
INTRODUCTION

I make my way through the corridors of the Justus Lipsius Building, the monstrous Brussels headquarters of the EU's main decision-making body, the Council of Ministers. Sitting in front of me is a senior Council official, fittingly wearing an elegant, yet inconspicuous, dark gray suit. I make some small talk and ask what he and his colleagues think about the public quarrels between the then French president Nicolas Sarkozy and the German chancellor Angela Merkel. "Quarrels among the heads of state don't affect what we are doing," he dismisses the question with a smile. "In these corridors, it's an unsuspecting regulation of the definition of wine that gives us sleepless nights." Why, I ask, does the Council care so much about such a technicality? Because technicalities, he explains, often really upset some people who then suddenly make a big fuss of it. This is what keeps the Council busy. "There will never be a decision against a government that faces strong problems selling or implementing it at home. In these cases, we always try to find a compromise."

The EU's achievements are beyond doubt.¹ Its member states are far more integrated than just a few decades ago and more so than any other group of sovereign countries in the world. When I was a child and visited my grand aunt in the Netherlands, we would fill up our family car to the roof with tea and coffee to take home, since these products were far more expensive in Germany than just a few miles away across the Dutch border. Today, I can buy tea or coffee anywhere in Europe for nearly the same price. I work abroad and travel within most of Europe without having to show my passport or exchange money. This

personal experience is borne out by hard evidence. Among most EU member states prices for tradable goods have converged to reach a level that is similar to the level of price convergence within the United States (Rogers 2007, 791). This is because the abolition of tariffs and the harmonization of domestic regulations within the EU have made it far easier to trade across borders. Europe has consequently become the world's leading trader. About 40 per cent of all world exports originate from an EU country, two-thirds of which are traded among the EU's member states (World Trade Organization 2011). Not least, the crisis of the Eurozone has made it blatantly obvious that the European economies are deeply interdependent. This depth of economic integration among sovereign countries is unparalleled in world politics.

To explain how Europe has been able to achieve this extraordinary depth of economic integration over more than five decades, many observers point to the EU's formal rules that delegate substantial authority to supranational institutions such as the European Commission, and that permit governments in the EU to act collectively by majority vote. The EU, like other international organizations, is based on international treaties that spell out the objectives and the rules of cooperation. Its ambitious, open-ended goal of genuine economic integration without any barriers to the free circulation of goods, persons, capital, and services, however, demanded a vast stream of further laws. Therefore, unlike most international organizations, at the heart of the EU is a legislative process that is set up to ensure that, in making laws, the member states achieve their ambitious objective. At every stage in this process there is consequently the possibility of imposing a decision on one or more governments and, thus, of advancing economic integration even against the governments' shortsighted interests. To some, these strong supranational features imply that the EU has been "constitutionalized" (Stein 1981; Mancini 1989, 596) and has evolved beyond an ordinary international organization to become more akin to the political systems of its member states (Hix 1994, 12).²

If this analysis of the EU is correct, then the chapter-opening anecdote makes little sense. The EU's formal rules permit it to impose an integration-advancing decision on one or more governments that respond to domestic pressure to oppose it. However, it is customary among the member states to refrain from overruling one another in precisely those situations the rules were designed for. There are more examples, described in the remainder of this book, where the treaty says one thing, and governments do the opposite. For example, nearly every textbook tells us that an independent supranational bureaucracy, the European Commission, enjoys a monopoly on setting the legislative agenda so that it may propose legal acts that promise to advance integration in the best possible way. Yet in most cases the Commission is only acting on requests from national leaders, who are therefore the true agenda setters.

It is not only that some governments and supranational institutions occasionally fail to follow the formal rules to the letter. In fact, they have adopted a number of practices that seem to *contradict* the formal rules' very purpose. Moreover, these practices appear to vary systematically across issue areas, yet remain remarkably stable within them regardless of major events. In short, a plethora of informal practices, nowhere mentioned in the treaties, operate parallel to the formal rules and yet differ from them substantially. I will henceforth refer to these practices as *informal governance*.

The EU has achieved a remarkable depth of economic integration. If this is not primarily due to its formal rules, how then has the EU managed to accomplish this? Why do states carefully design formal rules only to depart from them incessantly? What makes the EU work in reality? These are the questions this book seeks to answer. In doing so, it proposes a new way of thinking about international organizations more broadly.

Why Informal Governance? The Argument in Brief

Using the example of the European Union, this book develops a more general theory of informal governance in international organizations. At its core is the argument that practices of informal governance are the result of a norm of discretion among governments that adds flexibility to the formal rules. This norm is an implicit understanding among governments that departures from the rules are necessary when EU-level decisions threaten to stir up potentially disruptive conflicts at the domestic level. Informal governance, therefore, allows the member states to manipulate one another's politics of collective action in such a way that domestic interests remain persistently aligned in favor of integration. Put differently, informal governance sustains the EU's legitimacy by continually re-embedding the EU in the societal interests it is based on. The combination of formal rules and informal governance consequently permits a level of economic integration that the member states would otherwise not be able to maintain.

This argument about the critical importance of informal governance for the functioning of the EU sets this book apart from dominant conceptions that tend to equate the EU solely with its codified rules. Simon Hix (1998, 41), for example, defines the EU as an ordinary political system, the first and foremost characteristics of which "are the formal rules of collective decision-making, the 'government' of the EU." Conceiving of the EU as a highly advanced international organization, Andrew Moravcsik (1998, 1) studies European integration solely by looking at the intergovernmental bargains that result in formal treaty changes. This book, in

contrast, maintains that informal governance is critical for our understanding of the EU and, indeed, of what “makes cooperation work” the moment that hands have been shaken and the official treaties enter into force. In other words, the study of informal governance is not simply a more detailed perspective on *how* the European Union works day to day. Crucially, informal governance is the reason *why* it works and persists at all. The book evaluates this theory throughout the history of EU lawmaking, from the EU’s beginnings in the late 1950s until today. The findings also apply to international organizations more broadly.

Why is it necessary to add informal flexibility to the formal rules? Rules enable cooperation when states suspect that a cooperating partner might renege on its pledge to adjust its policy. By constraining the behavior of otherwise opportunistic governments, rules bolster the credibility of commitments to cooperation and thus allow states to form stable expectations about one another’s behavior.

However, precisely because states design these rules under conditions of uncertainty, underlying patterns of societal interdependence may change and alter the domestic distribution of the immediate costs and benefits of cooperation in ways that could not have been foreseen. Situations are consequently bound to arise in which following the rules to the letter, even if beneficial for society as a whole, suddenly requires costly adjustments by a single group. Facing excessive adjustment costs, domestic groups have an incentive to overcome initial barriers to mobilization and pressure their government into defying the rule in question in spite of punitive sanctions. The unpredictability of this domestic pressure for protection is one example of what we henceforth refer to as *political uncertainty*.

The chapter-opening example about the regulation of wine is instructive. In response to a diminishing wine consumption in Europe and a surge in imports of wine from North and South America the Commission was tasked to present a proposal on the reform of the common wine market that, among other things, would increase the competitiveness of European producers. According to the formal rules, the Council would, on a proposal from the Commission and after consultation with the European Parliament, adopt the regulation by majority vote. The southern wine-producing states preferred a strict definition that would protect the sector from imports of wine from the Americas that contained artificial by-products. Northern wine-importing states, in contrast, preferred a broader and arguably more consumer-friendly definition that would open the European market for imports.

In 2007, the Commission submitted a proposal that preserved the interests of northern wine-importing countries and, it argued, the European consumer as well. In line with rules by the International Wine Organization, it defined the term “wine” broadly as a product obtained in the Community from harvested grapes. This broad definition nevertheless excluded “Ebbelwoi” (literally “apple wine,” also known as Äppler or Stöffsche), a traditional cider-like alcoholic drink

made from apples that is produced in the German State of Hesse. The definition implied that Ebbelwoi makers would have to rename the product, which threatened to damage the drink's recognition value and standing as a cultural asset. In other words, the wine definition threatened to impose unexpected, concentrated adjustment costs on a single domestic group.

The proposal instantaneously prompted the Hessian Ebbelwoi producers to lobby the regional and federal government to fight the Commission proposal tooth and nail. Although this remote and localized adjustment shock seems of little importance to the federal government, domestic politics made it at this point highly susceptible to the Ebbelwoi lobby. The Commission proposal was published during a charged election campaign for the regional Hesse Landtag, which was of great significance to the composition of the Federal Council and, thus, of federal German politics at large. It, therefore, also caused unexpected media coverage, in which all parties outdid one another in complaining about Brussels' "regulatory madness." There were even somewhat serious calls to pull the state of Hesse out of the EU.

When situations like this turn into domestic pressure to defy the law in question, this is bad news not just for the government under pressure or for its most important trading partner. The defiance of an EU law—whether in the form of outright noncompliance, delayed transposition of EU law into national law, or the simple obstruction of cooperation—is detrimental for all cooperating partners at the same time.

Why? Because the defiance of rules, the principal function of which is to substantiate states' beliefs in one another's commitment to cooperation, shatters formerly stable expectations about this ordering function. It diminishes the very value of the institution itself. Not only the potential noncompliers but *all* governments who benefit from the institution's smooth functioning are better off adding situational flexibility to the formal rules—a flexibility that averts domestic conflicts from disrupting cooperation among EU member states.

Political uncertainty consequently generates a demand for an informal norm of discretion that prescribes that governments should be accommodated when they are facing unmanageable domestic pressure to defy the rules. The norm manifests itself in collective departures from the formal rules—that is, in informal governance—as governments accommodate a partner in trouble with a view to reducing the excessive concentration of adjustment costs that stirs up domestic pressure. In our "Ebbelwoi" example, the Council of Ministers refrained from overruling the German delegation and referred the Commission proposal to an informal committee of government representatives, which ultimately accommodated the German complaints without insisting on a quid pro quo. The Ebbelwoi lives on with the name wine.

Situations like this are daily fare in the EU, which raises the question of why the member states don't just legalize the norm or revise the rules to accommodate these situations. Why does the norm of discretion remain implicit? Simply put, the norm of discretion resolves precisely those conflicts that erupt when legal rules and principles reach their limits.

To be sure, just because rules are codified does not mean that actors have to follow them to the letter. Rules may be interpreted broadly and according to a number of different principles (Dworkin 1977, chap. 2). Informal governance as collective departures from what the rules stipulate does not necessarily involve violations of legal rules (Kennedy 2009, 56). However, the rule of law does require that legal principles be applied consistently in the interpretation of legal rules. This is why legalization reaches its limits when dealing with political uncertainty. Because the nature and extent of domestic demands for protection cannot be anticipated and remains ambiguous over time, no legal principle could ever determine when it is justified to accommodate a government that is tempted to defy the law for domestic political reasons. Institutional stability requires ad hoc decisions as to whether an imminent damage to the commitment justifies such concessions. The rule of law does not provide a consistent answer in these moments. The informal norm of discretion, however, mandates a variable, political interpretation of legal rules

Another conundrum follows. If the norm remains implicit and is not interpreted according to legal but according to political standards, where are its limits? The whole point of rules is to stabilize expectations and underwrite commitments, and so departures from these rules might create ambiguity about the rules' scope of application that undermines their very purpose. To resolve this tension between the formal rules' ordering function and informal flexibility, EU member states delegate adjudicatory authority to an entity they can trust. Since the norm of discretion allows for the interpretation of rules according to political rather than legal standards, its use cannot be policed by actors strictly pledged to the rule of law.³ The book argues that the decision whether formal rules apply or whether informal governance is pertinent rests with a government that, while having an incentive to preserve the institution, has nothing else to gain from accommodating a cooperating partner in trouble. All member states are consequently able to trust its recommendation and add flexibility to the formal rules without undermining the credibility of the commitment that these rules embody.

Against this background, the argument can be made that the EU has been able to achieve and uphold its level of economic integration *not only* because of its intrusive supranational institutions. Crucially, the EU has been able to sustain this level because a norm of discretion adds situational flexibility in the event that

its supranational features cause potentially disruptive conflicts at the domestic level. Formal and informal institutional elements complement each other to underpin a level of economic integration that neither formal rules nor informal norms alone could sustain.⁴

Furthermore, the argument implies that instead of impeding accountability, informal governance serves to include in the political process the voices of those actors who are most affected by a decision at the EU level. It thus mitigates excessive distributive effects that the EU might otherwise cause at the level of its member states. Somewhat counterintuitively, then, the book concludes that informal governance practices in the legislative process improve the EU's legitimacy by making it more responsive to those who are most affected by EU-level decisions.

Contributions to the Literature

In arguing that informal governance renders high levels of cooperation sustainable, this book engages various bodies of literature. It has significant implications for at least two fields in particular: the literature on EU integration and politics, on the one hand, and studies in International Relations on institutional design, delegation, and the nexus between domestic politics and international politics, on the other.

Most immediately, the argument that informal governance allows states to assume collective control of the EU ties the book to a debate in EU studies about the autonomy of supranational institutions. Intergovernmentalists argue that supranational institutions are mere *instruments*, designed by states to help them pursue their common interests. The autonomy of supranational bureaucrats, parliamentarians, and judges reflects, not transcends, member states' preferences (Garrett 1995, 174–76; Moravcsik 1998, 492).

Neofunctionalists, in contrast, regard supranational institutions as largely independent *actors* with substantial freedom to act on their own terms.⁵ This school of thought argues that supranational actors constantly exploit unforeseen control gaps in order to enhance their autonomy at the member states' expense (Farrell and Héritier 2007)⁶ as evidenced by the surprising rise to power of the European Parliament and the European Court of Justice (Hix 2002; Alter 1998). The next chapter discusses this literature in more detail.

For now, it is sufficient to note that the debate has made little headway because of the difficulty of predicting where unforeseen control gaps might emerge. Scholars in the neofunctionalist tradition tend to cite cases that support the argument that supranational institutions enhance their autonomy, yet

they remain unable to generalize from these examples. Intergovernmentalists point out that supranational activism necessarily remains in the realm of what the member states are willing to tolerate (Caporaso 2007, 394–404; Garrett 1995, 180; Moravcsik 1998, 492), yet they are unable to delineate these limits clearly.

This book, therefore, contributes to this debate between intergovernmentalists and neofunctionalists by formulating testable propositions about the absolute limits of supranational autonomy—that is, about why and how governments assume collective control of their supranational institutions. It argues that this limit is reached when EU-level decisions threaten to stir up excessive domestic opposition against them. Empirically, it demonstrates that tacit governmental control is, in fact, more far-reaching than one might suspect in light of the numerous studies on supranational autonomy.

Consequently, the argument that informal governance is pervasive in EU politics also has significant implications for analyses of the interinstitutional balance of power and the dynamics of decision making within the EU. It implies that its official procedures do not affect lawmaking in the EU in the same way that political systems affect lawmaking in the EU member states, and that decision outcomes cannot be predicted merely from knowledge of those procedures and the legislative actors' preferences. The conclusion elaborates on this topic in more detail.

The theory of informal governance is developed against the background of a burgeoning debate in international political economy, law, and economics about cooperation in a dynamic environment. The dilemma states face is the following: when states have reason to doubt one another's commitment to cooperation, rigid rules are superior to broad discretion in that they enhance the credibility of commitments and, thus, enable states to form stable expectations about one another's future behavior. In times of crisis, however, rigid rules may impede actions that are suddenly necessary in order to sustain cooperation. How, then, do institutions attain the right balance between rigidity and flexibility?

This book extends beyond this literature in three regards. First, where most studies explore how formal flexibility mechanisms might solve the aforementioned dilemma, this book addresses the real crux of the problem, namely how states maintain cooperation in potentially disruptive situations that are simply not predictable in detail and where, therefore, formal flexibility mechanisms turn out to be inadequate. Second, and related, where the rational design literature considers formal and informal rules as substitutes by exploring under what conditions states prefer the one to the other, this book explores the synergies between formal and informal institutional elements in the provision of flexibility.⁷ Third, this book focuses on the demand for flexibility in the stage of lawmaking within a set of rigid rules—the EU's legislative procedure—where most studies tend to focus on the stage of enforcement.

Why do so many students of international organization prefer to focus on the formal rules instead of the informal elements of institutions? This tendency is inherent in the rational design research agenda in International Relations and other disciplines, which defines institutions as “*explicit* arrangements negotiated among international actors” (Koremenos, Lipson, and Snidal 2001b, 762, italics added). From this perspective, states are believed to design institutions so as to prepare for future contingencies, just like architects factor the risk of earthquakes into the design of quakeproof buildings. Once an agreement enters into force, its strategic environment—that is, its members’ interests in cooperation—is assumed to remain largely stable or vary within known parameters. The institution’s quakeproof character implies that it suffices to look at its formal framework in order to understand how this institution works. As a result, formal rules take analytical precedence over those that are implicit. Although informal rules may well emerge when states deliberately leave some aspects of their agreement incomplete, informal institutional elements are, by assumption, of lesser relevance than the institution’s formal scaffolding for understanding its purpose and effects. In short, the assumption that an institution’s environment is largely static implies that formal rules enjoy analytical priority over informal institutional elements.

This book relaxes this assumption to present a *dynamic* theory of cooperation, in which informal institutional elements gain center stage. Granted, the assumption that states’ interests in cooperation are static and their variation by and large predictable may be appropriate in some areas such as security or human rights (Koremenos 2005, 555). In the realm of international economics, however, patterns of economic interdependence are inherently dynamic and difficult to predict due to the development of new technologies, changing consumer preferences, and multiple other shocks in supply and demand. These shocks may translate into unexpected changes in domestic preferences for cooperation that suddenly cut the ground from under the institution. In other words, the real crux of the dilemma between rigidity and flexibility is that precisely where rigid rules are most needed and beneficial, they may be most difficult to sustain in the context of a dynamic environment.

The consequences of viewing institutional environments as inherently dynamic instead of static are significant. Situations are then bound to arise in which states suddenly face incentives to break their commitment in spite of punitive sanctions. In these situations, informal governance helps restore states’ interest in adhering to the institution and, therefore, maintaining cooperation in the long run. This implies that formal rules no longer enjoy analytical priority, since the informal norm of discretion is imperative for understanding not just how cooperation works but more fundamentally why cooperation lasts.⁸ Accordingly,

formal and informal institutional elements should not be studied independently of each other as, for example, substitutes for certain institutional functions (Abbott and Snidal 2000, 445). They may also *complement* each other to make cooperation work in ways that neither formal rules nor informal norms alone permit.⁹

To link the above discussion to the debate about supranational autonomy in the EU, consider how a dynamic perspective on cooperation alters standard principal-agent analyses of international organization. In this view, governments first strike an agreement on cooperation and subsequently delegate the implementation of the substantive bargain to an international organization. The act of delegation reifies governments and institutions as actors in a principal-agent relationship. This relationship poses many problems, since the agent faces incentives to slack off or to act autonomously and in unintended ways (Hawkins et al. 2006, 9–11).¹⁰ Studies employing the principal-agent approach commonly analyze how the design of control mechanisms such as appointment procedures, budgetary control, and hearings allows the member states (the principals) to keep the international organization (the agent) in check (McCubbins and Schwartz 1984).¹¹

A dynamic perspective points to an additional but potentially more severe agency problem that arises when this relationship is placed in a context where the principal's preferences are mutable. In this case, states need not be concerned about the agent overstepping its discretion. On the contrary, situations may suddenly arise where *an agent needs to be prevented from doing exactly what it is supposed to do* when its action otherwise provoke forces that threaten to disrupt cooperation or, conversely, when the agents needs to be pushed to act in situations that are not covered by its mandate. In all these situations, informal governance allows states to control their agent beyond what is officially possible. In the EU, it allows the member states to prevent otherwise autonomous supranational agents from imposing excessive domestic adjustment costs on one another.

How to Identify Informal Governance

If formal rules are an inaccurate description of the real game that actors play, how can we identify the actual rules? How can we evaluate the proposition that the EU's legislative process is governed by a mix of formal rules and an informal norm of discretion when informal institutional elements are by definition difficult to observe?

Because informal elements cannot be directly observed, existing studies on this subject suffer from a potential "selection bias" (King, Keohane, and Verba

1994, 129). If we do not know how to identify informal rules, we cannot know whether a study considers all or merely a small and perhaps biased subset of informal institutional elements. This is a methodological, not a definitional problem. Henry Farrell and Adrienne Héritier (2007, 242n1), for example, define informal rules broadly as rules that are not subject to third-party dispute resolution. Thomas Christiansen and Simona Piattoni (2003, 7) specify informal governance as networks in which voluntary exchange is governed by unwritten rules. Although both projects demonstrate the pervasiveness of informal practices in the EU, they are less useful than they might be because they leave open how informal institutional elements can be identified empirically.

To avoid this potential selection bias, this book bases its analysis on the game-theoretic notion of institutions as equilibria. The principal advantage of this approach is that it allows scholars to trace an institution where all its elements, formal or informal, become visible, namely at the level of behavior (Greif 2006, 358).

Equilibrium is a situation in which no actor would want to change her behavior in interaction with others. In game-theoretic parlance, actors have no incentive to deviate unilaterally from their strategy. For instance, in a country where everyone drives on the left-hand side of the road, no (rational) driver would single-handedly deviate from this practice. Institutions can be part of these situations: they are in equilibrium when following the rules is each actor's best response to other actors' rule-following behavior. Given what everybody else is doing, no one is better off violating the rules.¹² Thus, regular behavior, or practices, allows us to make inferences about the institution that induces it. The focus on practices consequently enables us to avoid the aforementioned selection bias by mapping the entire universe of practices in the EU, including those that might contradict our theory.

For this purpose, the first section of the book (chapters 2 through 5) constructs a stylized model of the EU's legislative procedure as it is set forth in the Treaty of Rome and subsequent treaty revisions, adds plausible assumptions about actors' preferences and information, and then deduces the practices that the codified legislative procedure can be expected to generate in a stable environment. These rule-following practices are referred to as *formal governance*. *Informal governance* is then defined as systematic collective practices that differ from this standard.

An overview of all practices of formal governance and informal governance within the EU is only the first step to proving the existence of the institutional elements that induce them. The reason is that multiple equilibria and, thus, multiple institutions, rules, and practices can in principle be sustained under a "long shadow of the future." Driving on the left is just as much an equilibrium as driving on the right. If it is possible that one and the same situation results

in different equilibria, each of which is associated with different observable practices, then it is potentially possible that every practice we observe is in fact the result of a different equilibrium other than the one espoused by the theory (Greif 2006, 355–56).¹³ This implies that there are, in theory, potential alternative explanations for each and every practice of informal governance that we observe.

To deal with the problem that there are potential alternative explanations for the identified informal governance practices other than the informal norm of discretion, it is, as a next step, necessary to multiply our theory's observable implications (King, Keohane, and Verba 1994, 223–28). Even though different theories might account for one and the same observable practice, it is less likely that more than one theory explains precisely the same *set* of observations. Chapter 1 therefore specifies states' interests in devising an informal norm of discretion, and argues that this norm is associated with two visible practices. The first section of this book, chapters 2 through 5, evaluates the first hypothesis that the informal norm manifests itself in practices of informal governance in issue areas where political uncertainty is high, whereas formal governance prevails in areas of relatively low political uncertainty. However, the norm is prone to abuse insofar as governments might demand accommodation in order to avert strong domestic pressure when, in reality, they are perfectly able to manage this domestic conflict. The second section of this book, chapters 6 through 8, evaluates the second hypothesis that, in response to this problem of moral hazard, governments delegate the authority to adjudicate on ambiguous demands for added discretion to a trustworthy EU member government.

Fortunately, the theorem about multiple equilibria also facilitates the analysis. When one and the same situation may result in entirely different institutional equilibria, it follows that all institutions that exist must be to some extent historically contingent and particular to the specific context in which they emerged (Greif 2006, 353). In other words, all institutions are always to a certain degree unique. This makes it possible to exclude a few alternative explanations by specifying the theory's implications for the particular empirical context to which it is applied. For example, the EU's legislative process is based on an original set of rules that cannot be found in any other international organization or domestic political system. Thus, chapters 2 through 5 specify the first hypothesis about informal governance for the context of the EU's legislative procedure. The chapters define and trace six distinct practices of informal governance that arise in parallel to the EU's peculiar rules on agenda setting, voting, and implementation. Similarly, chapters 6 through 8 specify the second hypothesis about adjudication for the EU's specific context. They argue that although the economic literature proposes a variety of institutional solutions to the problem of moral hazard, some of them are simply impracticable in the EU. The EU member states therefore adapted an

existing formal institution, the Presidency of the Council of the European Union (the Council presidency), so it could wield adjudicatory authority.

Summing up, the fact that informal institutional elements are not directly observable need not prevent us from evaluating our theory empirically. For this purpose, the empirical analysis rests on the game-theoretic notion of institutions as equilibria that allow us to trace institutions, formal or informal, indirectly through the observable, regular practices they generate. The principal advantage of this analytical decision is that it avoids the potential selection bias that plagues existing studies that focus on a mere subset of informal rules, because approaching institutions analytically as equilibria allows for the mapping of the entire universe of formal and informal governance within the EU. Although this approach brings about new obstacles, the book seeks to meet them through the multiplication of testable implications, the specification of these implications within the institutional context of the EU, and their evaluation in light of alternative explanations.

Data on Informal Governance

A set of competing hypotheses tested with an unbiased set of observations is only as convincing as the data used for this purpose. Finding reliable data, however, is particularly challenging in the case of informal governance. First, collective departures from formal rules often remain undocumented, since there are few standards for coding and collecting this information. A good example is the plethora of government expert committees that assist the official institutions in the preparation, negotiation, and implementation of legal acts. Despite several attempts to systematize and record these committees, their number, function, and working methods still remain obscure. Second, some important cases of interest receive little media attention because informal governance effectively depoliticizes decision making that would otherwise generate strong conflict and media interest at the domestic level. As a result, negotiation of individual legal acts—like the wine market directive—can only be documented in cases where governments fail to extinguish the spark of a conflict and put out the fire at a later point.

The scarcity of primary data means we also need to be careful in the use of secondary analyses. The lack of secondary studies about certain practices cannot be interpreted as the absence of informal governance. Some practices might simply be too uncontroversial or obscure to attract scholarly attention. More important, especially in politically contested and emotionally charged issues such as European integration, the scarcity of primary data can lead to the creation and reification of myths in secondary analyses (Lustick 1996, 605).

To cope with the problems of scarce and unreliable data, the book draws, where possible, on newly collected archival material, which in the EU is available after a blocking period of thirty years.¹⁴ Particularly useful in this regard are the Council of Ministers' internal reviews of their own working methods, in which government representatives and Council officials identify and discuss their practices in light of possible alternatives.

In order to increase the intersubjective validity of these data, the strongest primary source is identified and its content cross-checked with other sources from actors with other viewpoints. For example, reports about informal practices by a Council official are considered more reliable when confirmed by similar statements of Commission officials. Contemporary public lectures, memoirs, and commentaries from politicians and officials are treated with a grain of salt, because they might underplay or exaggerate the presence of informal governance to prove a political point. The adequacy of the data and the uncertainty involved with using them are reported throughout the analysis.

Scope of the Analysis: What Is Left Out

A few caveats are in order about what the book will and can cover. Although the theory claims broad applicability, a more general test of its validity in other international organizations is far beyond the scope of this book. Apart from the fact that empirical testing is a laborious task, a cross-organizational analysis is complicated by the fact that inferences vary with the formal institutional framework under study. The conclusion to this book addresses the issue of generalizability in more detail, arguing that an informal norm of discretion should occur in other international organizations, especially when these institutions are highly legalized, beneficial, and governments are vulnerable to varying domestic pressure. The conclusion also takes up the question of how informal governance relates to power.

Within the European Union, the focus of this book is confined to the making of EU laws within its rigid legislative procedure. It deliberately neglects law enforcement through the European Court of Justice and domestic courts. A critic might argue that this focus exaggerates the significance of informal governance, since the extraordinary strength of the EU's legal system renders noncompliance almost impossible. It is true, as discussed in chapter 2, that the European Court of Justice has the opportunities, means, and motives to act to a large degree independently from the member states (Weiler 1991). Admittedly, a closer look at the enforcement stage could have provided greater insights into the EU's substantive impact on the domestic level. Yet its neglect does not bias my conclusions concerning the existence of an informal norm of discretion.

The EU's legal system is, just like the EU as a whole, based on a delicate consensus among governments about its extraordinary usefulness. A defiance of the European Court of Justice by a member state or a national court would, therefore, have disastrous consequences in that it would cast doubts about the system's effectiveness.¹⁵ Knowing that an effective system is more useful to them than an ineffective one, the member states have added incentives to nip acts of noncompliance in the bud. If anything, the effectiveness of the EU's legal system, therefore, implies that it is even more necessary to exercise flexibility at the stage of lawmaking in order to prevent states from withholding compliance at a later stage. The transposition rate of EU laws into national law, which lies at a remarkably high 99 percent, further testifies to the fact that there is something about the legal acts that makes it so easy for the member states to comply with them.

The book also excludes a few EU policies from the analysis. As Giandomenico Majone (1994) argued so brilliantly, the EU's defining characteristic is its focus on the definition of regulations for its single market. Accordingly, the book primarily deals with so-called regulatory policies, which grew out of the former European Economic Community (EEC) and deal directly with economic integration. These policies include, for example, the realization of the "four freedoms" (the free circulation of goods, capital, services, and labor), the common commercial policy, parts of the common agricultural policy,¹⁶ as well as "flanking policies" regarding competition, the environment, consumer protection, and so forth.

Excluded from the analysis, therefore, are the budgetary process, Justice and Home Affairs, and the Common Foreign and Security Policy, the latter two of which in the early 1990s emerged in parallel to the regulatory policies and outside their legal framework. A pragmatic reason for the exclusion is that these policies are governed by a different set of formal rules and the analysis would have required an entirely different research design. This does not introduce bias, since the theory may not apply to these policies to begin with. As mentioned before, political uncertainty describes situations where the concentration, timing, and extent of domestic adjustment costs cannot be predicted in their entirety. This uncertainty gives rise to the informal norm of discretion, which results in informal governance practices. The book shows how informal governance occurs when there is high political uncertainty, and how it recedes in the background when other variables reduce the amount of political uncertainty. In matters of foreign policy and security, however, domestic preferences are more stable and predictable than those in the economic realm, which is why the rules governing these policies are, by and large, less rigid and therefore less capable of imposing decisions that potentially stir up the domestic conflict.¹⁷ To be sure, this does not imply that these excluded policies are expected to feature formal instead of

informal governance. It means that the theory does not apply in these issue areas and, therefore, makes no predictions to that effect.

Also, the EU's monetary policy, the so-called Economic and Monetary Union (EMU), had to be left out, because its relative novelty makes it impossible to collect archival data about informal practices that would permit an adequate test of the theory. This is unfortunate, because monetary policy is a prime example of the dilemma between rigidity and stability. In normal times, rigid rules about monetary policy are superior to broad discretion, because they prevent the inflationary bias that arises when markets expect governments to abuse their discretion to have a monetary stimulus increase output and employment beyond the natural level (Kydland and Prescott 1977). In times of crisis, however, it may suddenly be necessary to depart from rigid, official commitments in order to stabilize the economy (Lohmann 1992). Unfortunately, the crisis has arrived in recent years in the EU in the form of housing bubbles and unsustainable sovereign debt. It is cold comfort that this policy will therefore become a fruitful ground for future research on informal governance.

Themes and Organization of the Book

The book is written so that both experts as well as people without previous knowledge about the EU can read it. The glossary provides definitions for EU-specific vocabulary. Chapter 1 develops the theory of informal governance in a generalizable manner and distinguishes it from rival theories. It predicts the use of informal governance on the one hand, and adjudicatory authority on the other.

These two hypotheses are considered separately. Chapters 2 to 5 focus on the claim that an informal norm of discretion manifests itself in practices of informal governance, and that these practices vary systematically with the extent of political uncertainty over time and across issue areas. For that purpose, chapter 2 introduces the reader to the EU's official legislative procedure and describes how, in this context, one can discriminate between practices of formal and informal governance. Against this background, it specifies the first hypothesis about informal governance by developing six further testable implications about the presentation of formal and informal governance in the context of this legislative procedure.

The subsequent three chapters trace these implications for agenda setting (chapter 3), voting (chapter 4) and implementation (chapter 5) in EU decision making in four time periods from 1958 until today. The result is what might be called a *large-N qualitative analysis* of more than fifty observations, each of

which is a mini case study about a specific practice of informal governance. For example, the mini case study on voting behavior from 1958 until 1970 constitutes a single observation. This *large-N qualitative approach*, though time consuming, has a major advantage compared to either quantitative analyses or qualitative single case studies. Instead of showing mere correlation, it allows us to focus on the operation of the causal mechanism and consider the context and idiosyncrasies of the case, while still accounting for the big picture of general trends in the full range of cases (Fortna 2004, 54–56). The analysis reveals that, in line with the theory's expectations, informal governance emerged almost immediately after the inception of the Community in all three stages of the legislative procedure, varied largely with the level of political uncertainty across policy areas, and remained remarkably stable thereafter.

Chapters 6 to 8 trace the second hypothesis that the member states delegate the authority to adjudicate on ambiguous demands for informal governance to a trustworthy government. The beginning of chapter 6 specifies this hypothesis again for the specific context of the EU, arguing that the government holding the office of the president of the EU's Council of Ministers is, under certain circumstances, able to wield adjudicatory authority.

The two subsequent chapters trace the testable implications of this argument. Chapter 7 demonstrates that the presidency assumed its adjudicatory authority in close parallel to the emergence of other practices of informal governance. Chapter 8 shows how the presidency allows the member states to discriminate in practice between legitimate and exaggerated demands for flexibility. It does so by taking a closer look at the negotiations of the controversial Working Time Directive, which was marked by ambiguous claims on the part of the British government that it faced unmanageable domestic recalcitrance against this law.

The conclusion to this book summarizes the findings and discusses their implications for the fields of EU studies and international organization. It also explores how the argument that informal governance makes the EU more responsive to varying societal interests sheds new light on normative debates about the EU's democratic deficit, which typically regard the EU as far removed from citizen interests and view the practices of informal governance as depleting the EU's procedural legitimacy.