ADDITIONAL INFORMATION FOR THE ARTICLE ON  
‘DELEGATING POWERS IN THE EUROPEAN COMMUNITY’, BJPolS 2004

Additional information on the process of selection of major EC laws

- **Rationale for the selection of the library**: The British Library of Political and Economic Science of the London School of Economics and Political Science is long established and is particularly rich in economics, political science and international law. It claims to be one of the largest social science libraries in the world.

- **Books that I have considered**: Different editions of the same book have been included because they are a sign of the book success and, therefore, of the saliency of the referred legislation. I have excluded dictionaries and encyclopaedias because they are not selective enough, while books on a single EC policy are excluded because they are too specific. Legal texts that focus almost solely on legal debates, constitutional matters or on the impact on national law are also excluded.

- **Type of legislation that I have considered**: I have disregarded decisions because of their addressee-related nature, opinions and recommendations because they are not legally binding, and Commission directives and regulations because it is tertiary legislation.

- **Parts/sections of the books that I have considered**: Chapters on EC institutions, jurisprudence, legal technicalities and constitutional matters have not been considered because citations of secondary legislation in these sections are not sign of saliency. Laws are cited either as examples of, say, Council-Commission relations or because disputes about such laws have led to important case law precedents. For instance, regulation 2647/72, an otherwise not very significant law, is frequently cited because it has led to the case law principle of legitimate expectations. Regulation 3600/85, another insignificant law, is used as an example of an act struck down by the Court of Justice because it lacked legal basis.

- **Possible selection biases**: It should be acknowledged that there might be two biases built into this selection mechanism. The first is a national bias as the large majority of the sampled books are British. I do not consider this to be too problematic. EC law emerged in the founding member states as a legal subfield only in the late sixties/early seventies, hence during the first enlargement. Many books are authored or co-authored by non-British lawyers. Finally, directives and regulations are rarely country-specific - none of those included in the sample is. Their relevance is likely to be European-wide. Second, the mechanism can be biased towards older legislation as new important acts make their way into books only after a few years. Indeed, the latest acts in the sample are adopted in 1993. However, the fact that almost sixty percent of the books are published in the nineties and twenty-eight percent in the eighties might redress, by no means perfectly, this bias.

Additional information on the operationalization of the discretion variable

- **Counting of major provisions delegating powers – variable Di**: Generally, I have only considered powers and constraints on executive action that are above and beyond those specified in the Treaty. However, I have considered both the Treaty provisions delegating powers and the related constraints included in laws extending the scope of the Treaty. For instance, agriculture was initially exempted from the provisions on competition and state aid (art. 36 EC). But, where laws on the common market organizations extend articles 87-9 EC to the relevant agricultural market, the Commission’s powers and constraints, as specified in the Treaty, have been taken into account.

- **Categories of procedural constraints**: Provisions that would fall under the category of compensations in Epstein and O’Halloran cannot be considered constraints on Member States. In some cases, governments are free to determine whether to compensate private interests (see e.g. the monetary compensation amounts for farmers - regulation 974/71). But, even when states are required to compensate social actors (e.g. fishermen organizations that
have intervened in some markets - regulation 100/76), Member States’ discretion is still considerable and is constrained mostly by time and (upper) spending limits. Both cases are coded as provisions delegating policy authority to governments. Equally, adaptation periods for companies cannot be considered constraints for Member States (see e.g. directive 79/267 on direct life assurance). Actually, it could be argued that national prerogatives are prolonged as a result of these periods. The only case of the sample that could be considered a constraint is in regulation 1191/69 where Member States are required to compensate transport companies for the imposition of public service obligations. Instead of creating a new category, I have included this constraint under Rule-making requirements, mostly because the regulation specifies detailed rules to be followed.

- **Comitology procedures included under Executive Action Required:** This category of constraint includes variant a and b of the regulatory committee procedures and variant b of the management committee procedure. These procedures differ in the degree of control exercised on the Commission. It is easier to block a Commission’s measure under the variant b of the regulatory committee procedure, while it is generally more difficult for a management committee. It can be argued that these procedures should be separated. However, the creation of other types of constraint violates a requirement for the factor analysis that will follow, namely that there should be more cases than variables. Gorsuch has also proposed a minimum of five cases per variable, see Richard L. Gorsuch, *Factor Analysis* (Hillsdale, NJ: Lawrence Erlbaum, 1983). There are only nine laws that use variant a of the regulatory committee procedure, two acts use variant b and three laws utilize variant b of the management committee procedure. Factor analysis would be unreliable with such small numbers. Furthermore, it is reasonable to conceive that these procedures collectively perform a similar function of ex-ante control by a separate executive agent.

- **Factor analysis based on four factors:** Four factors have an eigenvalue greater than one, but visual inspection of the scree plot suggests an initial levelling off after the second factor. The difference between the eigenvalues of the third and fourth factor is only 0.197, which is not greatly different from that between the eigenvalues of, say, the eighth and ninth factor (0.154). The oblimin method with Kaiser normalization has been used for all the rotations. Extraction using maximum likelihood suggests that solutions greater than three factors should be interpreted with caution because at least one communality estimate is greater than 1. The $\chi^2$ comparing the model with three factors vs. the model with two factors is 43.21 (df =10), significant at the 1 percent level.

- **Factor analysis based on three factors:** The first two latent variables group constraints that are used more frequently when policy authority is delegated to the Commission. The third factor groups categories of constraints that either do not correlate with any delegation ratio and independent variable or correlate positively with the Member States’ delegation ratios. Correlation tests on factor scores and delegation ratios confirm the meanings given to the factors. It is important to point out that I refer to the relative use of the constraints. Since the Council is more likely to delegate powers to Member States than to the Commission, there are, for instance, more laws imposing spending limits on Member States than on the Commission. However, the typical law delegating policy authority to the Commission is more likely to contain a spending limit that the typical law delegating powers to governments.

**Legislation excluded from the sample and reasons for exclusion**

There are two problems with the selection process:

1a) Dragging effect: law books tend to list the legislation in force at the time of publication, thus they also refer to minor amendments. Some of these amendments fill legislative gaps or update legislation taking into account the accession of new countries. These amendments are dragged into the sample by the relevance of the parent legislation.
1b) Some laws simply consolidate legislation adopted only few years earlier.

The following laws have been excluded from the sample.

1) Regulation No 59 of the Council amending certain provisions of Regulation No 17
   (13 citations)
   This regulation extends the time limits set by Regulation 17/62 to notify agreements, decisions
   and concerted practices by three (six in some cases) months
   Excluded because it is only a deadline extension
   Dragged into the sample by Regulation 17/62 (57 citations)

2) Regulation No 118/63/EEC of the Council of 5 November 1963 amending Regulation No 17
   (12 citations)
   This regulation extends the time limits set by Regulation 17/62 to notify agreements, decisions
   and concerted practices in existence at the date of entry into force of Regulation 17 by three
   years
   Excluded because it is only a deadline extension
   Dragged into the sample by Regulation 17/62 (57 citations)

3) Regulation (EEC) No 2822/71 of the Council of 20 December 1971 supplementing the
   provisions of Regulation No 17 implementing Articles 85 and 86 of the Treaty
   (15 citations)
   This regulation exempts from compulsory notification under article 4.2 of Regulation 17/62
   agreements encouraging co-operation in the field of R&D and specialisation agreements not
   affecting competition
   Excluded because it is only an addition to a list of agreements that do not need notification
   Dragged into the sample by Regulation 17/62 (57 citations)

   remain in the territory of a Member State after having been employed in that State the scope of
   the Directive of 25 February 1964 on coordination of special measures concerning the movement
   and residence of foreign nationals which are justified on grounds of public policy, public security
   or public health
   (12 citations)
   This directive extends the application of Directive 64/221 that allows limitations on movement
   and residence of foreign nationals on grounds of public policy, security or health to nationals and
   family members that exercise the right to remain in a M/S after been employed there.
   Excluded because it simply extends Directive 64/221 to a group of workers which were not
   considered in the original text
   Dragged into the sample by Directive 64/221 (55 citations)

   (EEC) No 1408/71 on the application of social security schemes to employed persons and their
   families moving within the Community
   (11 citations)
   This regulation amends Regulation 1408/71 to take into account the accession of Britain,
   Denmark and Ireland
   Excluded because it does not fundamentally amends the parent legislation (Regulation 1408/71).
   The act is rather long because the parent legislation is long and complex but it is only a list of
   additional provisions, mostly related to pensions and death grants, to take into account special
   circumstances of the accession states. It does not contain provisions that fundamentally amend
Regulation 1408/71 nor it delegates new powers (in some cases it just repeat powers of Regulation 1408/71).
Dragged into the sample by Regulation 1408/71 (51 citations)

6) Council Directive 75/35/EEC of 17 December 1974 extending the scope of Directive No 64/221/EEC on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health to include nationals of a Member State who exercise the right to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity (24 citations)
This legislation asserts that M/S can refuse the granting of a residence permit to persons which have exercised the right to remain in a M/S. Similarly to Directive 72/194, it is excluded because it simply extends Directive 64/221 to a group of persons which were not considered in the original text, further article 9 of Directive 75/34 on the right to remain already provides for derogation on similar grounds.
Dragged into the sample by Directive 64/221 (55 citations)

This regulation adds passive election (i.e. the right to be eligible for the administration or management posts of trade unions) to the list of factors where a worker should enjoy equality of treatment. Excluded because it is only an addition to a list of rights enjoyed by workers in another M/S
Dragged into the sample by Regulation No 1612/68 (44 citations)

This Directive extends the rights acquired under article 9.1-2 of Directive 75/362, Article 4 of Directive 77/452, Article 7.1-2 of Directive 78/686 and Article 4 of Directive 78/1026 to the diplomas which are evidence of training which does not meet the minimum training requirements and which was completed after the implementation of these Directives but has commenced before the said implementation. Excluded because it solves a minor problem related to existing circumstances, namely it deals with the acquired rights of people that have commenced training before the implementation of the Directives and completed after it.
Dragged into the sample by Directives 75/362 (31 citations), 77/452 (19 citations), 78/686 (19 citations) and 78/1026 (25 citations) – it only fills a legislative gap

This Regulation consolidates Regulations 1408/71 and 574/72 as amended by Regulations 1390/81 and 3795/81 (all four regulations are included in the sample). The consolidation includes:

- **Regulation 2793/81** which amends a) article 22.2 of Regulation 1408/71 by clarifying when authorization to go to another M/S to receive treatment may not be refused, b) article 39 clarifying the awards of invalidity benefits for wholly unemployed workers, and c) article 93 on rights of third parties in case of waiving of reimbursement. All the remaining amendments are of Annexes.

- **Regulation 2000/83** which amends a) article 61.5-6 of Regulation 1408/71 by adding that some domestic legislations specify that previous accidents should be taken into consideration to establish of the right to a benefit and the amount of benefit (not only the degree of incapacity) and adding the provisions thereto; b) article 72 of Regulation 574/74 which implements the amendment of point a). All the remaining amendments are of Annexes.

- **Extension the scope to M/S agreements to self-employed persons**

- **Amendments of paragraph 1 of section C, Annex 2 and paragraph 2 and 3 of section C of annex 10 to Regulation 574/72 and update of some other annexe as by Regulations 2474/82 and 99/83.**

Regulation 2001/83 is a consolidation which has been carried out because 1) minor Regulations (2793/81 and 2000/83) have amended the main 1970s Regulations after the adoption of the 1981 Regulations but before their entry into force, 2) annexes needed to be updated and renumbered and 3) references to self-employed persons needed to be added in minor agreements.

*In sum, this Regulation has been excluded because 1) it repeats probably more than 95% of the provisions of the major reform that has been carried out less that two years earlier, 2) it has been adopted predominantly for the purpose of clarification (see preambles, this also explains why it is frequently cited) and 3) contains predominantly amendments to annexes which are not part of the major provisions.*

Amendment of Regulations 1408/71 (51 citations), 574/72 (33 citations), and consolidation of Regulations 1390/81 (21 citations) and 3795/81 (11 citations), the latter two has been adopted only two years earlier. All are in the sample.


This directive amends section I of the annex to Directive 80/987/EEC (which is part of the sample) by adding that Spanish domestic servants are excluded the scope of the directive

*Excluded because it is a very minor amendment to an annex as a result of enlargement Dragged into the sample by Directive 80/987 (20 citations)*


This directive had been annulled by the ECJ in Case C-295/90 because the Treaty base was not article 235 but article 7 second paragraph. The directive has been replaced by the, virtually identical, Council Directive 93/96 of 29 October 1993 on the right of residence for students (also included in the sample).

*Excluded because 1) the directive has been annulled by the ECJ for procedural reasons, 2) the corrected version, adopted three years later, is included in the sample and 3) the two directives are practically identical.*

*Both directives were in the sample because books, for completeness, then to refer to both.*