Behind the Council Agenda: The Supranational Shaping of Decisions

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Abstract: Institutional analyses of the Council's decision-making normally treat this arena in isolation, focussing on the decision rules and the Commission's agenda-setting powers. In this paper I argue that decision-making in the Council may be ill-understood when neglecting the supranational legal context in which it is situated. The direct applicability of the Treaty's rules, often actively furthered by the Commission, may make the status quo untenable, putting pressure for an agreement on the Council. I give several examples for the ways in which the Commission may use its rights as a guardian of the Treaty and an administrator of competition law to alter the preferences of member states in favour of a Council agreement.

1 Introduction

Institutional analyses of European integration have been increasing in importance in recent years (Bulmer 1994a; Scharpf 1988). Beyond the teleological interests dominant in the ongoing discussion between neofunctionalism and intergovernmentalism, they have have contributed much to the understanding of the European polity. Rather than debating either-or-distinctions characterizing the EU, institutional analyses can show under which conditions it is that governments loose control over the integration process and supranational actors acquire the ability to independently influence the course of integration (Pollack 1997).

Particularly important in this respect has been the analysis of the Commission's agenda-setting powers (Steunenberg 1994; Schneider 1995; Garrett/ Tsebelis 1996). Based on the specific decision rules of the European legislative procedures, the means for the Commission's supranational influence on European decisions can be stated very precisely.

My concern is with the context of the Council's decision-making and the role the Commission plays therein. Analyses of the impact of decision rules normally assume a default condition (Ostrom 1986: 12f) that is stable. Thus, governments choose between the status quo and the Commission's proposal. This neglects the importance of the supranational legal context (Weiler 1981). Also without prior decisions of the Council, the European institutional context may have significant implications on any

particular problem at hand. Because of it, the governments in the Council are often not acting on the basis of a stable default condition and cannot choose between the status quo and a common European decision.[1] Rather, they may only have the option of agreeing on a common European approach, or to see their national systems slowly being eroded by the piecemeal application of European law.

In this paper my concern is with the way the member-state governments' preferences in the Council are impacted by the supranational context. Of course, a deteriorating rather than stable status quo will matter also for the European Parliament. In as far as it favours more integration, the Parliament should support the Commission's turn to Treaty rules for pressurizing the Council. However, since the Parliament does not partake in decisions taken under European competition law, which have particular relevance in this context, it is in a very ambivalent position towards the Commission's use of these powers. As its behaviour is therefore very case-specific, I will not analyze it any further.

Also the impact of the supranational legal context on the different member states will depend on their specific situations. But in as far as the Commission aims to maximize European integration, some general conclusions can be drawn up on the way it may complement its agenda-setting powers with its rights as a guardian of the Treaty, changing the preferences of hesitant member states. Thus, though the impact on the member states is case-specific, the fact that the default condition can be manipulated by the Commission has very general implications for analyses of the Council's decision-making.

Following, I will firstly discuss the different powers that the Commission has at its disposal. Then I present different cases where these rights have been influential for subsequent Council decisions, showing how the Commission may combine its different competences. Subsequently, I examine the general characteristics of the cases and point to the implications for analyses of decision-making in the EU.

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[1] Analyses assume a weak European policy as the default condition, drawn up under the Luxemburg compromise (Garrett/ Tsebelis 1996: 280). It is not seen that especially with the single-market programme many policy fields have been subjected to europeanization, which were formerly in the national realm.

2 The Supranational Shaping of Decisions

The supranational character of the European legal system is the most distinctive trait of European integration that sets it apart from other forms of international cooperation. Complementing intergovernmental decision-making in the Council, the direct effect and superiority of European law have loosened intergovernmental control. Much more than the supranational features of European decision-making comprising the Commission's role as agenda setter, the possibility of qualified-majority voting and the participation of the European Parliament, the supranational character of the European Court is recognized also by intergovernmentalists (Moravcsik 1995).

While it is much less involved than the Court, also the Commission takes part in the supranational legal system. It is the guardian of the Treaty and as such it has the responsibility to pursue infringements of the Treaty, calling upon the Court if necessary. In addition, European competition law bestows upon the European Commission considerable competences, making it into the "first supranational policy" (Mc Gowan/ Wilks 1995).

These rights of the Commission, as I will show in this paper, can be used to complement its role as agenda setter which has considerable implications on the Council's decision-making.

2.1 Complementing Agenda-Setting: The Commission's Residual Powers

The Commission's ability to influence the course of European decisions by using its rights for agenda setting are well recognized. Its pre-eminence to direct proposals to the Council is generally seen to be one of its major avenues to have impact on the course of European integration. While the Council and (recently) the European Parliament may only request the Commission to make a proposal to the Council, the Commission has the right of initiative and drafts all proposals. In addition to this role as a gatekeeper, the increased use of majority voting has strengthened the Commission's role as an agenda setter. In particular this is the case with the cooperation procedure. Here, the Council needs to act unanimously if it wants to alter the Commission's proposal, so that it is easier adopted than changed. This makes it

possible for the Commission to pick among different winning coalitions the one proposal that is closest to its own preferences (Garrett/ Tsebelis 1996: 285).

Next to this possibility of formal agenda setting, the Commission is well-placed to profit from informal agenda setting (Pollack 1997: 449). As a centrally located actor in the European polity it may benefit from informational advantages and uncertainty, allowing it to successfully launch policy programmes, with the single-markt initiative being the most important example (Sandholtz/ Zysman 1989). Although informal agenda setting is by no means an institutionalized monopoly of the Commission, by rallying support for proposals, the Commission can clearly influence the acceptance of its proposals by the Council and also the European Parliament.

Beyond its influence on the agenda, the Commission has other rights which it may use to influence the Council's decision-making. While this possibility of the Commission has appeared in several case studies (Bulmer 1994b; Cowhey 1990: 194; Montagnon 1990), so far there has not been any systematic analysis of how the Commission may employ its different rights in order to place the Council's decisions in a supranational context.

First of all, the Commission acts as the guardian of the Treaties. Under Articel 169 it has the right, and in a certain sense also the responsibility, to become active whenever member states do not meet their legal obligations. Where national regulations conflict with European law, the Commission can start an infringement procedure, which will lead eventually to a Court ruling, if the government concerned does not respond to the requests. Similarly, private actors or member-state governments may intervene to enforce Treaty provisions (Art. 170, 173), but traditionally this has been of little relevance. Governments hardly ever patrol each other and the recourse of private actors to European law normally either takes the form of complaints with the Commission under competition law, so that the Commission formally acts, or is raised in proceedings at domestic courts. National courts have been very prominent in furthering European law. The importance of the possible recourse to the European Court of Justice in preliminary references concerns, on the one hand, the implementation of measures which were agreed in the Council. On the other hand, and more important in this context, it refers to the direct application of Community law. Because of the direct effect and supremacy of the Treaty, established national orders

are not only europeanized by explicit European decisions. Rather, national rules may become obsolete in the light of the Treaty, as not least the famous Cassis de Dijon case has shown with respect to national regulations. The term "negative integration" denotes the market making through the demise of national rules that complements and influences the positive integration agreed on in the Council (Scharpf 1996b).[2]

The relevance of the direct subsumtion of national regulations under European law is strengthened through other competences of the Commission, namely the administrative powers it enjoys under European competition law. Articles 85 and 86 are directed at private actors, and prohibit cartels and the abuse of dominant positions. For their application by the Commission and national authorities, Articles 87-89 contain the procedural rules. Articles 90 to 94 deal with the actions of member states, whose potential to grant special rights or state aid to enterprises is restricted. The Commission enjoys very far-reaching rights in the implementation of European competition law, which are based partly directly on the Treaty and partly on Council regulations such as Regulation No. 17, which was agreed in 1962 for the application of Articles 85 and 86. The member-state governments only have limited formal possibilities to influence the way the Commission handles its competition law powers.

Thus, for the implementation of Articles 85 and 86 only advisory committees exist, giving the Commission the final decision power. This is even more than the governments have when their own activities are concerned. For the control of state aids the Commission only informs a committee of the member states twice-yearly of its activities. In the 1960s the Council had missed to adopt a regulation for the implementation of state-aid control, that the Commission had proposed. Subsequently, the appropriate procedural rules were mainly defined through court rulings. The com-

[2] Although my analysis deals in many respects with the way negative integration can further positive integration, I do not use these terms as extensively. On the one hand, negative integration is often realized in stages. Initially, the existing regime is challenged and changed in a few member states, and it is only subsequently that negative integration is realized for the whole internal market, which may be followed up by measures of positive integration. On the other hand, there is another cause of confusion. Market making (negative integration) versus market shaping (positive integration) only corresponds imperfectly to the implementation of primary law through the Commission and the Court versus the Council as loci of decision-making. Also the Council may agree on negative integration, for which I will give examples in the paper, and the Court sometimes favours positive integration, for which women's rights are often mentioned (Pierson 1996).

mittee was finally instituted as a compromise in the early 1990s when the Italian presidency had demanded that the Commission propose a Council regulation for the control of state aids which the Commission had declined (Lavdas/ Mendrinou 1995: 180, 183). For Article 90 and the control of the conferral of special rights, the Treaty does not even foresee a participatory role of the member states. No procedural provision for its implementation is included, although the Commission is granted the extraordinary right to direct not only decisions at the member states but also generally binding directives, which have to pass neither the Council nor the Parliament in this case. Informally, as several directives planned under this provision have shown, the Commission consults with the concerned governments quite closely (Schmidt 1998). Similarly in other areas of competition policy, governments have multiple means to put high pressure on "their" commissioners and the Commission as a whole when controversial measures are discussed, so that they may successfully prevent negative decisions (Ross 1995: 130-135).

The fact that the Commission enjoys such far-reaching rights can be explained on the one hand with a functionalist approach (Majone 1994). By delegating rights the member-state governments may ensure an even implementation of the rules which is low on transaction costs and high on credibility. On the other hand, national competition laws were still very much in their infancy when the Treaty of Rome was agreed so that the implications of an endowment of the Commission could hardly be known to their full extent at the time.

In sum, the Commission may on the one hand assist to the realization of the Treaty and its four market freedoms (mobility of goods, services, capital, labour) through its general rights as a guardian of the Treaty. On the other hand, it has considerable powers with view to the market structure of sectors. Market concentration and the behaviour of firms is as much captured by the Treaty as the action of the state with regard to the financial assistance of economic activities or the granting of legal privileges. Thus, the Commission has the potential to seriously interfere with those parts of the national economies which are not predominantly structured by market principles. Fundamental in this respect is the fact that European competition law knows hardly any restrictions. This is very different to national competition law which normally exempts certain areas, such as the classic utilities, and where it is moreover taken for granted that parliament remains free to regulate certain areas of

the economy. On the European level, this freedom is not granted as the control of member-state action aims to avoid national disturbances of the single market. Whereas national competition rules are one kind of secondary law, on the European level it has the status of primary law (Scharpf 1996a: 151). And even though European competition law only aims to outrule disturbances of the single market and does not bother with purely national concerns, the likelihood of such disturbances have been interpreted very broadly. As national restrictions almost always hamper a potential economic activity of other European nationals alongside governing the own population, there are in fact few inherently national concerns.

2.2 The Implications of Supranational Law

What is the general significance of these means of negative integration? On the one hand, their potential seems desastrous (Scharpf 1996a: 141f), while the fact that different national systems have persisted already decades under the Treaty of Rome might weaken concerns on the other. Though comprehensive empirical work on the relevance of negative integration is lacking, there is much reason to assume that its importance has been and will be increasing, and hence its possible influence on European decisions. This is mainly due to the only recent completion of the single market.[3] The *insurance market* may serve as an example (Basedow 1991: 161). Following a Court ruling in 1986 (Case 205/84) providers were free to offer their services in other member states, subject to their home-country regulation. A subsequent directive of the Council detailed this right more closely.[4] For German suppliers this meant

[3] General developments like the growing relevance of services and the increase in their tradeability, furthered also by advances in information and communication technologies, aggravate the situation, which may be illustrated by referring shortly to the system of mutual recognition based on the Cassis-ruling. For the free trade of *goods*, national regulations of production can be kept intact as every country has to accept foreign standards of regulation as much as their own. For the free trade of *services*, this principle leads to different results in as far as the provision of services in most cases requires the direct contact of the supplier to the customer (Nicolaidis 1993: 9, 54-57). Thus, the application of the principle of mutual recognition for services can lead to the situation that service providers compete on one market, but are subject to the very different regulations of their home countries.

[4] 88/357/EEC; O.J. 1988, L 172/1.

that they were put at a competitive disadvantage on their domestic market since their national rules were stricter than those of other member states. Although Germany was allowed to keep its national level of protection, the latter was subsequently lowered having had only the effect to disadvantage national service providers.

In a very similar way, the freedom of services together with the free movement of labour can be seen to have significant repercussions on national systems of social policy (Leibfried/ Pierson 1995). As member states cease to control their borders, consumers of social security can shop for services where they want, and service providers may become active in other member states, both being able to claim their new rights in court. Thus, an increasing number of litigations has had implications for national systems of social security. Beneficiaries are no longer only member-state nationals, but citizens may be able to consume the services of other member states, just as the consumption of national benefits cannot be restricted to the own territory any more. Moreover, claims to welfare benefits may also be determined by foreign authorities, for instance if a foreign doctor certifies an inability to work. The freedom of service provision so far has had less impact than the mobility of labour. Potentially, however, public monopolies of health care as well as restrictions on private pension insurance may conflict with the Treaty (ibid.: 68).

In these cases, the internal market with its essential market freedoms results in possibilities for *regulatory arbitrage*. By putting some countries at a disadvantage, incentives are being set to either adjust the national level of regulation, as is the case with regulatory competition ("race to the bottom"), or to agree in the Council on a common European regulatory framework replacing the different national systems with their possibility of arbitrage. Chances of agreement are very much dependent on the kind of decisions concerned, as it will be much easier to agree on high-level product-related standards than on high-level process-related ones given the differences in economic development among the member states (Scharpf 1996b: 20).

These examples show that negative integration is no monopoly of the Commission. Rulings of the European Court, for instance on questions posed by national courts, may have serious, unplanned repercussions for European integration. New case law from the Court may open a "window of opportunity" for the Commission (Bulmer

1994b). Similarly, private actors interested in entering new markets may be influential in bringing about court rulings or decisions by the Commission. Often action by the Court and private actors coincide with those by the Commission, as will be seen in the following examples. My focus will be, however, on how these rights give a significant strategical potential for the Commission, as it may use them to build up incentives for governments to reach an agreement in the Council. In the following I will review several instances where the Commission profited from the supranationality of the European legal context, often coupling its different rights in a strategic way.

2.3 Negotiating in the Shadow of Negative Integration

A striking example for how the Commission may benefit from the supranational legal context just described, can be found in the adoption of the *merger regulation* in 1989. As Simon Bulmer (1994b) has shown very convincingly, the Commission could successfully gain this new right because of the previous Court ruling in the case *Philip Morris* in 1987. Before, the Council had refused several times to accord this power. As the Treaty deals only with cartels and the abuse of a dominant position, but does not allow to prevent the forming of a dominant position, the Commission had sought the supranational competence for mergers for years. With the *Philip Morris* case, the resistance of the member-state governments could be broken effectively. In it, the Court implicitly accorded to the Commission the right to control mergers on the basis of Article 85.

Following the Court ruling, companies increasingly notified the Commission on planned mergers. At the same time, the Commission was active to highlight the drawbacks and the uncertainty of the new situation, which coincided with the increased business activity in the completion of the single market. As it was, there was no threshold for notifications, hostile takeovers were not included, and the property rights involved in mergers could not be dealt with appropriately (Bulmer 1994b: 431).

Thus, with the Court's ruling, the status quo changed considerably, altering the default condition of the governments. Whereas before they could choose between their

national responsibility, and a new European competence, they now faced an unclearly defined European competence they had not had any input in bringing about. This made it desirable to replace it with a more explicit European power, whose conditions they would specify.

> "From the Commission's perspective the great advantage of this merger regime, using Article 85, was the uncertainty that it generated. This served to put pressure on the doubting member states to settle for a better worked-out and potentially more limited merger regulation. By a combination of luck and skill the Commission had managed to create a problem which the Council felt could be eased only by passing the legislation it had previously refused to consider" (Allen 1996: 171; also cited in Pollack 1996: 37).

Merger control is an example, where the Commission could very easily built a proposal on the fait accompli of the Court. The Commission, however, does not have to remain relatively passive like this, as may be shown when looking at the *liberalization of air transport*. This was the first instance of the Commission using European competition law successfully for the liberalization and European re-regulation of a sector (Argyris 1989: 8-11; Strivens/ Weightman 1989: 559f; Cullen/ Yannopoulos 1989: 163). Following the US-American airline deregulation in the late 1970s, the Commission had made liberalization proposals, which found, however, little support in the Council. As air transport was not included in Regulation No. 17 governing the application of Art. 85 (cartels) and 86 (abuse of dominant position), it was widely felt among member states that the Treaty's competition law did not apply to this sector. Given that the Council had to decide unanimously to enact a Regulation for the application of the competition rules (Art. 84.2/ Art. 75), liberalization seemed a far way off.

A ruling by the European Court of Justice changed this situation. In the case *Nouvelles Frontières*, based on a preliminary reference the Court affirmed the relevance of European competition law to the airlines in principle in 1986. On this basis, the Commission strengthened its examinations for applying the competition rules, it had begun a few years earlier. Using Article 89, which allowed the transitional application of competition law through the Commission until the Council decided on the regime, the Commission enquired into the existing bilateral agreements between the airlines.[5] By fixing capacity in advance and sharing revenue, the airlines effectively

[5] Thus, already in 1985 the Commission had opened Art. 169 proceedings against seven member states who had not supported the Commission's enquiries into the bilateral agreements

hampered competition, thus infringing Article 85. Thirteen airlines were charged in 1986 and 1987, so that indirectly all member-state governments were concerned.[6] Should the airlines not conform to the demands of the Commission, which were also detailed in proposals for two regulations submitted in parallel to the Council, Commission decisions would come into force, based on Article 89.2. The Commission had already agreed on these decisions, but did not notify them for the time being. The Commission backed this threat when three airlines (Alitalia, Lufthansa, and Olympic Airways) refused to cooperate with it. Also here, the Commission issued decisions but let them lapse once the airlines cooperated. In December of 1987, an agreement on the Commission's proposals (the "first package") finally could be reached.[7] Thus the Commission successfully got the Council moving by threatening decisions based on Art. 89 which would have been most costly for the member states' airlines. Building on this first agreement, the second and third packages of air-transport liberalization subsequently led to full competition until April 1997.

Competition law has kept its importance for the air transport sector. Also the recent agreement on the liberalization of ground handling in airports cannot be understood without it (Dussart-Lefret/ Federlin 1994). Following complaints from different airlines about ground-handling monopolies in several member states, the Commission examined the situation in several airports in different countries, announcing possible decisions on the basis of Art. 90.3 from 1992 onwards. Ireland, Greece and Spain subsequently ended their monopolies. With these preparations the Commission prepared and facilitated the agreement in the Council on a common position for a directive liberalizing ground handling at the end of 1995, which was passed against Germany and Austria.

European *telecommunications liberalization* at least equals air-transport liberalization in the importance that has to be accorded to the possibilities of negative integration.

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between airlines, arguing that competition law did not apply to air transport. Subsequent to this they cooperated (15. Competition report, 1986, § 32).

[6] In mid-1986 ten airlines (Aer Lingus, Air France, Alitalia, British Airways, British Caledonian, KLM, Lufthansa, Olympic Airways, Sabena, SAS) received formal letters based on Art. 89.1 (16. Competition Report, 1987, § 36). In 1987 also the other airlines (Iberia, Luxair, TAP) were included into the proceedings (16. Competition Report, 1987, §46).

[7] 17. Report on Competition Policy, 1988, § 46.

Several examples can be drawn from this case, showing how the Commission may build on the case-law of the Court. An important starting point was the ruling in the case *British Telecom* of 1985, in which the Court had established that this traditional utility was not exempted by the Treaty but should be regarded as a normal economic sector. On this basis, and helped from complaints by private actors, the Commission started to intervene against the existing monopolies for *terminal equipment* in several countries, threatening each member state to pass a decision on the basis of Article 90.3 against it, should the illegal state persist. This was at a time, when European telecommunications policy was still in its infancy, focusing on joint R&D and the common introduction of the ISDN (Fuchs 1994). It was only after these interventions that the Commission published its 1987 Green Paper which started the European liberalization and re-regulation process.

By examining terminal equipment monopolies in Germany, Belgium, Italy, the Netherlands, and Denmark, these member states were led to loosen their domestic monopolies even before a common European liberalization policy was defined. In this way the Commission managed to break possible resistance at an early stage. In the case of telecommunications, this helped the adoption not of a Council but of a Commission directive based on Article 90.3. This unusual instrument was subsequently used for all directives liberalizing aspects of telecommunications, and need not concern us here further (cf. Schmidt 1998). Similarly decision-making of the Council could have been prepared in this way.

The abolishment of the equipment monopolies is not the only example to be found in telecommunications. Another instance of pursuing systematically single cases is found in the liberalization of mobile telephony. Before a directive (again based on Article 90.3) required all member states to license at least two mobile-telephone operators in 1996, the Commission had examined remaining monopolies in several member states since 1993. Italy, Belgium and Ireland licensed a second operator in response. Moreover, the Commission subsequently ensured that the newly licensed operators could work under the same conditions as the established national carrier, leading to disputes with Italy, the Netherlands, Belgium and Spain. In these countries originally only the new operator had been required to pay for its license.

Lastly, the clearance of the cooperation of the French and German telecom operators, originally called *Atlas*, should be mentioned. It needed the approval of the Commission under Article 85. The Commission took this opportunity to require both governments to liberalize existing alternative networks (held by railway companies, electricity utilities, etc.) for the provision of all services but telephony. Otherwise the proposed merger would entail too much of a market dominance. A similar request aiming at reciprocal market access for American Companies in Europe was forwarded by the US Federal Communications Commission and the Department of Justice with regard to the clearance of the joint cooperation of Atlas with the US carrier Sprint (called Global One). Subsequent to the agreement with the French and German governments, the Commission liberalized the use of alternative networks community-wide under Article 90.3 from mid-1996 onwards.

The example of Atlas, in particular, points to the fact that the Commission should not be set against the governments too rigidly. The French and German postal ministers had encouraged the liberalization of alternative networks already at a Council meeting in 1993, although in Germany there was not the necessary domestic majority for such a step. Other governments, backed by most national telecommunications operators, had opposed this measure. The tying of the Atlas approval with a partial network liberalization set an incentive for the telecommunications operators to drop their resistance. Since they were all searching actively for cooperation partners to improve their position on international markets, it made no sense for them to risk their future by clinging onto their monopolies a little bit longer.

Thus, European telecommunications policy gives several examples for measures of negative integration helping to achieve a common policy. The anticipated opposition of member states is broken by initiating infringement procedures or by starting an investigation that could lead to a decision under Articel 90.3. Governments and PTTs are isolated in confronting the demands of the Commission. Even when several member states are concerned, they are rarely informed about the other cases, which is helped by existing country-specific differences, hampering direct comparisons of the Commission's action. As a result, the Commission hardly risks the building-up of a coalition, blocking the change. Alternatively, the Commission may try to tie other decisions to the requirement of liberalization, using its powers under competition law as a hostage, as the Atlas example has shown.

Yet, the implications of the use of case-specific measures for telecommunications go still further. As member states agree that a common approach to liberalization be imposed, incentives are being set to devise a common regulatory framework. The common market leaves little scope for purely national restrictions, and especially those member states reluctant to liberalize are keen to see an appropriate European regulatory framework in place. The adoption in the Council of measures of positive integration such as the directives for open network provision (ONP) in telecommunications was therefore much helped by the previous liberalization.

Other utilities monopolies have been tackled in a similar way. Shortly after starting to define a European policy for *network-based energy*, the Commission initiated infringement procedures against the existing import and export monopolies for electricity and gas in originally ten member states in 1991. At the same time an attempt failed to liberalize network-based energy via Art. 90.3 directives just as the Commission had done in telecommunications. Also these cases progressed very slowly, indicating member states' means of influence on the Commission when measures are highly contentious. It was not until 1994 that the cases where handed to the ECJ, and at that time their number had dropped to five (E, F, I, IR, NL). Though an abolition of exclusive rights for the import and export of electricity and gas would leave most of the national monopolies largely intact, the cases exerted considerable pressure. Thus, France was led to start cooperating in the Council, making an alternative proposal for the partial liberalization of national electricity systems, called the single buyer concept. As the largest exporter of electricity in the EC with several member states relying on its exports and in view of its political weight, France had been in a good position to simply obstruct the Council discussions. The parallel application of primary law, however, changed the value of this strategy. Rather than seeing the monopolies crack in a piecemeal and unplanned way, an actively designed transition to Treaty conformity was preferred. In 1996, after long negotiations, a Council agreement finally could be reached, based on the modified Commission proposal and the French single buyer, which in future shall coexist. Importantly, the compromise could be achieved before the Court ruling. Thus, the governments managed to evade difficult-to-change impositions by the Court, trusting the fact, that the Court would be most unlikely to define requirements conflicting with a recent, complicated Council compromise.

Also *postal monopolies* are unlikely to conform in their whole breadth to the Treaty. The Commission started in the mid-1980s to examine monopolies for international courier services on the basis of Articles 86 and 90 in several member states (Schulte-Braucks 1987: 87). The German, Belgian, French, Irish, Italian and Danish PTTs stopped monopolizing this market segment as a consequence. As their monopolies persisted the Commission issued decisions under Article 90.3 against Spain and the Netherlands (Kerf 1993: 100). Though the Commission had made thus very similar preparations for postal as for telecommunications policy, the subsequent agreement on a European postal policy was most protracted. Just like for electricity, a plan for an Art. 90 directive had to be given up. And not until the end of 1996 could a common position be agreed in the Council on relatively modest liberalization steps. Until then, the Commission had kept also a very low profile with single cases, even though there had been some complaints by private actors.

Thus, also postal policy shows the contingencies of the Commission's success in using its residual rights. The Commission's action in this sector was much constrained by the political opposition of several governments to liberalization and the fact that rationalization would lead to significant employment losses in this stagnant sector. But similar to electricity policy, the existing constraints from primary law were very important in bringing about the final Council agreement on modest liberalization. Governments were afraid that the Commission should issue a communication detailing the implications of European competition law for postal services, leading to a disparate breaking up of monopolies on a case-by-base basis. In order to prevent this, a common directive was preferred.

Given that there are only few areas for which the ideas of liberalization and privatization have not become acceptable, opposition is generally likely to lead only to a more protracted application. So far, public lotteries and horse betting seem to be the only examples where initial Commission inquiries based on repeated complaints by the British company Ladbroke have been discontinued, leaving the sector to its national organization. Governmental opposition and the multiple member-state specific traditions apparently made this sector not worthwhile for the Commission to tackle. Beyond such a case, member-state governments only have the possibility to change the Treaty to exempt certain areas from its ambit, but can do so only unanimously.

3 Changing the Default Condition

A similar mechanism is behind all the examples discussed. The application of the Treaty's rules leads to a worsening of the status quo for either a few or for all of the member states. Because of this deteriorating default condition, a joint European policy becomes more attractive. Possibly, an adaptation of national regulations precedes this step, and if agreement on the European level remains difficult it may be the only available option for the time being. As a European-wide liberalization sparks demands for re-regulation in the sectors discussed, given their public-service nature and their proneness to monopolies, even further measures may be triggered, now of a positive-integration kind. As national regulations can hardly be maintained, there is a need for a European approach which does not always have to be defined in the same directive enacting the single market.

This is the common background to all cases discussed. More specifically, the following sub-types may be distinguished from the examples presented above:

- First of all, unplanned by the Commission, the case law of the Court may have negative implications on existing national regimes. National adaptations may ensue and eventually culminate in the demand for a European approach, as Leibfried and Pierson (1995) argue for social policy. The impact of case law, however, may be so significant, that there is an immediate interest in a common approach, which the Commission may use. Such a "window of opportunity" (Kingdon 1984) existed for the merger regulation.

- The Commission may actively threaten case-law implications. Either some member states (as with the import and export monopolies for electricity) may be concerned, or all member states, for which the original air transport case is an example. Member states' interest to pre-empt the announced Commission decision or imminent Court ruling precipitates a Council agreement. The incentive for settling the issue in the Council lie in the risks of an unfavourable Court decision. As the Treaty can only be changed by unanimity, interpretations of its obligations for sectors which have not been integrated always pose a high risk.

- Next to the cases of pre-emption there are those, where several concerned member states submit to Commission-requests for change, before or after a Court proceeding.

The governments conform to the imposed requirements, as was the case with the monopolies for terminal equipment, mobile telephony, courier services and ground handling. Subsequently, the agreement on a European reform is helped by the fact that the previous changes have allowed the Commission either to break the former opposition completely, or at least to have won new coalition partners against a persistent opposition. Having incurred costly institutional changes, the previously concerned member states are now interested in seeing reciprocal conditions community-wide.

- Finally, the Commission may use the possibility to impose requirements in a related area as a lever to abolish opposition to a Council agreement. Its broad powers in the administration of European law give it ample scope to design prerequisites for the approval of mergers or state aids, for which the Atlas cooperation was an example. The Commission may, moreover, simply threaten to start inquiries into established national practices, for instance of state aid, if the government maintains its opposition to proposed liberalization measures. As such a linkage will be rarely made as openly as the one between the approval of Atlas and the liberalization of alternative networks, it is difficult to establish the relevance of this possibility.

These different possibilities give the Commission a very important lever against the member states for which it is only dependent on the European Court of Justice supporting its legal interpretations. Most significant for the relevance of the Commission's instruments are their highly negative consequences for the member states. Rulings of the Court on the Treaty's relevance in new policy fields are difficult to predict and can hardly be influenced from the outside. And once they have been made they are difficult to alter. If the Council agrees on secondary legislation, however, before the Court has mapped out its interpretation, the latter is highly unlikely to deviate far from the Council's plan for a common sectoral policy.

These advantages of controlling the future shape of policy are even stronger when taking into account the disadvantages that ensue once different legal cases encroach on established national orders. As only isolated aspects of these orders are raised in court proceedings, and the repercussions of rulings on other member states are difficult to establish, a very fragmented and uncertain legal order results. In view of the need for long-term planning and the significant sunk costs involved, such a scenario

is the worst possible option for the established actors. Thus, by being in a position to credibly threaten legal cases, the Commission has the possibility to alter the previously rejected option of a common European policy into a second-best solution, that comes next to the non-defendable status quo.

In how far can historically grown orders be suddenly overtaken in this way by demands of European law? Article 5 requires the member states not to install nor to keep any rules conflicting with the Treaty. However, as the interpretation of the Treaty only slowly develops, the requirements for national governance forms are generally far from clear. As a result, member states may legitimately ask for postponement of the adaptation process. Thus, in the infringement procedures against its import- and export monopolies France justified itself with the argument that no common policy had been agreed upon so far, making it legitimate to hold onto its traditional national system of governance. However, were a previous Council agreement on a common policy generally a precondition for the application of the Treaty's rules, there would be hardly any scope for negative next to positive integration. The Commission's pursuit of negative integration is thus subject to a difficult balancing act where too far-reaching changes cannot be requested at once, but incremental steps may be taken towards them.

The cases presented show that the Commission's action is contingent on many factors, notably the opposition or support of member-state governments. The sectoral growth in telecommunications and the very similar national organizations of telecommunications provided very favourable conditions for the Commission's use of its powers (Schmidt 1996). The heterogeneous national organization of electricity systems as well as the rather stagnant development of this sector and of postal services made it much more difficult for the Commission to garner support for its plans. But also in these difficult cases there was - albeit protracted - progress. While governmental opposition could prevent the Article 90-directives which were originally planned for network-based energy and postal services in the same way as they had been used in telecommunications, the Commission could not be hindered in making case-specific encroachments into the established national orders. As cases may build on complaints of private actors or on rulings of the Court, governments are generally hardly informed of the examinations of the Directorate General of Competition (DG IV). In particular, member states know little about their respective cases and national

specific differences make it difficult for them to compare the Commission's interventions. Because of it, the Commission hardly risks the forming of a coalition against its case-specific plans. Although the governments had been warned through the earlier plans for a Commission directive, they could neither prevent the infringement procedures in electricty nor the announced communication on the application of the competition rules to the postal sector. After the Commission already had subdued with its stronger instrument, its overall credibility as a guardian of the Treaty and an administrator of competition law would have suffered, had it succumbed again to pressure. Even in difficult cases with much government opposition, therefore, negative integration with all its disadvantages makes itself felt, with important implications for Council negotiations.

4 Conclusion

In this paper I have shown that beyond its agenda-setting powers the Commission may use its rights as a guardian of the Treaty and as an administrator of European competition law to influence Council negotiations. By being able to bring the status quo position of the member states into decline, the Commission can improve the chances of getting its proposals accepted in the Council. Effectively, the Commission may bring about the worst-possible option to the established stakeholders in a sector through unilateral action. In view of the threatened legal uncertainty and fragmentation ensuing from the case-specific transformation of the status quo, the previously rejected common policy proposal becomes a second-best solution.

This relevance of the Commission's residual powers and of isolated court judgements is often referred to in the literature (Bulmer 1994b), however, it has not been treated systematically. Moreover, it seems to be taken frequently in support of a neofunctionalist explanation of European integration (Burley/ Mattli 1993; Leibfried/ Pierson 1995: 44), despite the weaknesses of neofunctionalism in dealing with institutions (Scharpf 1988: 266). In contrast to the notion of spillover, I have aimed to show how an institutionalist analysis focussing on the changing default condition of actors may grasp the impact of European law more precisely.

But the analyzed possibilities of the Commission also have repercussions on institutionalist analyses. Although it is surprising given Weiler's (1981) seminal analysis of the "dual character of supranationality" that emphasized the connection between the Council's intergovernmentalism and the supranational legal context, institutionalist analyses often focus on the Council's decision-making in isolation. The Commission's possible manipulation of the default condition of the member states is however all but insignificant for the Council's operation and can be at least as important an avenue of influence as the Commission's agenda-setting rights. In analyses of the Council's decision-making, the likelihood of governments accepting a Commission proposal clearly depends on the value of existing alternatives, among which the default condition has particular importance. As the supranational legal context may be decisive for the Council's acceptance of Commission proposals, failure to take it into account is certain to be as distorting as the recently criticised neglect of accounting for the probability of different coalitions in the Council, depending on whether the governments have extreme preferences or not (Garrett/ Tsebelis 1996).

The relevance of this additional avenue of the Commission's influence is much less clear-cut than its opportunities as agenda setter. As questions posed by national courts to the European Court of Justice or complaints of private actors to the Commission may trigger the pressing relevance of European law a much more haphazard picture emerges. While it may often be the case that the French étatisme is more prone to coming into conflict with the Treaty's market freedoms than the deregulated Britain, it is hardly possible to characterize all member states across these lines, especially when considering the significant sector-specific differences within countries. But not only a more complicated picture emerges out of the supranational shaping of the Council's decision-making. Thus, it is only with view to the Commission's additional rights that its possibility to withdraw proposals from the Council may become a credible threat. As the Commission may often be able to push the European-wide liberalization of a sector further through single cases than results from the Council, withdrawing its proposals becomes a viable alternative. When considering the Council in isolation, in contrast, this possibility is generally neglected as it is assumed that the Commission's agenda-setting right is its major means of furthering integration.

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