

**Influencing Policy Production in the European Union:  
The European Commission Before the Court of Justice**

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**Abstract**

The present paper addresses the role of the European Commission in shaping policy produced in the European Union. Most related studies have focussed on the Commission's positions in legislative or executive politics. However, there appears to be an underresearched interrelation between the actions of the Commission in legislative and judicial policy-making that may form the basis for its continued influence. This paper therefore investigates the relationship between the actions of the European Commission in legislative and judicial procedures in the European Union. Given the extraordinary success of the European Commission before the European Court of Justice revealed by recent research, the question arises how the Commission uses its privileged position before the Court to influence policy development. It is hypothesised that the Commission exerts influence on policy production at the European level through both of these 'modes of policy making'. I test my hypothesis by analysing Commission action in the field of social security.

## **Introduction: Influencing Policy Production in the European Union**

The role of the European Commission in shaping policy produced in the European Union has witnessed much scientific attention. Traditionally, neo-functionalist and intergovernmentalist accounts of European integration have debated the question whether the Commission as a nominally independent institution exerts any real influence on policy outcomes and whether it acts as an independent “engine of integration” contrary to the preferences of the member states. Recently, the increasing employment of institutionalist approaches, in particular the principal-agent (P-A) framework, has refined our understanding of under what conditions the European Commission can pursue its preferred policy options (Tallberg 2000, Pollack 2003). Most of the related studies have focussed on the Commission’s positions in legislative procedures or policy areas in which the Commission has been delegated extensive executive powers, such as competition policy. However, there appears to be an underresearched interrelation between the actions of the Commission in different modes of policy-making that may form the basis for its continued influence.

Revisiting one of his seminal articles, Fritz Scharpf recently called to attention three different modes of policy-making that he sees as central to European Union politics (Scharpf 2006). While the ‘intergovernmental mode’ of policy-making lies at the heart of his ‘joint decision trap’, he acknowledges a central position for the Commission in facilitating decision-making in the ‘joint-decision mode’, more commonly referred to as the ‘Community method’. As central to the functioning of the Union, however, Scharpf identifies a ‘supranational-hierarchical mode’ of policy-making in which the Commission makes use of its delegated powers as ‘guardian of the treaties’ by invoking Court rulings without resort to the Council or the Parliament.

While the role of the European Court of Justice in European politics has witnessed growing attention in the political science literature, comparatively little attention has been paid to European institutions’ actions before the Court. This is particularly surprising with regard to the Commission, since it is widely known that the Commission participates in every case brought before the Court, either in direct litigation or through the lodging of observations in cases brought before the Court by other actors. Research has further shown the Commission to be highly successful: the Court follows the Commission’s legal opinion in the vast majority of cases (Conant 2007). These findings pose an intriguing question: Given the

extraordinary success of the Commission before the Court of Justice, how does the Commission use this privileged position to influence policy development?

In one of the few treatments of this phenomenon, Susanne K. Schmidt argues that the Commission uses legal constraints and action before the Court of Justice to influence legislative decision-making in the Council by applying pressure on Council positions (Schmidt 2000). She argues that the Commission can use the autonomy of the Court of Justice strategically to either change the preferences of some member states or change the default condition of Council voting. I extend this argument by pointing out that the Commission may choose to completely circumnavigate legislation by using its privileged position before the Court to achieve policy goals that seem unlikely to be successfully achieved – or only at high negotiation cost – through the legislative cycle. Based on this model, I will outline the position of the Commission in different modes of policy-making and indicate why in some cases it may be more attractive for the Commission to pursue a legal strategy than to initiate legislation. Drawing on a case study of the development of social security regimes for migrant workers in Europe, the paper will investigate whether the Commission pursues a long-term litigation strategy to influence the production of European legal norms outside or in combination with the legislative mode of policy-making.

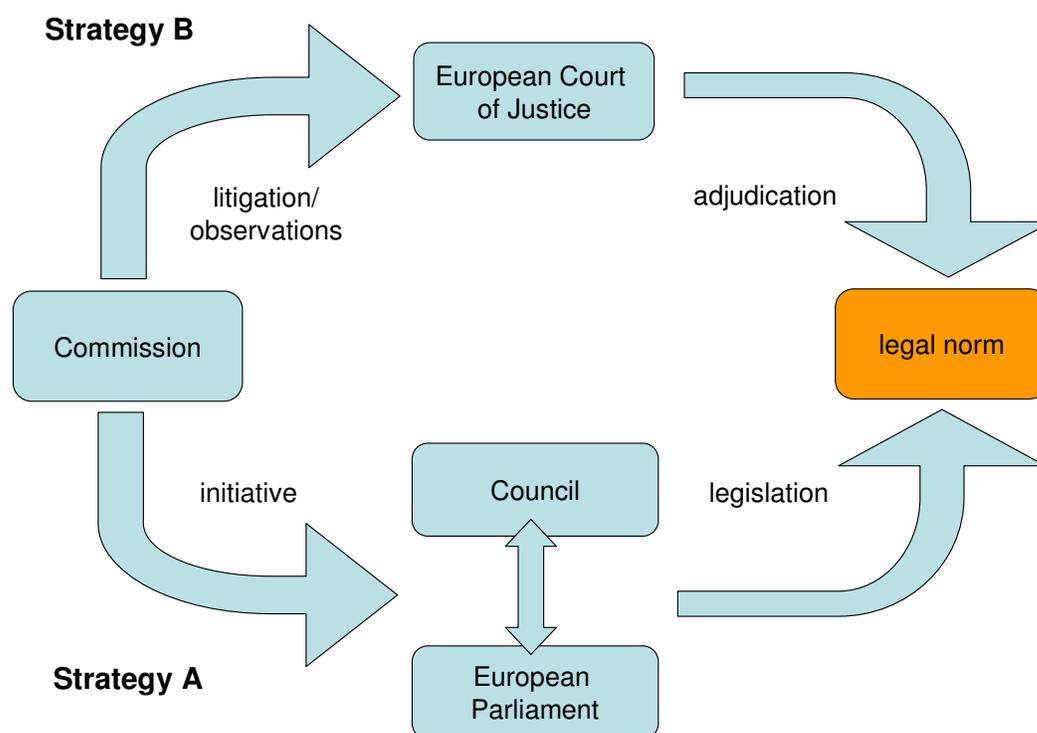
### **Strategy choice in policy-making**

Traditionally, the spheres of legislation and adjudication have been treated as analytically distinct. On closer inspection, however, this distinction becomes blurred. The production of binding norms is central to both processes; in this regard they could be interpreted as functionally equivalent. The interpretation of a norm in court is in most cases equivalent to a (quasi-legislative) recasting of said norm with universal impact and future relevance as precedent (Vanberg 2005: 184, Shapiro and Stone Sweet 2002: 90, Dehousse 1998: 72, Dehousse and Weiler 1990: 246). The European Commission is situated as a central actor in both processes. It is thus surprising that very little attention has so far been paid to the alternative strategies of influencing the production of legal norms that are at the disposal of the Commission.

The paper hypothesises that the Commission can use litigation in much the same way that it uses its position in legislative processes to achieve its interests in European policy. Rather than initiating the ‘ordinary’ process of policy-making through legislation (strategy A in Figure 1 – the joint-decision mode), the Commission may choose to influence policy-making

by initiating judicial proceedings before the Court of Justice (strategy B in Figure 1 – the supranational-hierarchical mode).

**Figure 1: Alternative strategies in policy-making in the EU**



*The joint-decision mode: initiating legislation*

Literature analysing legislative processes in European politics has highlighted the Commission’s power to influence policy outcomes by using its position as agenda setter.<sup>1</sup> This capacity is held to be greatest in policy areas where majority voting applies, since it is more costly for the Council to amend a Commission proposal than to adopt it (cf. Schmidt 2000: 38; Tsebelis and Garrett 2001). Rather than having to account for all preferences in the Council, the Commission merely has to respect the preferences of the pivotal members of the Council (Tsebelis and Garrett 2001: 374). While the expansion of qualified majority voting thus increased the leeway for the Commission in initiating potentially successful legislation, the concomitant expansion of the involvement of the European Parliament in legislation has

<sup>1</sup> Alternatively, studies embracing Coasian negotiation theory have stressed the Commission’s role in lowering the transaction costs of intergovernmental bargaining and facilitating consensual outcomes (Scharpf 2006: 850-1).

rendered this procedure more complicated and curtailed its agenda-setting powers to some degree (Tsebelis and Garrett 2001: 374). The introduction of co-decision further amplified this trend (Tsebelis, Jensen et al. 2001).

Moreover, the persistently frequent necessity for unanimous decisions in the Council deprives the Commission of much of its agenda-setting power, as in such situations it is equally costly for the Council to approve a Commission proposal as to amend it (cf. Tsebelis and Garrett 2001: 359; Schmidt 2000: 38).

*The supranational-hierarchical mode: initiating or intervening in judicial procedures*

Engaging in judicial proceedings on the other hand is in many respects less costly for the Commission than initiating legislation. The Commission has vast legal resources and enjoys a privileged position before the Court. The ‘Legal Service’ as the Commission’s ‘law firm’ employs roughly 150 legal experts covering all policy areas within the Commission’s competences. Even where governments dispose of a specialised legal branch (such as the Austrian ‘Verfassungsdienst’), the Commission outnumbered (in terms of personnel) the resources at the disposal of member states. The Commission furthermore acts as a privileged applicant, being able to initiate judicial proceedings and intervene (through observations) without the prior assent of the parties involved. It thus acts as the pivotal ‘repeat player’ (Galanter 1974) in judicial proceedings before the European Court of Justice, enjoying considerable advantages over other actors before the Court in both resources and experience. Both factors have been shown to be the prime predictors of success in court proceedings (cf. McGuire 1998). Empirical research on rulings of the European Court of Justice has shown that the Commission is indeed much more successful than other actors before the Court. While it must be taken into account that only a small percentage of infringement proceedings initiated by the Commission actually reach the Court of Justice – in most cases, the defendant and the Commission reach an agreement through negotiation before the Court is invoked<sup>2</sup> – “in the few cases in which [the Commission] invokes the Court in infringement procedures, its success rate is so high as to make the ECJ look like a kangaroo court – being the baby in the pouch of the mother, it has to follow wherever the Commission goes” (Schepel and Blankenburg 2001: 18).

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<sup>2</sup> Only about 10% of infringement proceedings reach the Court, with a judgement rendered in less than 4%. Note that there are marked differences in avoiding judicial proceedings between the member states; cf. Schepel and Blankenburg 2001: 17-18.

Adding to this strategic advantage, initiating infringement procedures is exempted from the protracted and increasingly centralised requirement for Strategic Planning and Programming and Impact Assessment within the Commission. Such proceedings can be employed much more on an ad-hoc basis and are subject to fast-track inter-service consultations, whereas internal administrative hurdles may lead to bottlenecks in legislative initiatives (Tholoniati 2009: 233-34).

Initiating infringement proceedings is not the only legal strategy at the disposal of the Commission. While both Schmidt and Scharpf concentrate on such proceedings in their treatment of the Commission's resort to the Court, this narrow focus overlooks the possibility to influence judicial proceedings through the lodging of observations (similar to *amicus curiae* briefs in the US-American system; cf. Spriggs and Wahlbeck 1997, Collins Jr. 2004, Nicholson and Collins Jr. 2008) in cases brought before the Court by other actors – in particular in preliminary rulings, which constitute roughly half of the Court's caseload at any given time. While infringement proceedings usually bear some political weight, the impact of preliminary references should not be underestimated. In fact, the majority of cases cited with regard to major policy developments find their origin in such references.<sup>3</sup> The European Commission lodges observations in all such procedures and enjoys a high success rate (cf. Conant 2007: 53; Mortelmans 1979).

Looking at the internal workings of the Commission with regard to judicial proceedings, it also becomes apparent that the formulation of an intervention in preliminary references takes place at a significantly lower level within the Commission hierarchy, with mainly the responsible Directorate General (DG) and the Legal Service involved. The DG formulates a legal opinion to be lodged before the Court by the Legal Service. In some cases, differences arise between the Legal Service and the responsible DG, but mostly this process involves little friction. Infringement proceedings however have to be decided at the apex of the Commission hierarchy, with at least a majority of Commissioners having to vote in favour.

Paying attention to the systematic differences between different judicial proceedings affords more detailed insights into the mechanisms by which the Commission pursues policy preferences through different modes of policy-making. It also opens up the perspective of the Commission as a unitary actor and allows for the observation of internal dynamics that may systematically influence strategy choices (cf. Hartlapp, Metz et al. 2008).

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<sup>3</sup> One needs only to think of the famous 'Costa v E.N.E.L.' (case C-6/64) or 'van Gend & Loos' (case C-26/62).

Finally, “all obstacles to European political action in the intergovernmental or joint-decision modes will also immunize judicial legislation against political correction” (Scharpf 2006: 853). Court rulings are therefore difficult to override legislatively (and this would require a proposal by the Commission), becoming ‘locked in’ in the process. Assuming that the Commission is interested in stable policy outcomes that are within its range of preferences, these factors should make judicial proceedings an attractive alternative to other modes of policy-making.

### *Three Strategies*

Taking these observations a point of departure, I identify three potential strategies for the Commission to use Court proceedings for achieving policy goals.

- 1) The Commission can engage in Court proceedings to alter the status quo as default condition for future Council voting. The Commission thus entices legislation that ‘reels in’ a (too) far reaching Court decision but still moves the initial status quo in the direction desired by the Commission. Susanne Schmidt calls this option the ‘lesser evil’ strategy (Schmidt 2000: 42-44)<sup>4</sup>.
- 2) The Commission may also use the opposite strategy: it can initiate legislation, the content of which it then challenges in Court (by favouring a ‘broad interpretation’) to move it in ‘post-factum’ in the desired direction. I call this the ‘legislate-then-litigate’ strategy.
- 3) The Commission may use Court proceedings to influence policy outcomes in its own right without resorting to the legislative cycle where doing so appears more costly. This strategy should particularly occur where legislative policy making is at its costliest – with co-decision and unanimity in the Council. I call this the ‘litigate only’ strategy.

I now turn to a case study of activities of the Commission in the area of social policy to put this model to an empirical test.

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<sup>4</sup> Susanne Schmidt uses this term to refer to a strategy whereby the Commission may use the threat of resorting to Court proceedings – without actually resorting to the Court – to enhance its position in the legislative process by credibly threatening to alter the status quo as default condition and therefore entice the Council to adopt a Commission proposal that does not coincide with its position vis-à-vis the initial status quo. I have adapted this proposition for my model.

### **The case study – coordinating social security for migrant workers**

While seemingly a highly technical issue, the coordination of social security schemes for migrant workers presents an interesting testing ground for the alternative strategies at the disposal of the Commission in influencing policy. Social security schemes touch upon central aspects of national welfare systems and should therefore be of high relevance to the member states. As a highly dynamic field it has frequently faced pressure to adapt to altered realities in light of increasingly sophisticated welfare regimes.

An analysis of the development of the coordination scheme for social security pertaining to migrant workers in some ways represents a ‘most likely case’ scenario for the assumptions outlined above. Legislative procedures in social security issues are characterised by high negotiation costs. Decision-making in the Council requires unanimity; the Treaty of Amsterdam moreover introduced the European Parliament as a veto player with the co-decision procedure (art. 42 TEC). As outlined, unanimity in the Council also deprives the Commission of much of its agenda-setting power. According to the model, high negotiation costs in legislation paired with the lack of agenda setting power should create incentives for the Commission to pursue a litigation strategy – following the ‘supranational-hierarchical mode’ of policy-making – to achieve its policy preferences. The litigation option should be particularly attractive since high negotiation costs lead to an equally high rigidity of rules once cast. The status quo thus becomes locked in, with ECJ decisions interpreting (and thus altering) the status quo costly to legislatively overrule. The model would thus run into serious trouble if no corroborating evidence is found in the present study.

The domain in question is subject to frequent proceedings of the legislative and the judicial kind. Regulation 1408/71, which serves as the basis of the coordination regime, alone has been amended over 40 times – sometimes substantially – while the scheme has been subject to more than 550 preliminary references and 35 infringement proceedings.<sup>5</sup> Moreover, the revealed preferences of the Commission and the member states in this regard are markedly disparate. While member states frequently argue for a narrow definition of the scope of the regulation, the Commission tends to favour a broad application. The relatively low number of infringement proceedings lodged by the Commission<sup>6</sup> highlights the need to take into account the large number of preliminary references lodged by national courts. These judicial

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<sup>5</sup> Calculated on the basis of a dataset compiled by Alec Stone Sweet and Thomas Brunell (2006) in the context of the NewGov project; cf. [http://www.eu-newgov.org/datalists/deliverables\\_detail.asp?Project\\_ID=26](http://www.eu-newgov.org/datalists/deliverables_detail.asp?Project_ID=26).

<sup>6</sup> It should be noted that stated number only refers to infringement proceedings that have ended up in court.

proceedings – even though not directly initiated by the Commission itself – do indeed present a viable avenue of influence that is actively used by the Commission – bearing in mind that the Commission acts as *amicus curiae* in all of these cases.

Provisions on the coordination of social security schemes for migrant workers follow the principal aim of ensuring the free movement of workers within the Common Market. Art. 39-42 TEC which govern this domain are thus of central relevance to legislative and judicial proceedings in this regard. In particular, art. 42 TEC imposes on the member states the duty to „adopt such measures in the field of social security as are necessary to provide freedom of movement for workers” to guarantee both the consideration and addition of entitlements to benefits acquired in different member states as well as the receipt of social security benefits in the member state of residence. One of the first regulations of the European Economic Community (regulation 3/58) followed the requirement of art. 42 TEC to establish such a coordination system and, recast as regulation 1408/71, serves as the basis for this coordination until today.<sup>7</sup> The development of this coordination scheme has witnessed a central involvement of the Commission in defining the scope of its applicability.

While the European provisions for the coordination of social security schemes do not represent a novelty in international law, they have created a dense system of rules on the European level that necessitate constant updating to suit the needs of sophisticated and rapidly evolving welfare states. Central and recurring point of contention is the definition of the matters covered by the regulation. Central to this conflict is the distinction between social assistance benefits (defined as services of general interest based on individual need at the discretion of the institution providing the benefits) and social security schemes (defined as benefits to which a right has acquired through individual contribution). While both domains were fairly neatly separable at the end of the 1950s (the time of the first regulation), the increasing sophistication of national welfare policy has since blurred the lines between social assistance (excluded from coordination) and social security (subject to coordination). A detailed definition of the two sectors was however omitted from the regulation. The coordination scheme thus had to grapple with benefits bearing characteristics of both types, in particular so called ‘special non-contributory cash benefits’. The court had identified this problem at an early stage: “Whilst it may seem desirable from the point of view of applying

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<sup>7</sup> A new regulation 883/2004 replacing 1408/71 is due to take effect in late 2009.

this regulation to establish a clear distinction between legislative schemes that fall respectively within social security and assistance, one cannot exclude the possibility that by reason of the persons covered, its objectives and its method of application, a legislation can come close to both these categories, thus preventing any comprehensive classification” (case C-24/74, ‘Biaison’, para 9). It was therefore necessary to find a solution to the question of how to deal with such ‘hybrid’ benefits.

The European Commission and the member states reached opposite conclusions. While the member states favoured narrow interpretations, the European Commission saw itself as safeguarding the free movement of workers by favouring an inclusion into the coordination schemes of a wide range of welfare instruments. Since existing legislation did not sufficiently address this question, additional policy-making was required. A court case acted as a catalyst in this development. In ‘Piscitello’, the Court invalidated an Italian legal norm which allowed Italian authorities to withhold a social aid pension, designed to guarantee a minimum income to pensioners and classifiable as a ‘hybrid’ benefit, from recipients living outside Italian territory.<sup>8</sup> The inclusion of such ‘special non-contributory benefits’ in the coordination scheme (which mandates the exportability of benefits) was highly contested and substantially opposed by the member states.

The Commission subsequently (in 1985) drafted a proposal for a Council regulation in response to the Court ruling, amending regulation 1408/71 with the aim of including hybrid benefits in the system of coordination, however making the exportability of these benefits subject to national legislation.<sup>9</sup> Despite the swift approval of the European Parliament and the Economic and Social Committee in the consultation procedure the same year, the Council – being unable to reach consensus on the inclusion of hybrid benefits into the coordination scheme – did not act on the proposal.

Facing the inaction of the Council, the Commission in 1988 decided to reactivate an infringement procedure against the French Republic which it had initiated in 1979 with regard to the French authorities’ refusal to export a ‘supplementary allowance’ (a hybrid benefit) but had suspended in 1981 to allow for Community legislation.<sup>10</sup> While the adoption of the proposed regulation by the Council would have ended the infringement procedure (as the regulation in question would have exempted the benefit from exportability), the

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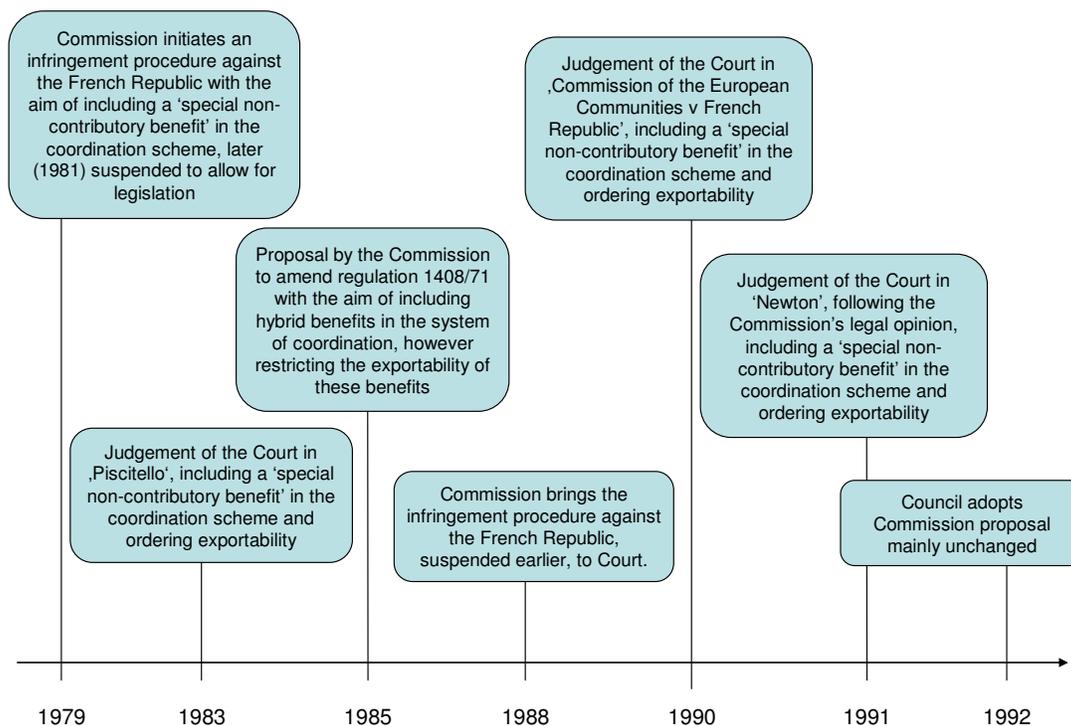
<sup>8</sup> Cf. case C-139/82, ‘Piscitello’. The judgement in this case is dated 5 May 1983.

<sup>9</sup> Cf. COM(1985) 396 final. The proposal was transmitted to the council on 8 August 1985.

<sup>10</sup> Cf. case C-236/88, Commission of the European Communities v French Republic.

Commission insisted on the applicability of the provisions of Community law in force as long as the new regulation was not decided upon. The Court followed this opinion in its judgement and ordered the exportability of the benefit.

**Figure 2: Timeline leading to the adoption of regulation 1247/92**



Moreover, in 1989 the Commission lodged an observation in 'Newton'<sup>11</sup>, another case in which the applicability of the coordination scheme to a 'special non-contributory benefit' and hence its exportability was disputed. In this observation, the Commission again argued that since the Council had not acted upon its proposal, which would have prevented the exportability of the contested measure while including it in the coordination scheme, the current status quo of legislation would have to be observed.<sup>12</sup> Hence, following previous case-law, the 'mobility allowance' in question would have to be interpreted as a hybrid benefit and thus judged exportable. The Court followed this opinion, disregarding observations to the contrary lodged by the governments of Belgium and the United Kingdom.

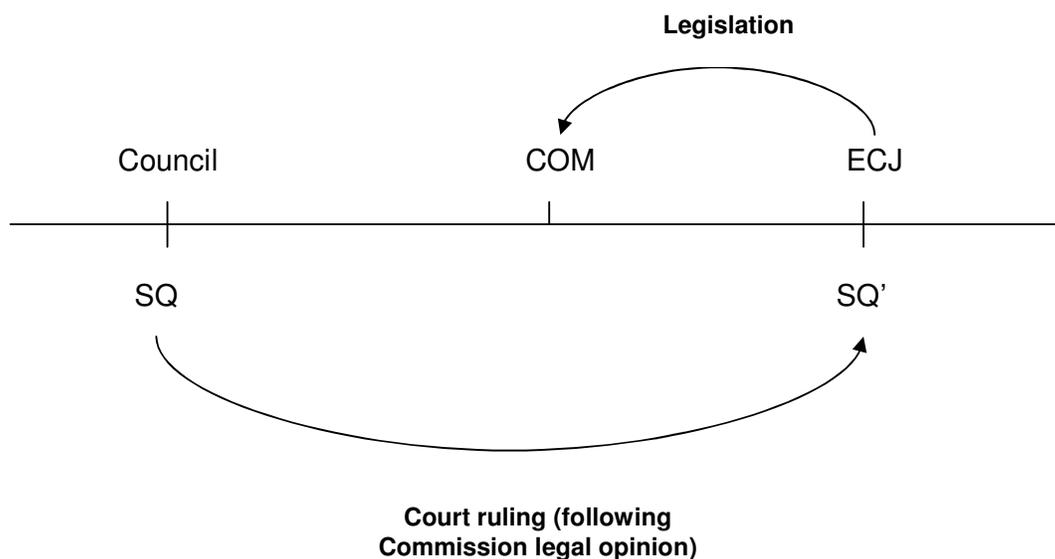
<sup>11</sup> Cf. Judgement of the Court in case C-356/89, 'Newton'.

<sup>12</sup> Cf. Opinion of the Advocate General in case C-356/89, 'Newton' para 24.

Less than a year after the judgement in ‘Newton’, the Council, seven years after the Commission’s proposal, adopted the proposed regulation (1247/92) mainly unchanged, merely emphasising the non-exportability of hybrid benefits.

Modelling this situation in a one-dimensional policy space, the situation can be depicted as follows.

**Figure 3: Changing the status quo through judicial proceedings and legislation**



The status quo (SQ) of regulation 1408/71 with regard to the matters covered by the coordination regime (social security benefits included, social assistance excluded) is challenged (both by private actors through preliminary references and the Commission through infringement procedures) when applied to ‘hybrid benefits’. The Council favours a narrow interpretation (the exclusion of hybrid benefits from coordination) whereas the Commission favours a broad interpretation (the inclusion of hybrid benefits in the coordination regime). A Commission proposal (COM) is not acted upon by the Council. The Commission engages in judicial proceedings and succeeds in moving the status quo in the desired direction (but beyond its own ideal point COM) to SQ’. The Council then acts on the Commission proposal and moves the status quo to the Commission’s ideal point (COM), which, to the Council, is preferable to SQ’.

The Commission thus employed judicial proceedings to alter the status quo in a point undesirable to the Council, only to later ‘reel it in’ by legislation. The Commission thus applies pressure on the Council position without merely resolving to threaten. The situation thus goes beyond the ‘lesser evil’ strategy employed by the Commission described by Schmidt (Schmidt 2000: 50).

While the Commission supported this solution in a series of ensuing court cases, it subsequently revealed a preference to interpret the rights of migrant workers wider than the status quo resulting from regulation 1247/92. This became apparent in its intervention in ‘Jauch’.<sup>13</sup> Its observation lodged in this case aimed at limiting member states’ leeway in classifying benefits as ‘hybrid’ and implicitly called into question the validity of the non-exportability of hybrid benefits set down in the recent regulation by highlighting the principle of non-discrimination. It upheld the view that the Austrian ‘care allowance’ in question should not automatically be classified as a hybrid benefit only because the Austrian government had listed it as such in the appropriate section of regulation 1408/71.<sup>14</sup> The Court followed this view against the interventions of Austria, Germany, the Netherlands and the United Kingdom.<sup>15</sup> According to its judgement, national governments cannot merely declare a benefit to be ‘special non-contributory’ and therefore exempt it from exportability, but the benefit must also accord to a number of conditions which the Court itself proceeded to define.

The Commission subsequently took up the judgement of the Court in ‘Jauch’ in a proposal for a regulation<sup>16</sup> amending the existing coordination scheme to take account of the criteria for interpreting what constitutes a ‘special non-contributory benefit’ laid down by the Court. It assessed the benefits listed as hybrid in regulation 1408/71<sup>17</sup> according to these criteria and proposed some changes.

The Council, however, was unable to agree on the Commission’s assessment of the benefits in question.<sup>18</sup> In particular, the governments of the United Kingdom, Sweden and Finland contested the deletion of some of their entries from the list of hybrid benefits and insisted on

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<sup>13</sup> Cf. case C-215/99, ‘Jauch’.

<sup>14</sup> Cf. Opinion of the Advocate General in case C-215/99, ‘Jauch’, para 42-50.

<sup>15</sup> The Dutch government in particular argued that “proper account must be taken of the authority of the Member States to organise their own systems of social security”, cf. Opinion of the Advocate General in case C-215/99, ‘Jauch’, para 36.

<sup>16</sup> Cf. COM(2003) 468 final.

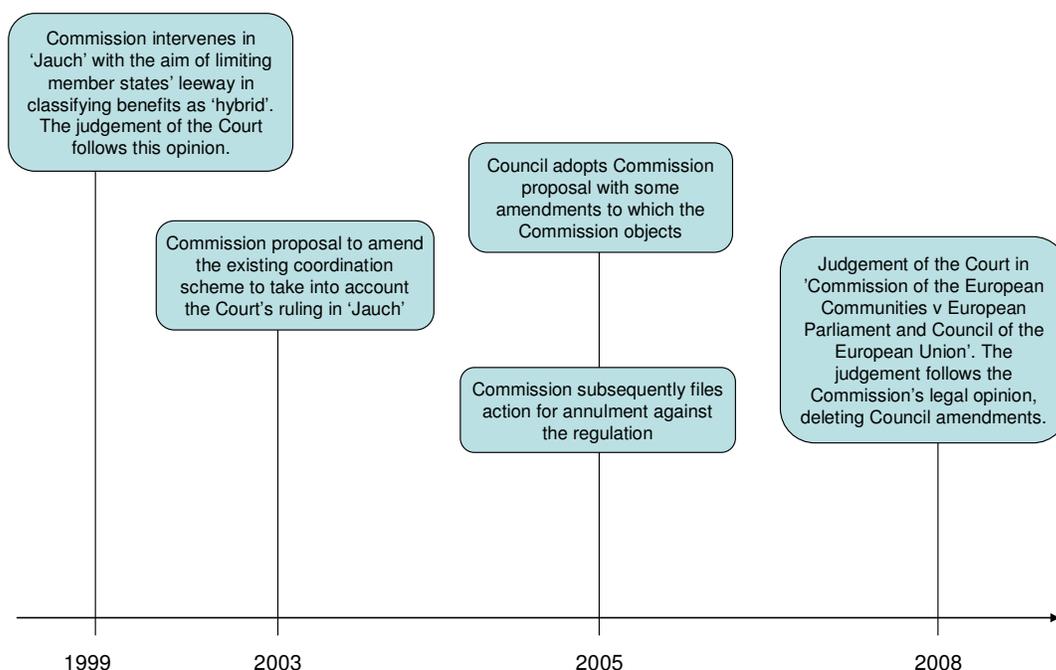
<sup>17</sup> The regulation since 1992 contains an Annex IIa which includes a list of benefits claimed by the national governments to be special non-contributory.

<sup>18</sup> Cf. COM(2004) 752 final: 3.

their retention. Subsequently, the Council and the European Parliament adopted the Commission proposal as regulation 647/2005, amending it suit the objections of said governments, while the Commission reserved the right to refer the matter to the Court of Justice and to present a new proposal, if necessary, to revise the list of entries based on the findings of the Court.<sup>19</sup>

Only weeks after its adoption, the Commission made use of this right and filed an action for annulment against the regulation on the grounds that the British, Swedish and Finnish government had declared benefits as hybrid that did not match the criteria laid down by the Court in 'Jauch'.<sup>20</sup> The Court once again followed the Commission's opinion against the interventions of the Parliament, the Council, the United Kingdom, Sweden and Finland and deleted the contested benefits from the list of 'special non-contributory benefits'.

**Figure 4: Timeline leading to regulation 647/2005**



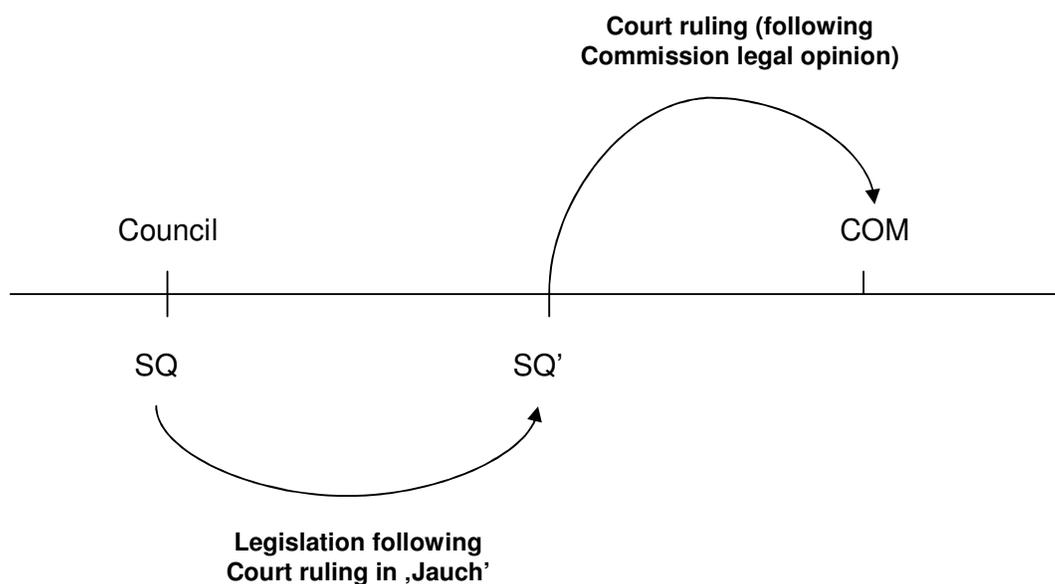
<sup>19</sup> Cf. COM(2004) 752 final: 4.

<sup>20</sup> Cf. case C- 299/05, 'Commission of the European Communities v European Parliament and Council of the European Union'.

Modelling this situation in a one-dimensional policy space, the situation can be depicted as follows (see Figure 5): The Commission challenges the status quo (SQ) established by Council regulation 1247/92 with regard to the member states' leeway in declaring benefits as 'hybrid'. After an initial success in 'Jauch', it proposes legislation to take into account the Court ruling. The Council adopts this proposal with some amendments (SQ'). The Commission subsequently challenges this legislation in Court and succeeds in getting the amendments to its proposal deleted, moving the status quo beyond the favoured Council position even after legislation (to COM).

The Commission thus uses judicial proceedings to achieve policy it had been unable to bring about through the legislative cycle. Rather than withdraw its proposal from the legislative process, it challenges the adopted legislation to move the status quo to its desired position – employing what I have called the 'legislate-then-litigate' strategy.

**Figure 5: Changing the status quo through legislation and judicial proceedings**



### **Conclusion**

The analysis has shown that the Commission indeed uses different strategies of influencing policy. It frequently combines the 'joint-decision mode' and the 'supranational hierarchical mode' of policy-making. The case study has further shown that the legal strategy employed by the Commission is not restricted to direct action (i.e. initiating infringement proceedings)

but influence can be exerted through preliminary reference procedures. In its observations, the Commission has frequently argued for a wide interpretation of the scope of the coordination scheme. The Court has followed this option regularly.

The findings indicate a close linkage between legislative and judicial proceedings. It is possible to identify a pattern in which the Commission proposes legislation and follows it up with litigation either before the actual adoption by the Council (and the Parliament) or after its adoption in the light of perceived deficits. It is important to notice that the Commission does not merely threaten litigation to speed up the process of legislation and move the outcome towards its own preferences (Schmidt 2000: 42-44), but actually does litigate and move the status quo in the desired direction regardless of the stage of legislation. Both strategies therefore appear mutually reinforcing, rather than alternative or subsidiary. Preliminary references play a major role in this regard. Given the steadily high caseload before the Court in this domain, the Commission does not have to induce judicial proceedings itself but can use those cases already brought before the Court by other actors to present its policy preferences (cast as legal opinion) to the Court.

The case study has shown no incidence of the Commission using judicial proceedings in their own right, with legislative proposals entirely absent (the 'litigate-only' strategy). While this study does not warrant a dismissal of this strategy, it is uncertain whether the theoretical possibility of this strategy is also an empirical fact. Judging by the results from this limited case study, I tentatively conclude that legislation may be regarded as the 'appropriate' way of policy making, with litigation as a tool to influence the direction of its outcome. Comparative studies are required to indicate whether this is a characteristic of the domain of social security or whether this pattern can be found in other policy areas as well.

Comparative research will also have to establish the exact condition under which the Commission is more likely to choose one strategy over the other or whether they are indeed complimentary in all policy fields. An analysis of Commission action in diverse policy fields should serve to establish whether there is a cost factor involved in strategy choice. Following rationalist assumptions, the Commission should display a greater preference for judicial proceedings where the cost of legislation is high (i.e. the difference in preferences between the Commission and the Council (or within the Council itself) is great and the number of veto players is large).

There is sufficient initial evidence to suggest that the Commission's influence on policy development is safeguarded by its central position in several different modes of policy-

making. Further research can thus contribute to a better understanding of the concrete interrelationship of these different modes.

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