Behind the Council Agenda: The Commission's Impact on Decisions

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Abstract

This paper contributes to the ongoing discussion about the scope for autonomous action of supranational organizations in the European Union, focussing on the European Commission. In the literature, the independence of the Commission is frequently questioned, while the relative autonomy of the European Court of Justice is less contentious. The Commission's power is largely related – and restricted – to its role as an agenda-setter. Particular emphasis is accorded to its agenda-setting powers as an avenue of influence. What has so far been seldom recognized is how the Commission can profit from its specific role in the supranational legal system. I present empirical evidence showing how the Commission can take advantage of the supremacy of European law, and force the Council to act. Thereby it manages to influence the course of European integration largely independently, benefitting from the greater autonomy of the European Court.

Zusammenfassung

Die Grenzen der Handlungsfähigkeit supranationaler Organisationen in der EU werden heftig debattiert. In der Literatur wird die Unabhängigkeit des Europäischen Gerichtshofs anders als die der Kommission kaum bezweifelt. Mit den Handlungsmöglichkeiten der Kommission beschäftigt sich dieser Beitrag. Sie werden in den meisten Analysen mit ihrem Vorschlagsrecht verbunden. Dagegen wird zu wenig beachtet, in welchem Maße die Kommission von den ihr im supranationalen Rechtssystem zugedachten Aufgaben profitieren kann. Anhand einiger Beispiele zeige ich, wie die Kommission ihre Rolle als Hüterin der Verträge dazu nutzen kann, den Ministerrat zum Handeln zu zwingen. Auf diese Weise vermag die Kommission die Europäische Integration weitgehend eigenständig zu beeinflussen. Dabei profitiert sie von der größeren Unabhängigkeit des Europäischen Gerichtshofs.

Contents

1 Introduction

The Commission is the central actor in the European polity because it prepares legislation and monitors its implementation. This supranational actor is not only of interest with view to discussions between neofunctionalism and intergovernmentalism. Beyond the debate of either-or distinctions characterizing the EU, institutional analyses have been focusing on the conditions under which governments lose 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 channels through which the Commission can exert supranational influence on European decisions have been precisely defined.

In this paper I argue that the role played by the Commission in the Council's decision-making has so far been only partially revealed. This is because studies usually treat the decision-making of the Council in isolation, ignoring the fact that it is embedded in a supranational legal context. 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), and seems reminiscent of regime conceptions of the EU. But the European institutional context may have significant implications on any particular problem at hand even without prior decisions of the Council. As a result, the governments in the Council are often not acting on the basis of a stable default condition so that the status quo is not an alternative to a common European decision.[1] Rather, they may only have the option of agreeing on a common European approach, or watching their national systems be slowly eroded by the piecemeal application of European law. The fact that the default condition can be manipulated by the

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1 Analyses assume a weak European policy, which was decided upon under the Luxemburg compromise, as the default condition (Garrett / Tsebelis 1996: 280). It is not seen that many policy fields, which were formerly in the national realm, have been subjected to Europeanization with the single-market programme without any action of the Council.

Commission has very far-reaching implications for analyses of the Council's decision making.[2]

I begin with a short review of how the Commission's role has been conceptualized in the literature. After discussing the different powers that the Commission has at its disposal, 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, pointing to the implications for analyses of decision-making in the EU. I close by considering the relevance of the identified mechanisms.

2 The Debated Autonomy of the Commission

The degree of the Commission's autonomy is widely debated. Before all else, proving an independent impact of supranational actors on the course of European integration is central for those authors interested in refuting intergovernmentalist explanations (Sandholtz 1996). In addition, institutionalist analyses have become more important, aiming not so much to determine whether the Commission may exert influence, but under which circumstances (Pollack 1996).

The Commission's ability to influence the course of European decisions by using its rights for agenda setting has received particular attention from the perspective of rational-choice institutionalism (Steunenberg 1994; Schneider 1995; Garrett/ Tsebelis 1996). But also more generally, its formal monopoly on the right of initiative to the Council is seen to be one of its major avenues for having impact on the course of European integration (Peters 1994: 21; Kerremans 1996: 225). The Council and (recently) the European Parliament may only request the Commission to draw up a legislative proposal, whereas the Commission prepares all drafts, making it a gatekeeper. In addition, the increased use of majority voting under the cooperation procedure in the Council has strengthened the Commission's influence as an agenda setter. Since the Council needs to act unanimously whenever it wants to alter a Commission proposal, these propositions are more

2 Of course, a deteriorating rather than stable status quo will also have consequences for the European Parliament. Since it favours more integration, the Parliament should support the Commission's use of Treaty rules to put pressure on 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. Therefore its behaviour is very case-specific, and I will not analyze it any further.

easily adopted than changed. In practice, this allows the Commission to pick among different winning coalitions the one proposal that is closest to its own preferences (Garrett / Tsebelis 1996: 285). Depending on the distribution of preferences in the Council, rational-choice institutionalism may delineate precisely the role the Commission can play under different decision-making procedures. Such analyses also include the role of the European Parliament under the more recent co-decision procedure (Schneider 1995; Garrett 1995a).

Next to formal agenda setting, the Commission is well-placed to profit from informal agenda setting (Pollack 1997: 449). Being the most centrally located actor in the European polity it can benefit from its informational advantages. Especially whenever member states face a high level of uncertainty with regard to particular issues, the Commission may exploit this situation, allowing it to launch policy programmes successfully. The single-market initiative is the most important example for this (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 their acceptance in the Council and in the European Parliament.

Some analyses take the scope of influence connected to agenda setting one step further (Eichener 1993). The Commission may gain even more impact because of the fact that European policy-making is very segmented along sector-specific lines. Thus, the Commission prepares its proposals in close interaction with member-state experts having an issue-specific interest to see certain policies come about. Because of the way the policy process is organized, these same national experts often decide on the proposals in the working groups of the Council. Even in the Council this bias in favour of sectoral policies is not broken. Thus, the Commission may take advantage of the sector-specific interests to further the Europeanization of policies, whereas the member-state officials and ministers realize their self-interest in sector-specific goals rather than general national interests to keep European policies at bay. In coalition with the Commission constraints faced in their national cabinets can be overcome.

Despite the significant potential apparent in these Commission powers, it is being debated whether member-state governments face a loss of control over the Commission, and thus over integration. Increasingly, the role of the Commission has been conceptualized as that of an agent to whom the member states as principals have delegated certain responsibilities, allowing them to realize advantages (Majone 1994, 1996; Moravcsik 1995; Pollack 1997). By delegating clearly delineated rights to an independent agent, principals may save transaction costs by sharing a central pool of information, facilitate the design of impartial policies, strengthen the commitment of member states to cooperation, and increase the credibility of policies vis-à-vis third parties by letting an independent agent over-

view implementation. From a rational-choice perspective, governments will only delegate rights to the extent to which the benefits of delegation outweigh the possible costs arising from "agency loss," given that the agent is bound to pursue self-interests that might diverge from the intention of the principals (Noll/ Weingast 1991: 238).

Empirically, it is difficult to prove member-state control or lack of control based on single cases (Schmidt 1996). Essentially, governments may have an interest to hide their responsibility behind the Commission's action. Because blame-avoidance is so attractive for them (Weaver 1986), it is hard to establish whether the Commission overstepped its competences. It is therefore much more useful to examine the Commission's ability to act across several cases, analyzing the extent to which the Commission's relative independence is contingent on different factors – most of all on governmental control (Pollack 1996). To give an example, Sandholtz (1996) has recently argued that the Commission's use of special competition law powers (its prerogative to issue Commission directives under Art. 90.3) in telecommunications policy demonstrates the significant extent of loss of governmental control. When comparing the telecommunications case to similar Commission plans for the liberalization of energy networks and postal services, however, I found that governmental control of the use of these Commission powers is all but absent, given that the Commission had to back down in these instances (Schmidt 1998).

In general, despite the amount of work being done, Commission rights other than those relating to agenda setting are rarely analyzed (Laffan 1997). The Commission enjoys significant powers as a guardian of the Treaty and under European competition law. While individual case studies have pointed to the significance of these rights (Bulmer 1994b; Young 1994), there have not been more systematic studies. With these rights the Commission can take advantage of the exceptional features of the supranational legal system, its supremacy and direct effect. While the Commission's work is generally seen under the focus of the preparation of directives and the control of their implementation, its ability to directly apply the Treaty's rules is overlooked. As will be seen, the Commission has specific rights to demand policy changes from the member states which the governments have no formal opportunity to veto. If member states fail to comply with the Commission's action, it is up to the Court of Justice to decide on the necessary scope of national adaptation to the supranational legal context.

Though the attempt to establish the precise conditions of the autonomy of supranational actors seems to be the most fruitful way forward for analyses of European integration, I cannot venture quite that far in the present paper. While I can only provide suggestions rather than precise guidelines as to the conditions under which the Commission competences I discuss may become relevant, the sys-

tematic evidence of how these little recognized rights may give the Commission leeway against the member states has important implications for explanations of Council decision-making.

3 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 supremacy of European law have loosened intergovernmental control. Neither the supranational features of European decision making comprising the Commission's role as agenda setter, nor the possibility of qualified-majority voting, nor the participation of the European Parliament, are considered to be as significant as the supranational character of the European Court, which is even recognized by intergovernmentalists (Moravcsik 1995).

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

These rights of the Commission, as I will show, can be used to complement its role as agenda setter, meaning that it has considerable influence on the Council's decision-making, which has gone almost unrecognized in the literature to date.

3.1 Beyond Agenda Setting: The Commission's Residual Powers

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 legal context, though this possibility of the Commission has appeared in several case studies (Bulmer 1994b; Cowhey 1990: 194; Montagnon 1990). The special powers the Commission may draw on essentially rely on the supremacy and direct effect of the Treaty's rules. Because of these characteristics, as I will show, explicit decision making of the Council is not always required before subsuming national policies under the Treaty.

First of all, the Commission acts as the *guardian of the Treaties*. Under Article 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 usually the recourse of private actors to European law either takes the form of complaints with the Commission under competition law, so that the Commission formally takes action, or of proceedings at domestic courts. National courts have been very prominent in furthering European law (Weiler 1994). Possible recourse to the European Court of Justice in preliminary references involves, 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 the famous Cassis de Dijon case has shown (Alter / Meunier-Aitsahalia 1994). National regulations may restrict trade only within narrow limits, and regulations of other member states aiming to control negative externalities have to be mutually recognized. Such market-making through the demise of national rules is called "negative integration". It complements and influences measures of positive integration agreed on in the Council, which establish common rules of market-shaping (Pinder 1968; Scharpf 1996b).

The relevance of the direct subsumption 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, prohibiting 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 on the Treaty and partly on Council regulations such as Regulation No. 17, which was agreed upon in 1962 for the application of Articles 85 and 86. The member-state governments only have limited formal opportunities to influence the way the Commission handles its competition law powers.

Thus, the governments only partake in the implementation of Articles 85 and 86 through advisory committees, giving the Commission the final decision power.

The governments are even less involved when their own activities are being scrutinized under European competition law. For the control of state aid the Commission only informs a committee of the member states twice yearly of its activities. In the 1960s the Council had refused 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 committee was finally instituted as a compromise in the early 1990s when the Italian presidency demanded that the Commission propose a Council regulation for the control of state aid which the Commission had declined (Lavdas / Mendrinou 1995: 180, 183).[3] 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 issue generally binding directives at the member states, in addition to directly targeted decisions. These directives do not have to be passed by the Council or the Parliament. Informally, as several directives planned under this provision have shown, the Commission consults quite closely with the affected governments (Schmidt 1998). Similarly, in other areas of competition policy, governments have multiple means to put significant pressure on "their" commissioners and the Commission as a whole when controversial measures arise, so that they may successfully prevent negative decisions (Ross 1995: 130–135).

In sum, the Commission may on the one hand assist in the realization of the Treaty and its market freedoms (the mobility of goods, services, and labor as well as the freedom of establishment[4]) through its general rights as a guardian of the Treaty. The market freedoms may be restricted only in exceptional cases.[5] On the other hand, it has considerable powers regarding the market structure of sectors. The Treaty addresses market concentration and the behaviour of firms as well 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 the parts of the national economies that are not predominantly structured by market principles. The fact that European competition law knows hardly any restrictions is crucial. This is very different from national com-

3 In mid-1997 the Commission made a proposal for a Council regulation for certain kinds of state aid.

4 The mobility of capital is a special case in this respect since the Treaty requires secondary legislation for its implementation. Therefore, the direct application of the Treaty has played no role in this area (Behrens 1992: 154).

5 For the free trade of goods Article 36 contains an exemption; comparable constraints exist for the other market freedoms. While constraints necessary to realize important national goals are generally recognized, this is granted under the caveat that the internal market is not adversely affected.

petition law which normally exempts certain areas, such as the classic utilities, and where it is taken for granted that parliament remains free to regulate certain areas of the economy. On the European level, member states are denied this freedom which would amount to a disturbance of the single market. Whereas national competition rules are one kind of secondary law, on the European level they have the status of primary law (Scharpf 1996a: 151). And even though European competition law only aims to outrule hindrances of the single market and does not bother with purely national concerns, the likelihood of such disturbances have been interpreted very broadly. Since a country's national restrictions almost always hamper a potential economic activity of other European nationals in addition to governing its own citizens, there are in fact few inherently national affairs.

Table 1 summarizes the different rights which the Commission may exercise. Ideally, the Commission may start to apply its powers in all areas not exempted by the Treaty's rules, interfering seriously with the national orders of member states. It is important to note that this does not presuppose that the Commission is ideologically pre-committed to a free market. Rather it is sufficient, next to being empirically plausible, to assume that the Commission has an institutionalized self-interest in furthering European integration as this allows it to consolidate and expand its competences as a corporate actor (Schneider / Werle 1990; Schimank 1992). Because the Treaty favors negative over positive integration (Scharpf 1996b), the Commission's action will reflect this bias. Moreover, negative integration may be pursued by the Commission not only because it seeks to accomplish the Treaty's goals, but also because it may be attractive as a basis from which to propose positive regulatory measures to the Council. Since member states are reluctant to see national regulations surmounted by a European free market, they have an incentive to agree to European-wide rules of market-shaping.

Precisely which policy areas are particularly prone to Commission action can hardly be determined in advance. For one thing, there has not been comprehensive empirical work on the relevance of negative integration. In addition, the interpretation of the Treaty and its market freedoms is still evolving (Behrens 1992), so that it is not possible to foretell the extent to which secondary law from the Council is needed and judicial policy making can substitute for it. Most of the examples I will give are related to competition policy and its special Commission powers.[6] In the course of the completion of the single market, these rights have

6 I will not include cases where judicial policy making replaces decisions of the Council in an outright way (see Pescatore 1983). Such an example is given by Stein (1986: 638): Following a Court ruling (Case 293/83) the Commission excluded the

Table 1 Different commission powers

<table>
<tr><th>Competence</th><th>Directed at</th><th colspan="2">Procedure</th></tr>
<tr><td>Infringement procedure (Art. 169), relating, for example to insufficient market freedoms</td><td>State actors</td><td colspan="2">Interaction between Commission and member state on the allegations, reference to the European Court of Justice</td></tr>
<tr><td>Control of cartels (Art. 85)</td><td>Private actors</td><td rowspan="3">Commission decisions amounting to:
Prohibiting the action, requiring alterations, and/or imposing fines.</td><td rowspan="4">Appeal to the European Court of Justice</td></tr>
<tr><td>Prohibition of abuse of market power (Art. 86)</td><td>Private actors</td></tr>
<tr><td>Control of subsidies (Art. 92–94)</td><td>State actors</td></tr>
<tr><td>Control of the granting of special rights (Art. 90)</td><td>State actors</td><td>Decision or directive prohibiting the action or requiring alterations</td></tr>
</table>

been increasingly applied to the previously monopolized utilities. Nevertheless, the Commission strategies I analyze are not confined to this exclusive area of utilities. While I cannot supply a comprehensive overview of all the cases in which the Commission could successfully or unsuccessfully act under the Treaty, I demonstrate that the Commission may also influence European policy making by drawing on other legal principles. Besides analyzing the mechanisms on which autonomous action of the Commission relies, I will discuss possible limits to these strategies later on in the paper.

3.2 Negotiating in the Shadow of Negative Integration

A striking example of how the Commission may benefit from the supranational legal context can be found in the adoption of the *merger regulation* in 1989. As Simon Bulmer (1994b) has shown convincingly, the Commission was successful in gaining 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 with cartels and the abuse of a dominant position, but provides no safeguards to prevent the forming of a dominant position, the Commission had sought the supranational competence for mergers for years. With the

right of residence of university students from a proposal for a directive on the freedom of movement, as this right had already been fully granted by the Court.

Philip Morris case, the resistance of the member-state governments could be broken. In this case, 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 actively highlighted the drawbacks and the uncertainty of the new situation, which coincided with the increased business activity in the course of completing the single market. Without Council regulation, 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 a poorly 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 the governments 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)

In the case of merger control, the Commission was easily able to build a proposal on the fait accompli of the Court. A similar case can be found in the liberalization of *road haulage* (Héritier 1997). In 1985, responding to a complaint by the European Parliament, the Court ruled that the Council of Ministers had violated the Treaty by failing to realize the freedom to provide services in the transport sector. For the member states the ruling "was an implicit threat that, if the Council did not redress the shortcomings in road transport quickly, the Court would directly apply the Treaty …, which could have meant the instantaneous liberalisation of the road haulage market" (Young 1994: 6). In the aftermath of the ruling, the Council could agree on the necessary measures despite a significant amount of opposition to the liberalization of road haulage.[7]

The Commission, however, does not have to remain relatively passive like this, which may be shown when looking at the *liberalization of air transport*. This was

7 According to Young (1994: 15) France, Germany, Italy, Spain, Portugal, and Greece opposed the liberalization of road haulage (48 votes), whereas the UK, Belgium, the Netherlands, Denmark, Ireland, and Luxembourg (28 votes) supported it.

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 airline deregulation in the United States in the late 1970s, the Commission 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 Articles 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 general relevance of European competition law to the airlines 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 enforcement of competition law through the Commission until the Council decided on the regime, the Commission inquired into the existing bilateral agreements between the airlines.[8] By fixing capacity in advance and sharing revenue, the airlines effectively hampered competition, thus infringing Article 85. Thirteen airlines were charged in 1986 and 1987, so that indirectly all member-state governments were concerned.[9] Should the airlines not conform to the demands of the Commission, which were also detailed in proposals for two regulations submitted simultaneously to the Council, Commission decisions would come into force, based on Article 89.2. The Commission had already agreed on these decisions, which it did not notify for the time being. The Commission backed this threat when three airlines (Alitalia, Lufthansa, and Olympic Airways) refused to cooperate with it. Again the Commission issued decisions but let them lapse once the airlines cooperated. In December of 1987, the Council finally reached an agreement on the Commission's proposals (the "first package").[10] Thus the Commission successfully got the Council moving by threatening decisions based on Arti-

8 In 1985 the Commission had already opened Article 169 proceedings against seven member states who had not supported the Commission's inquiries into the bilateral agreements between airlines, arguing that competition law did not apply to air transport. Subsequent, the airlines cooperated (15th Competition report, 1986, par. 32).

9 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 Article 89.1 (16th Competition Report, 1987, par. 36). In 1987 the other airlines (Iberia, Luxair, TAP) were also included in the proceedings (16th Competition Report, 1987, par. 46).

10 17th Report on Competition Policy, 1988, par. 46.

cle 89 which would have been most costly for the member states' airlines. "If the Council of Ministers wished to control the speed and intensity of competition it was in their power to do so by introducing appropriate deregulatory measures" (Button 1992: 155). Building on this first agreement, the second and third packages of air-transport liberalization subsequently led to full competition by April 1997.

Competition law has continued to play an important role in the air transport sector. 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 Article 90.3 from 1992 onwards. Ireland, Greece and Spain subsequently ended their monopolies. With these actions 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. Several examples of how the Commission may build on the case-law of the Court can be drawn from this case. An important starting point was the ruling in the case *British Telecom* of 1985, in which the Court established that this traditional utility was not exempted by the Treaty but should be regarded as a normal economic sector (Sauter 1995). On this basis, and with the help of complaints from 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 situation 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 digital network 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 their *terminal equipment* monopolies, the Commission prompted Germany, Belgium, Italy, the Netherlands, and Denmark 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 facilitated the adoption not of a Council directive 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). It is

only important to note that decision-making of the Council could have been prepared in a similar way.

The break-up of the equipment monopolies is not the only example to be found in telecommunications. Another instance of systematically pursuing single cases is found in the liberalization of *mobile telephony*. Before issuing a directive (again based on Article 90.3) requiring all member states to license at least two mobile-telephone operators from 1996 onwards, 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. Originally, only the new operator in these countries had been required to pay for its license.

Finally, 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 have entailed 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"). After the agreement between the French and German governments was reached, the Commission liberalized the use of alternative networks throughout the EU under Article 90.3 from mid-1996 onwards. When approving alliances between other network operators, the Commission similarly imposed the liberalization of alternative networks as a precondition so that member states like Spain which had been granted an extension were put under pressure.

The example of Atlas, in particular, elucidates how misleading it may be to readily conceive the actions of the Commission as being in opposition to the governments. The French and German postal ministers had encouraged the liberalization of alternative networks at a Council meeting in 1993, although Germany lacked a sufficient domestic majority for such a step. Other governments, backed by most national telecommunications operators, had opposed this measure. Linking the Atlas approval with a partial network liberalization set an incentive for the telecommunications operators to drop their resistance. Since all operators were actively searching 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 of measures of negative integration helping to achieve a common policy. The anticipated opposition of member states is broken by enforcing competition law. 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, and country-specific differences make direct comparisons of the Commission's action difficult. As a result, the Commission hardly risks the building-up of a coalition among the concerned member states aimed at 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 a common approach to liberalization is being imposed, incentives are being set to devise a common re-regulatory framework. The single market leaves little scope for purely national restrictions, and especially those member states reluctant to liberalize are eager to see an appropriate European regulatory framework put in place. Liberalization serves as a catalyst for the adoption in the Council of *measures of positive integration* such as the directives for open network provision (ONP) in telecommunications. The fact that increased negative integration sets incentives to agree on positive integration is an important factor within the Commission especially when it is rallying support for contentious measures. Even directorates opposed to liberalization may thereby see their own goals indirectly furthered.

Other utilities monopolies have been tackled in a similar way. Shortly after starting to define a European policy for *network-based energy*, the Commission, in 1991, initiated infringement procedures against the existing import and export monopolies for electricity and gas in ten member states. At the same time an attempt failed to liberalize network-based energy via Article 90.3 directives in the same way the Commission had done in telecommunications. Also the infringement proceedings progressed very slowly, indicating that member states' had considerable influence on the Commission regarding highly contentious measures. It was not until 1994 that the cases where handed to the European Court of Justice (ECJ), and at that time their number had dropped to five (Spain, France, Italy, Ireland, the Netherlands). 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. They were essentially the first application of primary law to these monopolies, with possibly many more to follow. With the help of these cases, France decided 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, rendered this strategy useless. 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 could finally be reached, based on the modified Commission proposal and the French single buyer, which in future shall coexist. It is important to note that the compromise could be achieved before the Court ruling. Thus, the governments managed to evade impositions by the Court that would be difficult to change later, trusting the fact that the Court would be most unlikely to define requirements conflicting with a recent, complicated Council compromise.

It is doubtful that *postal monopolies* 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. The Commission issued decisions under Article 90.3 against Spain and the Netherlands because their monopolies persisted (Kerf 1993: 100). Though the Commission had made these very similar preparations for postal policy as it had for telecommunications policy, the subsequent agreement on a European postal policy was most protracted. Just as had happened in the case of electricity, a plan for an Article 90 directive had to be given up in the 1990s. And it was not until the end of 1996 that a common position could be agreed in the Council on relatively modest steps toward liberalization. Until then, the Commission had also kept a very low profile regarding single cases, even though private actors had filed complaints about violations of competition law.

Thus, postal policy also shows the contingencies of the Commission's success in using its residual rights. The Commission's action in this sector was very constrained by the political opposition of several governments to liberalization and the fact that increased pressures for rationalization would lead to significant job losses in this stagnant sector. But as in the case of 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 document detailing the implications of European competition law for postal services, leading to a disparate breaking up of monopolies on a case-by-case basis. In order to prevent this, they preferred a common directive.

3.3 Changing the Default Condition

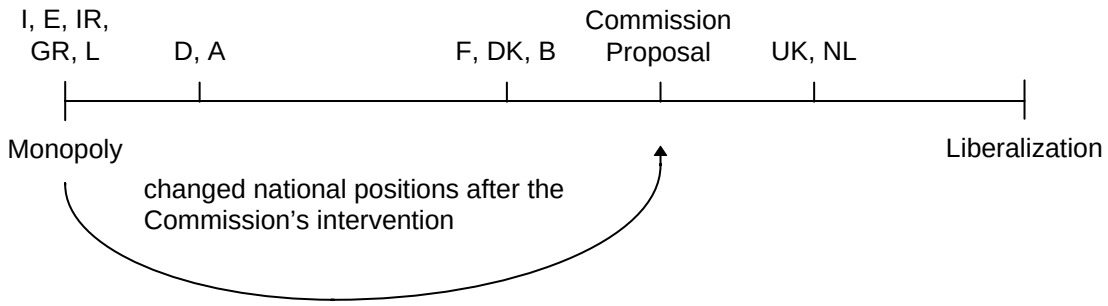
All the examples presented share a similarity. The application of the Treaty's rules, either directly by the Commission or by way of the Court, changes the status quo position of the member states involved in a particular case. Whereas a Commission proposal to the Council was once rejected as being unfavourable compared to the status quo, an agreement of the Council is now being sought. In view of the deteriorating default condition, a joint European policy becomes more attractive.

Next to this common background of a changed default condition, the cases discussed can be distinguished into *two subgroups*. In the first set of cases, the Commission employs a divide-and-conquer strategy. In the second group, the implications of European law serve as a threat, making the adoption of Council measures preferable.

In the *first type* of strategy, the Commission succeeds in triggering reforms in some member states by initiating examinations and threatening to make decisions. This allows, in a second step, to reach a qualified majority in the Council on a European-wide reform. Having already had to initiate national reforms, the member states involved in a particular conflict no longer have any reason to object to a Community measure. Rather, they might have a special interest in bringing such a result about. If the Commission failed to examine the national situations of member states evenly, a Community measure will assure that the member states that were not pressurized by the Commission in the same way also have to initiate reforms. Next to general interests in the equal treatment of all member states, there may be interests in specific reciprocity if the member states which have reformed are disadvantaged, for instance in terms of market access, over member states with intact monopolies.

The liberalization of ground handling is a particularly good example for the *divide-and-conquer* strategy. In this case, seven countries (Spain, Ireland, Greece, Italy, Luxembourg, Germany, Austria) were opposed to liberalization before the Commission started its investigations. This amounted to 41 votes where 26 votes were needed for a blocking minority in the Council. By initiating changes in Greece, Ireland, Spain, and Italy, the Commission broke down the blocking coalition and the directive could be passed against Germany and Austria.
Other examples follow the same logic: the examination of terminal equipment monopolies and mobile telephony monopolies found in telecommunications, and the early intervention against monopolies for courier services in posts. However, this latter case was not reinforced by a directive, possibly because the European-wide liberalization had already been achieved through the Commission's inter-

Figure 1 Divide and conquer: The example of ground handling

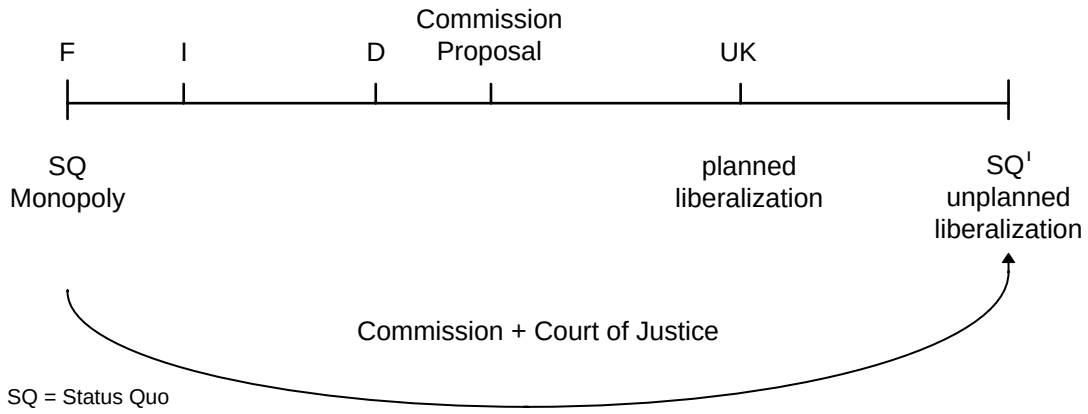


ventions. In telecommunications, the cases were followed by a Commission directive instead of a Council directive (using Article 90.3), but this does not alter the fact that it was the divide-and-conquer strategy that allowed the Commission to minimize opposition.

In the examples representing the *second type* of strategy, Council agreement is precipitated by the fact that member-state governments want to avoid a possible worst-case scenario. Here, the Commission threatens to impose high costs on the member states if they do not adopt its proposals in the Council. These costs often consist of a loss of planning capacity due to an uncertain legal situation. This was feared in the case of the liberalization of electricity, posts, and road haulage as well as in the case of the lack of merger regulations. In addition, in the liberalization of electricity and posts member states wanted to avoid a situation where the opening of monopolies would have been shaped by judgements of the Court. But *"preventing worse"* may also refer to direct financial losses: the impending fines the member states were able to avoid by adopting the first package for air transport liberalization are an example. Another possibility is that the Commission achieves agreement by imposing opportunity costs in related areas. Linking the approval of the Atlas cooperation to the liberalization of alternative networks is an example for this, which had an immediate impact on other member states eager to see their national operator participate in international ventures.[11] The Commission's broad powers in the administration of European law give it ample scope to design prerequisites for the approval of mergers or state aids, or to threaten inquiries into established national practices if a government maintains its opposition to proposed liberalization measures. However, since 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.

11 Again the common measure was passed as a Commission directive.

Figure 2 "Preventing worse": The example of electricity



The "preventing worse" strategy may be illustrated on the basis of the electricity case. Member states had differing interests, situated between the maintenance of the monopolies (which was the status quo and was preferred by France) and a substantial, planned liberalization (which was favored by the UK). It is not necessary here to note the position of all member states. What is worth noting is that the electricity case is one of de facto unanimous decision-making, given that France's position as the largest exporter of electricity is too central to draw up an agreement against it. By applying the Treaty's rules directly to the electricity monopolies, the Commission with the help of the Court, could threaten an unplanned liberalization. What is important is that this new status quo was much more distanced from (and therefore less in line with) the outcomes preferred by the member states than the Commission's proposal for a directive. Faced with this new default condition of action, governments agreed on the directive.

The "preventing worse" strategy relies heavily on the 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. 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. 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 for the Council of controlling the future shape of policy are even stronger when we take into account the disadvantages that ensue once different legal cases encroach on established national orders. Since 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 litigation, 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.

Both "divide-and-conquer" and "preventing worse" are closely related. They may be employed separately, but they may also coincide. This can be demonstrated again by using the electricity case. Of the ten member states originally involved in the infringement proceedings, some like Denmark and Ireland initiated the required domestic changes. Depending on whether their domestic situation was already compatible with the proposed directive after this move, for both member states the procedures may have triggered an interest in a European reform through the adoption of the directive.

The two strategies complement the often analyzed right of formal agenda setting. In part, they are even necessary to fully understand the formal agenda-setting powers. Thus, it is only when we consider the Commission's additional rights that its option to withdraw proposals from the Council can be viewed as a credible threat. As the Commission may often be able to use single cases to push European liberalization of a sector further than could result from the Council, withdrawing its proposals becomes a viable alternative for the Commission. In contrast, when considering Council decision-making in isolation, scholars often neglect this possibility (Garrett 1995a; Garrett / Tsebelis 1996). As it is assumed that the Commission's agenda-setting right is its major means of furthering integration, and that its proposals will support this aim, it makes no sense for the Commission to threaten a possible withdrawal.

These two strategies give the Commission a very important lever against the member states for which it is primarily dependent on the European Court of Justice supporting its legal interpretations. I will now discuss the potential relevance and limits of influencing the Council's decision-making using these strategies.

4 Limits to Action

"Divide-and-conquer" and "preventing worse" are powerful mechanisms. But how relevant are they? Do they only apply to more or less marginal areas and exhaust themselves in the examples presented? Can they also account for moves toward positive integration, and not only for market-making? Moreover, to what extent is their application contingent on different factors, such as sector characteristics and, more importantly, on the support of member-state governments? Is it possible for governments to keep these mechanisms at bay by controlling their agent Commission?

Sector-specific characteristics, first of all, may have an important impact on the Commission's use of its powers. Thus, telecommunications with its sectoral growth and very similar organization at the national level offered extremely favorable conditions for the Commission's use of its powers, with many large users and service providers backing such a strategy. In contrast, the heterogeneous organization of electricity systems at the national level as well as the rather stagnant development of this sector and of postal services made it much more difficult for the Commission to design and to garner support for its plans among private and governmental actors (Schmidt 1996).

Member-state governments have renounced formal control of the Commission's application of competition law. At most, they participate in advisory committees. Governments and the Commission are put more clearly in an adversarial position when they are involved in infringement proceedings, the Court of Justice decides on eventually. Informally, however, governments may have an important influence on the Commission, as their national Commissioners are known to listen closely to the "country they know best."[12] Internally, the Commission decides by majority rule, so that whenever measures are contentious with a sufficient number of member states, Commission action can be avoided at least for the time being. Nevertheless, in the example of courier services and terminal equipment monopolies, several member states were involved. As cases generally build on complaints from private actors, governments are hardly informed about the examinations by the Directorate General of Competition (DG IV). In addition, member states know little about their respective situations, and national-specific differences hardly allow them to compare the Commission's interventions. This makes it quite difficult for the governments to oppose the Commission in a similar way the Council can reject a proposal.

12 Interview with Commission official, 17 January 1995.

Sometimes the Commission may pursue its plans even though governments have mounted their opposition, as the energy cases show. While it made concessions in the speed with which it conducted the infringement proceedings, the Commission did not back down entirely.[13] After it had already given in when it chose not to use its stronger instrument of an Art. 90 directive, the Commission's overall credibility as a guardian of the Treaty and an administrator of competition law would have suffered had it succumbed again to pressure. In less visible cases involving only one member state, Commission action may be successfully avoided, as it was in the *Ladbroke* case. The British company Ladbroke had filed several complaints about the French horse-betting monopoly with the Commission starting in 1989, and called in addition upon the Court of First Instance to force the Commission into action. However, French interventions at the Directorate General for Competition (DG IV) apparently prevented any Commission measures. With the strong French opposition, and the probability of other governments joining in (given the variety of member-state traditions in horse betting and lotteries), this sector was seemingly not worthwhile for the Commission to tackle. This example also shows that while complaints from private actors help the Commission to apply competition law, such complaints are not sufficient to assure Commission action.

Even if member-state governments are successful in controlling the Commission in such a way, it may be only a relative success. After all, even without the Commission acting, the feared implications may arise should the Court of Justice decide on a comparable case. Among the examples given above, the merger regulation and the liberalization of road haulage were cases originating with the Court, which raised the costs of uncertainty in such a way that governments preferred a Council directive. Here the Commission merely had to time its proposal to the Council appropriately, in addition to raising the awareness of all the actors involved as to the consequences of the new status quo. Its well recognized rights for formal and informal agenda setting could be put to good use under these circumstances.

Thus, the Commission can profit directly from the Court's greater autonomy. The difficulty the member-state governments have when they try to influence the Court's rulings has been widely debated (Burley / Mattli 1993; Garrett 1995b). Partly it is argued that the lack of governmental intervention with the Court reflects the fact that the Court closely follows the member states' wishes, while others emphasize the Western tradition of an independent judiciary. In a recent arti-

13 However, several member states could either convince the Commission in the course of the examinations that they did not have the alleged monopolies, or they changed their domestic rules to conform with the Commission's requests (in this respect, the infringement proceedings had a "divide-and-conquer" effect).

cle, Karen Alter (1997) gives a convincing three-tiered explanation for the Court's independence, next to examples for governmental criticisms of judgements. Thus, the Court has a longer time horizon than governmental actors, allowing it to slowly build up new interpretations and precedents over several rulings. The support of lower national courts of the ECJ implies that member states cannot simply disobey unwanted rulings, since European law is being enforced alongside national law. Finally and most importantly in this context, Court rulings can hardly be changed, in particular if the Court has been interpreting Treaty principles, as happened in my examples. While misled interpretations of secondary law can be countered with a new directive, governments may respond to interpretations of the Treaty only through changes of the Treaty. In addition to the procedural difficulties of Treaty negotiations that only take place periodically, governments face a "joint-decision trap" (Scharpf 1988). As long as the Court's venture favors at least one government, it is unlikely that the unanimity required to return to the former status quo will be reached.[14] Thus, the interest of some governments in the liberalization of road haulage, air transport, posts, telecommunications, and electricity made it impossible to prevent further pressure for liberalization through a Treaty revision.

But governments face the difficulties of the joint-decision trap only when they aim to avoid any impact of the supranational legal system. It is much easier for them to co-determine the Europeanization of a previously nationally shaped sector. This is due to the fact that the Court is most likely to take secondary legislation passed by the Council into account when interpreting the Treaty for areas traditionally situated in the national realm. By agreeing on directives or regulations in a timely fashion, the Council can ensure that an interpretation of the Court will not deviate from the political consensus. This made it particularly attractive for the governments to find a compromise on the directive in the electricity case, thereby diminishing the danger of unwanted obligations arising from the pending judgement of the Court.

The examples I have given all relate to the introduction of competition in previously monopolized areas. Can the Commission, therefore, only influence the Council in the described way when drawing on its special competition law powers? And is it only negative integration that can be furthered? European law draws a distinction between the different market freedoms, which prohibit the discrimination of cross-border market transactions, and the competition rules,

14 Peters' (1997) recent critique of the use of the joint-decision trap in European integration studies fails to notice this point. Because of the trap, advances made by judicial politics can hardly be repealed by the governments. Peters' argument that the deepening integration is showing the marginal importance of joint-decision traps is a step in the wrong direction.

which safeguard the competitive order of markets. While both sets of rules are complementary, referring either to trade or to competition, they may partly serve as substitutes. With the famous Cassis formula for the freedom of goods, the Court replaced the prohibition of discriminating against imported goods with the prohibition of restricting trade. Whereas before, restrictions were allowed to the extent that domestic actors faced the same constraints, now imports had to be accepted even if this meant that domestic actors were being discriminated against. Restrictions to trade in the internal market are only justified to the extent that they are in the general interest, and no alternative means are feasible (Behrens 1992: 149). This interpretation was first developed for goods (Art. 36) and was subsequently extended to services, the mobility of labor and the right of establishment. Therefore, whenever national monopolies prevail it may be possible to realize liberalization either by applying competition law, or by allowing foreigners to offer their services. As a result, the Commission could start infringement proceedings based on the market freedoms to support the opening of monopolies instead of drawing on its competition law powers.

Among the cases presented, the infringement proceedings against energy monopolies serve again as an example. While the competition law powers could have been used, the Commission based its infringement proceedings on the necessary abolition of import and export monopolies to assure the freedom of goods. The liberalization of *insurance services* may serve as another example here (Basedow 1991: 161). While this highly regulated sector led the Commission to a few examinations based on competition law in the beginning of the eighties (Greaves 1992: 91–96), the adoption of two directives (88/357/EEC and 90/619/EEC) in the Council was furthered by a ruling of the Court (Case 205/84) which determined that the freedom of services could be applied to this sector (Greaves 1992: 47f). Before, Germany in particular had required providers to be established in their territory when providing services.

Thus, the Commission may alternatively draw on Treaty rules other than competition law to set incentives for Council decision-making. As the Treaty's strength lies in market-making, the pursuit of market freedoms will have particular relevance. The scope remaining for legitimate national market intervention in these cases relies on the Court's interpretation of the market freedoms. Can historically grown orders be suddenly overtaken by demanding negative integration under European law? Article 5 requires that the member states neither install nor keep any rules conflicting with the Treaty. However, as the interpretation of the Treaty only slowly develops (Behrens 1992), the requirements for national governance forms are often 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 its actions with the ar-

gument that no common policy had been agreed upon so far, making it legitimate to hold onto its traditional national system of governance. However, if a previous Council agreement on a common policy was generally a precondition for the application of the Treaty's rules, there would hardly be any scope for using the Treaty to put pressure on the Council. The Commission's pursuit of negative integration is thus subject to a difficult balancing act: changes that are too far-reaching cannot be requested at once, but incremental steps may be taken.

The precise scope of the legal exemptions from the market freedoms is part of such an evolutionary interpretation. Principally, the market freedoms may be restricted if it is in the common interest, and if the measures are proportionate and non-discriminatory. The precise extent of such a legitimate confinement is difficult to predict, however. In the aforementioned insurance case, for instance, next to emphasizing the freedom of services, the Court recognized the need for regulation in a way that restricted the Commission's leeway more than had been expected (Pool 1990: 45).

A particularly striking example for an interpretation of the market freedoms in a way that maximizes the scope for national jurisdiction can be found in the case of *posted workers* (Eichhorst 1997). Posted workers have become a problem for the construction industry of high-wage member states such as France and Germany. Exploiting the wage-rate differential between the member states, EU nationals employed and posted by contractors from low-wage countries outcompete national construction workers on domestic construction sites. As they are able to "import" their less demanding labor law in terms of minimum wages, they add to already severe unemployment rates. However, it is possible for the member states involved to impose their national minimum wage or sector-specific wage on all EU nationals, thus averting the pressure of direct competition with lower paid workers from other member states. In cases relating to the freedom to provide services by posting workers, the Court of Justice, rather than emphasizing the freedom of workers to provide their services throughout the EU, and be paid according to the rates of the country of origin, has emphasized the protection of workers and the general interest in the national system of wages. Thus, an interpretation corresponding to the Cassis formula for the trade in goods was not followed.

As a result, member states can protect their high-wage regimes against the direct competition of low-paid EU-nationals. Given that the legal ability to maintain high wages does not alter the de facto difficulty to withstand increasing competitive pressures, this is only a relative success. If Germany has high construction costs, this is a disadvantage when competing against other member states for the establishment of firms. Nevertheless, the interpretation of the Court of Justice is an important barrier to negative integration. Not all sectors are subject to global

competitive pressures to the same extent. Since globalization seriously restricts the autonomy of nation states to determine their policies independently, it is important to draw distinctions among sectors as to their relative dependence on global markets (Scharpf 1997). The construction industry – dealing in immobile real estate – could be relatively protected from global market pressures. It is therefore becoming very important for European law not to raise these competitive pressures artificially, and not to subject sectors that are still relatively sheltered to a legally imposed competition.

In the last few years the Court has generally started to allow more scope for national policies, in particular in its case law relating to utilities. In its very recent ruling on the import and export monopolies for gas and electricity of October 23, 1997, the Court thus sided with the member states against the Commission. However, this does not mean that these monopolies can be maintained under the Treaty, so that the member states remain under pressure, even though it is moderated.

European law and judicial politics may not only allow remnants of legitimate national regulation to persist, they may also provide incentives for positive integration. Particularly the case law to Article 119 of the Treaty, mandating the equal pay for women and men, has demonstrated that if positive rights are laid down in the Treaty, it is possible to facilitate positive integration (Pierson 1996: 150f). On the one hand, this effect has been noticeable in certain member states. In the UK, for instance, domestic groups have exercised their right to take recourse to European law to improve the situation of women. Thus, in the 1990s after a ruling of the Court of Justice on this matter (*Marshall II*), the average award to compensate women in sex discrimination cases in the UK rose from £ 2,940 to £ 12,172 (Alter / Vargas 1997: 16).

On the other hand, there has been some impact on the overall European situation and on the Council's decision-making. The Court has steadily expanded its interpretation of Article 119 in order to enforce not only a formal concept, but also a substantive one of equality (Fenwick / Hervey 1995: 448). For instance, the Court has ruled in several cases that occupational pensions constitute pay. The Court's influence is well demonstrated by the famous Barber protocol added to the Maastricht Treaty that restricted the retrospective validity of the Barber judgement (Garrett et al. 1997: 19–23). While it is not possible to prove whether the Commission has used Article 119 for a "preventing worse" or a "divide-and-conquer" strategy within the scope of this paper, it is clear that case law had an impact on the Council. To give an example, in the *Kowalska* ruling the Court established that certain provisions the Commission had proposed for legislation on part-time workers were already following out of Article 119 (More 1991: 63f).

In principle, rules such as Article 119 could lead to a situation where substantive rights were improved throughout the Community through judicial politics and pressure on the Council. However, the effect of Article 119 should not be overestimated (Whiteford 1995). "Although the Court may occasionally favour substantive equality, … it will do so only where the impact on the market will be minimal. In view of this observation, the assumption that EC law is particularly beneficial to women should be viewed with caution" (Fenwick/Hervey 1995: 469). Given that Article 119 is an exceptional provision, an incentive to harmonize social policy will mostly arise from the different market freedoms. As these may undermine the social security systems of the richer member states, pressures are most likely to lead either to a unilateral lowering of standards in the countries concerned, or to a harmonization on a low common denominator among member states representing different levels of development (Streeck 1995: 415–417). Thus, the freedom of services together with the free movement of labor can be seen as having 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 amount of litigation has had implications for national systems of social security. Benefits can hardly be restricted to member-state nationals, and citizens may be able to consume the services of other member states, just as the consumption of national benefits can no longer be linked solely to residence within the country. 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 sum, member-state control of the Commission poses a relative limit to its actions. While governmental pressure can curb the Commission's plans significantly, it is only in very rare cases that the application of the Treaty may be prevented altogether. As long as some private actors have a strong interest in realizing the Treaty's mandate and seek the assistance of the Court, which in turn acts under much more limited direction of the member states, judicial policy-making to the same effect can hardly be prevented. All then depends on the Court of Justice, and whether it follows a line of reasoning that favors the single market onesidedly, or whether it accords more autonomy to member states, as it has recently been seen to be doing. Nevertheless, the impact of the Commisson's action and of the supremacy of the Treaty affects the realization of the market freedoms most strongly. This reflects the bias of the Treaty towards negative integration. Only if substantive rights have been laid down, for which Article 119 seems to be the

most notable example, can recourse to primary law facilitate steps toward positive integration. Beyond this, positive integration can only be furthered indirectly and in an ambiguous way. As national systems of governance are being undermined through the application of the market freedoms, incentives are laid to reestablish regulation on the European level. Given the very different state of development among member states, regulation on a high level is unlikely to be achieved (Scharpf 1996b).

5 Conclusion

In this paper I have shown that the Commission may use its rights as a guardian of the Treaty and as an administrator of European competition law to influence Council negotiations beyond its agenda-setting powers. By being able to alter the status quo position of the member states *unilaterally*, the Commission can improve the chances of getting its proposals accepted in the Council. I have singled out two mechanisms the Commission has at its disposal: In the *divide-and-conquer* strategy, the Commission singles out some member states who are pressured into changing their domestic situation. By isolating member states, the Commission minimizes their means for opposition. Since governments have no incentive to block community-wide measures once they have enacted domestic changes, the Commission can break up blocking coalitions in the Council in this way. Alternatively, the Commission may threaten legal uncertainty and fragmentation ensuing from the case-specific transformation of the status quo through Court rulings. This is the worst-possible option for the established stakeholders in a sector. In order to *"prevent worse"*, the previously rejected common policy proposal becomes a second-best solution for the governments.

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 cited 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 options available to the Commission analyzed throughout the paper also have repercussions for 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. But the Commission's possible manipulation of the default condition of the member states is not at all insignificant for the Council's operation and can be at least as important an avenue of influence as the Commission's agenda-setting rights. The likelihood of governments accepting a Commission proposal clearly depends on the value of existing alternatives, among which the default condition is particularly significant. 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 at least as distorting as the recently criticized 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 Commission's ability to influence the Council beyond setting its agenda finally sheds light on the conceptualization of the Commission's autonomy. The Commission is generally seen to be acting within the boundaries set by its principals, the member states (Pollack 1996; 1997). The Court, in contrast, may have greater independence, since a Treaty revision – the ultimate sanction – is hard to administer (Alter 1997; Garrett et al. 1997). What has been overlooked so far is that the Commission may benefit from the ECJ's greater capacity for action. By credibly threatening judicial policy-making from the Court, the Commission may compel the Council to take action.

References

Allen, David, 1996: Competition Policy: Policing the Single Market. In: Helen Wallace / William Wallace (eds.), *Policy-Making in the European Union.* Oxford: Oxford University Press, 157–183.

Alter, Karen J., 1997: Who Are the "Masters of the Treaty"? European Governments and the European Court of Justice. Manuscript, forthcoming in: *International Organization*.

Alter, Karen J. / Sophie Meunier-Aitsahalia, 1994: Judicial Politics in the European Community. European Integration and the Pathbreaking Cassis de Dijon Decision. In: *Comparative Political Studies* 26(4), 535–561.

Alter, Karen J. / Jeanette Vargas, 1997: Shifting the Domestic Balance of Power in Europe: European Law and UK Gender Equality Policy. Paper presented at the 93rd American Political Science Association Conference, Washington, DC, August 28–31, 1997.

Argyris, N., 1989: The EEC Rules of Competition and the Air Transport Sector. In: *Common Market Law Review* 26(5), 3–32.

Basedow, Jürgen, 1991: Deregulierungspolitik und Deregulierungspflichten – Vom Zwang zur Marktöffnung in der EG. In: *Staatswissenschaften und Staatspraxis* 2, 151–169.

Behrens, Peter, 1992: Die Konvergenz der wirtschaftlichen Freiheiten im europäischen Gemeinschaftsrecht. In: *Europarecht* 2, 145–162.

Bulmer, Simon J., 1994a: The Governance of the European Union: A New Institutionalist Approach. In: *Journal of Public Policy* 13(4), 351–380

Bulmer, Simon, 1994b: Institutions and Policy Change in the European Communities: The Case of Merger Control. In: *Public Administration* 72(3), 423–444.

Burley, Anne-Marie / Walter Mattli, 1993: Europe Before the Court: A Political Theory of Legal Integration. In: *International Organization* 47, 41–76.

Button, Kenneth, 1992: The Liberalization of Transport Services. In: Dennis Swann (ed.), *The Single European Market and Beyond*. London: Routledge, 146–161.

Cowhey, Peter F., 1990: Telecommunications. In: Gary Clyde Hufbauer (ed.), *Europe 1992. An American Perspective*. Washington, DC: The Brookings Institution, 159–224.

Cullen, Peter / George N. Yannopoulos, 1989: The Redistribution of Regulatory Powers Between Governments and International Organisations: The Case of European Airline Deregulation. In: *European Journal of Political Research* 17, 155–168.

Dussart-Lefret, Corinne / Christine Federlin, 1994: Ground Handling Services and EC Competition Rules. In: *Air & Space Law* 19(2), 50–61.

Eichener, Volker, 1993: *Social Dumping or Innovative Regulation? Processes and Outcomes of European Decision-Making in the Sector of Health and Safety at Work Harmonization.* EUI Working Paper, SPS No. 92/28. Florence: European University Institute.

Eichhorst, Werner, 1997: Europäische Sozialpolitik zwischen nationaler und supranationaler Regulierung: Die Entsendung von Arbeitnehmern im Rahmen der Dienstleistungsfreiheit innerhalb der Europäischen Union. Manuscript. Köln: Max-Planck-Institut für Gesellschaftsforschung.

Fenwick, Helen / Tamara K. Hervey, 1995: Sex Equality in the Single Market: New Directions for the European Court of Justice. In: *Common Market Law Review* (32), 443–470.

Fuchs, Gerhard, 1994: Policy-Making in a System of Multi-Level Governance – The Commission of the European Community and the Restructuring of the Telecommunications Sector. In: *Journal of European Public Policy* 1(2), 177–194.

Garrett, Geoffrey, 1995a: From the Luxembourg Compromise to Codecision: Decision Making in the European Union. In: *Electoral Studies* 14(3), 289–308.

Garrett, Geoffrey, 1995b: The Politics of Legal Integration in the European Union. In: *International Organization* 49(1), 171–181.

Garrett, Geoffrey / R. Daniel Kelemen / Heiner Schulz, 1997: The European Court of Justice, National Governments and Legal Integration in the European Union. Manuscript, forthcoming in: *International Organization.*

Garrett, Geoffrey / George Tsebelis, 1996: An Institutional Critique of Intergovernmentalism. In: *International Organization* 50(2), 269–290.

Greaves, Rosa, 1992: *EC Competition Law: Banking and Insurance Services. European Practice Library*. London: Chancery Law Publishing.

Héritier, Adrienne, 1997: Market-Making Policy in Europe: Its Impact on Member-State Policies. The Case of Road Haulage in Britain, the Netherlands, Germany and Italy. In: *Journal of European Public Policy* 4(4), forthcoming.

Kerf, Michael, 1993: The Policy of the Commission of the E.E.C. Toward National Monopolies. In: *World Competition. Law and Economics Review* 17(1), 73–111.

Kerremans, Bart, 1996: Non-Institutionalism, Neo-Institutionalism, and the Logic of Common Decision-Making in the European Union. In: *Governance* 9(2), 217–240.

Laffan, Brigid, 1997: From Policy Entrepreneur to Policy Manager: The Challenge Facing the European Commission. In: *Journal of European Public Policy* 4(3), 422–438.

Lavdas, Kostas / Maria Mendrinou, 1995: Competition Policy and Institutional Politics in the European Community: State Aid Control and Small Business Promotion. In: *European Journal of Political Research* 28(1), 171–201.

Leibfried, Stephan / Paul Pierson, 1995: Semisovereign Welfare States: Social Policy in a Multitiered Europe. In: Stephan Leibfried / Paul Pierson (eds.), *European Social Policy. Between Fragmentation and Integration*. Washington, DC: Brookings Institution, 43–77.

Majone, Giandomenico, 1994: The European Community: An "Independent Fourth Branch of Government"? In: Gert Brüggemeier (ed.), *Verfassungen für ein ziviles Europa.* Baden-Baden: Nomos, 23–43.

Majone, Giandomenico, 1996: The European Commission as Regulator. In: Giandomenico Majone (ed.), *Regulating Europe*. London: Routledge, 61–79.

McGowan, Lee / Stephen Wilks, 1995: The First Supranational Policy in the European Union: Competition Policy. In: *European Journal of Political Research* 28, 141–169.

Montagnon, Peter, 1990: Regulating the Utilities. In: Peter Montagnon (ed.), *European Competition Policy*. London: Pinter Publishers, 52–75.

Moravcsik, Andrew, 1995: Liberal Intergovernmentalism and Integration: A Rejoinder. In: *Journal of Common Market Studies* 33(4), 611–628.

More, Gillian, 1991: Severance Pay for Part-Time Workers. In: *European Law Review* 16, 58–64.

Nicolaidis, Kalypso, 1993: Mutual Recognition Among Nations: The European Community and Trade in Services. Doctoral Dissertation. Cambridge: Harvard University.

Noll, Roger G./Barry R. Weingast, 1991: Rational Actor Theory, Social Norms, and Policy. Implementation: Applications to Administrative Processes and Bureaucratic Culture. In: Kristen Renwick Monroe (ed.), *The Economic Approach to Politics.* New York: Harper Collins, 237–258.

Ostrom, Elinor, 1986: An Agenda for the Study of Institutions. In: *Public Choice* 48, 3–35.

Pescatore, Pierre, 1983: La carence du législateur communautaire et le devoir du juge. In: Gerhard Lüke et al. (eds.), *Rechtsvergleichung, Europarecht und Staatenintegration. Gedächtnisschrift für Léontin-Jean Constantinesco.* Köln: Carl Heymanns Verlag, 559–580.

Peters, Guy, 1994: Agenda-Setting in the European Community. In: *Journal of European Public Policy* 1(1), 9–26.

Peters, Guy, 1997: Escaping the Joint-Decision Trap: Repetition and Sectoral Politics in the European Union. In: *West European Politics* 20(2), 22–36.

Pierson, Paul, 1996: The Path to European Integration: A Historical Institutionalist Perspective. In: *Comparative Political Studies* 29(2), 123–163.

Pinder, John, 1968: Positive Integration and Negative Integration. Some Problems of Economic Union in the EEC. In: The World Today 24(3), 88–110.

Pollack, Mark A., 1996: *The Engines of Integration? Supranational Autonomy and Influence in the European Community.* Working Paper 2.41. Center for German and European Studies. Berkeley, CA: University of California.

Pollack, Mark A., 1997: Delegation, Agency, and Agenda Setting in the European Community. In: *International Organization* 51(1), 99–134.

Pool, Bill, 1990: *The Creation of the Internal Market in Insurance*. Luxemburg: Office for Official Publications of the European Communities.

Ross, George, 1995: *Jacques Delors and European Integration.* Cambridge: Polity Press.

Sandholtz, Wayne, 1996: *The Emergence of a Supranational Telecommunications Regime.* Working Paper 2.43. Center for German and European Studies. Berkeley, CA: University of California.

Sandholtz, Wayne/John Zysman, 1989: 1992: Recasting the European Bargain. In: *World Politics* 42(1), 95–128.

Sauter, Wolf, 1995: The Telecommunications Law of the European Union. In: *European Law Journal* 1(1), 92–111.

Scharpf, Fritz W., 1988: The Joint-Decision Trap: Lessons from German Federalism and European Integration. In: *Public Administration* 66(3), 239–278.

Scharpf, Fritz W., 1996a: Democratic Policy in Europe. In: *European Law Journal* 2(2), 136–155.

Scharpf, Fritz W., 1996b: Negative and Positive Integration in the Political Economy of European Welfare States. In: Gary Marks et al., *Governance in the European Union.* London: Sage, 13–39.

Scharpf, Fritz W., 1997: Globalisierung als Beschränkung der Handlungsmöglichkeiten nationalstaatlicher Politik. MPIfG Discussion Paper 97/1. Köln: Max-Planck-Institut für Gesellschaftsforschung.

Schimank, Uwe, 1992: Spezifische Interessenkonsense trotz generellem Orientierungsdissens. In: Hans-Joachim Giegel (Hrsg.), *Kommunikation und Konsense in modernen Gesellschaften*. Frankfurt a.M.: Suhrkamp, 236–275.

Schmidt, Susanne K., 1996: Sterile Debates and Dubious Generalisations: European Integration Theory Tested by Telecommunications and Electricity. In: *Journal of Public Policy* 16(3), 233–271.

Schmidt, Susanne K., 1998: Commission Activism: Subsuming Telecommunications and Electricity under European Competition Law. In: *Journal of European Public Policy* 5(1), forthcoming.

Schneider, Gerald, 1995: The Limits of Self-Reform: Institution-Building in the European Union. In: *European Journal of International Relations* 1(1), 59–86.

Schneider, Volker / Raymund Werle, 1990: International Regime or Corporate Actor? The European Community in Telecommunications Policy. In: Kenneth Dyson / Peter Humphreys (eds.), *The Political Economy of Communications.* London: Routledge, 77–106.

Schulte-Braucks, Reinhard, 1987: Ordnungspolitische und gemeinschaftsrechtliche Aspekte der europäischen Telekommunikationspolitik. In: Joachim Scherer (Hrsg.), *Nationale und europäische Perspektiven der Telekommunikation*. Baden-Baden: Nomos, 82–102.

Stein, Torsten, 1986: Richterrecht wie anderswo auch? Der Gerichtshof der Europäischen Gemeisnchaften als "Integrationsmotor". In: *Richterliche Rechtsfortbildung. Festschrift der Juristischen Fakultät zur 600-Jahr-Feier der Ruprecht-Karls-Universität Heidelberg*. Heidelberg: C. F. Müller, 619–641.

Steunenberg, Bernard, 1994: Decision-Making Under Different Institutional Arrangements: Legislation by the European Community. In: *Journal of Institutional and Theoretical Economics* (JITE) 150(4), 642–669.

Streeck, Wolfgang, 1995: From Market-Making to State-Building? Reflections on the Political Economy of European Social Policy. In: Stephan Leibfried / Paul Pierson (eds.), *European Social Policy. Between Fragmentation and Integration.* Washington, DC: Brookings Institution, 389–431.

Strivens, Robert / Elizabeth Weightman, 1989: The Air Transport Sector and the EEC Competition Rules in the Light of the Ahmed Saeed Case. In: *European Competition Law Review* 10, 557–567.

Weaver, R. Kent, 1986: The Politics of Blame Avoidance. In: *Journal of Public Policy* 6(4), 371–398.

Weiler, Joseph, 1981: The Community System: The Dual Character of Supranationalism. In: *Yearbook of European Law* 1, 267–306.

Weiler, Joseph, 1994: A Quiet Revolution. The European Court of Justice and Its Interlocutors. In: Comparative Political Studies 26, 510–534.

Whiteford, Elaine E., 1995: Lost in the Mists of Time. The ECJ and Occupational Pensions. In: *Common Market Law Review* 32, 801–840.

Young, Alasdair R., 1994: *Ideas, Interests and Institutions: The Politics of Liberalisation in the EC's Road Haulage Industry*. Working Paper. European Institute. Brighton: University of Sussex at Brighton.