-world actors to abandon their interest-maximizing calculus even on matters of normative rightness and adopt a more community-oriented rationale

This question is addressed in three steps. First, I identify two complementary functions which must be discharged separately to provide a foundation for communicative rationality. Drawing both on Habermasian discourse theory and public choice theory, I argue that these are the functions of norm-moulding and norm application (1). Subsequently, I explore the conditions under which rational utility maximizers may be motivated to argue, rather than to bargain, in a sub-system specialised on moulding general norms (2), and in sub-systems applying these norms to specific cases (3).

3.3.1. The Separation of Two Functions: Norm-moulding and Norm-application

If the differentiation of decision-making functions provides a clue for devising an institutional arrangement that drives actors systematically towards communicative rationality, the first step is to identify the relevant decision-making functions. Indications may be derived from a more careful analysis of the implicit arrangements of a discourse. To reach agreement discursively, a group of actors must fulfil two complementary functions. In the first step, the participants develop abstract, i.e., non-case

specific, criteria which must be commonly agreed upon. In the second step, they judge the particular claims on the basis of these criteria (see Section 2.1.). Without producing commonly accepted standards in the first step, they would not be jointly able to appraise the empirical truth nor the normative rightness of disputed validity claims in the second step (Section 2.2.). The same group of actors may well discharge both functions in an institutionally undifferentiated deliberation. Even in this case, the actors will follow a logical sequence. To reach agreement discursively, they must define commonly accepted criteria before they are able to appraise the competing claims (Eriksen/Weigard 1997: 299–234).

The two complementary functions may be discharged by separate sub-systems. The institutional separation of communication processes does not introduce anything entirely new into a decision process. It merely reinforces the actual separation of functions which already exists. As a consequence, we obtain a differentiated decision–making system which consists of two different communication processes which discharge mutually complementary functions and operate under significantly different conditions. To reach communicative rationality, actors will have to communicate discursively, *i.e.*, based on reason, rather than power, in both sub-systems. The development of criteria is comparatively unrestricted. It allows participants to discuss and decide how to organise life in society, and how to accommodate reasonable demands of the different groups. These political justification discourses ('*Begründungsdiskurse*') on the normative rightness of social norms are based on even more abstract criteria, eventually being based on the 'general principle of discourse' (see Section 2.2). In contrast, 'application discourses' are much more restricted and closely bound to existing norms. Here, actors identify the appropriate norms to be applied in a given

conflict situation, like the participants do in a court trial, or in administrative decision-making (Habermas 1992: 283).

Before addressing the question of how rational utility maximizers may be motivated to argue, rather than bargain, in political justification discourses and in application discourses, it should be emphasised that arrangements to institutionalise the separation of the functions of the political justification of social norms and their application to specific cases reflect a fundamental characteristic of the complex governance systems from which they derive legitimacy. Habermas argues, for example, that this institutional arrangement is basically enshrined in the fundamental principles of the democratic state under the rule of law[2]. On the one hand, these principles ensure that the political system operates according to modern democratic principles. (I ignore the fact that these principles may not always ensure that general norms are entirely decided upon by deliberation; see contributions in Elster 1998.) On the other hand, they ensure that the political system is bound to its own decisions by the rule of law, and that an administration does not control the premises upon which it acts (Habermas 1992: 167-214). Remarkably, it turns out that application discourses are not at the disposal of a deliberating public or a political majority. Administrative and judicial decision-making contributes to communicatively rational governance without being itself subject of public debate. Thus, Habermas identifies a systematic separation of a political norm-making function and a legal or administrative norm-application function as a core source of state-legitimacy.

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[2] Note the subtitle of his most important contribution in this regard (Habermas 1992): "Diskurstheorie Rechts und des demokratischen Rechtsstaates" (translated somewhat awkwardly as 'discourse theory of law and democracy')

We may identify a very similar idea in the public choice literature. Functionally differentiated decision-making always raises the 'Principal-Agent' problem. Generally, a principal will expect to benefit from division of labour and specialisation (Coleman 1990: 146, Kiewiet/McCubbins 1991: 22-24). Delegation increases the agent's capacity to address complex issues and to digest an overwhelming lot of decisions (Lupia/McCubbins 2000). However, it necessarily establishes

new actors (sub-systems) that may develop and pursue their own interests, rather than those of their principals (Moe 1990: 121). Accordingly, it is believed to create 'agency losses' and control problems (Kiewiet/McCubbins 1991, also Pollack 1997). A closer inspection of the US political system reveals a wide variety of mechanisms to control an agent. The principal may closely supervise the activities of an agent (McCubbins/Schwartz 1987), prescribe administrative procedures (McCubbins et al. 1987, Bawn 1997), control the agency's budget and appoint its executives (Huber 2000), or adopt detailed legislation to limit discretion (McCubbins et al 1989, Huber/Shipan 2001). Focusing on the control problem implicitly assumes that the agent should, ideally, be motivated to act as the principal would have done in his place. From this perspective, the discharge of different, and mutually complementary, functions does not yet play a major role.

A deviant branch of the 'Principal-Agent' literature observes that majorities in domestic political systems as well as the members of the European Union occasionally establish decidedly independent regulatory

agencies (esp. Majone 1994, 1999, 2001). The most prominent example is independent central banks, including the European System of Central Banks. In this case, a principal deliberately sacrifices the ability to tightly control the agency's activities. A rational utility maximizer will only do so if he anticipates that his intervention in subsequent decision-making might counteract his own interests. Generally, this will be the case if his long-term interests contradict his short-term, *i.e.*, situation-specific, preferences. Under these conditions, the order of preferences becomes inconsistent (Keech 1995: 38-40) and the actor is faced with the problem of the 'weakness of the will' (Elster 1979: 67-68). In light of his inconsistent order of preferences, he may pursue his short-term preferences only at the expense of his long-term interests – and vice versa. Neither the representative-democratic political systems of modern states nor inter-governmental negotiation systems are immune to this problem of inconsistent preferences over time (Shepsle 1991: 250-252). Democracy is government *pro tempore* (Linz 1998: 19-20), and elected politicians have an incentive to calculate in terms of election periods, *i.e.*, with a comparatively short time horizon (Cukierman/Meltzer 1986: 368).

The dilemma of inconsistent preferences over time will diminish if the time horizon of the decision-making system is systematically enlarged. The mere determination of political representatives to take the long-term interests into account will be a vague and unstable foundation because of contradictory incentives existing in the concrete decision situations (Elster 1979: 42). What is required is a more 'credible commitment' (Shepsle 1991, Moravcsik 1998) to long-term interests. In

order to realise his long-term interests, an actor must sacrifice his margin of choice in the concrete situation, and bind himself to a suitable 'mast', as Ulysses did in light of the Sirens (Elster 1979: 38, 2000: 65-77). The 'mast' available in modern societies is an appropriate institutional restraint. A principal will credibly bind himself if he delegates implementing decisions to an actor that is unsusceptible to the temptations of specific situations. In this way, he avoids exposing himself to the specific decision-situation (Cukierman 1994).

The reversal of the traditional Principal-Agent problem draws attention to the fact that the principal and his agent may well employ different decision rationales in order to ensure that decisions are made in the long-term interest of the principal. The quality of regulatory decisions is enhanced by a sufficiently strict separation of decision-making from the grip of the principal (Keech 1995: 154, Majone 1999: 4-6, 2001). The general, *i.e.*, long-term, interests of society in the sector will be determined by accommodating different, occasionally contradictory, goals and values. In an intergovernmental organisation, this task will require the support of the Member States. Application of these rules to numerous specific situations should be performed in a way that excludes, as far as possible, situation-specific and opportunistic considerations.

To conclude, both the public choice literature and the Habermasian Theory of Communicative Action predict that the institutionalised separation of two regulatory functions, namely, the definition of long-term interests and general norms on the one hand, and situation-specific decision-making on the other, will generate normatively better results than the tight connection of these functions.

3.3.2. Discursive Norm–moulding under the 'Veil of Ignorance'

At first glance, norm-moulding among a group of rational utility maximizers seems to closely resemble simple negotiations. It has been argued above (see Section 3.1.) that discursive interaction in negotiations is restricted to truth-seeking. Moreover, actors may be expected to argue, rather than to bargain, in negotiations only if they operate under a Rawlsian 'veil of ignorance'. This veil will appear if, and as long as, they are uncertain about their preferences. In this case, they cannot bargain because they do not know which of a number of available options would best fit their parochial interests. There is no reason to believe that this condition does not apply to more complex decision-making systems. However, uncertainty was not institutionally manipulated in simple negotiations. Norm-moulding in an institutional arrangement with differentiated functions differs in one important respect from simple negotiations. The participating actors address only a part of the decisions made in the regulatory process. The norms produced by them are applied to situation-specific cases elsewhere, i.e., beyond their immediate control. If functionally differentiated decision-making is capable of systematically creating communicative rationality even in discourses about the normative rightness of proposed regulatory solutions, it must generate analytical uncertainty at the norm–making level, which, in turn, forces actors to operate under a form of uncertainty which does not occur in simple negotiations. Can we expect this to happen ?

Consider two ideal-type situations. On the one hand, there are narrowly delimited decision problems, such as the status of Jerusalem in the Israeli-Palestinian conflict, or the regulation of emissions for a particular type of chemical plant which is located only in one Member State of the Union. In these cases, the participating actors are readily able

to identify their preferences. When discussing the general rules ("how should chemical plants of type x located only in country y be regulated?"), rational utility maximizers will always appraise different options according to their effects on their preferences in the application stage. In these situations, an institutional arrangement of divided labour between norm-moulding and norm application cannot be expected to create any additional veil of ignorance.

On the other hand, there are decision situations in which the general rule to be discussed applies to a large, possibly unknown number of similar cases ("How should dangerous industrial installations in the European Union be regulated?"). In cases of this type, selfish actors will also endeavour to pursue their parochial interests. However, there will no longer be a tailor-made norm for every specific case which might be influenced according to situation-specific preferences. Instead, numerous similar cases are linked by the particular form in which the decision process is organised, and may be affected only as a package. Moreover, their subsumption under a general norm forces actors to be consistent. Even if the effect of the general norm on all cases were readily calculable, preferences would have to focus on the 'median case'. If a general norm is valid for an unlimited time, actors will not even be aware of the many cases to which it will be applied during its lifetime, and preferences will become increasingly ill-determined (Brennan/Buchanan 1985: 29). In situations of this type, actors operate under an institutionally created Rawlsian 'veil of ignorance'. In both cases, rational utility maximizers develop an inherent interest in identifying general norms which promise to produce overall acceptable case-by-case decisions even if some of them turn out not to meet their eventual case-specific preferences, which help prevent disastrous outcomes (Brennan/Buchanan 1985: 28-31, Tsebelis

1990: 115-118). These norms cannot be identified by bargaining, *i.e.*, by resorting to power resources or by building coalitions to influence the decision process. Hence, uncertainty created by an institutionally organised decision process which would not exist in case-by-case decision-making arrangements will motivate actors to interact in the mode of arguing (Vanberg/Buchanan 1989). The participating actors operate in an institutionally created Habermasian 'ideal speech situation', or in a Rawlsian 'state of nature', and enter a discourse about the normative rightness of proposed social norms.

To conclude, there are cases in which an institutionally enshrined division of labour can be expected to contribute to the proliferation of communicative rationality. The social mechanism is based on the institutionalised exclusion of case-specific details from the negotiations. Accordingly, it may not be activated in all situations alike. There are two essential conditions that must be fulfilled: case-specific preferences must be sufficiently uncertain (or evenly distributed) at the time of norm-moulding, and the cases must be sufficiently homogeneous to be regulated by the same general norms. Generally, incentives for bargaining and the relevance of parochial interests for the negotiating behaviour of rational utility maximizers will decrease with the number of cases to which a general norm applies, with the time horizon up to which the general norm is expected to govern application decisions, and with the distributive balance of the aggregate effects of well-known cases on actors' preferences. With decreasing incentives to bargain and to pursue parochial interests, the resulting decisions will tend to approach the standards of communicative rationality.

3.3.3. Reason-based Norm-application

At application level, we cannot expect to promote communicative rationality by creating a veil of ignorance. Application decisions are made on a case-by-case basis and actors will usually be aware of their preferences. Hence, rational utility maximizers might resort to power in order to pursue their interests (Brennan/Buchanan 1985: 29). Apparently, close control in the sense of mainstream Principal-Agent theory is not appropriate. In particular, threats to cut budgets and appoint (or dismiss) officials (Huber 2000) amount to implicit intervention into decision-making and a reverse of functional differentiation. However, application decisions have comparatively clear-cut indicators of the common interests generated outside their own communication processes. Accordingly, appropriate administrative procedures (McCubbins et al. 1987, Epstein/O'Halloran 1994, Bawn 1995) must provide incentives to ensure the sincere application of the substantive criteria provided for by the general norms agreed upon elsewhere. The task is to bind the decision-makers to these standards and motivate them to argue about their case-specific implications.

Rational utility maximizers may be induced to prefer reason-based arguing to power-based bargaining by a number of different institutional arrangements that may be instituted without major difficulties even by rational utility maximizers.

(1)   Limited room for bargaining. Compared to undifferentiated negotiations, decision-making actors operate in a different setting. Norm-application is always subject to criteria that limit the room for arbitrary decision-making, which could be filled by interest-based bargaining. And whereas the scope of a decision is broadened at the level of norm-

moulding by the linkage implicit in effective schemes of divided labour (Section 3.3.2.), it will be narrowed at the level of norm-application to a single case at a time if cases are dealt with separately. The room for accommodating diverse interests by bargaining will virtually disappear if a single case is at stake. Actors cannot expect to identify a mutually beneficial outcome, i.e., make a decision and, at the same time, respect the Pareto-condition.

Thus, in procedures based on consensus or near consensus (*e.g.*, qualified-majority), an actor has basically the choice of two options. He may block an unwanted decision, but, if he does so, he must expect that others will act accordingly. The inevitable outcome of this strategy is a reduced decision-making capacity for the whole procedure, and the sacrifice of the mutually desired harmonising regulation. In game-theoretic terms, the actors find themselves in a Prisoners' Dilemma situation. If the game is played in isolation, Pareto-inferior non-regulation may be the expected outcome. However, as soon as the actors are faced with a steady stream of cases, they play an iterated game. When calculating their preferences in individual cases, they have to take the effects of their choice for future cases into account. The more benefit an actor expects from regulation at large, the more concessions he will make in a particular case. We know from co-operation theory that a sufficiently long 'shadow of the future' may induce rational utility maximizers to co-operate in PD situations (Axelrod 1984). 'Co-operation' in the present case means agreement on general standards. Hence, even rational utility maximizers are induced to engage in a discourse about the appropriate application of general norms because bargaining does not constitute a viable option.

This mechanism relies on the clear and effective separation of cases. Otherwise, rational utility maximizers might resort to putting package deals together based on the existing constellation of power and interests, and refrain from engaging in an application discourse. The separation of cases will be reinforced if single decisions enter into force separately, as they do in the European Union. *If* successfully triggered, the mechanism will be self-sustaining. Actors, having agreed to disadvantageous, but discursively reached, decisions in the past, will block any attempt to circumvent the agreed criteria by others. It will be in their interest to apply the same criteria in all cases unless they become convinced that there are good reasons to modify the criteria to new circumstances.

(2)   Staged decision-making: A second mechanism will be mobilised if the norm application function is assigned to a number of different bodies locked together in a staged decision process, rather than entrusted to an independent agency, as is frequently assumed in the public choice literature (Majone 2001). The establishment of a number of sub-systems which discharge specialised functions within the application procedure divides the decision process horizontally. This arrangement creates mutual interdependence and control among the sub-systems involved (see Kiewiet/McCubbins 1991). As in a production process based on division of labour, stalemate in an area of regulation can only be avoided if a sub-system ensures that its own output is digestible by other sub-systems. If there is a general interest both in regulation and in avoiding stalemate, mutual interdependence and control generate the incentives for developing criteria that ensure the compatibility of the output. The decision–criteria provided for by the relevant directives and regulations constitute a focal point which is common to all the sub-systems involved,

independently both of their specific perspectives, and of actors involved. Hence, we may expect the institutional arrangement of a horizontally differentiated, i.e. staged, decision-process to relate decisions to the external decision criteria systematically.

(3)   The Giving Reasons Requirement: Application decisions are not only taken in the shadow of substantive decision criteria, they may also be made subject to justification referring to these criteria (Cohen/Sabel 1997: 328-329). If an actor is obliged to give reasons for his decisions, he will endeavour to avoid decisions that are difficult to justify. Moreover, the requirement to give reasons provides other actors with better opportunities to challenge an undesired decision because it can be appraised on the basis of the reasons given (Shapiro 1992). Accordingly, strict accountability (Majone 1994) of decision-making sub-systems increases the power of relevant general norms, and vice versa: general norms to which the reasons can refer promise better accountability of decision-making sub-systems.

(4)   Judicial Review: Finally, in institutions comprising a judicial review mechanism, such as the European Union, courts play an important role in producing reasonable administrative decisions. Judicial review constitutes an additional and final stage in the decision process. Moreover, a court constitutes a sub-system of the institution which typically specialises in the application of the appropriate general norms to a particular case (Shapiro 1981). It does so based upon internal procedures that are typically designed to create a legal discourse (Habermas 1992). Hence, the threat of judicial review closely relates decision-making to binding general norms, or, at least, provides an incentive for doing so. In so far as this last step of the decision chain is anticipated, a decision will be made compatible with the existing legal restrictions. It also becomes an

anticipated legal decision, and the interaction from which it emerges is partially transformed into a legal discourse. The margin open for arbitrary decision-making, i.e., for the intervention of other, say, power-based criteria, diminishes or is reduced to the choice between options which are equally justifiable before the Court.

Altogether, we may, theoretically, identify the institutional arrangements which generate strong incentives for the actors involved to reach outcomes which stand up to an examination of a practical application discourse. These mechanisms are not mutually exclusive; their effects reinforce each other. Once again, they are based on the separation of the functions of norm-moulding and norm application. Moreover, we could not/cannot? expect rational utility maximizers to agree upon a norm application discourse in an isolated case, because both the winners and losers would be readily identifiable. Only by implicitly linking many cases can actors gain a common interest in co-operation. And we could not/cannot? expect actors to engage in an application discourse unless they have a substantive standard at their disposal, according to which a case may be decided upon conformity with the general interest.

4.   Communicative   Rationality   in   Single Market Regulation

Decision-making in the European single market policy is characterised by a high degree of delegation and functional differentiation (Wallace/Young 2000). The policy forms the core of the integration process from its very beginning, and is among the most advanced policies in its kind. It is probably not wrong to state that the European single market is, among the most important factors, what attracts new members to the Union.

In this section, I will more closely explore the consequences of differentiated decision-making in the single market against the backdrop of the theoretical propositions about the prospects of institutionally driven communicative action made in Section 3. I argue that, while not unimportant, neither the separation of the treaty level and the legislative level, nor the horizontal differentiation of decision functions at the legislative level will create a profound transformation of decision-making towards communicative rationality compared to simple negotiation systems (1). In contrast, I find the institutional pre-requisites for reason-based interaction in the arrangements of the so-called 'New Approach' (2).

4.1. No Profound Changes Caused by Delegation of Decisions from Treaty-level to Legislative Level

After more than fifty years of European integration, the Member States still play an important role (Sbragia 1992) in the decision process. Similar to any regular international organisation or regime, the Member States control the access of new members, and only states may accede to the Union. Moreover, the Member States dominate the top level of European decision-making where the European treaties are made and amended under procedures that are very close to international treaty-making. For analytical purposes, we may consider the Union as an international organisation with a high degree of delegation (Keohane/Hoffmann 1991).

The World Trade Organisation (WTO) which, like single market policy, is directed at market integration and at removing trade restrictions (Jackson 1999) may be considered as the 'bottom line' of traditional international co-operation. In the GATT/WTO, trade policy

is made in encompassing trade rounds. Accordingly, the agreements of the most recent trade round, concluded in Marrakech, filled several thousand pages of treaty language and legally-binding annexes (Hoekman/Kostecki 1995). If the single market programme had been realised according to the procedures established in GATT/WTO, its approximatelty 300 measures would have been prepared in the course of an overall European trade round and adopted in a single decision on the whole package. Instead, the Single European Act adopted by an intergovernmental conference in 1986 requires only a few pages in the Official Journal of the EU (Lodge 1986, 1994). The bulk of the decisions necessary to create the single market were delegated to other levels of European policy-making.

Does the division of labour between the treaty level and the legislative level promote communicative rationality? To answer this question, we must examine the functions performed by the two decision-making levels more closely.

Two European 'grand bargains' are of particular relevance for European single market policy. In the 'Treaty Establishing the European Economic Community' of 1956, the Member States agreed on the establishment of a common market which, *inter alia*, included the so-called 'four freedoms' for goods, services, labour, and capital (Moravcsik 1998: 86-158, Milward 1992: 196-223). These freedoms are phrased in very broad terms. They apply to numerous similar cases over a long time span. Negotiators were apparently not in a position to calculate the domestic implications of these rules and, therefore, operated almost automatically under a Rawlsian veil of ignorance. To the degree to which these rules are directly applicable, they have provided a strong basis for

court decision-making. Extensive litigation (VerLoren van Themaat 1988) has led to the development of powerful doctrines, such as the famous 'Cassis-de-Dijon' doctrine (Garrett 1992, Alter/Meunier-Aitsahalia 1994). If we can consider court decision-making with its exchange of legal arguments and its triadic structure which will almost entirely preclude bargaining, the creation of the four freedoms and their implementation by the European Court of Justice may be considered as an institutional arrangement driving decisions towards communicative rationality. However, it is less interesting for the present paper because it does not envisage any role for collective (political) action.

In many trade-relevant areas, the four freedoms are not directly applicable because domestic regulation serves to protect the health and life of consumers and workers, the environment, and other legitimate purposes, and thus, cannot simply be declared void. In these areas, market integration relies on harmonised European standards. The original EEC-Treaty of 1956 enabled the Community to adopt harmonising legislation (Article 94, ex-100) under the consultation procedure which required unanimity in the Council. As this proved to be overly cumbersome and time-consuming, the Member States paved the way for a reform of harmonisation policy (Ehlermann 1987, Moravcsik 1991, Cameron 1992). With the Single European Act of 1986 (Lodge 1986, 1994), they introduced a new decision-making procedure (first called co-operation, later replaced by the co-decision procedure), which provided for qualified-majority in the Council, and, for the first time, granted some real legislative powers to the European Parliament, while upholding the established exclusive right of initiative of the Commission. Negotiations on the areas to which these procedures were applicable, allowed countries to bargain. It is well-known that countries block majority-voting in areas

in which they preferred the non-harmonised *status quo* to harmonised regulation. For example, Britain preferred to maintain its border controls (Moravscik 1991), and Luxembourg its freedom on interest-tax matters. However, to the extent that all participants prefer market liberalisation to the *status quo*, we have an almost perfect arguing situation. Negotiations of the particularities of the procedures fulfil the conditions of deliberation under the veil of ignorance. Decision procedures are applicable over many years to numerous case-specific decisions, and the Member States can expect to be among the winners of harmonisation in some instances and among the losers in others, without being readily able to calculate the aggregate effects of the procedures on their aggregate preferences. Undoubtedly, these procedural decisions had an impact on the making of delegated decisions.

In contrast to providing procedures, the Member States abstained from determining substantive guidelines for harmonisation - apart from the provision that harmonising legislation should be at a high level of protection. It is true that they endorsed the Single Market Programme prepared by the Commission (COM 85/310), but the programme did not provide any serious information about the substance of future harmonised legislation. Hence, an abstract 'community interest' to be applied in case-by-case decisions through legislation was not defined at treaty level. Instead, the Member States passed the entire margin of choice that was available at treaty level on to the legislative level. Accordingly, there is no effective division of labour between the making of general rules and their application to cases, which had been identified as a pre-requisite for the promotion of communicative rationality (Section 3.1.).

Do the new European legislative procedures, especially the widely applied co-decision procedure, promote communicative rationality? Compared to the bottom-line of pure inter-governmental negotiations, they introduce a number of modifications. The Commission enjoys the exclusive right of initiative; the European Parliament is granted the opportunity to intervene into the legislative process, and the Council decides by qualified-majority voting. In the past years, there has been an extensive debate especially on the exact role of the European Parliament in the different legislative processes (Garrett/Tsebelis 1995, Hubschmidt/Moser 1997). This new stage institutionalises some kind of checks by the Parliament, but it is difficult to see how it could *systematically* drive outcomes towards communicative rationality. Given that the members of the Parliament represent societal interests, there is no need to expect parliamentary proceedings to be *per se* more deliberative than intergovernmental ones. What is more important is the concentration of the functions of the 'policy-entrepreneur' (Young 1991), and of the cognitive and technical preparation of proposals at the Commission. During the Commission stage, there may well be deliberation on the opportunities of co-operation (location of the Pareto-frontier) as well as on the empirical facts relevant to a regulatory project. Deliberation may well include non-state actors such as interest groups. While opportunities will be better exploited by the separation of the preparatory stage from the decision stage, truth-seeking deliberation of this sort may be also be expected in undifferentiated negotiations (Section 3.1.). The Commission might even deliberate internally or with external actors about the normative rightness of a norm. However, the Council remains the bottleneck through which all legislative projects have to pass, and in which many of them are watered down in protracted and time-

consuming inter-governmental negotiations. Whether the Council decides by unanimity, as the Member States prefer, or by qualified-majority voting, does not change their ability to bargain over the particularities of a proposal. The Member States tend to block proposals which do not fulfil the Pareto-conditions, particularly for a qualified-majority. Accordingly, legislative decisions are still heavily influenced by the parochial interests of the Member States and their power resources.

Clearly, the 'Community method' (Lindberg/Scheingold 1970) of European governance is not without consequences. For example, European policy-making is characterised by the adoption of numerous decisions of comparatively limited relevance (Gehring 2000). The Commission prefers small projects because they limit the room for manoeuvre of, and deal with, the Member States. In the same vein, rational utility maximizers will also not bargain as hard on subjects with limited consequences as on those with important ones (Fearon 1998a) because the transaction costs outweigh the possible gains. However, consequences of this sort do not hinder the Member States from bargaining, and thus do not systematically affect their decision-making *rationale*. In short, we cannot expect the legislative procedures to drive outcomes systematically towards communicative rationality.

4.2.   The Pre-requisites for Communicative Rationality in the 'New Approach'

The bottleneck of Council decision-making is particularly narrow in cases in which European harmonisation legislation is based on a choice between discrete co-operative solutions. The ideal case of only two options amounts to a game theoretic 'battle of the sexes' which is notoriously difficult to overcome in negotiations. Moreover, the Council

is over-burdened with the all too detailed and technical legislation which will frequently have to be adapted to new circumstances every now and then. The adoption of some directives, for example, on 'the Approximation of the Laws of the Member States Relating to Seamless, Unalloyed Aluminium and Aluminium Alloy Gas Cylinders' (ABl. 1984 L 300: 20-47), took about ten years (Falke 1989). Other projects were overly detailed. For example, the Commission proposal for a 'Directive on the Approximation of the Laws of the Member States Relating to Roll-over Protection Structures Incorporating two Pillars and Mounted in Front of the Driver's Seat on Narrow-Track Wheeled Agricultural or Forestry Tractors' filled almost 80 pages in the Official Journal of the EU (OJ 1985 C 222: 1-77). Moreover, the Member States have enacted more new product standards than could possibly be harmonised by the Union. Thus, the race with technical progress could not be won by traditional harmonising legislation alone (Lauwars 1988: 154-56, Falke 1989: 220).

Single market policy does not, therefore, rely entirely on the realisation of the legislative measures of the programme (*Schmidt* v. *Sydow* 1988: 94-98). It envisages the creation of a third level of decision-making – thus reinforcing the differentiation of decision-making. According to this 'New Approach', legislation was limited to providing for the minimum requirements for the protection of health and safety as well as the procedures for the adoption of delegated decisions (Pelkmans 1987, Joerges *et al.* 1988: 341-365). All detailed regulation of particular products was referred to a lower level of decision-making (COM 85/310: 19), especially to European standardisation organisations. The 'New Approach' had the immediate consequence of relieving the Council of the task of defining detailed requirements for narrowly limited groups of

products. From then on, directives and regulations governing subjects as large as 'machines', toys', 'food additives', or 'pharmaceuticals', were adopted in a comparatively short negotiation time.

This form of regulation seems to be quite successful. The Commission has repeatedly, most recently in its White Paper on European Governance (COM 2001/428), proposed to expand its scope to new areas of regulation. It is thus a comparatively modern form of regulation in Europe that may be expected to gain relevance in the future. Moreover, it provides the basis for the observed transformation of policy-making 'from strategic interaction into deliberative problem-solving' (Joerges/Neyer 1997b).

'New Approach' instruments largely fulfil the conditions of norm-moulding under a veil of ignorance. If a single legislative instrument devises substantive and procedural criteria for the authorisation of drugs for human, or for the safety requirements of 'machines' or 'toys', or for the authorisation of 'food additives', it will be applied to numerous cases over time. Accordingly, the Member States negotiating in the Council, as well as the supranational actors intervening into the process, cannot reliably calculate their aggregate preferences over all cases. To some degree at least, they will have to operate under a veil of ignorance. In an empirical research project, we found little evidence that Member States actually bargained over the safety standards. Instead, bargaining was largely limited to other areas, for example, the scope of the respective instruments (Krapohl 2002, Stefanova/Kerler 2002). This effect is neither incidental, nor inherent to the regulated subject matter. It is an immediate consequence of the institutional arrangement which effectively separates the moulding of general, i.e., not case-specific,

criteria from their subsequent application in single cases. The effect would not have occurred if each product, or small group of products, had been regulated by a separate specific directive, as was the case prior to the 'New Approach'. In this case, the Member States would have had a rather clear idea of their case-specific preferences and would, accordingly, have bargained over the distribution of costs and benefits.

The 'New Approach' legislation refers the bulk of detailed product specification to a subsidiary level of decision-making, which operates according to different procedures. Generally, we may distinguish between three types of decision-making:

- Embedded in a multi-step procedure involving the Commission and the Member States, harmonisation projects are assigned to privately organised European standardisation organisations, for example, the 'Comité Européen de Normalisation'. (CEN) (Vos 1999: 251-311, Anselmann 1991, Voelzkow 1996, Falke 1997, Stefanova/ Kerler 2002). Standards enter into force upon authorisation by the Commission after consultation with the Member States. While not legally-binding, they oblige the Member States to presume that products that are in conformity with a standard also meet the requirements of the mandatory directive. (Pelkmans 1987: 255). However, the Member States still remain responsible for product safety in their jurisdictions, and may, in exceptional cases, prohibit the access of dangerous products onto their markets, even if they are in conformity with a standard. (Joerges/Falke 1991, Joerges *et al.* 1988, Schreiber 1991). According to the 'safeguards procedure', the step must be justified and a final decision is taken by the Commission. (Vos 1999: 308). The procedure is comparatively successful. Today, at least 15 directives provide a basis for standardisation, while several hundreds of standards have been authorised. (Vos 1999: 275).

- In some particularly sensitive areas, such as foodstuffs, the 'New Approach' refers secondary decision-making to the so-called 'Comitology-'committees, in which the Member States, chaired by a Commission representative, decide about Commission

directives and regulations according to different procedures. (Vos
1997). Several directives on the regulation of foodstuffs delegate
decision-making to the 'Standing Committee on Foodstuffs'
(Bücker *et al.* 1996, Henkin 1996: 5-8, Vos 1999: 110-187) and
provide for substantive and procedural criteria for secondary
decisions. Several Directives in the food sector, for example,
prescribe that the regulatory committee must hear the scientific
advice by the Scientific Committee for Food (Vos 1999: 140) so
that scientific advice is taken into account. (Joerges/Neyer 1997a:
286).

• Finally, regulation in the single market involves agencies with
limited competences that are independent from the Commission.
(Everson 1996). The most relevant of the currently existing
agencies (see Kreher 1997: 229-231) is the European Medical
Evaluation Agency (EMEA), founded in 1993 and located in
London. (Krapohl 2002). It occupies a core role in the multi-step
procedure for the licensing of pharmaceutical products in the
single market (Gardener 1996, Sauer 1996, Vos 1999: 188-250).
While legally-binding decisions are ultimately adopted in a
committee procedure by the Commission and the Member
States, deviation from EMEA evaluations is strictly limited. This
new type of regulation adapts the model of regulatory agencies,
which are particularly widespread in the USA (Shapiro 1988,
1997, Majone 1990), to the European polity. The EMEA
constitutes a prototype for future agencies, for example, the
European Food Agency, proposed by the Commission (COM
2000/716).

In spite of their comparatively different procedures, the three types of
single market regulation have a number of common characteristics. First
of all, they are all decisions which are subject to substantive requirements.
These standards are most detailed in the directives which refer
implementation decisions to standardisation organisations as well as, by
reference to other instruments, in the regulation on pharmaceutical
products. Substantive standards are not codified so well in the foodstuffs
sector. However, for issues on which the Commission and the
(administrative) members of a comitology committee do not have the

necessary expertise, the ECJ requires consultation even if the relevant directive does not clearly stipulate consultation obligations (ECJ C 212/91, 1994 I-200-214, at 210, *Angelopharm*).

Second, substantive standards are used to appraise decisions. All three types of 'New Approach' regulation directly employ the requirement to give reasons in one way or another. In the procedure for the authorisation of pharmaceutical products for humans, the EMEA is obliged to give reasons for its scientific assessment, and the Commission must justify a possible decision to deviate from the EMEA opinion. In European standardisation, Member States employing the safeguards procedure to deviate from an authorised standard must expressly justify their decisions. While the decision-makers, namely, the Commission and the comitology committee, are not formally bound to follow the scientific advice in the foodstuffs sector, they must provide sufficient reasons for their decisions to enable the Court to review whether the scope of legitimate assessment has been overstepped (ECJ C-69/90, 1994 I-5495-5503, at 5499, Technische Universtät, München). This will be considerably more difficult if the decision deviates from a scientific advice, than if it is in conformity with this advice. Moreover, all decisions discussed in this paper formally fall to the responsibility of the Commission and may be challenged before the European Court of Justice. As formally binding-decisions, they are automatically integrated into the European legal system and are subject to judicial review by the ECJ. Hence, decisions must also be justifiable in legal proceedings.

Third, all three types of new approach regulation limit the room for deliberate decision-making through a close delimitation of cases. Decisions are made on single norms, or on the authorisation of a single

pharmaceutical product, or a single food additive. If adopted, decisions enter into force. Accordingly, they are treated separately from each other, and Member States cannot usually link decisions to larger package deals.

Fourth, all procedures include staged decision-making in which sub-systems control each other. European standardisation is based on a multi-tier procedure which involves the Commission and the Member States at the beginning, the private standardisation organisations in the middle stage, the Commission and the Member States again in the approval stage, and eventually individual Member States and the Commission in the so-called 'safeguards-procedure'. (Stefanova/Kerler 2002). The authorisation of pharmaceutical products relies on a three-staged procedure, locking together the EMEA, which is responsible for the scientific evaluation, with the Commission and a comitology committee in which the Member States dominate. (see Krapohl 2002). Finally, the regulatory committee procedure in the foodstuffs sector relates the Commission, which chairs the comitology-committees, to the Member States. Whereas the Member States may, within the limits left for bargaining, tend to agree on a deal which accommodates interests, the Commission has an interest not to overstep the margin of the free choice provided for by the relevant legislative instrument. This is also because the Commission is responsible for decisions of this type, and court proceedings will be directed against it (see Joerges/ Neyer 1997a: 286). Although the arrangements differ considerably, all of them are designed to mobilise this control mechanism, and none of them invests authority in a single actor.

In short, lower level decision-making in areas governed by the 'New Approach' does not exclude stakeholders, be they Member States

or non-state actors. And application decisions are not assigned to a powerful independent agency. Instead, the institutional arrangements are designed to increase the relevance of substantive standards and reason-based interaction between the actors involved.

5.   Conclusion: Consequences for Democratising the European Union

The system of policy-making in the single market may be 'opaque' and difficult to understand. However, the complicated institutional arrangements of the 'New Approach' bear the potential of systematically generating outcomes that meet the public interest. These institutional arrangements may not only improve the efficiency of supranational governance, they may also enhance its legitimacy in the Habermasian sense.

In this paper, I have explored the question of whether the impressive decision-making apparatus of the European Union has a significantly higher potential to produce 'good' decisions than simple negotiating systems. For this purpose, I have drawn from two branches of the literature that are usually ignorant of each other, namely, Habermasian theory of communicative action and rational choice analysis. From Habermas, we can learn that inter-subjective relationships are not just shaped by power and the parochial interests of the actors involved. They may also be influenced by validity claims and their accompanying reasons. Accordingly, reasons become a resource in addition to, and distinct from, the power which actors may employ to pursue their goals. From Habermasian communicative action, we may derive a discursive form of interaction, namely, arguing, which allows actors to appraise the rationality of validity claims. And we obtain a standard for the appraisal of

the quality of real world norms and decisions. Rational in the Habermasian sense means those norms and decisions that withstand a practical discourse about their validity.

Unfortunately, the world is not as ideal as we may desire. Thus, from rational choice analysis, we may learn to examine the incentives which motivate the behaviour of actors even if they are not inclined to put community interests first. Real world actors will not always behave as egoistically as rational utility maximizers. However, the institutional arrangements that affect these stylised actors positively will be more robust than those which may succeed only if actors disregard their parochial interests. On this basis, we have seen that isolated negotiations offer a certain potential for discursive interaction and communicative rationality, but they cannot be expected to motivate selfish actors to side-step their interests and refrain from resorting to their power resources. In contrast, more complex decision-making systems, such as that of the European Union, may do so. Institutional arrangements may change the situations in which actors operate, affect their preferences, and, subsequently, influence their behaviour in ways that produce collective outcomes which approach communicative rationality. The key for understanding this effect is the functional differentiation of a decision process, *i.e.*, the distribution of a given decision-load to the sub-systems that fulfil the complementary functions. The systematic separation of the functions of norm-moulding and norm-application is of particular relevance for the generation of communicative rationality. Under certain conditions, which have been explored in detail in Section 3, this step may force actors at the norm-moulding level to operate under a Rawlsian 'veil of ignorance', and induce them to enter a discourse on the appropriate application of the relevant norms at the norm-application level. This type

of functionally differentiated decision-making has been found in the institutional organisation of 'New Approach' decision-making.

However, the arrangement does not come without a price. Politically legitimated supervision, for example, by the governments of Member States or by a parliamentary majority are largely replaced by the institutionalised self-control of the system. To put it more drastically: the institutional generation of Habermasian rationality depends on the readiness of politically legitimated actors *not* to intervene deliberately into differentiated decision processes and not to attempt to control their outcomes. However, this system of deliberate non-intervention is also institutionalised in the rule of law as well as the separation of administration from policy-making of modern democracies.

The insights of this paper have three consequences for the discussions on European governance and the democratic deficit:

1. If the systematic separation of norm-making from norm-application provides the foundation for generating outcomes that are rational in the Habermasian sense, it is not useful to struggle for a politicisation – or to put it differently, for increased political control – of all European decisions. Instead, delegation arrangements that systematically restrict political control to the making of general norms, while avoiding political intervention during their application, bring the promise of increased legitimacy of the European Union.

2. This does not necessarily mean that the Commission has to be empowered, or that the Member States have to be deprived of an important role at the application level. The 'New Approach' arrangements demonstrate that the Commission is relevant, but also that it does not control the procedures itself. It is locked into the multi-staged procedures like any other sub-system. The 'New Approach' also demonstrates that Member States, in particular, if they are acting through their specialised administrations, may well

perform important functions in a staged norm application process, albeit without being able to politically control the process and its outcomes.

3. We may even conclude that the relevance of formal decision-making power diminishes the degree to which the separation of functions creates a veil of ignorance at the norm-moulding level and induces the participating actors to enter a discursive search for the most appropriate ('best') solution. Thus, it is more important that, during its preparation, a legislative proposal is discussed with many different actors, including interest groups and Member State administrations.

6.   Literature

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