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# **Institutions and the implementation of EU public policy in Greece: the case of public procurement**

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# **Institutions and the implementation of EU public policy in Greece: the case of public procurement**

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## **ABSTRACT**

Greece is often perceived as one of the laggards of European integration, often seen as lacking the required policy credibility and institutional capacity for implementing specific EU-derived policy processes. This paper provides a detailed discussion of the way in which the Greek central government utilises the tools of government to steer the implementation of EU public policy, using the 1981-2006 directives on public procurement as its case study. Drawing on the theoretical literature on the implementation of public policy and on new primary research, it seeks to demonstrate that the pattern of implementation is dynamic, i.e. it changes over time. In that sense, it challenges the view of Greece as part of a 'world of neglect' in terms of compliance with EU legislation.

**Keywords:** Implementation; public procurements; politics of transposition

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# **Institutions and the implementation of EU public policy in Greece: the case of public procurement**

## **1. Introduction**

Greece is often perceived as one of the laggards of European integration. There are good reasons for this perception. The credibility deficit that has plagued many (though not all) Greek governments since the country's accession to the then European Communities in January 1981 and some political positions adopted by Greek governments on issues of EU-wide interest in the early 1980s have helped create the image of Greece as an 'awkward partner'. Neither of these problems is purely Greek, as successive French, Italian, British and other governments have demonstrated in the course of European integration.

Membership of the EU entails a complex web of processes and actors which – if the literature on the sectoral dynamics of policy making is to be believed – often includes cases that differ from the broad and often professed pattern. So, to assess the credibility of the aforementioned broad perception, it is important to subject it to systematic and theory-driven empirical research. This paper aims to contribute to a more fine-grained and accurate account of this country's pattern of membership of the EU. It does so by providing a detailed discussion of the way in which the Greek central government utilises the tools of

government (Hood 1983) to steer (Lundquist 1972; 1987) the implementation of EU public policy (specifically, the directives<sup>1</sup> on public procurement<sup>2</sup>) between 1981 and 2006. Drawing on the theoretical literature on the implementation of public policy and new primary research (especially on confidential interviews with policy makers in the Athenian bureaucracy) it seeks to demonstrate that the pattern of implementation is dynamic, i.e. it changes over time. In that sense, it (a) challenges recent work (Falkner et al. 2005) that classifies Greece in the ‘world of neglect’ in terms of ‘compliance’ with EU legislation and (b) seeks to provide evidence of the need for (as well as indication about the origin of) a more nuanced approach.

## **2. The dynamics of implementation**

Implementation is inherently dynamic because it is the pursuit of an objective or set of objectives, or a struggle to realise ideas (Majone and Wildavsky 1984, 180). This pursuit unfolds over time (Lane 1983, 26). It is both open-ended - in the sense that there is uncertainty over its final outcome, and pre-ordained as a result of choices made when policy was formulated. There are many additional reasons why implementation is dynamic which are also reasons why it should

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<sup>1</sup> The research presented here focuses on the public sector and excludes the directives on utilities.

<sup>2</sup> These directives impose specific duties on the member states and seek to improve transparency and reduce the arbitrary allocation of public contracts. They compel member states to advertise many of these contracts on an EU-wide basis and then select bidders and award the contracts on objective and transparent criteria. Thus *transparency* and *equality of treatment* are the two fundamental objectives of the EU’s policy in this core area of the single market.

be conceptualised and analysed as a process, rather than an event (Mazmanian and Sabatier 1983, 39).

Implementation typically involves a significant number of actors each with their own tasks, priorities, standard operating procedures and institutional repertoires. As these actors interact with their environment, their priorities may change and the balance of their resources may improve or deteriorate. Second, implementation is dynamic because it is inherently political.<sup>3</sup> It is not the linear continuation of formulation (Hogwood and Gunn 1984, 20, 217; Jones 1984, 29). This is so because actors who were defeated when policy was being formulated often attempt to defeat their opponents when policy is implemented.

In addition, implementation also illustrates two contradictory human characteristics that are reflected in the institutions that human beings create, namely the problematic allocation of attention<sup>4</sup> on the one hand, and their capacity to learn, on the other (Cohen, March and Olsen, 1972; March and Simon 1958; Olsen and Peters 1996; Argyris and Schön 1996). Indeed, attention is limited. Individuals, organisational units and organisations as a whole cannot attend to everything all the time. Moreover, at any point in time there are more than one issues competing for attention within a given organisation. Efforts to improve implementation in the EU offer an excellent example. Rather neglected until the late 1970s, improving implementation

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<sup>3</sup> Eugene Bardach captured this reality when he appositely claimed that ‘implementation is the continuation of politics by other means’ (Bardach 1977, 85). On the notion that the factors that shape formulation also shape implementation see Barrett and Hill (1984).

<sup>4</sup> Of course, this concerns target groups and other interested parties as well (Sabatier and Mazmanian 1979, 496).

became an objective of the Jenkins-led Commission and – after having being over-shadowed by the euphoria and policy activity that accompanied the re-launch of the single market project in the mid-1980s, it took centre stage in the run-up to the signing of the Maastricht Treaty.

Learning is not only a way in which the allocation of attention can be rationalised but also an important way in which organisations involved in implementation (and decision making more generally) cope with competing claims on their attention and the exigencies of the tasks entrusted to them in the environment in which they operate. Organisational learning is construed here as

*‘an organization’s acquisition of understandings, know-how, techniques and practices of any kind and by whatever means’*  
(Argyris and Schön 1996, xxi)

It entails the improvement of an organisation’s performance over time and relies on observations and inferences from experience that create fairly enduring changes in structures and procedures (Olsen and Peters 1996, 6). Organisational learning involves change in an organisation’s theory of action that is implicit in its activity. Such changes may stem from conflicting views, shifting organisational environments, the analysis of the potential and the limits of alternative strategies as well as images of desired outcomes (Argyris and Schön 1996, 17). Therefore, learning can be construed both as a process and an outcome.



Learning can take three forms. Single-loop learning is instrumental (i.e. it focuses on effectiveness) and entails changes in the strategies of action or assumptions underlying them without affecting the values of an organisation's theory of action. Double-loop learning entails changes both in an organisation's strategies of action as well as the values that underpin them (Argyris and Schön 1996, 20-1). Finally, a third form of learning, 'deuterolearning', entails acquiring the capacity to learn (Argyris and Schön 1996, 28-9). Learning can be attributed to an agent who is either within or outside an organisation and deliberately seeks to improve performance. Hence, learning (as defined above) and change are inextricably intertwined. However, change is conditional since it depends on the availability of resources, the willingness and capacity of its promoters to overcome opposition and may well be based on single but critical events, especially in conditions of ambiguity and uncertainty. Such events are significant because they (a) are branching points which affect subsequent developments and (b) 'evoke meaning, interest and attention for organizational participants' (March, Sproull and Tamuz 1999, 140) and, most importantly, they focus the attention of decision makers. The pace of change associated with learning is not linear. Rather, the more radical change is, the more likely it is to activate opposition (Olsen and Peters 1996; Argyris and Schön 1996, Chapter 1; March, Sproull and Tamuz 1999). Hence, single-loop learning - and the incremental pace of change that is associated with it - is less controversial than double-loop learning usually combined with radical change.

Finally, implementation should be construed as a dynamic process because it often involves fixing (Bardach 1977). Many of the problems that occur when policy is being implemented cannot be foreseen – in part because of the bounded rationality of policy makers (March and Simon 1958; Simon 1997; Simon 1976). In addition, the formulation of policy entails a balancing act that is tested only when policy is implemented, namely the need to combine uniformity with a degree of autonomy which implementers need (and inevitably use) when abstract policies are put into effect. In other words, since discretion is both inevitable and necessary (Majone and Wildavsky 1984, 177), the presence of ‘fixers’ is a condition for successful implementation. This is particularly important in the growing and increasingly diverse EU.

Fixing is a concept that incorporates two meanings, namely (i) ‘repairing’ and (ii) ‘adjusting’ certain elements of the system of games that constitute the implementation process (Bardach 1977, 274-83). Fixing is a multi-faceted notion and activity. It connotes a degree of covertness – since much of it takes place away from the public view. In addition it indicates that conflict and the use of a degree of coercion may accompany it. Although it is an inherently political activity<sup>5</sup>, it is not limited to the exercise of power. Powerful fixers will not be effective if they do not know when, where and about what they should intervene but this will not happen unless they possess the relevant information. The uncertainty that surrounds fixing is further highlighted by the fact that it is often associated with the incentives and the resources of those who can perform

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<sup>5</sup> In Bardach’s words (1977, 278), ‘it is a job for a coalition of political partners with diverse but complementary resources. It is therefore no different from any other political task’.

this role. Senior civil servants need political support while politicians may lack the technical expertise that is required.

In addition to the fixers that exist at the national level, there are two institutional fixers at the level of the EU, namely the European Commission (Mendrinou 1996) and the ECJ.<sup>6</sup> In addition to its role of ‘guardian of the Treaty’ and its power to refer member states to the ECJ when they fail to fulfil their duties, the Commission has established a number of informal procedures in an attempt to reinforce its monitoring actions. These procedures include mainly the so-called *réunions-paquets* where Commission officials and national civil servants meet in the capital of the interested member state and discuss specific problematic cases (Thomas 1991, 890). The success (Dewost 1990, 79) of these procedures is partly due to their informal nature and the prevalent spirit of co-operation as opposed to the necessarily adversarial nature of legal proceedings. The Commission has also provided a focal point for the decentralised control of transposition and implementation (Ehlermann 1987, 217) by affected individuals.<sup>7</sup>

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<sup>6</sup> One could also add the European Court of Auditors. Its role is similar to the role of the ECJ in that both are passive and *post hoc*.

<sup>7</sup> Although a large number of problems are resolved in these informal meetings or even in the administrative stages of the procedure of Art. 169/226, others reach the ECJ. This is the most visible part of the ECJ’s participation in the implementation process. The ECJ facilitates this process by issuing judgements relating to all aspects of implementation and has thereby been able to identify fundamental principles of this implementation structure. However, the primarily *passive* role of the ECJ, is illustrated by the inability of the EC to implement judgements. Until 1993 and the entry into force of the Treaty on European Union, the non-implementation of a judgement could only trigger another procedure under Art. 169 (or Art. 170), due to the initial weakness of the provision of Art. 171. As it was not an effective deterrent, a number of member states had accumulated a significant backlog of judgements which they had not implemented. The new version of Art. 171 which has received positive comments in the light of the previous intransigence of the member states enshrined into the

### 3. The politics of transposition

The process of transposition in Greece has been characterised by three fundamental traits. First, the Greek accession in January 1981 meant that the EC's policy had already developed its basic characteristics.<sup>8</sup> As a result, Greek policy had to be adapted accordingly. Second, the first four years of Greek membership were marked by the socialist government's reluctance to implement some of the fundamental aspects of the Treaty of Accession. The memorandum that it submitted in spring 1982 reflected the need for longer transitional periods in various aspects of trade relations, including public procurement. The memorandum was consistent with the PASOK's pre-electoral view that Greek firms and producers were not ready to compete in an open European market. However, it broke with its pre-electoral rhetoric regarding withdrawal from the then EC and the establishment of a 'special relationship'. Indeed, it was an initial indication that the new government was increasingly aware of the new organisational context in which it was operating. The memorandum was the beginning of a process of gradual change in the

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TEU enables the Commission to bring the case (after having opened a dialogue with the state in question) before the ECJ by specifying a lump sum or penalty payment. This may then be imposed on the member state in question. Apart from this *post hoc* function, the ECJ also exerts its influence *during* the implementation process through the procedure of Art. 177/234 which organises a dialogue with national courts aiming at the *uniform interpretation* of (primary and secondary) legislation through the so-called preliminary rulings. This is the mechanism that it has used in order to establish and develop the principles of supremacy and direct effect of EC law. The significance of this function of the ECJ is illustrated by the *obligation* of national courts of last instance to submit questions relating to the interpretation of EC law to the ECJ.

<sup>8</sup> The importance of this point should not be over-estimated because the provisions of the Treaty would have the same effect, although the pace of change would have been slower.

attitude of the government towards the EC while it realistically reflected the state of the Greek economy (Pangalos 2000). Third, the intensity of protectionist policies that had been implemented in the past (Zorbala 1992) meant that not only was there a need to transpose the relevant rules into Greek legislation, but an important effort had to be made in order to modify or abolish a large number of legislative instruments that incorporated these policies. Although this had been partly achieved through the Treaty of Accession (Zorbala 1992, 217-8), the significant degree of co-ordination that was required was missing and, as a result, transposition was problematic. The adoption of Law 936/1979 was illustrative of these problems.

Between the conclusion of the Treaty of Accession (May 1979) and its ratification by the Greek Parliament (July 1979), Parliament passed this law that facilitated the implementation of discriminatory practices against imported products in the field of supplies (Art. 6 § 6), along the lines of a protectionist policy dating from 1955.<sup>9</sup> Having already missed this opportunity to commence the process of transposition even before her accession, Greece followed the same pattern throughout the 1980s. The problems that have been observed also concerned services contracts and the system of remedies. Throughout the 1980s, laws were used extensively - followed by presidential decrees that gave more specific meaning to some of the provisions of laws - frequently on the basis of the delegation of legislative power from Parliament.

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<sup>9</sup> Law 3215/1955 established a general preferential scheme which was characterised by the addition of a number of taxes and levies to imports, in a manner that clearly protected domestic products (Zorbala 1992, 206-7).

The transposition of legislation regarding supplies has been characterised by the conflict between the EC policy and the overt policy of the so-called 'Hellenisation' of supplies – i.e. preference for domestic products - implemented by the socialist government between 1981 and 1985 not only in concrete, practical terms but also by means of public ministerial declarations (Bernitsas 1987, 188). The conflict took the form of the non-transposition of the directives (that is the lack of any national implementing measures) and the use of existing legislation for the protection of the domestic market. As a result, the European Commission initiated the procedure of Art. 169 of the Treaty (case C-84/86). The need to handle this issue (and a large number of similar problems regarding trade liberalisation) led the government to create an EC Affairs Unit in the Ministry of Trade which, despite the existence of a separate Legal Affairs Unit and the recent establishment of ENYEK (a similar unit in the Ministry of Foreign Affairs) in 1986, was responsible for dealing with problems relating to infringement procedures. In other words, there was a mismatch between the problem (conflict between domestic legislation and practice on the one hand and EU policy on the other) and the response chosen by the government, i.e. the establishment of an administrative unit whose aim was to deal with infringement proceedings. The Greek government managed to convince the Commission not to pursue the case further because the Greek authorities were about to commence the process of transposition.

The initial result took the form of Law 1797/1988 which did not constitute a satisfactory solution because it abolished the distinction between domestic and

international competitions only indirectly while it did not abolish the system for the protection of regional/provincial industries at all (Zorbala 1992, 208). It was followed by Presidential Decree 105/1989 that transposed correctly Directive 77/62. This was followed by Presidential Decree 173/1990 containing discriminatory provisions (e.g. Art. 19 § 2) that were subsequently abolished by Presidential Decree 137/1991, both adopted by the conservative government that succeeded the socialists in power. The process was completed by Law 2286/1995 which expressly abolished every remaining discriminatory provision.<sup>10</sup>

The differences between the two parties and the way in which they understood the role of the Ministry of Trade in the area of public procurement was also evident in the decisions that they took about the intra-departmental arrangements. The establishment in 1988 of a Secretariat General for State Purchasing (within the then Ministry of Trade) covering every aspect of public supplies including the European dimension reflects an effort to modernise the Greek legal framework. The need to end a series of EU-related problems was a major incentive for this effort. The decision of the conservative government to abolish this body four years later (Presidential Decree 304/1992) symbolised its willingness to limit the role of the state in the economy. The end of a cycle of conflict with the European Commission is illustrated by the reinforcement of the role of the Community Affairs Unit in the formulation of policy, negotiation and transposition rather than the preparation of litigation. The

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<sup>10</sup> It was only because the European Commission used every ounce of its good will that the Greek government managed to avoid an embarrassing judgement of the ECJ.

return of the socialists to power in 1993 led to the establishment in 1995 (Law 2286/1995) of a Directorate General for State Purchasing.

The transposition of the directives on public works presents a more diverse picture. Those that had been adopted prior to 1981 was characterised by problems regarding the specificity and accuracy of the Greek legislation (Law 1418/1984). The Commission held the view that (a) the mere introduction of the principle of non-discrimination between Greek and European tenderers was insufficient for the liberalisation of the market, (b) the use of administrative circulars as a follow-up to legislation was sub-optimal and (c) a number of important provisions, including those regarding the selection criteria, had either been ignored or transposed incorrectly (Spathopoulos 1990, 109-10). The problem was resolved in 1991 with the adoption of Presidential Decree 265/1991 whose content was almost identical to the directive. The use of the copy-out technique certainly enabled Greece to avoid a condemnation in the ECJ for non-transposition but created several problems in the stage of administrative implementation. By contrast, Presidential Decree 334/2000 accurately transposed Directive 93/37.

The transposition of the directive on services differed in a number of ways. The fundamental characteristic of the process in this case was the challenge to the responsibility of the Ministry of National Economy for this area. Given the initial absence of transposing legislation, the European Commission initiated the procedure of Art. 169. The initial action (formal notice of August 1993 and



the reasoned opinion of May 1994) had no result thus leading to a condemning judgement issued by the ECJ (case C-311/95). In the proceedings before the ECJ, the representatives of the Greek government - despite not disputing the failure to transpose Directive 92/50 - argued that initial steps had already been taken through the establishment of an inter-departmental committee at official level in November 1994. Its purpose was to prepare the accurate and effective transposing legislation. Moreover, the Ministry of the Environment, Spatial Planning and Public Works had already issued a circular and a draft Presidential Decree for the provisional transposition of Directive 92/50. The activism of this department is at the heart of the problem.

Indeed, officials of the Ministry of National Economy which is formally responsible for this aspect of procurement policy preferred the adoption of a single text because the directive in question covers many different forms of services. On the contrary, officials of the Ministry of the Environment, Spatial Planning and Public Works preferred the adoption of two legislative instruments, one of which ought to cover the regulation of plans and studies prepared for public works projects while the other must cover the remaining forms of services. In essence, the latter sought to maintain the status quo which contained many discriminatory clauses that protect domestic planning firms from European competition.<sup>11</sup> In addition, the body that represents Greek civil engineers opposed the liberalisation of the market (Simitis 2005, 411) that

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<sup>11</sup> The unwillingness of the interested organisations to accept the opening of the profession to European competition was a major factor behind the condemnation of Greece by the ECJ (Spathopoulos 1990, 110).

would result from the transposition and subsequent implementation of the Directive. They did not want to face competition from abroad. Also, this conflict is directly linked to the high profile of the Ministry of the Environment, Spatial Planning and Public Works which is based on the use of significant European and national funds and its subsequent role as a major mechanism for economic development. In January 1998 the Commission initiated proceedings against Greece under Art. 171/228 of the Treaty for failure to comply with the aforementioned ruling of the ECJ (European Commission press release IP/98/6) and six months later it took Greece to the ECJ asking the latter to impose a penalty of €39,9<sup>75</sup> per day (European Commission press release IP/98/559) but the Greek government managed to avoid the fine as a result of the adoption of Presidential Decree 346/1998.<sup>12</sup> In addition to the changes that it introduced in the legislative framework (in line with the directive), it established (Art. 35) the Service Procurement Unit (see *infra*).

The transposition of Directive 89/665 (remedies) has been plagued also by a legal dispute regarding the adequacy of the Greek legislation. However, a significant part of the problem was rooted (initially) in the inability of the central government to initiate and co-ordinate the process of transposition. More importantly, it resulted from the unilateral action of the Ministry of the Environment, Spatial Planning and Public Works. The Commission utilised its

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<sup>12</sup> This was subsequently amended (at the instigation of the European Commission) by Presidential Decree 18/2000 that takes account of the Government Procurement Agreement concluded in the context of the Uruguay Round.

powers under Art. 169/226 and rightly argued that Greek legislation (Presidential Decree 23/1993) covered only part of the required domain (Koutoupa 1993, CS88).

In the proceedings before the ECJ (case C-236/95) the Greek government admitted not having adopted the necessary measures to cover supplies contracts but argued that the existing system of remedies offered some legal protection to bidders and that the recent jurisprudence of the Council of State<sup>13</sup> made explicit reference to the Directive, thus providing adequate protection for bidders. Moreover, it argued that domestic formal and procedural difficulties undermined its efforts effectively to transpose the Directive. However, it did not avoid a condemning judgement.

When Prime Minister Simitis took office (in 1996) he realised that the significant backlog of directives that had not been transposed included Directive 89/665.<sup>14</sup> Acting in an effort to resolve the problem, the Secretary General of the Cabinet created a committee composed of two members of the Council of State and a member of the Court of Appeal. These were experienced judges who prepared a draft legal text in order to transpose the directive in a manner that would cover the three sub-sectors concerned (works, services and supplies). However, one of the three ministers concerned initially refused to sign the draft decree arguing that the directive would effectively bring all major

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<sup>13</sup> This concerned especially its judgements in cases 355/1995, 470/1995, 471/1995, 473/1995 and 559/1995).

<sup>14</sup> He was aware of it after having served as Minister of Trade right after the electoral victory of the socialists in 1993.

works projects to a halt across the country. As a result, Prime Minister Simitis convened an ad hoc meeting with the ministers concerned at the end of which all ministers signed the draft document. Law 2522/1997 transposed the directive, six years after the formal deadline. The new text introduced significant changes to the Greek system of remedies (Marinos 1997) and is the direct consequence of the aforementioned ruling of the ECJ (Georgopoulos 2000, 86).<sup>15</sup> Clearly, this was an issue that would have been resolved more rapidly and more effectively, if effective alert procedures and co-ordinating mechanisms had existed at the heart of the Greek central government prior to 1996.

Finally, as regards the transposition of Directive 2004/18 that consolidates, simplifies and updates the EU's public procurement legislation, two key characteristics confirm the existing procedural patterns. The perceived specificity of the three sub-sectors has led to the preparation and adoption of separate transposing instruments. Law 3316/2005 deals with the works-related services that concern the design and the execution of public works projects thereby leaving the remaining forms of public procurement, i.e. those that concern other service-related contracts (e.g. those that concern financial services, legal services, etc), supply-related and works-related contracts to be transposed by means of a separate legal instrument. Its adoption has been delayed both as a result of the inter-departmental consultation and the workload

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<sup>15</sup> The only decentralised aspect of the system that it introduces concerns the collection and provision of information to the European Commission regarding the use of the system of remedies in the fields of works (Ministry of the Environment, Spatial Planning and Public Works), supplies (Ministry of Development) and services (Ministry of National Economy).

of the State Council which scrutinised its compatibility with EU legislation. As a consequence, the transposition of Directive 2004/18 had not been completed eleven months after the deadline. Nevertheless, all three ministries concerned have issued substantive circulars<sup>16</sup> that bring the directive to the attention of the relevant awarding authorities (Ministry of Development 2006; Ministry of Economy and Finance 2006; Ministry of the Environment, Spatial Planning and Public Works 2006).

## **4. The politics of implementation**

### *4.1. Beyond resistance*

The process of change that underpins the implementation of EU public procurement policy in Greece has been channelled through central government institutions aiming to produce lasting effects. The Commission has contributed to the process of change that had been initiated during the second half of the 1980s by avoiding the marginalisation of Greece despite using its powers of guardian of the Treaty under Art. 169/226. This approach had three important repercussions. First, it contributed to a gradual shift in the implementation patterns facilitated by continuous contact with ‘Brussels’ and a change in the attitude of the socialist government vis-à-vis the integration process, as illustrated by the appointment of a number of pro-European politicians to senior ministerial posts, including the Ministry of National Economy. Second,

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<sup>16</sup> Substantive circulars go beyond the mere description of a directive and include guidance on its use by the awarding authorities.

the increasing number of infringement procedures initiated on the basis of Art. 169/226 led to the institutionalisation of contacts with the Commission. These réunions-paquets produced significant results. Commission officials were informed of changes in national legislation and jurisprudence while they also highlighted outstanding complaints which had been brought to their attention by bidders. Third, Greek officials gradually discovered that the Commission could easily be used as a mechanism for blame avoidance whenever they were faced with pressure or protests from domestic suppliers. This was a crucial development because it diverted pressure away from the Greek central government, thus facilitating change by making it appear practically inevitable. Nevertheless, these informal procedures have not eliminated every problem, as case C-79/94 illustrates.

This case concerned a three-year framework agreement concluded in July 1991 by the then Ministry of Industry and six textile manufacturers for the supply of dressing materials for hospitals. The agreement could be extended to cover the needs of other institutions for these materials, still exclusively supplied by the six manufacturers. The Greek administration admitted that it had not advertised the contract but argued that cancelling it unilaterally would expose the Greek state to claims for damages from manufacturers. Further, the ministry in question abolished a clause stipulating that the manufacturers would use only domestic primary material and stated its intention to organise a public competition before the end of 1993, thus fulfilling EU obligations; but commensurate action did not follow. Hence, the case reached the ECJ, where

condemnation was inevitable. This case was indicative of a broader pattern of subtle, incremental and adaptive change. Indeed, the Greek government used substantive arguments based on EU legislation. It argued that Directive 77/62 did not apply in that case, because the value of each contract did not exceed the threshold, and that in the past no foreign supplier had expressed an interest in similar competitions, thus reducing the publication of a tender notice to a mere formality. It illustrates that the central government was becoming more capable and willing to use substantive and procedural arguments based on EU rules rather than national policy priorities.

Until the early 1990s administrative implementation of public works Directives relied exclusively on the lowest price as the main award criterion. This was a key choice that produced a number of significant unintended consequences. Constructors used artificially low bids (Kosmidis 1997) in order to beat competition. This meant that they had to find ways to limit construction costs after the award of a contract. This had a direct impact on the quality of the works; some had structural problems, while in other cases the quality of the materials used was poor (To Vima 24 November 1996; 12 January 1997). The use of unrealistic bids did not prevent constructors from making a profit. On the contrary, they made extensive use of their legal right to claim a refund (Koutoupa 1995, CS98) of the difference between the initial bid and the final cost of the project after its completion, thus falsifying competition. This problem was associated with the incomplete or low-quality plans upon which these projects were based (Simitis 2005, 261). This resulted from the lack of

specialist staff in the central administration, which was unable effectively to monitor the construction process. Therefore, it relied on ex post controls, facing a fait accompli every time there was a problem. The Commission and a group of determined ministers were the catalysts that increased the pace of change by means of a number of measures channelled through the central government.

The conditional nature of EU funding gave a de facto role to the Commission. Although EU public procurement policy does not regulate the enforcement of public contracts<sup>17</sup>, the role of the Commission was mainly based on this phase and the link to regional policy. The Head of DG XVI (To Vima 16 June 1996) and Commissioner Millan, then in charge of EU regional policy, repeatedly warned the Greek government that the flow of funds from Brussels was going to stop. This happened in 1993, in a demonstration of specific and direct steering, in the case of the Evinos dam (To Vima 2 February 1997) because the conservative government had not used the correct award procedure. This event provided a key incentive for change, especially at the political level, because it enabled the government to better conceptualise what was at stake. This new interpretation of events provided the impetus for change. The first sign was a letter by three ministers of the new socialist government in 1993 to the Commission, which contained a clear political undertaking to adopt all the legislative and administrative measures necessary to improve implementation

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<sup>17</sup> Nevertheless, it does affect the enforcement of contracts indirectly in that it excludes actual or potential bidders who do not meet criteria aiming to assess their professional conduct and/or financial position.



(general steering).<sup>18</sup> These measures were to be channelled through the Ministry of the Environment, Spatial Planning and Public Works, under the supervision of a joint steering committee composed of officials of the said ministry, the Ministry of National Economy and, crucially, the Commission (specific steering).

The most significant legislative measure was the limitation of the right of constructors to re-assess the cost of works projects on an ex post basis (Simitis 2005, 261-2). This obliged them to submit more realistic bids.<sup>19</sup> Furthermore, the administration is no longer obliged to accept the constructor's final assessment of the cost. Procedures for the preparation and submission of plans have been simplified, while a register of public works designers has been introduced. Model notices have been established in order to compel awarding authorities to use comparable documents before the award procedures. Competitive procedures for the award of contracts have been extended below the threshold of the Directives. Moreover, since January 1997 a new unit (the Tenders and Contracts Monitoring Unit - MOPADIS<sup>20</sup>) established within the Centre for International and European Economic Law, an independent

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<sup>18</sup> One good example of the credibility of this commitment was the cancellation (in 1995) of a contract (in line with the complaints submitted by the European Commission) for the construction of a waste water treatment facility on Thessaloniki (European Commission press release IP/95/810).

<sup>19</sup> The use of a mathematical model for the award of works contracts was a temporary solution. It was designed to operate until the establishment of a robust framework entailing reliable plans, accurate tender documents and effective control mechanisms that would subsequently be coupled with the use of the lowest price as the main criterion for the award of works contracts (Simitis 2005, 262). After the introduction by the socialists of the important changes discussed here, the conservative government introduced new legislation that shifts the emphasis of the system to the lowest price (Law 3263/2004).

<sup>20</sup> It has the status of a formal advisor to the Ministry of National Economy.

academic research centre based in Thessaloniki, provides advice to public bodies covered by the Directives. This advice concerns both the material and the procedures used by awarding authorities. More specifically, awarding authorities can obtain (i) guidance with a view to avoid mistakes when detailed and summary tender documents are drafted, (ii) corrective measures in cases of mistakes, (iii) advice regarding complaints<sup>21</sup> prior to the conclusion of a contract, (iv) advice regarding supplementary contracts, (v) supporting statistical information for the reports that national and awarding authorities are expected to submit to the EU, (vi) generic advice regarding common errors and guidance as to how to avoid them, as well as (vii) updates on EU legislation (Ministry of National Economy 1997a; 1999). The creation of this new arrangement by the Ministry of National Economy was explicitly couched in the need for ‘the provision of co-ordinated advisory support’ to the awarding authorities.<sup>22</sup> Indeed, the relevant circular of the Ministry of National Economy explicitly acknowledged the fact that the main cause of problems regarding ‘compliance with EU legislation’ was incomplete knowledge of the relevant provisions (Ministry of National Economy 1997b).

Moreover, the importance of the need for various fixing mechanisms has been acknowledged. They go beyond the introduction of new legislation and include

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<sup>21</sup> In case of a complaint, this unit may also represent the relevant awarding authority in discussions with the European Commission.

<sup>22</sup> The awarding authorities are only compelled to provide draft summary and detailed tender documents (and the relevant advertisement), the draft announcement regarding the award of a contract and the main contract. As a result, quite a lot depends on their willingness to co-operate with MOPADIS. This is monitored by the Ministry of National Economy via the monthly reports submitted to it by MOPADIS, with a view to taking the required measures if the awarding authorities prove to be unwilling to co-operate.

the diffusion of information, training and other administrative measures regarding the entire system of public procurement. The extension of the scope of the system - just one year after its establishment, and the fact that about 600 Greek awarding authorities have used it demonstrate the demand for guidance and the importance of the new system. Although the number of written questions submitted to MOPADIS seems to have remained stable between its establishment in January 1997 and March 2005, many queries are submitted informally (e.g. by telephone) and the number of tender documents that have been submitted to it increased from 200 in 1997 to about 1,000 in 2004.<sup>23</sup> In addition, MOPADIS (a) publishes written guides regarding various aspects of public procurement for the attention of awarding bodies and (b) occasionally intervenes on its own initiative by asking awarding bodies to inform it about contracts that they have advertised.

More importantly, since 1999 all major<sup>24</sup> public contracts have to be reviewed pre-emptively (i.e. prior to their conclusion) by the Greek Court of Auditors as a condition of their validity (Art. 8 of Law 2741/1999) despite the ensuing time pressures (Simitis 2005, 371). This arrangement has also been included in the Constitution as amended in 2001 (Art. 98). In a clear instance of specific and direct steering, fines have been imposed by the government on companies that do not fulfil contractual obligations (To Vima 12 January 1997), while a

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<sup>23</sup> This information stems from the web site of MOPADIS (see <http://mopadis.cieel.gr/statistics.jsp?extLang=> accessed on 6 November 2006).

<sup>24</sup> The threshold was identified by the Secretary General of the Cabinet after consultation with the Court of Auditors so as to ensure that the latter would be able to cope with the corresponding workload.

number of award procedures have been suspended because incorrect procedures had been followed (To Vima 24 November 1996). In addition, major public works now have to be covered by insurance schemes (To Vima 11 February 1996).

Further, the focus of the mechanism for control shifted to control during (rather than after) construction work. Monitoring mechanisms<sup>25</sup> have been established (see Simitis 2005, 209). External advice has also been sought through a specialist Italian company that has been brought in to monitor quality in major public works projects. New administrative units have been created within the Ministry of the Environment, Spatial Planning and Public Works in order to monitor the implementation process. Apart from the creation of a Directorate-General for Quality Control in Public Works within the Secretariat-General for Public Works (Presidential Decree 428/1995), the most significant institutional change involved the establishment of a Secretariat-General for Jointly Funded Public Works (Presidential Decree 166/1996) reporting directly to the Minister. This enhanced its profile within the implementation structure and underlined the ‘hands-on’ approach of the then Minister, Costas Laliotis. Specialist staff has been recruited in order to enhance administrative effectiveness, especially at the regional level (Simitis 2005, 263; 364).

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<sup>25</sup> Former PM Simitis acknowledged that when he took office in 1996 each ministerial department and awarding authority had knowledge of its ‘own’ works projects but the central government was not in a position to provide an accurate overall picture covering the entire country. In turn, this prevented the adoption of *systemic* measures. This is why he introduced an electronic network which - after its full implementation in 2000, collected information from approximately 7,500 awarding entities (Simitis 2005, 464-5).

The need for specialist managers in the public sector, some of whom would manage jointly-funded public works projects in the context of regional policy, led to the establishment (Law 2372/1996) of the Management Unit for the Community Support Framework, a semi-independent body which is supervised by the Minister of National Economy (To Vima 25 February 1996). It employs officials from the private and the public sectors and is responsible for the assessment of the staffing needs of various parts of the administration. It has the power to recruit new staff from the private sector or second civil servants and to provide technical expertise regarding the management of projects in effort to assist public bodies in meeting EU criteria and obligations for funding. Strong opposition from the officials of the Ministry of National Economy and their union (To Vima 8 June 1995), delayed its establishment.<sup>26</sup> Its opponents argued that (a) it would simply establish a new power centre, blurring existing lines of authority, and (b) the recruitment of staff from the private sector did not guarantee success, since the mentality and the methods of the private sector were simply ‘inappropriate’ for this particular task.<sup>27</sup> Opposition to the establishment of this body was not limited to civil servants; rather, it stemmed from opposition parties as well (Lalioti 2002, 76). Also, ministers in charge of technical departments also expressed serious reservations but encouragement

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<sup>26</sup> Although it is perceived as a successful (and limited) reform, it has been argued (Lalioti 2002, 131-2) that the role of this unit in the implementation of the Community Support Framework that covered the period between 1994 and 1999 would have been even more positive if the attitude of some of its staff was less dismissive vis-à-vis the Greek administration.

<sup>27</sup> Greek construction companies, too, strongly opposed it because they thought it was an attempt to limit their ‘freedom’.

provided by the European Commission helped overcome their concerns (Lalioti 2002, 71).

Further proposals regarding the establishment of an independent administrative authority that would monitor the implementation of public procurement policy were rejected by the socialist government. Senior government officials objected to the proposal (To Vima 28 September 1997) because they felt that the establishment of this authority in the Greek context would be construed as the unacceptable transfer of political responsibility. Constitutional obstacles have also been invoked. More importantly, the socialist government led by Costas Simitis had already commenced the process of implementing a number of important reforms – including the direct involvement of the Greek Court of Auditors – that effectively dealt with the concerns that motivated the aforementioned proposal (see *infra*).

Change in public works did not stop there but spilled over into public supplies as well as services, i.e. two areas where the risk of losing EU funding did not exist. Indeed, technical standards which are used for the description of supplies are now determined by one public body and controlled by the Ministry of Development. In addition, the income of public officials involved in public procurement is now subject to official scrutiny designed to detect corruption. Finally, Law 3060/2002 has extended the power of the Greek Court of Auditors to review (prior to their conclusion) all major services contracts as a condition of their validity. As regards specifically services contracts, until the adoption of

the relevant legislative measures, the implementation process could rely on the willingness of interested parties to use the concept of direct effect in order to oblige the administration to use the proper award procedures, the possible action of the European Commission under the revised Art. 171 of the Treaty for non-implementation of a judgement of the ECJ and, finally, the professionalism of purchasing officers.<sup>28</sup> The author witnessed an incident that demonstrates the point about the professionalism of individuals. An interview with a senior official of the Ministry of National Economy was interrupted by a purchasing officer of an awarding authority who sought guidance regarding the award procedure that he had to follow in relation to a specific contract. He had to have recourse to this ministry - which at that time (1997) was not formally responsible for this aspect of public procurement - as he was unable to find in the other ministries that he contacted an official who could answer his query. Presidential Decree 346/1998 established the Service Procurement Unit (within the then Ministry of National Economy, now Ministry of Economy and Finance) that is in charge of providing to purchasing officers guidance regarding services contracts (Art. 35). In addition to being involved in EU-level negotiations regarding procurement in services, the unit is directly involved in the transposition as well as the implementation of Directive 2004/18. While awarding authorities retain formal responsibility for individual service procurement projects, since its establishment the unit has become a

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<sup>28</sup> Although the use of the second instrument is likely to lead to the imposition of a heavy fine on Greece, thus constituting a rather significant incentive for implementation, the first possibility does not seem to be very likely, if the past experience of suppliers is anything to go by (Spathopoulos 1990, 126) despite the fact that the State Council has used the so-called 'detachable act doctrine' (Spathopoulos 1990, 121; Koutoupa-Rengakos 1993, 395).

focal point that provides guidance and resolves practical problems (such as responses to questions regarding the appointment of the panels that award contracts, ways to deal with competitions where only one bid is submitted) despite some resistance from some sizeable awarding authorities. Although it initially comprised just one official, its size has grown<sup>29</sup> and its most experienced staff are also involved in training purchasing officers. Part of its capacity to steer awarding authorities lies in the willingness of its staff to provide written responses to requests made by bidders. Though they are not legally binding, the willingness of its staff to ‘go on record’ reflect its confidence in their views.<sup>30</sup> This provides a major incentive to individual authorities to follow the views of the unit.

As regards the political level, the establishment of the inter-ministerial Committee of Major Works in 1996 (Decision of the Prime Minister 3307) reflects not only the wider political and economic significance of public works in Greece but also the importance that Prime Minister Simitis attached to the co-ordination of formulation and implementation of government policy. Chaired by the Minister of the Environment, Spatial Planning and Public Works, its membership included the Ministers of Development, Transport and Communications, junior ministers from the ministries of National Economy, Environment, Spatial Planning and Public Works, and three advisers to the

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<sup>29</sup> In December 2006 it comprised four officials.

<sup>30</sup> Officials involved in public procurement in the three countries examined in this book almost invariably avoid this practice because of the potential legal implications of the views expressed in their written responses.



Prime Minister.<sup>31</sup> The committee monitored the development of all major public works projects. Unlike other committees that were created while Simitis was Prime Minister, this committee met frequently in order to monitor the development of all major public works (To Vima 29 March 1998). In addition, Simitis included (every three to four months) the progress of all major public works projects in the agenda of the Cabinet.

The electoral victory of the conservative ND in March 2004 changed the pattern of government activity yet again. Indeed, the cabinet met just nine times between March 2004 and the end of 2005. During this period, most discussions were of a general nature and only one of them was devoted to EU-related issues - specifically, the implementation of the 3rd Community Support Framework. By contrast, the Government Committee meets practically every week. Although it appears to rely on single-issue agendas, this inner Cabinet has discussed EU-related issues - such as the preparations for the 4th Community Support Framework and the common agricultural policy – but not major public works projects (Xiros 2006, 174-7).

#### *4.2. Learning and the dynamics of implementation in Greece*

The dynamic nature of implementation patterns (Dimitrakopoulos, forthcoming) is demonstrated by the Greek case. The pattern in the early 1980s

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<sup>31</sup> Simitis recruited a technical adviser in the PM's office so as to be able to be better informed about the progress of major works projects and also met regularly with the Minister of Environment, Spatial Planning and Public Works (Simitis 2005, 251).

was one of political conflict underpinned by the persistent pursuit of domestic policy priorities. Change occurred initially in the mid- to late 1980s and accelerated in the 1990s, albeit in a variegated and incremental manner. Variation relates to the pace of change, which is higher in public works. This has been transformed into a pattern of co-operation with the Commission and broad compliance with EU public procurement policy.

The available data support this view. Indeed, although procurement expenditure as a share of Greek GDP fell between 1987 and 1994 by about 50%, more contracts have been advertised (European Commission. Directorate General XV 1996, 19, 125). This is evidence of the market's increasing transparency, which is a fundamental objective of EU public procurement policy. Between 1993 and 1998, the number of Greek calls advertised in the OJEC rose steadily from 922 to 1680<sup>32</sup> i.e. by more than 82%. Furthermore, between 1995 and 2002 Greece has consistently achieved the highest transparency rate – defined as the value of public procurement contracts published as a percentage of the estimated total procurement value in 2002 figures - amongst the fifteen member states (European Commission 2004, 7, table 2). Moreover, data from Tenders Electronic Daily indicate that between 2001 and 2005 the number of advertised Greek contracts grew from 1623 in 2001 to 4390 in 2005.<sup>33</sup> Moreover, between 1993 and 1998 (i.e. a crucial period

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<sup>32</sup> The data concern all types of contracts and awarding entities (*Single Market News* 2000, 12-13).

<sup>33</sup> The search covered the entire period between 2001 and 2005 for works, supplies, service and combined contracts and included contracts awarded on the basis of accelerated negotiated procedures, open procedures, open procedures with recurring quantities, restricted procedures,

during which both countries engaged in significant incremental institutional reforms) the pace of substantive change (defined in terms of the number of calls that were advertised at the European level) was much faster in Greece (82.21%) than it was in other member states.<sup>34</sup> Implementation was problematic but the pattern changed over time as a result of incremental changes introduced by the central government.

To what extent do specific attributes of the Greek central government account for change in implementation patterns and, more importantly, how did this change come about? The first five years of Greek membership of the EU were characterised by the newly elected socialist government's political opposition to trade liberalisation en bloc largely, but not exclusively, for ideological reasons. However, significant problems occurred both before and after that period. Therefore, it has been argued that fundamental attributes of the Greek central government account for the patchy nature of implementation in Greece. The process of transposition illustrates clearly that the Greek central government was, and partly remains, dominated by sectoral logics that transform the policy process into a power struggle between ministries and ministers. Repeated calls for a co-ordinated approach to transposition are frequently ignored by major actors, who seem to be more interested in pursuing their narrow goals rather than acting as parts of a larger body. Arguably, this attribute has become a part of the ethos of the Greek central government and

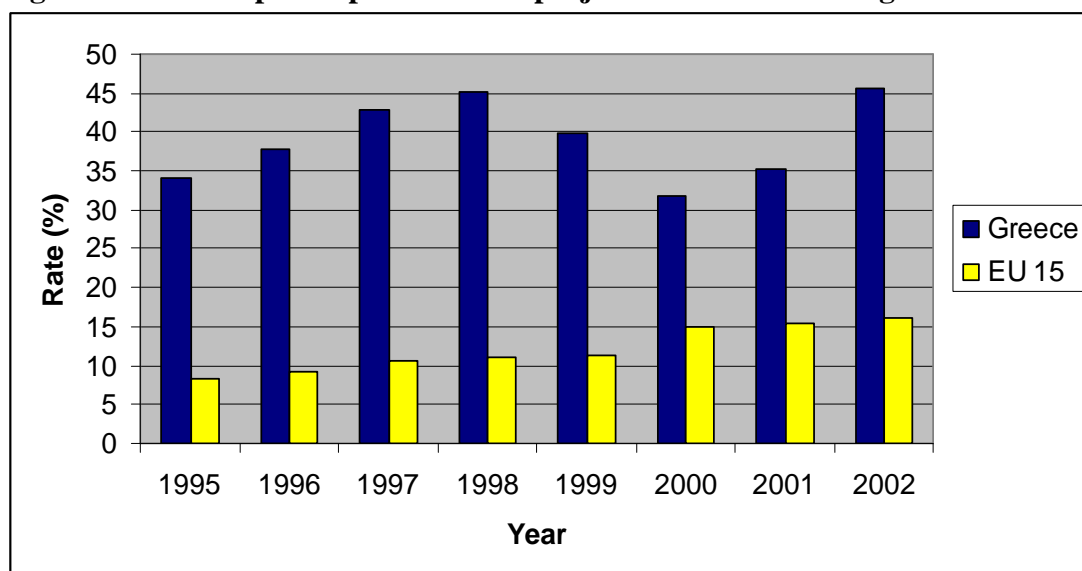
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accelerated restricted procedures, negotiated procedures, competitive dialogue procedures, design contests, calls for expressions of interest and prior information or periodic indicative notices.

<sup>34</sup> Author's calculations based on data published in *Single Market News* (2000, 12-13).

mirrors identical problems that have plagued the Cabinet and the Athenian bureaucracy since the 1970s. The Ministry of Environment, Spatial Planning and Public Works has repeatedly acted as a pro-active player by promoting a narrowly defined sectoral logic which ignores wider policy considerations while considerably weakening the position of the Greek state vis-à-vis EU institutions. Thus, problematic co-ordination (or total lack thereof) was associated with ineffective transposition (and subsequent implementation).

**Figure 1. Share of public procurement projects advertised through the OJEU**

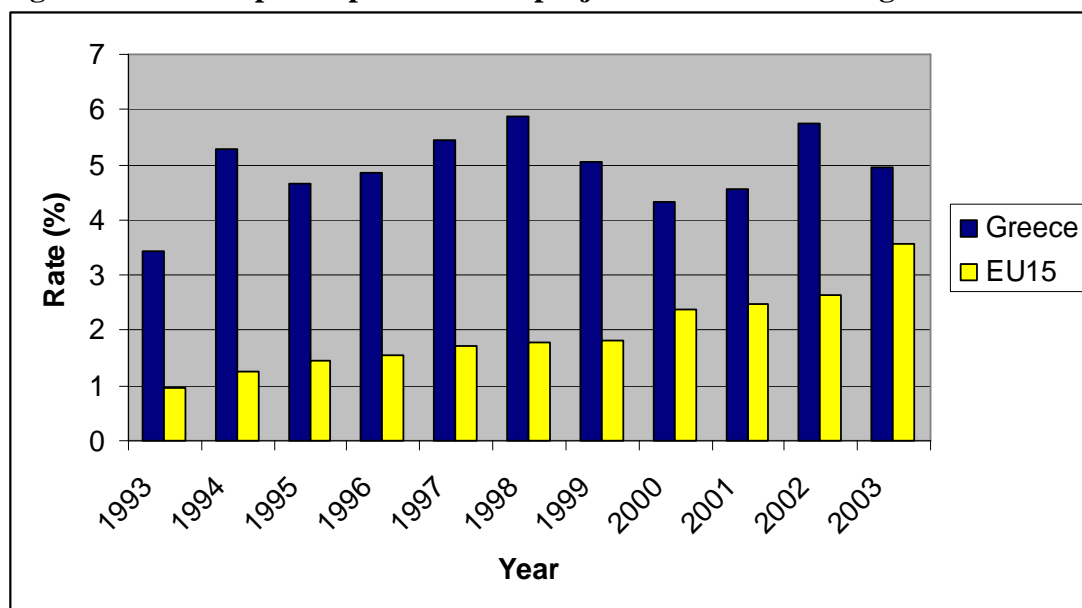


**Source:** Compiled by the author on the basis of data published by the Commission (2004, 7, table 2).

Problems in administrative implementation initially mirrored difficulties in transposition. The passive role of the administration after transposition largely reflected the view held by many officials that their role ended once EU law had been incorporated into national legislation (Anastopoulos 1988, 250). The capacity (Lundquist's 'can') to use the tools of government in order to steer action after transposition largely remained outside the actual remit of the

bureaucracy, although it was within its formal powers. The lack of homogeneity and equilibrium in the bureaucracy also contributed to this phenomenon. The bureaucracy is both top-heavy and politicised. Thus it remains unable to develop skills and practices that could improve its effectiveness. Politicisation undermines any systematic attempt to improve the bureaucracy's own capacity to manage EU affairs (Makridimitris and Passas 1994, 59). Hence, attempts to change long-established practices and implementation patterns (steering) are either imposed from the top or stem from the EU. Both of these trends account for changes in implementation patterns in Greece.

**Figure 2. Share of public procurement projects advertised through the OJEU**



**Source:** Compiled by the author on the basis of data published by EUROSTAT.

Change in the field of public works is indicative of the significant role of determined ministers and the Commission. The Commission has provided a major incentive for the acceleration of change because it has enabled the Greek

central government to ‘understand’ what was at stake. Previously, the symbolic power of Art. 169/226 procedures and subsequent proceedings in the ECJ (authority) have been unable to foster change by influencing the ‘will’ of the Greek government. On the contrary, when the Commission threatened to stop the flow of EU funds, change gathered pace. The subtle but significant change observed in the arguments used by government officials in cases that reached the ECJ exemplifies the new approach. Clearly, the choice of the tools of government and the change of attitudes affect each other and it is their cumulative effect that shapes implementation patterns, while both are mediated by key attributes of the Greek central government which affect its ability to learn.

Arguably, learning played a significant role in the evolution of these implementation patterns. The concept of organisational learning relies essentially on (a) observations and inferences, (b) the acquisition of new techniques and (c) the improvement of an organisation’s performance. Crucially, it has been argued that it involves changes in an organisation’s theory of action which is implicit in its activity. Further, the key difference between single-loop and double-loop learning consists in the fact that the latter, unlike the former, entails a change in values that underpin this theory of action. Single-loop learning accounts for the changes in Greek implementation patterns in the case examined here, for five reasons.

First, change started from the bureaucracy when officials identified a mismatch between an increasing number of problematic cases raised by the Commission on the one hand, and the gradual abandonment of PASOK's anti-EC rhetoric from the mid-1980s on the other. Thus, they resorted to blame avoidance and the gradual adaptation of the domestic legal framework. From the perspective of the bureaucracy, this is a case of single-loop learning because the values, in particular the primacy of the elected government and the passive subordinate role of the bureaucracy, remained stable.

Whether the stance of the government represents a case of double-loop learning, that is, one that involves changes in values, is less clear. It is disputed whether PASOK actually meant to take the country out of the EC in the first place. Indeed, one of the first acts of foreign policy undertaken by the socialist government in early 1982—only a few months after the general election of October 1981—was the submission of the memorandum which focused on the terms of membership rather than membership per se. Changes in values are much more cumbersome and take place over longer periods of time than changes in strategies. Hence, this change in emphasis from membership per se to the terms of membership was tactical and cannot be interpreted as evidence of learning. On the contrary, if one places this shift in a wider context, in particular the involvement of pro-European politicians in the management of European affairs and the gradual discovery of the opportunities offered by the then EC (Pangalos 2000), one can argue that, although the values—that is, the

importance attached to the protection of the economic interest of the country—remained unchanged, the strategy was evolving.

Second, learning has been facilitated by the approach of the Commission, which has institutionalised contacts with the Athenian bureaucracy during the second half of the 1980s. Indeed, unlike court proceedings, which are by definition confrontational, these contacts enabled the Greek administration (and government) to approach issues regarding implementation as a form of problem-solving. The gradual introduction of new techniques, such as the use of copy-out for the transposition of EU legislation and, more importantly, blame avoidance, constitutes evidence of single-loop (instrumental) learning. Blame avoidance has enabled both the government and the administration to divert pressure from the previously protected domestic suppliers, who gradually became exposed to competition.

Third, evidence that single-loop learning, illustrated by the conscious use of new techniques as a result of observations and inferences in the quest for improved performance, rather than a rational institutionalist approach based on the use of the ‘stick and carrot’ strategy accounts for the dynamics of the implementation patterns examined here is provided by the fact that change (a) had started before the critical event of the Evinos’ dam and (b) timid though it was—it occurred first in the field of public supplies, where the Commission did not and does not possess a ‘carrot’ (conditional funding). More importantly,



when the Commission resorted to this strategy, the changes introduced by the Greek government did not remain limited to the field of public works.

Fourth, since learning is not always routine (Olsen and Peters 1996, 12), it relies on critical events. One such event was the decision of the Commission in the case of the Evinos' dam. This was a branching point which has affected subsequent developments by demonstrating that the Commission was both able and willing to use its powers. This has facilitated learning not only by defining the potential and the limits of alternative strategies—e.g. how far the Greek authorities could go in breaching EU law—but by openly legitimising subsequent changes as well. This was underpinned by the attempt of the Greek government to limit potential losses, which is a typical feature of implementation (Bardach 1977, 42).

Fifth, learning is easier when it is associated with incremental rather than radical change. Marginal adjustments based on trial and error (normally associated with experiential learning) do not generate strong opposition. Such opposition can be overcome when promoters of change draw on the experience generated by critical events. More importantly, strong opposition may not even occur in the first place because of critical events. Indeed, the use of fines against (mainly domestic) constructors prior to the case of the Evinos dam would have been opposed by their powerful lobby.

Finally, single-loop learning such as that identified in this case does not lead to the resolution of chronic problems that generated it in the first place. Indeed,

the action of the Greek government remained confined to the field of public procurement. In other words, the basic characteristics of the Greek central government initially identified as causes of problematic implementation have been addressed only to the extent that they concern public procurement.<sup>35</sup>

#### *4.3. The politicisation of public procurement*

One particular aspect of the reform process was the explicit politicisation of public procurement and its direct links to other cardinal issues regarding the Greek political system. This was the result of the explicit strategy of the conservative ND (in opposition between 1993 and 2004) to make political capital against the socialist governments led by Papandreou and – especially – Simitis, by turning public procurement into a major component of party politics.<sup>36</sup> The legislation that regulates the links between public procurement on the one hand and mass media ownership on the other is a clear example.

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<sup>35</sup> For example, the errors that MOPADIS has identified would not normally have escaped the attention of appropriately trained civil servants. The most important errors that have been identified by MOPADIS include major omissions such as the absence of reference to the awarding criterion, the publication of summary notices in the Greek press prior to the announcement in the *OJEU* and divergence between the summary documents published in the Greek press and the *OJEU* as well as practical errors regarding the contact details of the awarding authority or the location of a works project; the non-publication of the indicative budget, the duration of the contract or the deadline for the provision of services, the conditions for and the origin of funding, provisions regarding alternative bids, the date, time and place for the opening of bids, details regarding bank deposits, the documents that tenderers must submit in order to prove their financial and technical standing (Ministry of National Economy 1999). Importantly, as a result of the establishment of MOPADIS some tenders have been cancelled and then re-advertised, once errors had been corrected (see <http://mopadis.cieel.gr/about.jsp;jsessionid=84E5D6C7D5A0F4A978334521C5D8D4A2?extLang=>)

<sup>36</sup> The socialist government led by C. Simitis re-activated the provision which ensured that major supplies contracts and those that entail the transfer of significant technological

Given that the owners of some Greek construction companies were also major shareholders in mass media companies (especially daily newspapers and television channels) fears arose during the 1990s that (a) the power of the latter might be used in an effort to influence decisions regarding the former and (b) media power might be concentrated in a handful of powerful organisation. As a result, the socialist government introduced in the mid-1990s new legislation stipulating that companies involved in the award of major<sup>37</sup> procurement contracts, had to name their shareholders at the time of the submission of their bid and to do so by means of a certificate obtained from the relevant supervising authority (Koutoupa 1996). As a result, interested firms lobbied the government in an effort to postpone the implementation of this legislation. They also unsuccessfully sought to have this legislation suspended by the Council of State<sup>38</sup> (Koutoupa 1996, CS 169).

Moreover, as a result of the revision of 2001, the Constitution stipulates (Art. 14.9) that owners, partners, main shareholders or senior executives of media companies cannot simultaneously be<sup>39</sup> owners, partners, main shareholders or senior executives of media companies engaged in public procurement

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significance are awarded by committees that include observers of the major political parties; 23 such committees operated between 1996 and 2004 but in 1997 the conservative ND withdrew – as part of its strategy of tension - its representatives and refused to replace them (Simitis 2005, 371). After its electoral victory of March 2004, the same party retained the aforementioned system and asked the opposition parties to name their representatives.

<sup>37</sup> These were worth more than 3.3 million ECU.

<sup>38</sup> As former Prime Minister Simitis noted, in the course of the preparations for the Athens Olympics of 2004 (which entailed large scale construction, supplies and services contracts), some tenderers used legal proceedings in some cases as a way to exert pressure on the government in their effort to win other contracts. However, the government won 58 of the 60 cases brought to the Council of State (Simitis 2005, 441).

<sup>39</sup> This prohibition also concerns their consorts, relatives and firms or individuals who are financially dependent on them.

projects.<sup>40</sup> Although the MPs of the two main political parties ended up voting in favour of the new provision, the intensity of the debate regarding its scope – especially the contentious notion of ‘main shareholder’ and the specificity of its definition – was indicative of a broader problem that undermined efforts to resolve a real issue whose implications go way beyond the remit of public procurement. Indeed, the prevailing climate of polarisation that resulted from the attitude of the main opposition party (the conservative ND) forced the government to (i) accept a constitutional provision and (ii) endorse the implementing law purely in an effort to avoid allegations regarding favouritism. In that context, the voices of those (including Prime Minister Simitis and senior members of the Cabinet<sup>41</sup>) who claimed – rightly, as it turned out – that the draconian provisions of domestic legislation were (a) in conflict with primary and secondary EU legislation and (b) likely to prove ineffective were hardly heard. The opposition made political capital by portraying the real problem of compatibility with EU law as a fig leaf<sup>42</sup> covering laxity while the government was simply forced to bide its time until the time of the expected future EU-induced changes to domestic legislation. After its victory in the general election of March 2004 the conservative ND passed a new law (Law 3310/2005) that was meant to enhance the existing national legislation. In the letter of formal notice that it sent to the Greek

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<sup>40</sup> Law 3021/2002 was subsequently adopted on the basis of this constitutional provision.

<sup>41</sup> See, for example, the comments made by Ev. Venizelos on behalf of the majority in Parliament on 7 February 2001 in the context of the debate on the revision of the constitution.

<sup>42</sup> See, for example, the statement made by Pr. Pavlopoulos, an academic lawyer and (then) leading opposition MP, in Parliament on 7 February 2001 in the context of the debate on the revision of the constitution.

government in March 2005, the Commission argued that domestic legislation<sup>43</sup> violates both procurement-related Directives (in particular the provisions that specify the selection criteria) and the provisions of the Treaty regarding

*the exercise of almost all the fundamental freedoms acknowledged  
by the EC Treaty*

(European Commission press release IP/05/356)

As a result of the subsequent suspension of Law 3310/2005, Law 3021/2002 (adopted by the socialists) came back into force. Nevertheless, according to the Commission, it too poses the same problem (European Commission press release IP/05/855). The sensitivity of the issue and the intensity of the domestic political debate are such that the Commission repeatedly stressed its willingness to collaborate closely with the Greek authorities in order to resolve the problem<sup>44</sup> while, on the domestic front, the two main parties have agreed to revise Art. 14.9 in the context of the constitutional reform that commenced in 2006.

In a narrow sense, the main question concerns the proportionality of the provisions of domestic legislation. The dispassionate analysis of the new legislation introduced in 2005 leads to the conclusion that (in their draft form) they conflicted with the requirements of the internal market (Hellenic Parliament 2005, 17). At the same time, both the jurisprudence of the ECJ and the Treaty allow exemptions to the extent that they are either dictated by

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<sup>43</sup> This concerns both the Constitution and the implementing law of 2005.

<sup>44</sup> Of course, it too runs the risk of being seen to promote the economic logic enshrined in the Treaty but in a manner that is detrimental to other legitimate concerns.

considerations regarding public order, public safety or public health or are in the public interest; indeed, the ECJ has accepted the notion that limitations may be placed on the fundamental freedoms enshrined in the Treaty when this is required by the effective handling of services of general interest (Hellenic Parliament 2005, 18). More importantly, the preamble of Directive 2004/18 stipulates that

*[n]othing in this Directive should prevent the imposition or enforcement of measures necessary to protect public policy, public morality, public security, health, human and animal life or the preservation of plant life, in particular with a view to sustainable development, provided that these measures are in conformity with the Treaty.*

Moreover, as regards the substance, politicians were aware of (a) the limits of any legislative measure and (b) alternative means of problem-solving used in other member states, including the enhanced role of national competition authorities (Simitis 2005, 412-3). Thus, the embarrassing situation in which the conservative government found itself could have been avoided if the route of overt political conflict had been replaced by the dispassionate analysis of existing opportunities and constraints. Of course, this requires a more mature understanding of the implications of membership. In this particular case, it appears far from being part of the *référentiel* of the senior ministers involved in the handling of this case, it was quickly discredited as a result of the requirements of party political competition.

In a more general sense, what is at stake here is the capacity of the Greek politico-administrative system to cope with the exigencies of membership. The

preceding analysis regarding learning and its impact on patterns of implementation ought to be assessed against the recent experience regarding the laws of 2002 and 2005 as well as other changes announced by the conservative government since it took office in 2004. The first announcement concerns the establishment of an independent administrative agency that will be empowered to verify the legality of all public procurement contracts. It is unclear as to whether and how its role will differ from the role that is currently performed by the Greek Court of Auditors. The announcement made in Parliament by the junior Minister of Development in March 2006<sup>45</sup> did not indicate whether the role of the new agency will include guidance on substantive issues (Ministry of Development 2006).

The second announcement concerns the establishment of a system that will deal with procurement issues in the area of the health service. In response to recent media reports which indicated that major problems exist in this area<sup>46</sup>, the Minister of Health decided to introduce legislation that centralises the health procurement system. For that purpose, he has decided to create a separate central procurement agency (health) that will unify the existing fragmented system that operates in this particular sub-sector. This seems to maintain the sub-sectoral logic and raises the simple issue of continuity: what is so peculiar about procurement in the domain of health that requires a separate system?

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<sup>45</sup> Nine months later (December 2006) this had not materialised.

<sup>46</sup> For example, the price charged for the purchase of the same product by public hospitals varies as much as 405% (*To Vima* 17 September 2006). Others allegations concern discrepancies between the advertised contracts and the quantity and quality of the purchases (*To Vima* 9 October 2006).

## **5. Conclusion**

Although there are good reasons why Greece has, in the past, been seen as an ‘awkward’ and often unreliable partner, there are equally good reasons why the dominant perception of Greece ought to be subjected to systematic analysis. The objective of this paper was to present and discuss the case of public procurement. Three broader conclusions can be drawn from the preceding analysis. First, since implementation is a process, rather than an event, the pattern of its development over time can – indeed does – change over time. Second, because implementation patterns change over time, it is important to identify and discuss the factors that account for change. Learning is one such factor. Third, since implementation patterns change over time it is important to move away from sterile and – as this research shows – inaccurate broad generalisations and opt for a more accurate, fine grained, theoretically-driven analysis capable of revealing both instances of success and failure. After all, there is a rich body of public policy literature that can be usefully be used to shed light to this complex issue. This literature can be ignored only at the risk of broad and often spurious generalisations.



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