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EU environmental governance: Uncomplicated and predictable policy making? By Jenny Fairbrass and Andrew Jordan

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Abstract

Based on studies of the reform of the European Union's (EU's) structural funding programmes, some scholars consider the EU to be a disordered, complex and multi-layered polity. According to such a perspective, shifting and contested power relationships in the EU, resulting in the dispersal of decision-making authority among different tiers of governance, have produced some loss of control over policy development among member states' national executives. Critics dismiss these claims on the basis that structural funding is intrinsically distributive and, therefore, inherently pluralistic. By contrast, in this paper we examine aspects of a *regulatory* policy area (i.e. environmental policy) to see how it has unfolded in the United Kingdom (UK) over a thirty-year period, unveiling the activities of both government and non-governmental (NGOs) actors. The data suggest that UK-based environmental groups who were previously marginalised in the national arena have adapted their behaviour to establish direct relations with EU level policy-makers and channel their demands via European-wide and international groups. This approach has enabled the UK groups to press for environmental policy outcomes that were not likely to have been secured had they relied *solely* on pursuing their objectives with or via national policy-makers. That the entrepreneurial activities of supranational actors have been a major source of unintended and unwelcome consequences for the UK government is also evident. Our evidence suggests that environmental decision-making in the EU is unpredictable, confused, intricate and multi-centred and not entirely within the control of member states' national executives.

Key words: biodiversity; land use planning; multi-level governance; European Union.

1. Introduction

In this paper we examine two strands of the European Union's (EU) environmental policy (i.e. biodiversity and land use planning) and look at how it has unfolded in relation to the United Kingdom (UK) over a thirty-year period. We unveil the activities of both government and non-governmental (NGOs) actors and their interactions. The focus of the paper is on one main body of ideas, a relatively recent addition to the body of scholarly work concerned with the study of the EU: multi-level governance (MLG). To provide contrast and context, we compare it with a rival account of the EU: namely, liberal intergovernmentalism (LI). Crucially, these two competing frameworks conceptualise governance (Jordan, 2001a) and the role of the various policy actors (i.e. member states, their national executives, national and international interest groups, and EU institutions) in EU policy-making in strikingly different ways.

From the theoretical basis above, our paper is developed around several research questions. What is the character of EU environmental decision-making? Does our evidence from this policy area affirm the portrayal of the EU supplied by LI? Or, does MLG provide a more accurate picture? Moreover, is MLG merely a useful *description* of EU (environmental) policy-making rather than just a "(dis)ordering framework" (Rosamond, 2000, 111) which identifies certain attributes of MLG (i.e. multiactorness, unpredictability and complexity) without really explaining them (Benz and Ebelein, 1999, 330). We conclude the paper by reflecting on the explanatory power of these two approaches in the light of the data collected. In order to respond to the questions above, the research concentrates on four EU environmental directives. The first two form the nucleus of EU biodiversity policy, namely Directive 79/409/EEC (the Birds Directive) and Directive 92/43/EEC (the Habitats Directive). The other two selected measures relate to land use planning: Directive 85/337/EEC (the Environmental Impact Assessment (EIA) Directive) and the recently agreed Directive 2001/42/EC on Strategic Environmental Assessment (SEA).

This paper highlights the contribution made by UK actors to the development of the selected measures. These include the UK national executive: primarily the central government department that has responsibility for environmental matters, which was (until 1997) the Department of the Environment (DoE). We also focus on a number of UK-based conservation groups, such as the Royal Society for the Protection of Birds (RSPB) and the Council for the Protection of Rural England (CPRE). In conducting our research, we have adopted a thirty-year perspective (c.1970 to 2000). This permits an examination of the aims and actions of the UK central administration and the UK-based environmental

groups over the full policy cycle (from agenda setting to implementation). In other words, we are able to compare the actors' *objectives* to actual *outcomes*. Significantly, this not only exposes the motives and roles of the DoE and the conservationists, but also of other policy actors such as the European Commission, Parliament, Court and European/international environmental groups.

The paper proceeds as follows. The next section explains our reasons for treating environmental policy and the UK as a good test case of theory. We then explore MLG in some depth and briefly outline an intergovernmental explanation of the EU. Section Four portrays the politics surrounding the adoption and implementation of the four directives. Part Five reviews the empirical evidence in the light of the theories of the EU and reflects on the utility of MLG as a general theory of the EU.

2.2. EU Environmental Policy and the UK: A Critical Case?

Why do we consider the four selected directives in relation to the UK to be a critical test of theory? First, the UK has traditionally approached European negotiations with great scepticism (Wallace, 1995). Across a whole range of different issues, the UK has regularly found itself isolated in, and at odds with, continental Europe (Wallace, 1997). Public opinion in UK has veered from the ambivalent to the deeply Euro-sceptical. Golub (1995) claims that this has encouraged the judiciary in the UK to retard legal integration by refusing to make references to the ECJ. Second, UK has been characterised as an “extreme case” of a unitary state because of the subservient position of local government (it has no independent constitutional existence) (John, 1996, 132). In an important and compelling critique of Marks' MLG thesis, Bache (1999) confirms the power of central government by presenting robust evidence that it operates as an “extended gatekeeper”, which controls the structural funds right through to their detailed implementation on the ground (see also Pollack, 1995). In other important respects, the UK's relatively strong, centralised bureaucracy and internal co-ordinating mechanisms (Metcalf, 1994) also imply that any interest representation¹ would be most likely to be directed at and through national government departments/the core executive, not around them/it. Thirdly, unlike structural policy, biodiversity and land use planning policy are both regulatory policies. Recall Lowi's celebrated typology: distributive policies typically involve a relatively open competition for (newly distributed) resources (Lowi, 1964), whereas regulatory policies tend to be more narrowly drawn and conflictual in nature. It seems reasonable, therefore, to expect sceptical states such as the UK to accept regulatory policies where they are necessary for the proper functioning of the single market, and to resist them when they do not. Biodiversity protection and land use planning would seem to be only very tenuously connected to the logic of the single market. Moreover, since the costs of regulatory policies fall most heavily on national actors (i.e. not the EU), member states could be reliably expected to defend their national economic interests as LI predicts (Pollack, 1994, 110-111).

In summary, given the characteristics of environmental policy (i.e. regulatory) and the UK polity (i.e. centralised, sceptical, unitary state) it would be reasonable to expect to find little evidence of multi-level governance. Rather, we would anticipate more support for LI contentions. National and sub-national

¹ It should be noted that these established interaction patterns may well have begun to dissolve or change as the result of constitutional reforms (e.g. devolution in Wales and Scotland) in the UK dating from the late 1990s. These events, however, occurred very late in the day with respect to our study (c. 1970 –2000) and we, therefore, would expect them to have little impact on our findings.

environmental groups could be expected to rely on the UK central administration to promote their interests rather than routinely seeking common cause with other European actors (state and non-state) against the wishes of the UK central government and by-passing the national level of governance.

3. Theoretical Approaches: Explaining the EU

3.1 A state-centric account: liberal intergovernmentalism

Before examining some of the detailed points arising from MLG thinking, we first briefly outline a contrasting perspective: namely, liberal intergovernmentalism (LI). Such state-centric theories argue that states are essentially in control of the European integration process. The nation state is *the* most important source of EU policy and it is the most influential tier of governance, acting as ‘gate-keeper’ at all stages of the policy-cycle. Five of its guiding assumptions are especially noteworthy:

- States direct the process of integration: the bargaining between them more or less determines the course of integration. Outcomes reflect the relative strength of the most powerful member states.
- States are rational, self-interested actors and domestic, societal forces determine their preferences. However, domestic political systems are biased against diffuse interests. A state’s core task is first to aggregate national societal preferences (the ‘L’ in LI) then take them to the international level, where the necessary policies are supplied through inter-state negotiation (the ‘I’ in LI).
- States keep the gate between national and international politics: despite the explosion of lobbying in Brussels, national channels of representation are pre-eminent.
- States enjoy little flexibility in making concessions beyond their own domestically determined preferences: this drives EU agreements towards the lowest common denominator of state preferences.
- Integration strengthens the state: states use the EU as part of a “two level game” to overcome domestic opposition by pushing through important but unpopular policies that might otherwise have been blocked (“slack cutting”).

Subsequently, Moravcsik (1994, 47) has substantially developed the last of these points to argue that national governments purposively exploit the EU to “manipulate their own domestic constituents into accepting common policies.” By organising themselves into “executive cartels”, national leaders trade state sovereignty for no obvious societal benefit other than to simply enhance their autonomy at home. In other words (ibid., 3):

“[w]hile cooperation may limit the external flexibility of executives, it simultaneously confers greater *domestic* influence. *The [EU] severely restricts formal participation in decision-making by most domestic actors other than the executive.* Issues that were once handled by domestic parliaments and publics are bargained in secret sessions of the European

Council, employing domestic constitutional procedures designed to handle “high politics” issues of traditional foreign policy... In this sense the EC strengthens the state.” (emphasis added).

Several criticisms have been levelled at LI (see Wincott (1995), Peterson (1997) and Jordan (2001b)). First, LI assumes that states function as a “single agent” in Europe (Moravcsik, 1994, 5), rather than amalgam of different and very often competing, organisations. This is a credible enough assumption to make if one is (like Moravcsik) looking solely at Intergovernmental Conferences (IGCs) and unitary states such as the UK, but it becomes more questionable when the focus is shifted to the day-to-day process of policy-making and more decentralised states are considered. Second, a number of key terms and concepts underpinning LI are unclear (e.g. ‘state’, ‘state executive’, ‘national leader’). It would seem that Moravcsik (1994, 4) is mainly concerned with the head of state (“chief executive”) or Minister in a particular issue area. Rather confusingly, “societal groups” are said to comprise interest groups and political parties, but also civil servants and other cabinet ministers. In other words, having assumed the state is unified he promptly disaggregates it! Third, the conditions under which “slack cutting” arises are at best very poorly theorised and at worst internally contradictory. So, on the one hand state preferences are said to be determined domestically, yet when these constraints are “loose” the executive can “shirk” tasks and pursue “her preferred policies” in Europe (ibid., 5). According to the definitions supplied above, this could conceivably include one Minister going beyond their brief, although only by undercutting one of the central tenets of LI: state coherence. There is, of course, another important aspect to this: if societal groups do not determine state preferences where do they come from? Finally, in spite of the ‘slack cutting’ argument, LI still struggles to explain why states/state executives, which (under an earlier elaboration of the model) are preoccupied primarily with “safe-guarding their countries against the future erosion of sovereignty” (Moravcsik, 1991, 27), are progressively undermining their own existence by diffusing state authority to other actors.

If LI paints a complete and entirely accurate picture, we might confidently predict that EU biodiversity and land use planning policy would reflect strongly the economic preferences of the UK, France and Germany and that the domestic interests in those countries would channel their demands via the national executive during international negotiations. Domestic groups such as the RSPB and the CPRE in the UK would not be likely to establish direct relations with EU level policy makers. Moreover, central government departments would exploit EU decision-making in order to overcome any domestic opposition and solve domestic policy problems. Such predictions are strikingly different from

those that can be derived from MLG thinking, as set out in the section below. For example, given MLG contentions we might clearly expect to find national/sub-national interests forming alliances with EU policy-makers (e.g. the Commission) *in opposition* the national policy-makers where their interests diverge sufficiently.

3.2 Multi-level governance

Although Marks argues (1992) that a state-centric model can be usefully employed to explain the growth of EU structural funding, he suggests that a “more open-textured, multi-level perspective” (1992: 192-193) is more productive for explaining the subsequent reforms. In his view, EU institutions should be seen as independent political actors. Generalising from the structural funding case, Marks argues that states remain pre-eminent but are incapable of fully controlling the integration process, which escapes their collective command in many important respects. Domestic interest groups ‘outflank’ national executives and establish direct relations with EU institutions, finding common cause against the member state national executive. MLG arguments chime with historical institutional² arguments (Steinmo and Thelen, 1992; Pierson, 1998), which suggest a number of circumstances under which member states can and do ‘lose control’ over the policy process (e.g. partial autonomy on the part of the EU institutions and the potential for unintended consequences). In summary, Gary Marks describes (1992: 221-223) the EU as a polity that is characterised by emerging political disorder and which exhibits complex, multi-layered, decision-making ‘above’ and ‘below’ the state.

Looking in more detail at some of the key arguments advanced by MLG thinking, we find certain aspects to be particularly thought-provoking: namely, its emphasis on issues such as (sub)national mobilisation; complex, uncertain and contested decision-making; entrepreneurial supranational activity; and unintended consequences and learning. We examine these as follows.

3.2.1 Subnational mobilisation and potential rewards

Marks notes that there has been a mobilisation of regional national and subnational interests. They seek direct contact with EU level policy makers, which can be achieved in a number of ways including, *inter alia*, establishing

² ‘Old’ institutionalism consisted mainly, though not exclusively, of detailed studies of different administrative, legal, and political structures. The ‘behavioural revolution’ of the 1950 and 1960s rejected the old institutionalism on the grounds that formal laws, rules, and administrative structures did not explain actual political behaviour and policy outcomes. There was a need also to look at informal distributions of power, attitudes, and political behaviour. The behavioural revolution then spawned two further separate institutionalist critiques: historical and rational choice institutionalism. HI literature is diverse but among scholars there is a shared interest in ‘historical contingency’ and ‘path dependency’.

representation (an office or a pan-European grouping base) in Brussels. He appears to link this development with the provision of ‘rewards’ by EU institutions (e.g. EU funding), stating (Marks 1992:214-15) that:

“Recent developments in the regions in response to the structural reforms indicate the potential for the mobilization of regional governments and regionally based interest groups intent on gaining direct access to EC decisionmaking. Virtually every regional government *receiving significant structural funds is now directly represented in Brussels...*” (emphasis added).

For Marks, one of the potential repercussions of the direct interaction between domestic interest groups and EU policy-makers is that the member state national executives may not be able to dictate the path of these relationships. Marks argues that (1992: 217, emphasis added):

“once policy networks linking subnational governments to the EC have been created, there is *no certainty that they can be dominated by national government*. Local authorities are well aware that their interests diverge from those of the government.”

Whilst the bulk of MLG literature concerns the subject of regional or local government, it does make some direct references to interest groups (see Marks and McAdam, 1996). In a way that is reminiscent of early neofunctionalist ideas, Marks *et al.*, (1995, 19) argue that interest groups are likely to feel encouraged to mobilise at the EU level once they think that the EU institutions have acquired decision-making authority and competence. Such a development has further implications for the legitimacy and conflict-resolution role of the EU. Marks *et al.*, (1995, 19) contend that the legitimacy of EU decisions are enhanced by the mobilisation of interests at the EU level. This in turn may create expectations among the interest groups that the EU will develop or possess the capacity to resolve future conflict.

In terms of making strategic decisions (Fairbrass, 2002) about which level of governance to target, it is arguable that interest groups need not choose between different levels of governance (i.e. selecting one level of governance in favour of another). They could (should?) mobilise in both national and supranational arenas. In the words of Marks *et al.*, (1995:20):

“The strategic choice facing a group is not, however, between these arenas, for they are by no means mutually exclusive, but between using neither of them, one of them exclusively, or using both arena.

3.2.2 Complexity, uncertainty and contested decision-making

For Marks (1992), one of the outcomes of the reforms to EU structural funding was to produce a changing and ill-defined situation distinguished by rival understandings of the extent and the location of decision-making. For Marks, reforms to EU structural funding will have created (1992:215):

“new and untried issues of governance and jurisdiction; they [will] have spawned new arenas in which decisionmaking will take place; and they have multiplied the number and type of groups that contend for influence over substantive outcomes and, more important, for control over the decisionmaking process.”

Given an unstable, shifting and uncertain political environment, a greater premium is likely to be placed on knowledge and information by all of the actors with an interest in a particular policy area. The possession of a well-developed intelligence system should clearly be advantageous. Moreover, given uncertainty in relation to policy-making process, actors would be well advised to prepare contingency plans and recognise that outcomes of policy-making can be difficult to predict.

Actors may well wish to develop ‘insurance’ strategies. For example, nationally-based interest groups may be well advised to join or form a larger European or international grouping (Greenwood and Cram 1996: 451-452) which should (or could) reduce uncertainty by providing intelligence about impending or forthcoming developments as the larger group is able to ‘bulk buy’ information. They also argue that there are important costs of non-membership such as the *inability* to influence policy, neither that of the government nor the group.

The contested nature of the decision making process is likely exacerbate other potentially adverse features of the unstable political environment found within the EU. For example, conflict at the EU level is likely to attract increasing numbers of policy actors towards the policy-making process/centre. As this occurs, uncertainty about outcomes is likely to increase. One implication for our study is that if there is a significant and rising degree of uncertainty about which level of governance wields greatest influence over policy development, the subnational actors are likely to want to create and maintain close relationship with *both* national and supranational levels of governance.

3.2.3 Supranational entrepreneurial action

One significant MLG claim that challenges LI contentions is that supranational actors can play a decisive and *proactive (entrepreneurial)* rather than a subordinate role in EU policy-making. Marks finds (1993, 399) that:

“[w]hen one lifts the lid on the practice of structural policy, it is clear that the Commission has played a vital role in designing the institutional framework. Within that framework the Commission is a key actor in the process of policymaking and implementation.”

He reinforces the point when he goes on to contend that (1993: 403)

“Several aspects of the conflict [over additionality³] – the way in which local actors were mobilized, their alliance with the Commission, and the effectiveness of their efforts in shifting the government’s position – confirm the claim that structural policy has provided subnational governments and the Commission with new political resources and opportunities in an emerging multilevel policy area.”

In a later work, Marks *et al.*, (1996) examine reasons why national interest groups and the European Commission might/should form alliances. The Commission requires technical information, a basis for ‘practicable’ and ‘workable’ legislation, legitimacy, and political power. By joining forces the Commission and interest groups both stand to make significant gains, although Marks *et al.*, (1996, 359) recognise that, in common with other policy actors, the Commission is constrained.

Clearly some of its checks may emanate from the member states. It is still an unresolved question (Pierson 1998: 37) as to what extent the Commission and other EU level actors really have the power to take the initiative. It is conceivable that the Commission merely ‘anticipates’ the wishes of the national executives of the member states. Nevertheless, for Marks and his associates, part of the Commission’s potency in EU policy-making derives from its ability to foster and exploit a variety of contacts (presumably both state and non-state actors). In addition, part of Commission’s strength will come from its ability to forecast accurately demands from a variety of sources, its capacity for handling difficult negotiations, and its decisional efficacy. Marks *et al.*, argue that the

³ The British Conservative government was opposed to matching EU funding for the regions as part of its overall strategy of controlling public spending and because of its perception that Britain received no net benefit from EU structural funds. The British position placed it directly in confrontation with the Commissioner for Regional Fund (Bruce Milan). The latter threatened the British government that he would withhold EU funds. Eventually the British government compromised and the RECHAR funds were made available to the UK.

commission is uniquely well placed to influence EU policy-making because it a focal point for demands and information from a variety of sources (both state and non-state).

The Commission is not the only EU institution credited with some independence of action. Hooghe and Marks contend that (1996: 37) the ECJ can be a decisive player in policy development because its decisions are an accepted part of the legal order in the EU (i.e. via the doctrines of direct effect and supremacy) and as a result decision-making has become multi-level. Moreover, the ECJ creates opportunities to affect or influence policy for a variety of policy actors: the Commission, interest groups, and national courts.

3.2.4 Unintended outcomes and learning

Given the uncertainty discussed above, all actors face the risk that policy outcomes may not be as expected or desired. However, based on his findings with regard to structural funding policy, Marks notes the possibility that national executives (and presumably other policy actors) might learn from their ‘mistakes’ over the course of time. He argues that (1993: 403) the conflict (between the UK and the Commission over additionality),

“shows the scope for unintended consequences in the EC very clearly... member states do not know exactly what they are agreeing to when they sign on...[I]t is worth stressing, however, that the idea of unintended consequences is tricky in the context of ongoing political relationships where learning takes place. Having been at the sharp end of growing Commission power and subnational government assertiveness, the UK government is likely to pay more attention to institutional details in the future and be more willing to exert its veto power, or threaten to do so, to stave off future debacles.”

Marks acknowledges, therefore, that national governments have recognised the potential for loss of control over policy and have taken steps to try to regain it. They have not watched passively but have attempted to tighten or retrieve their grip on sub-national government. In the sphere of regional policy and structural funding, the UK central administration can do this because they often hold the financial purse strings of sub-national government.

4. The Development of EU Environmental Policy

4.1 Biodiversity

EU biodiversity policy comprises an array of different statutes, encompassing subjects as diverse as forestry protection and seals. However, the two main planks of EU biodiversity measures are Directive 79/409/EEC on the conservation of wild birds and Directive 92/43/EEC on the conservation of natural habitats and wild fauna/flora.

4.1.1 *The Birds Directive (79/409/EEC)*

The founding Treaties of the EU contained no direct references to biodiversity policy (nor any other aspect of environmental policy) because it was not regarded as a suitable area for EU competence (Dixon, 1998, 223). Consequently, it was not until the Single European Act came into force in the late 1980s, that the EU acquired a solid legal foundation for nature protection or biodiversity policy. Nevertheless, from the early 1970s, the EU had begun to establish environmental principles and programmes. A broad range of political support for the Birds Directive can be dated from that period.

By the 1970s there was a recognition that species and habitats were under considerable threat (Haigh, 1997, 9.9-1). This had resulted in the signing and adoption of some important international intergovernmental conventions⁴, which were to provide the impetus for EU level action. The first EU level proposal to include an undertaking to protect birds and certain other species was the First Action Programme (C112/40), dated 22 November 1973), which exploited Article 2 of the Treaty of Rome (that refers to harmonious economic development and improvement of quality of life). The signing of this programme signalled the endorsement by the member states of the need for species protection.

Among the sources of pressure for nature conservation measures were the public, who were outraged at annual slaughter of migratory birds, and interest groups such as Save our Migratory Birds. The latter petitioned the European Parliament, which later issued a Resolution (February 1975). This Resolution led in turn to proposals from the Commission, although it was not the Commission's first involvement in the policy area: since the 1970s the Commission had already undertaken a number of studies and consulted national experts. In December 1974, the Commission had already reminded member states of their obligations to comply with the 1950 Paris Convention and the 1971 Ramsar Convention (Wils, 1994, 219).

⁴ Many of international conventions pre-date EU measures. The most important, arguably, were the 1971 Ramsar Convention, and the 1979 Bern and Bonn agreements.

As a result of the broad support for protection measures for birds, the Birds Directive was proposed in December 1976 (COM (76) 676) but was not adopted until April 1979 (OJ L103 25.4.79). This eighteen month delay was largely the consequence of opposition from the French and Italian governments. Having adopted the Birds Directive, in due course there were a number of technical amendments to reflect the enlargement of EU (to include Greece, Spain and Portugal). Of much greater import was the amendment to the Birds Directive introduced via the Habitats Directive in the early 1990s (Wils, 1994, 219).

The Birds Directive places a duty on member states to maintain the populations of wild birds subject to *ecological, scientific cultural, economic and recreational* grounds. It prohibits any deliberate killing or capture of birds, deliberate damage to or destruction of nests, eggs, breeding and rearing sites, and the keeping of birds whose hunting or capture is prohibited (Haigh, 1991, 9.2-1). Under the Birds Directive member states were required to designate their own Special Protection Areas (SPAs) and to notify the Commission of these sites by April 1981 (i.e. 2 years the adoption of the Directive). Despite this deadline, the Birds Directive lacked a strict timetable for compliance (unlike the later Habitats Directive) and the result was that many EU member states failed to comply with this obligation.

In the UK, formal compliance with the Birds Directive was achieved via a number of pieces of legislation. These included the National Parks and Access to the Countryside Act (1949), the Countryside Act (1968), the Countryside (Scotland) Act (1967), and the fiercely contested Wildlife and Countryside Act (1981). Under UK procedures, SPAs are classified by the Secretary of State for the Environment, on the recommendation of the National Conservancy Council (later split into three bodies following the 1990 Environmental Protection Act). In the UK, SPAs would normally have already been notified as Sites of Special Scientific Interest (SSSIs).

With respect to the Birds Directive, there were widespread implementation problems affecting most EU member states, reported in the late 1980s (European Parliament, 1988). As early as 1983, the Commission responded to growing concern over the failure to adequately implement the Birds Directive, by initiating infringement proceedings against every single member state. Several of these cases drew upon information submitted by national environmental groups, such as the Royal Society for the Protection of Birds (RSPB), which had consciously adopted a 'watchdog' role (Pritchard, 2000).

EU level legal action concerned three main issues: non-designation of 'candidate' SPAs, derogations, and formal legal transposition of the Directive.

Two of the most important cases upon which the European Court of Justice (ECJ) ruled in the early 1990s were C-57/89 (CEC v Federal Republic of Germany with the UK intervening, a.k.a. *Leybucht Dykes*⁵) decided in 1991 and C-355/90 (CEC v. Spain, a.k.a. *Marismas de Santona*) decided in 1993. Crucially, the ECJ's decisions in these two cases appeared to elevate *ecological* considerations over *economic* ones during the designation and development of protected sites (Ball, 1997, 217). Employing the principles upheld in the above cases, the ECJ ruled against the UK Government in the *Lappel Bank* case⁶ in July 1996.

4.1.2 *The Habitats Directive (92/43/EEC)*

In common with the Birds Directive, the Habitats Directive was the product of the efforts of more than one type of political actor. Governments signalled their recognition of the link between species and habitats (Haigh, 1997, 9.9-6) in the Third Action Programme. National and transnational conservation organisations continued to campaign for increased protection (Dixon, 1998, 224; Hatton, 2000; Hepburn, 2000) and exhorted the EU to fully implement the provisions of the Bern Convention through EU legislation. Once again the Commission, European Parliament and the ECJ played an important role in the developing the Directive.

The Habitats Directive proposed was proposed in September 1988 (COM (88) 381) but was not finally adopted until 1992 (OJ L206 22.7.92) (Haigh, 1997, 9.9-8). Once again progress had been obstructed by one or two member states. One source of delay was the UK government, which led a determined campaign to reverse the effects of the *Leybucht* decision. This case was in progress whilst Habitats Directive was being negotiated and when the ECJ decision was announced in February 1991 it took the UK Government by surprise. Alarmed by the ECJ ruling, the UK Government supported amendments to the draft habitats directive, which strongly resembled instructions issued by the UK Government in a 1987 circular (Freestone, 1996, 248). In addition to the UK objections to the proposed habitats legislation, negotiations also foundered over

⁵ In the *Leybucht Dykes* case, the ECJ rejected the Commission's argument that the protection of SPAs was an absolute duty other than when there were risks to human life. But it also rejected the German government's demand for a wide margin of discretion when identifying SPAs. Many Member States were so alarmed by the ECJ ruling that they worked to secure amendments. The Habitats Directive responds to these by permitting states to take social and economic factors into account when managing SPAs.

⁶ In the *Lappel Bank* case, which was brought against the British government by the RSPB, the ECJ ruled that the British government had been wrong to exclude an area of land from a SPA to allow development of a nearby port. Again, the Court supported a much more maximal interpretation of EU law than Britain had anticipated or been prepared to accept.

the issue of providing financial assistance to 'ecologically rich' but 'economically poor' countries, such as Spain.

The UK Government's successful campaign to 'restore' member state discretion over protected sites, resulted in the inclusion of a number of crucial Articles in the final Habitats Directive. Articles 6(4) and 7 of the Habitats Directive replaced Article 4(4) of the Birds Directive, thus appearing to render the former a rather weaker piece of species protection legislation. The Habitats Directive and the amended Birds Directive appeared to give member states greater licence or autonomy with regard to protected sites (for example, to use economic reasons to allow damage to sites). Nevertheless, the Habitats Directive that was finally adopted places obligations on member states to protect plant and animal species and their habitats. Member states are required to avoid deterioration of sites and to carry out appropriate assessments of any plans or projects that might damage protected sites.

In the UK, the Habitats Directive was enacted via the 1994 Regulations, which were a direct transposition of the EU Directive. The Regulations have been characterised as 'minimalist', whilst the EU law called for 'absolute' protection (Ball, 1997, 215/216). For example, the UK Government failed to adequately protect marine sites and this has led to a number of court cases. For example, in 1999, Greenpeace brought a test case against the UK Government (ENDS Report, 1999, 54-55) concerning the territorial boundaries of the Habitats Directive. The UK High Court found against the government and confirmed that the Directive did apply to the continental shelf and to waters up to the 200-mile fishing limit, rather than solely up to 12 miles from British shores.

As with its predecessor, the implementation of the Habitats Directive has also been problematic (Ledoux *et al.*, 2000). Despite the inclusion of a strict but quite generous, ten-year implementation timetable (negotiated by the UK), the Commission again has been busy issuing warnings and initiating infraction proceedings against a majority of the member states. For example, in 1998 the Commission initiated infringement proceedings against nine member states (not including the UK) for their failure to comply with various aspects of the two Directives, but especially the identification of protected sites.

4.2 Land Use Planning Policy

4.2.1 Environmental Impact Assessment Directive (85/337/EEC)

In 1969, the US Government first introduced Environmental Impact Assessment⁷ (EIA). This provided inspiration for similar systems in European states and, eventually, the EU. By the time the EU adopted an EIA Directive in 1985, some member states were already experienced at undertaking their own, domestic assessments (West Germany, France and the Netherlands, since 1975, 1976 and 1981 respectively) but for the rest, EIA was a novelty (Haigh, 1983, 592; Wood, 1995).

In common with the biodiversity directives outlined above, a number of policy actors contributed to the development of the EU's EIA directive. These included the Commission, which had began preparing the ground in the mid-1970s by commissioning a series of expert reports, the first by two British academics (Lee and Wood, 1978). The European Environmental Bureau tried to crystallise opinion by holding an information-sharing seminar in 1975 for national experts and Commission officials (Sheate, 1997, 270). On the basis of these discussions, the Commission began drafting a formal proposal in 1977. However, almost from the start, progress was slow because the proposal represented the EU's first intrusion into national land use planning practices. It is reported that the proposal went through 20 different drafts before finally being published in 1980 (CoM 80 313) (Wood, 1995, 32). Once again the UK government presented a significant obstacle. During the drafting stages, important changes were made to accommodate the UK's objections. Nevertheless, the final draft still contained a number of elements which the UK opposed, such as a long list of Annex I projects where EIA was mandatory, provisions for Commission coordination of the Article II thresholds, and a requirement to consider alternatives project sites (Wood, 1995, 32).

The Directive that was adopted in 1985⁸ provides for a system of assessment prior to consent being granted to projects that are considered to have *significant* impacts upon the environment. Article I of the Directive lists 9 types of project which must receive an environmental assessment (EA), although exemptions in exceptional circumstances can be made. Annex II includes 13 categories of development project covering 80 separate types of project which require an EA

⁷ EIA is a tool for evaluating the impacts of proposed developments such as a road or a power station. Ideally, the systematic collection of information should enable the most environmentally damaging impacts to be alleviated or mitigated entirely.

⁸ Directive 97/11/EEC amended the 1985 EIA Directive. It built on a 1993 CEC review. It adds new classes to Annexes I and II, and introduces a new Annex III that lays down new selection criteria, which appear to reverse the 1995 ECJ ruling on minimum thresholds (Haigh, 1998, 11.2-5).

where states "consider that their characteristics so require". Article 4(2) requires Member states either to specify *a priori* certain types of projects that will fall under Article II, or establish the criteria and thresholds to determine which apply. In the UK the test is "significant" environmental impacts.

In common with its perception of its expertise with regard to nature conservation, the UK government also considered itself to be a pace setter in land use planning policy and thought that the EU law would only formalise what the UK was already doing as part of a well established planning process, dating back to 1948. Initially, formal compliance with the EIA Directive in the UK was attempted via secondary regulation adopted under the European Communities Act 1972, relying on over forty pieces of legislation. When this failed to produce adequate compliance with the strict terms of the Directive (since it did not cover developments like agriculture and forestry), the UK government was obliged to introduce the 1991 Planning and Compensation Act.

In parallel with biodiversity policy, rulings by the European Court have played an important part in giving the EIA Directive greater legal and political bite. The rulings, which stemmed from continuing disagreements about the interpretation of the Directive at the national level, have confirmed that states have far less leeway in the implementation of the Directive than they expected. Most significant among the ECJ cases were C431/92 (Germany supported by the UK v Commission⁹) in 1995 in which the ECJ ruled in favour of the Commission, and C133/94 (Belgium and Germany V Commission¹⁰) in 1996.

In terms of its general impact on the UK, the EIA Directive has resulted in far more Environmental Impact Assessments being undertaken than anyone expected, particularly with respect to activities under Article II, which the UK Government had wanted to be very sparingly applied (Wood and Jones, 1991). Between 1988 and 1993, 1000 environmental impact statements (EISs) were produced under EU law (of which only 10% were related to Article I) and over 300 outside it, indicating the tremendous interest in EIA generated by the

⁹ Case 431/92 concerned Annexes I and II. Germany argued that Annex I did not apply to an alteration to an existing project. The ECJ held that member states did not have the discretion to decide whether or not EIA required, and said an EIA was compulsory. Although the ECJ ruled in favour of the Commission, the Advocate General (on whose view the ECJ relied) was critical of the ambiguities surrounding the 'pipeline issue', finding the Directive ambiguous and therefore deficient (Haigh, 1998, 11.2-21).

¹⁰ Commission felt that Belgium (with Germany) had adopted a narrow interpretation of the applicability of Annex I. The Court agreed with the Commission and ruled that states should consider projects on a case by case basis. They should not establish generic thresholds or criteria for exempting certain projects in Annex II from EIA. In both senses the Court indicated how states had less discretion over implementation than they had perhaps hoped.

Directive (Wood, 1995, 53). The growing popularity of EIA among developers, environmentalists and local planners has led to it being formally applied to projects falling outside the ambit of EU rules. Interestingly, the UK government's lukewarm enthusiasm for EIA has also grown considerably in the period since 1988 as the dire warnings of delay and excessive litigation failed to materialise.

4.2.2 Strategic Environmental Assessment (2001/42/EC)

Strategic Environmental Assessment (SEA) has been one of the Commission's strategic political goals for almost as long as the EU has had an environmental policy. In the late 1970s, two British academics first recommended the idea to the Commission and there were plans to introduce it in the Commission's 1980 draft EIA proposal. However, it was only with the 1987 Fourth Action Programme that the member states and the Commission formally committed themselves to introducing SEA. Notably, environmental groups and the European Parliament have always been enthusiastic advocates of SEA, but the Commission has always had to tread carefully in order to win member states around to its way of thinking. It failed to read the runes in the early 1980s and SEA was rejected. By the mid 1990s, the whole proposal had become mired in controversy.

However, by the 1990s the political context had become much more supportive of SEA. Many states, including the UK, began to experiment with national-level systems of SEA to achieve sustainable development – the emerging *leitmotif* of EU environmental policy. The Commission was then able to use the prospect of inconsistent national SEA systems as a justification for proposing SEA at the European level, though, not without much delay and patient negotiation. Work commenced on a formal proposal in 1990, which was released to national experts in March 1991. Early drafts implied that SEA would be applied to virtually all policies, programmes and projects that give rise to development.

In December 1992, the UK Government used a subsidiarity debate to formally kill off the SEA proposal, which in any case had never achieved formal status and was strongly disliked by many other states. This set back did not deter the Commission from making efforts to extend SEA by other means, such as via the structural funding process, in certain Directives such as those addressing habitats, and also in the construction of roads (Therivel *et al.*, 1992, 53; Sheate, 1997, 279-281). Following extensive discussions with member states the Commission finally issued a formal SEA proposal in 1996 (see COM (96) 0304 and COM(96)511 as amended by COM (99)73). This required an environmental assessment of all plans and programmes adopted under national

town and country planning legislation but not (as originally suggested) policies. Its scope was narrowed to land use planning decisions such as local development plans and waste local plans. Other changes made to appease member states included greater discretion and flexibility to tailor the directive to suit national circumstances.

Thereafter, the proposal remained in limbo as a succession of Council Presidencies (including the UK's) ignored it. Interestingly, during its Presidency in 1998, the UK Government shunned SEA and opted instead to push environmental policy integration (EPI) at the supranational level via the so-called 'Cardiff process' of review and reporting (Jordan and Lenschow, 2000). The 'history making' decision at Amsterdam in 1997 to strengthen the legal commitment to achieving EPI in the EU gave the SEA proposal a much needed shot in the arm. In 1999, first the Finnish and then the German Presidencies, picked up the initiative in response to the EU-wide challenge of implementing newly strengthened commitment to achieving EPI. By 1999, even the UK Government was said to be broadly in favour of the proposal as it stood.

Following some delays associated with the process of conciliation (ENDS, 2001) Directive 2001/42/EC was given formal approval by the European Parliament and the Council on the 27th June 2001 (OJL 197, 21-07-2001, p30-37). Member states will have until 21st July 2004 to introduce suitable national legislation in order to comply with the Directive.

5. Discussion and Conclusions

We have highlighted four areas of MLG thinking associated with the study of EU structural funding policy: sub-national mobilisation and rewards; complexity, uncertainty and contested decision-making; entrepreneurial activity by supranational actors; and unintended consequences and learning. If the MLG characterisation of EU policy-making is valid then we would expect to find that national/sub-national actors (e.g. environmental groups such as the RSPB and the CPRE) will have by-passed the national executive to establish direct relations with EU level policy-makers, motivated by the perceived rewards (e.g. favourable legislation) and the entrepreneurial actions of the supranational actors. In addition, we would expect to find that environmental decision-making is complex, disordered, disputed, unpredictable and not entirely under member state national executive control. We might equally expect to find evidence of learning on the part of (thwarted or disgruntled) national executives, determined to try to regain control over policy development.

There is evidence that the UK-based environmental groups (e.g. the RSPB) have mobilised at the EU level. They have made direct contact with staff and the Commissioner in DG Environment (Hepburn, 2000; Long, 2000). For example, by assisting senior staff (Stanley Johnson) and the Commissioner (Stanley Clinton Davis) they were instrumental at the agenda setting stage of the Habitats Directives and in drafting the proposal. They have also established close links with leading MEPs on the Environment Committee of the European Parliament, such as Caroline Jackson and Hemmo Muntingh. In addition, they have worked with the Brussels based group, Birdlife International, in providing information to the Commission (Papazoglou, 2000) with a view to influencing biodiversity policy via legal channels (e.g. the ECJ). Given that groups such as the RSPB and the CPRE were marginalised by the NFU-MAFF relationship at the national level in the UK, they clearly had *incentives* to mobilise elsewhere.

That EU decision making is 'complex, uncertain and contested' in the sphere of environmental policy is evident from the fact that the biodiversity and land use planning policy development reflects conflict between the objectives of a sizeable number of actors. Complexity arises partly from the sheer number of vested interests that attached to the two policy domains (i.e. the public, environmental groups, land owning and economic development interests, different UK government departments who were at odds, other opposed member state national executives, the European Parliament and the Commission). Conflicting objectives were evident among these various actors.

With regard to biodiversity and land use planning, the DoE's objectives were to install policies, paradigms and practices (i.e. a flexible, case-by-case, voluntary approach) at the EU level that simply replicated those already in place in the UK. These objectives were opposed by other actors and were only partially achieved. The UK government did record some successes in amending the Habitats Directive and diluting the Birds Directive. In contrast to UK government aims, EU institutions promoted and adopted a more formalised system that gave the Commission and the ECJ sufficient leverage, with help from the NGO community, with which to discipline member states such as the UK (e.g. the Lappel Bank and Twyford Downs cases).

The degree of uncertainty for the various stakeholders in the development of biodiversity and land use planning policy is reflected in the way in which both policies 'mutated' from their original drafts, through negotiations, to adoption, and especially during implementation. On several occasions the UK government, for example, found that the policies, as actually interpreted by the Commission and ECJ, took a form and direction that was unexpected and undesirable: there were (Sharp, 1998) unintended consequences. The Leybucht Dykes case ruling shocked the DoE. The Lappel Bank and Greenpeace cases were unwelcome.

There is also clear evidence that action on the part of both the Commission and the European Parliament were intended to build political support and provide them with the type of information that would mean that they could influence policy development. Both EU institutions actively encouraged links with the environmental groups. Without the alliances between the NGOs and the EU institutions, it is unlikely that EU biodiversity and land use planning policy would have taken the shape that they did, given the objectives of member states such as the UK.

The case studies reveal that the UK government did 'learn' from its earlier experiences. Directives proposed and adopted in the 1970s and 1980s (i.e. the Birds and EIA Directives) produced unintended consequences from the point of view of the DoE. As a result, the government approached subsequent draft directives (i.e. the Habitats and SEA measures) much more warily, and did achieve a measure of success in shaping the policy more to their liking. Nevertheless, even after apparently 'restoring' or 'reclaiming' sovereignty with regard to the later directives, the UK government has still experienced unintended consequences. For example, recent (1999) successful, legal action on the part of Greenpeace against the UK government has shown how the Habitats Directive can be interpreted in unwelcome and unexpected ways.

So, what light does the empirical evidence throw on the LI thesis? Our data concerning EU environmental policy reveals significant gaps and flaws in intergovernmentalist thinking. Of particular note is that member state national executives were not able to control policy development to their complete satisfaction. The involvement of other proactive policy actors such as the Commission and the environmental groups, at all stages of the policy cycle, but especially during implementation, meant that policy evolved in unexpected and unwelcome ways from the point of view of the member states, even when member states tried to resist that policy development (for example, by contesting legal action in national courts and the ECJ).

Doubtless, Andrew Moravcsik would argue that environmental policy is a minor, 'low' policy area compared to other EU policy areas such as EMU, and therefore the main tenets of LI remain unchallenged despite the evidence from this policy area. However, in response we would contend the environmental policy is important for the following reasons. It is *financially* very costly for both private and public actors to implement and achieve compliance with environmental legislation. It is also costly in terms of a given member state's national freedom to act: compliance creates constraints on the actions of national executives and member states. From the evidence above it is clear that states and non-state actors at the national and supranational level regard it as sufficiently significant to bargain over and contest. Finally, environmental policy cannot be treated as an isolated policy area: it has clear links and implications for other major EU policies such as the Single European Market, the Common Agricultural Policy, transport and regional policy.

With regard to MLG thinking, the evidence suggests that it provides a vivid characterisation of policy-making in the EU, but not a fully developed explanation of the processes and mechanisms in operation during policy development. The MLG thesis accurately describes the way in which member states have lost some control of interest mediation and representation at the international level because national groups have established direct relations with supranational policy-makers. Policy-making is a contested process with different levels of governance competing with one another to impose their demands or secure their objectives. EU level institutions have exhibited considerable autonomy and independence from the member states. The MLG portrayal of polity building is also valid when it refers to learning on the part of member state national executives. The UK central administration demonstrably learnt from its painful experiences at the hands of the Commission, the ECJ and the environmental groups as a result of the Birds and EIA Directives. The MLG picture is also accurate when it suggests that national groups will not have to choose between national and supranational levels of governance. The astute

environmental groups try to ensure that they do not jeopardise their relationships with either level. The groups try to exploit both policy-making venues.

However, we would level a number of criticisms at MLG. First, it is not especially novel, being an amalgam of existing theoretical statements.¹¹ Second, although it provides a compelling description of contemporary changes in European governance but, in contrast (say) to neofunctionalism or intergovernmentalism, it lacks an explicit causal motor of integration, unlike some other approaches such as historical institutionalist (e.g. the idea of path dependency). It only hints at what might prove to be the reasons for the mobilisation of sub-national actors (i.e. rewards). Third, it may overstate the autonomy of sub-national and supranational actors (see: Pollack, 1995; Bache, 1999): the state is still an important shaper of post-decisional politics and a powerful gatekeeper. In our test cases the member states were able to exercise some influence over implementation (by delaying implementation or contesting court cases). This evidence provides some support for LI contentions. Fourth, it implicitly adopts a top down view of sub-national actors, who are assumed to passively accept power handed down to them from Brussels/national capitals rather than fighting to achieve it for themselves (Jeffrey, 2000, 8; but see Marks *et al* 1996). Fifth, as originally proposed, MLG focused exclusively on sub-national authorities rather than other sub-national actors such as pressure groups (but see Marks and McAdam, 1996). Sixth, just because sub-national actors bypass states and operate independently in Europe does not necessarily imply that they have the power to shape outcomes. In other words, *mobilisation* and *influence* are not synonymous (see: Jeffery, 2000, 3). Finally, one of the weaknesses with the early literature on MLG is that it developed from a very narrow focus on the politics surrounding the implementation of the EU's structural funds. The work could be easily dismissed as "anecdotal" since it appeared to exclusively address policies (structural funding) that were expressly designed to empower non-state actors (Moravcsik, 1994, 53).

In conclusion, based on our evidence from the role of UK actors in the development of EU biodiversity and land use planning policy, we find that environmental policy-making exhibits a complex, multi-layered, multi-actor and disordered character. This suggests that MLG provides a valid characterisation of day-to-day policy making in the EU (whilst LI offers a good explanation of the EU's 'grand bargains') because it accurately captures the sense of intricacy,

¹¹ For instance, twenty years earlier, Puchala (1972, 278, 279) portrayed the EU as a "concordance system". Pluralist rather than state-centred, channels of communication between actors in such a system are not "exclusively government-to-government" in character, but encompass a range of other (informal?) "standardised procedures".

uncertainty and disarray that prevails. However, MLG remains more a description rather than a theory. It does not yet furnish us with a fully elucidated theory of EU polity building. The task therefore remains to subject MLG to further testing to identify the causal motors for the events and features that it describes. Given the claims made to date it can be seen that MLG does point to (hint at) some causal links between the strategic engagement (see Fairbrass, 2002) of sub-national actors with supranational policy-makers. It seems essential at this stage in the debate to extend the scope of the research conducted: to incorporate both 'high' and 'low' politics; to encompass a range of EU member states, including those that are not unitary in character (such as Germany); to enlarge the range of policy areas under investigation. In such a manner we may discover whether the patterns uncovered in EU structural funding and environmental policy are typical or representative of the general nature of EU policy-making. Such research might also allow us to determine or more fully elaborate the reasons why EU policy-making is complex, disordered, and unpredictable and why sub-national actors do choose to 'outflank' member states' national executives.

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